The European Arbitration Review 2019

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The European Arbitration Review 2019

A Global Arbitration Review Special Report

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Energy Arbitrations

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Introduction

This is the third year that the authors have contributed a chapter on energy arbitrations to this publication. It would be an understatement to suggest that 2016 and 2017 were volatile years in this respect. However, 2018 not only followed that pattern, but represented one of the most seismic periods for the practice of European investor–state arbitration.

In 2016, the first award against Spain, in respect of dozens of claims it faces concerning changes to legislation regarding its renewable power industry between 2010 and 2012, was seen in *Charanne BV and Construction Investments SARL v Kingdom of Spain* (Arbitration No. 062/2012). While Spain was successful in that case, the respite was short as 2017 brought with it a defeat in *Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v Kingdom of Spain* (ICSID Case No. ARB/13/36) (although Spain succeeded in defeating a similar claim in *Isolux Netherlands, BV v Kingdom of Spain* (SCC Case V2013/153)). The past year has brought yet more awards in respect of the long list of claims Spain faces and we summarise the findings of tribunals in those arbitrations below, together with a review of another award rendered in respect of a separate EU state – the Czech Republic.

However, perhaps the biggest event of 2018 came in the form of the Court of Justice of the European Union's (the CJEU) judgment in *Slovak Republic v Achmea* (Case C-284/16). This decision shook the arbitration community to its core and will have significant ramifications for energy arbitrations and beyond. Since *Achmea*, both the European Commission (EC) and tribunals constituted under the Energy Charter Treaty (ECT) (and hearing intra-EU disputes) have had their say on its effect. We look at both sides of the divide on *Achmea* below before posing the question – where will European energy arbitration (especially under the ECT) go next?

Little respite for Spain in 2018

Before delving into developments in respect of the numerous arbitration claims that Spain faces, for background we summarise the position as things were left following the 2018 edition of this article.[1]

In the mid-2000s, to comply with the EC's objectives under Directive 2001/77/EC, many EU nations legislated to encourage foreign investors to establish renewable power generation capacity. In countries such as Spain (as well as Italy and the Czech Republic – see below), the focus was on solar power.

Between 2007 and 2008 Spain developed a 'Special Regime' to promote solar energy, offering investors a specified feed-in tariff for 25 years, following which certain generators would benefit from 80 per cent of the feed-in tariff, entitlement to distribute all energy generated to the Spanish national grid and no limitation on generation hours.

Spain's promotional drive was successful in attracting investment but this, coupled with the effect of the global financial crisis on the Spanish economy, led Spain to reform the Special Regime in 2010. RD 1565/2010 removed the applicability of the feed-in tariff to generators after the 26th year of the solar plant's life (subsequently increased to 30 years) and added the requirement that certain plants install mechanisms to protect the electricity grid from voltage dips. RD 1614/2010 together with Royal Decree-Law (RDL) 14/2010 introduced a limit on the operating hours subject to the feed-in tariff and a charge of €0.5/MW for access to the transmission grid.

In spite of these measures, the Spanish government became increasingly concerned by the growing tariff deficit.[2] Following elections in 2011, the new government implemented a number of additional legislative measures.

- Law 15/2012 – imposed a 7 per cent tax on the value of all energy fed into the National Grid. This was adopted without prior notice to solar power producers.
- RDL 9/2013 – repealed RD 661/2007 and eliminated the entire regime in respect of fixed tariffs and premiums. In its place a system was adopted based upon specific remuneration measured against hypothetical 'standard' costs per unit of installed power, plus 'standard' amounts of operating costs.
- Law 24/2013 – superseded the previous 1997 Electricity Law and removed the distinction between the ordinary and special regimes.
- RD 413/2014 – replaced the Special Regime with a regime based upon investors receiving a set 'reasonable return' based upon a further hypothetical, this time in the form of a hypothetical 'efficient' photovoltaic plant.
- Ministerial Order IET/1045/2014 – set out the specific remuneration parameters to be applied to the new regime.

These legislative changes, conducted between 2013 and 2014, applied retrospectively and investors complained that these changes undermined or even destroyed the profitability of schemes that had gone ahead on the basis of the existing Special Regime. Consequently, many investors claimed under the ECT.

Charanne BV and Construction Investments SARL v Kingdom of Spain (Arbitration No. 062/2012)

The first of these ECT cases to be decided was *Charanne* in 2016, in which the claimants alleged that the 2010 amendments breached articles 10(1) and 10(12) (fair and equitable treatment (FET)) and article 13(1) (expropriation) of the ECT. However, the majority of the tribunal held that the 'legal order in force at the time' (ie, the Special Regime) was not capable of creating 'legitimate expectations' that the legislative framework would not change during the course of the regulatory life of the plants, since there was no specific promise to this effect.

Accordingly, the claim was dismissed.

Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v Kingdom of Spain (ICSID Case No.ARB/13/36)

While similarly asserting breaches of articles 10(1) and 13(1) of the ECT, significantly the claimants in *Eiser* diverged from those in *Charanne*, and complained about the 2013–14 amendments to the Special Regime. The claimants argued that, at the time of deciding to invest, they held reasonable expectations of a stable regulatory framework (based upon their own expert advice and Spain's promotional materials). As a result they had leveraged their investments with substantial non-recourse loans.

The *Eiser* tribunal (as in *Charanne*) rejected the claimants' contention that the Special Regime provided them with unalterable economic rights. However, it indicated that the 2010 measures complained of in *Charanne* 'had far less dramatic effects than those at issue' in *Eiser* – ie, the 2013–2014 measures. The tribunal decided that article 10(1) entitled the claimants to expect that Spain would not suddenly revise the regulatory regime upon which their investments had been based to such an extent that all value in them was lost. Those (legitimate) expectations were considered by the tribunal to be based upon not only the initial 2007 legislative framework, but also Spain's further actions between 2010 and 2011 that had confirmed that the claimants' plants would continue to receive the original favourable regulatory treatment. The tribunal held that the later amendments were a 'total and unreasonable change', which implemented an entirely new regime based upon assumptions different to those provided for in the 2007 legislation. Significantly, for the purpose of the tribunal's determination, that new regime had retroactive effect and was intended to significantly reduce subsidies paid to existing plant owners.

The tribunal awarded the claimants damages of €128 million, determined to be the reduction in the fair market value of the investments, pursuant to what it considered to be the current value of the past and present cash flows that had been lost on account of the 2013–14 measures.

Spain has applied to annulment of the award, alleging a failure to state reasons and a manifest excess of power, based upon the finding of a breach of article 10(1) in circumstances where the tribunal held that Spain had a sovereign right to amend its legislation and had made no commitments as to a stable regulatory environment.[3]

Isolux Netherlands, BV v Kingdom of Spain (SCC Case V2013/153)

The claims in *Isolux* were similar to those in *Eiser*, ie, breach of article 10(1) on the basis of the 2013–14 measures. However, the tribunal in *Isolux* determined that those same measures that constituted a breach in *Eiser* did not amount to a breach in this case.

As in *Charanne*, the tribunal held that in determining an investor's legitimate expectations, a crucial factor is the information which the investor ought reasonably to have known prior to investing.

The tribunal held that the date upon which the claimants' legitimate expectations arose in this case was not the date of the decision to invest (June 2012, when the Spanish and Canadian parent companies decided to relocate the Spanish solar assets to the Dutch entity which became the claimant), but the date upon which the restructuring actually took place (ie, October 2012). That was only weeks before Spain passed a law imposing a 7 per cent tax on electricity production.

Consequently, the tribunal determined that, as at that date, the claimant could not have possessed legitimate expectations that the original Special Regime would not be subject to substantial change – the tribunal pointed to the fact that the Spanish Supreme Court in 2009 had held that the only limit on the government's powers to amend the original Special Regime was to ensure that 'reasonable returns' could be achieved by investors.

It was held (by the majority of the tribunal) that this was the only legitimate expectation that could be attributed to the claimant at the time of investing, and as at October 2012, all investors in the Spanish solar energy industry knew or ought to have known that the abolition of the Special Regime was a real possibility. The claims were dismissed.

Hence, as last year's article went to press, the score was two-to-one in favour of Spain. Sadly for Spain, the three awards rendered in the last 12 months have not preserved this ratio. We summarise these decisions below.

Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain (SCC Case No. 2015/063)

In February 2018, the tribunal in *Novenergia* ordered Spain to pay €53 million to the claimant, a Luxembourg fund which had invested in photovoltaic plants in Spain. Significantly, the tribunal took a more expansive approach to investor claims than in the previous cases detailed above (including *Eiser*).

Novenergia's claim related to the same 2013–2014 reforms as in *Eiser* and *Isolux*. Consistently with those awards (and *Charanne*), the tribunal confirmed that article 10(1) of the ECT does not create an independent obligation to provide stable investment conditions. The key question is whether the investor has legitimate expectations of stability.

Contrary to *Charanne*, however, the tribunal held that such expectations 'arise naturally from undertakings and assurances' given by the state. The tribunal determined that these are not required to be specific undertakings or contractual stabilisation clauses; on the contrary, state conduct and statements which objectively create such expectations (irrespective of whether the state intended to) are sufficient. The tribunal found that the claimant was entitled to form legitimate expectations as to the original 2007 Special Regime based on statements by officials to Spain's Congress of Deputies, as well as Spain's marketing documents which, the tribunal said, constituted 'bait'.

As in *Eiser*, the tribunal held that Spain's 2013–2014 reforms were a 'radical and unexpected' departure from the original regime. At the time of its investment decision, Novenergia had a legitimate expectation that the 2007 regime would remain relatively stable.

While Novenergia's investments had not been destroyed by the 2013 reforms,[4] the tribunal, going further than *Eiser*, held that it was sufficient that Novenergia could show 'quantifiable prejudice' compared with its position when it initially made its investment. The tribunal found that the latter reforms had a 'significant damaging economic effect' on Novenergia's plants, decreasing revenues by 24–32 per cent, and awarded damages of €53.3 million.

Of particular interest in this case was the fact that the tribunal determined that a review of the FET standard was a 'balancing exercise'[5] and that '[d]estruction of the value of the investment is . . . but one of several factors to consider when determining whether a state has breached article 10(1) of the ECT'.[6] In doing so, the tribunal disagreed with Spain in its contention that for the purpose of a breach of the FET standard, the measures in issue must have destroyed the value of the claimant's investment.[7]

Spain had contended that this was the view of the *Eiser* tribunal; in making its own comments the *Novenergia* tribunal specifically indicated that it disagreed with the earlier tribunal (although it did not indicate with whether it concurred with Spain that this was, in fact, the *Eiser* tribunal's position). Irrespective of whether the *Eiser* tribunal did actually consider the destruction of the value of an investment to be necessary for the purpose of a breach of article 10(1) ECT, the *Novenergia* tribunal's views could spell trouble for Spain (and other respondent states) if followed by future tribunals.

Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain (ICSID Case No. ARB/13/31)

In May 2018, the tribunal in *Antin* ordered Spain to pay the sum of €112 million in respect of a breach of article 10(1) of the ECT.

By way of background, in 2011, the two claimants (owned and controlled by a French company) bought shares in Spanish companies owning two operational concentrated solar power (CSP) plants in Granada, which used natural gas to boost power-generation capacity. The claimants brought claims against Spain under the ECT, alleging a breach of the FET standard on the basis that Spain's 2013 legislative measures completely 'wiped out' the previous original Special Regime, which they had legitimately expected to continue.[8]

Given that *Antin* made its investments in 2011 (by which point the guaranteed feed-in tariff scheme had already been partially reformed), one might have expected that investors could not have formed legitimate expectations about the stability of the incentive regime. Indeed, this was the determination in *Isolux*. However, the tribunal in *Antin* found that, at the time of the claimants' investments, the most significant changes to Spain's solar incentive regime only affected PV installations, not CSP-based projects. It also noted that the claimants undertook thorough due diligence before investing, which had concluded that 'there was strong government support for the CSP sector'.[9] The claimants had therefore reasonably concluded that there were significant differences between the PV and CSP sectors and the CSP regime was unlikely to be significantly changed.

The tribunal noted that ensuring stability of conditions for investors 'is a leitmotiv in . . . the ECT'.[10] The tribunal referred approvingly to the award in *Charanne*, pointing out that a state was certainly entitled to exercise its sovereign power to amend its regulations to respond to changing circumstances in the public interest. However, it went on to assert that such changes must be 'consistent with the assurances on stability of the regulatory framework provided by the state and required by the ECT'.[11]

Adopting reasoning similar to *Eiser*, *Isolux* and *Novenergia*, the tribunal held that investors' legitimate expectations must be assessed objectively at the time the investment was made. Such expectations must originate from some 'affirmative action of the state' – either specific commitments or representations, which could derive from 'features of a regulation aimed at encouraging investments in a specific sector'.[12] In this regard, the tribunal found that Spain had repeatedly emphasised the stability of its renewable incentive regime in reports, press releases and the preamble of its royal decrees, government plans and advertising material. Therefore, the claimants had legitimate expectations that the legal framework for CSP plants would remain stable and predictable.

The tribunal rejected Spain's argument that Antin could only have a legitimate expectation of a reasonable return on their investment (which the modified framework guaranteed). The tribunal held that for Spain's reformed regime to comply with ECT's requirements for stable and predictable conditions for investment, the payment due to CSP installations must be based on 'identifiable criteria'.[13] However, Spain did not identify the parameters by which it identified the 'standard installation' on which the reasonable return was based; nor did it explain how the revision of the 'reasonable rate' would be calculated.

The tribunal, therefore, held that Spain's:

> *violation of the ECT resulted due to the entire elimination and replacement of the entire Original Regime, and not from the elimination or modification of certain features of the Original Regime.*[14]

While *Antin* could not recover historic losses (allegedly arising from measures preceding the June 2014 elimination of the original regime), it could recover damages based upon projected future cash flows over a 25-year lifespan of the plant.

Masdar Solar & Wind Cooperatief UA v Kingdom of Spain, ICSID Case No. ARB/14/1

May 2018 turned out to be a particularly bad month for Spain as a further award was rendered against it, this time from the tribunal in *Masdar*.

As with the majority of the cases against Spain, this case concerned the extent to which the investors' investment was made on the legitimate expectation that it would benefit from the Special Regime for the entirety of its lifetime. The claimants once again asserted a breach of article 10(1) of the ECT (breach of FET).

On liability, the tribunal's reasoning broadly followed that found in *Eiser* and *Novenergia*, in that it held that the ECT's fair and equitable treatment standard protected the legitimate expectations of an investor that the legal framework in which its investment was made would not be subject to 'unreasonable or unjustified modification', or changed contrary to specific commitments made. The tribunal found that specific commitments had been made to Masdar, including in certificates registering its investment, as well as letters from Spain's Ministry of Industry, Tourism and Business explicitly confirming that Masdar's solar installations would be entitled to compensation for their entire operational lifetime.

The tribunal, by a majority, awarded damages of €64.5 million to the claimants.

Both *Antin* and *Masdar* are noteworthy not only for their determinations against Spain, but for the fact that both awards were rendered following the CJEU's judgment in *Achmea*. We consider *Achmea* below together with both the EC's response to the same and the reaction of these specific tribunals to the judgment.

ECT claims against other EU states

As noted in the previous edition of this article, Spain is not the only EU state facing ECT claims arising out of its renewable energy industry.

We previously commented on the case of *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v Italian Republic* (ICSID Case No. ARB/14/3) in which Italy successfully defeated the investor's claims.[15] In May 2018, an award was released in the case of *Antaris Solar GmbH and Dr. Michael Göde v Czech Republic* (PCA Case No. 2014-01), which similarly provided a victory for the respondent state.

The claimants brought the arbitration under both the ECT and the Germany–Czechoslovakia bilateral investment treaty

(BIT) concerning measures introduced by the Czech government in order to encourage investment in its solar sector. The first was the introduction of a 26 per cent levy that would apply for three years on all electricity generated by solar plants commissioned in 2009 and 2010. At the end of the applicable three-year period, the levy was reduced to 10 per cent and its application limited to plants commissioned in 2010.

The second was the abolition of an income tax exemption for all renewable energy producers and removal of a right to accelerated depreciation of solar energy equipment. While reporting on the award could constitute an article in itself, for brevity, the authors focus below on the tribunal's analysis of the concept of legitimate expectations in the context of an alleged breach of the FET standard.

The entirety of the tribunal acknowledged that legitimate expectations could be inferred from domestic legislation, or even from official statements. Specifically, it concluded that the Czech government did originally actively promote its new legislative and regulatory framework 'in terms of a guarantee or promise of stability'.[16] However, the tribunal noted that there was no doubt that 'investors such as the claimants would have been well aware of'[17] significant concerns regarding the 'solar boom' (the country had gone from 28 solar plants in 2007 to 2,230 by August 2009). This culminated in statements by the government regarding the intention to reduce incentives during the course of 2009 and 2010.

The state asserted that the claimants were, like many similar entities (both domestic and foreign), no more than opportunistic investors who sought to take advantage of the delays in implementing reforms in order to invest massively in the closing months of 2010.[18] The majority of the tribunal agreed with this contention, holding that the claimants 'should have been aware, that dealing with the solar boom was a fast-moving and controversial political issue'.[19] Of potential relevance to future cases concerning the FET standard and legitimate expectations, the majority also noted:

> *[t]he investment protection regime was never intended to promote and safeguard those who, in the words of the Respondent, 'pile in' to take advantage of laws which they must know may be in a state of flux caused essentially by investors of that type. In the words of the Respondent, the Claimants had 'a speculative hope – as opposed to an internationally-protected expectation'.*[20]

As noted in the last edition of this article, the *Charanne*, *Eiser* and *Isolux* awards all made clear that the recording of the basis of an investment decision (and its financing) is critical in respect of an FET claim. Such action ought to enable the fixing of a date upon which legitimate expectations of a specifically attainable return on the investment arose. In *Antaris*, the claimants admitted that they had not carried out any specific due diligence and this appears to have been relevant in respect of the majority's determining that:

> *Investors know that the legislative framework may change and evolve in the light of circumstances and of political developments. It is not every change which gives rise to a claim.*[21]

These findings in respect of the investors' legitimate expectations were not shared by the third arbitrator, Gary Born, who produced a dissenting opinion in the case. On the facts of the case, Mr Born disagreed that the investors could not have had legitimate expectations that the regulatory framework would not change. He focused on two aspects. First, in respect of the statements made by the Czech government and the majority's view that these ought to have been heeded by the investors, Mr Born contended that the evidence was such that statements made specifically relating to the changes complained of post-dated the investments.[22]

Second, and of potential significance in other similar cases, Mr Born took issue with the majority's position in respect of the investors' due diligence. He asserted that 'it is not the role of the tribunal to pass abstract judgment on the quality of [the investors'] due diligence'[23] and that 'an investor is under no abstract duty to conduct due diligence'[24] as a condition to investment protection as a matter of international law. In this respect, Mr Born differentiated the impact of an investor's due diligence between cases in which such work would have contradicted asserted expectations, on the one hand, and scenarios where such efforts would have merely confirmed what the investor claimed, on the other.

As previously noted, the impact of an investor's due diligence has been a battleground in a significant number of energy arbitrations during the past three years. It will be interesting to see the extent to which Mr Born's dissenting opinion in *Antaris* is utilised by investors in the future.

2018 – the year that the European Commission lost patience with intra-EU investment arbitration

In the 2017 edition of this article, we detailed the attempts made by the EC to intervene in a significant number of arbitrations concerning intra-EU disputes (*Charanne*, *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux SARL v Kingdom of Spain* (ICSID Case No. ARB/13/30) and *Iaon Micula, Viorel Micula, SG European Food SA et al v Romania* (ICSID Case No. ARB/05/20). The EC had faced consistent defeat in its efforts to assert that the courts of member states and the CJEU had exclusive jurisdiction over intra-EU investment disputes. In the face of this pattern, we noted that the 'EC appear[ed] to be losing the war on the jurisdictional question, but shows no sign of surrender'. To say the EC continued fighting in 2018 would be an understatement.

EC Decision of 26 December 2017

In December 2014, and following the 2013–2014 amendments to its Special Regime, Spain formally (and belatedly) notified the EC of the reformed scheme. This prompted an EC investigation into the scheme's legality.

On 26 December 2017, the EC published its decision (the Decision) on the reformed scheme. The Decision found that the 2012–2014 reforms were compatible with EU law. That it did so is no significant surprise, however, the Decision went on to attack the ECT claims brought by investors against Spain (and other EU states) and represented the first of three significant statements on the part of the EU.

The EC indicated that it had considered submissions made by investors to the EC investigation (and to the ECT tribunals) that Spain had, in making the reforms, breached EU law principles of legal certainty and legitimate expectations. These were essentially the same arguments as raised and decided in the *Charanne*, *Eiser* and *Isolux* cases.

Regarding legitimate expectations, the Decision pointed out that Spain had established the Special Regime, and reformed it, without obtaining prior approval from the EC. That constituted the granting of state aid without first notifying the EC, and EU law provided that in such circumstances, investors could not form any legitimate expectations with regard to such state aid schemes. Given that these were claims by investors from one EU state

against another EU state, the applicable law of the dispute must be EU law; and since 'the principle of fair and equitable treatment [in the ECT] cannot have a broader scope than the [EU] law notions of legal certainty and legitimate expectations in the context of a state aid scheme', no investor could have a legitimate expectation with regard to the Special Regime and its reforms.

The Decision went on to strongly criticise the very concept of the ECT claims, indicating that:

> *any provision that provides for investor-State arbitration between two Member States is contrary to* [European] *Union law . . . . Union law provides for a complete set of rules on investment protection . . . . Member States are hence not competent to conclude bilateral or multilateral agreements between themselves*.

The Decision concluded that '[f]or those reasons, ECT does not apply to investors from other member states initiating disputes against another member states'.

Finally, the Decision stated that if an arbitral tribunal awarded an investor compensation in respect of losses caused by Spain's reform of the Special Regime, that would constitute state aid; and thus if Spain paid such an award, it would require EC approval. For good measure, the Decision pointed out that:

> *this Decision is part of Union law, and as such also binding on Arbitration Tribunals, where they apply Union law. The exclusive forum for challenging its validity is* [sic] *the European Courts.*

Slovak Republic v Achmea (Case C-284/16)

Three months after the Decision, on 6 March 2018, the CJEU's judgment in *Achmea* shook the world of investment arbitration to the core. The CJEU held that an arbitration clause in the Slovakia–Netherlands BIT – and, essentially, all intra-EU BIT arbitration – was incompatible with EU law.

A significant amount of commentary has already been released in respect of *Achmea*. In the context of this article, we set out the determination of the CJEU below, before considering how the EC has interpreted that judgment and its potential impact upon existing and future intra-EU energy arbitrations.

As readers are likely already aware, in September 2017, Advocate General Wathelet delivered an opinion in which he advised that the arbitration clause did not violate the autonomy of EU law and was not discriminatory. In its judgment, the CJEU framed the issue in the following way:

> *do Articles 267 and 344 TFEU*[25] *preclude a provision in an international agreement between EU Member States under which an investor from one member state may bring proceedings against the another Member State before an arbitral tribunal, whose jurisdiction that Member State has undertaken to accept?*

The CJEU departed from the Advocate General's opinion and held that the arbitration clause was incompatible with EU Law. Its reasoning, in summary, was as follows.

- Article 8(6) of the BIT (similar to many arbitration clauses in BITs) provides that the arbitral tribunal shall take account of the law in force of the contracting party concerned, and international law principles. That would include EU law.
- Therefore, the tribunal may be called on to interpret and apply EU law, particularly provisions concerning freedom of establishment and free movement of capital which are closely related to the substantive BIT provisions.
- Article 19 Treaty on European Union (TEU) provides that it is for the national courts and tribunals of member states and the CJEU to ensure the application of EU law in member states. Key to this is the preliminary ruling procedure in article 267 of the Treaty on the Functioning of the European Union (TFEU), which enables the courts of a member state to refer questions on the interpretation and application of EU law to the CJEU, so as to ensure uniformity and consistency.
- An arbitral tribunal constituted under article 8 of the Netherlands–Slovakia BIT is not a court or tribunal of a member state within the meaning of article 267 TFEU. Moreover, the award rendered by such a tribunal is subject to very limited judicial review, the extent of which is determined by national law depending on the seat of the arbitration.
- Member states cannot enter into treaties that affect the allocation of powers created by the EU's constitutional treaties, including the TFEU, so as to detract from the autonomy of the EU legal system. Article 344 TFEU, in particular, provides that member states may not submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in the treaties.
- It follows that the arbitration agreement in article 8 of the Netherlands–Slovakia BIT has an adverse effect on the autonomy of the EU legal order and is incompatible with EU law.

While the CJEU recognised that it has previously held commercial arbitration agreements compatible with EU law, it distinguished such agreements because they originate in the 'freely expressed wishes of the parties', whereas BIT arbitrations derive from a treaty by which member states agree to remove from the jurisdiction of their own courts a dispute which may concern the application or interpretation of EU law. Accordingly, the CJEU found that this violates their obligations under article 344 TFEU and article 19(1) TEU.

European Commission's Communication COM (2018) 547/2 of 19 July 2018

The *Achmea* judgment did not find that the intra-EU BITs themselves were contrary to EU law; nor did it explain how EU investors could avail themselves of the protections in the BITs. Moreover, the judgment did not address the question of whether an arbitration provision in a multilateral treaty to which the EU is party, such as the ECT, would also contravene EU law.

Given the significant amount of debate about how EU investors could protect their investments in the European Union, the EC sought to address these issues by way of Communication COM (2018) 547/2 of 19 July 2018 (the Communication). The Communication sought to address these issues, as well as 'the perception that EU law does not provide for adequate substantive and procedural safeguards for intra-EU investors'.

Broadly, the Communication set out the Commission's views that EU law provides a comprehensive, and exclusive, system for the protection of intra-EU investments in respect of expropriation, measures having equivalent effect to expropriation, and unfair, inequitable or discriminatory treatment.

The Communication noted that, if investments are affected by member state action, the investor can sue the member state in the national courts which have jurisdiction. Those courts must apply EU law so as to uphold the protections granted by the EU's founding treaties even if that conflicts with domestic law. EU law also requires member states' national courts to be independent, efficient and provide effective enforcement of EU laws.

Finally, the Commission expressed its view that intra-EU BITs themselves are contrary to EU law in that they are discriminatory (they apply only as between the two countries which are party to the BIT) and, by incorporating arbitration clauses, they 'take away from the national judiciary litigation concerning national measures and involving EU law . . . [entrusting this] to private arbitrators, who cannot properly apply EU law' as they cannot make references to the CJEU.

Although the Communication is not legally binding, it provides clarification of the Commission's views of the implications of *Achmea*. It confirms the EC's view that *Achmea* correctly held that arbitration provisions in intra-EU BITs are contrary to EU law. Therefore, any tribunal constituted under an intra-EU BIT or the ECT (see below) lacks jurisdiction and '. . . national courts are under an obligation to annul any arbitral award rendered . . . and to refuse to enforce it'. The Communication specifically asserted that *Achmea* applies equally to ECT arbitrations: 'given the primacy of [European] Union law,' article 26 ECT (providing for investor-state arbitration) is 'inapplicable'. The Communication states that the EU's participation in the ECT only 'created rights and obligations between the EU and third countries'.

For energy investors, *Achmea* and the Communication are clearly of significant concern in respect of investment protection.

First, bringing a claim for breach of the rights established by the TFEU and the Charter of Fundamental Rights is somewhat different from bringing an arbitral claim for breach of a specific protection conferred by a BIT or the ECT (eg, the FET requirement). The latter is generally a narrower issue, whereas there is scope for argument about the breadth of protection conferred by the general freedoms, save perhaps where the CJEU has pronounced on a particular topic. Perhaps of more practical significance is the fact that such a claim would be to challenge a government regulation or, even more problematically, national legislation. While the Communication emphasises their obligation to do so, courts of member states might be loath to strike down a domestic act or regulation, or to award damages to someone affected by it. Indeed, domestic law within a member state might not even recognise such a right, meaning that the investor's claim would necessarily have to amount to challenge to the member state's legal system for failing to provide an adequate remedy for a breach of EU law.

Second, there are significant practical drawbacks to an investor falling back upon domestic courts. One of the key attractions of arbitration, in general, is that a dispute is considered by independent and impartial arbitrators whom the investor has had some say in appointing. This is obviously not the case with domestic litigation. In addition, while lengthy timescales are a familiar complaint in relation to investor–state arbitration, the courts of certain EU member–states can take much longer to finally dispose of a claim than others. For example, the average time for an ICSID claim from request for arbitration to final award is just under four years; in Italy, the average time for a civil case is in excess of eight years.

While a communication has no legal effect; practically, it is unlikely that judges of the CJEU and member state national courts would be unaware of, or would ignore, the Communication when considering cases related to its subject-matter. Indeed, in May 2018, Spain applied to the Svea Court of Appeal in Sweden to set aside the award rendered against it in *Novenergia*. As part of this application, Spain has requested the court to seek a preliminary ruling from the CJEU on the compatibility of the ECT with EU law in light of *Achmea*. When the CJEU hears this case, it will answer for once and for all whether intra-EU ECT claims violate EU law.

However, whether arbitrators constituted under either the ECT or a specific BIT will do so, is an entirely different matter. We look at this issue in the next section of this article.

Have intra-EU investment tribunals taken heed of Achmea and the Communication?

Perhaps unsurprisingly, given the determinations on the same issues by previous tribunals, *Achmea* has had little impact on the tribunals subsequently hearing intra-EU ECT claims.

In each of the awards rendered following *Achmea*, tribunals have either refused to be briefed on *Achmea* (*Antaris*) or dismissed the state's objections in reliance thereon (*Antin* and *Masdar*).

Masdar was the first ECT claim against Spain decided after *Achmea*, and it specifically addressed the question of whether, in light of the arguments adopted therein, article 26 ECT applied to claims between an investor from one EU member state and an EU member state.

The tribunal decided that it had jurisdiction to hear the claim, reasoning the following:

- The ECT contains no provision carving out intra-EU disputes, though it does for other treaties.
- The ECT treats signatory states as separate sovereign entities, not subsumed by the European Union. Consequently, intra-EU claims fulfil the requirement that the investor must be of different nationality than the host state.
- Article 16 ECT provides that where signatory states entered into preceding treaties that concern the same subject matter as the ECT, nothing in the preceding treaty shall derogate from the protections in the ECT where such protection is more favourable to the investor. The EU founding treaties make no provision for investors to sue a state directly, whereas, more favourably to the investor, the ECT does. Otherwise, there is no conflict between investors' rights under the ECT and EU law.
- Correctly interpreted, the EU founding treaties' prohibition on EU member states agreeing to refer questions of EU law to a tribunal other than the CJEU or a national court only applies to disputes between member states regarding the interpretation of the founding treaties.
- Finally, *Achmea* cannot be applied to multilateral treaties, such as the ECT, to which the European Union itself is a party, as the EU thereby consented to the possibility of investor-state arbitration.

The *Antin* tribunal dismissed Spain's objections to jurisdiction, adopting similar arguments to those in previous ECT claims.[26] Moreover, the tribunal refused Spain's attempts to reopen argument on jurisdiction by reference to EC Decision C (2017) 7384 and *Achmea* judgment. The tribunal concluded that nothing in the ECT suggests that 'a development in [European Union law] could be employed to undermine the prior consents to submit to arbitration under the ECT given by each of the EU member states and the EU itself'.[27]

Thoughts on the future – will intra-EU energy arbitration under the ECT remain available to investors?

The past three years have demonstrated that trying to predict the future in respect of intra-EU energy arbitrations is folly. At the time of writing, possibly more than ever, the future of intra-EU energy arbitration and even the ECT itself is uncertain.

It is impossible to reconcile the position of the EC and CJEU on the one hand, in respect to the primacy of EU law, and the exclusive jurisdiction of the courts of member states, with the position of tribunals hearing disputes in intra-EU investment arbitrations, on the other. Ultimately, the question will come down to issues of enforcement. If unsuccessful respondent member states are stuck between the rock of failing to satisfy an award and the hard place of breaching EU state aid rules, will successful investors actually obtain the sums awarded? Successful claimants in arbitrations against Spain have begun the process of seeking to enforce their awards outside of the European Union. Whether non-EU courts will have regard to the European Union's views is yet to be seen.

However, the EC appears now to be taking a stronger approach to these issues; one that is certainly more stick than carrot. The Commission has formally requested Austria, the Netherlands, Romania, Slovakia and Sweden to terminate their existing intra-EU BITs. Indeed, the Communication states that 'the Commission will monitor progress in this respect and, if necessary, may decide to further pursue the infringement procedures'.

In addition, the EU is replacing traditional investor-state arbitration provisions in its free trade agreements with investor–state courts (eg, the EU–Vietnam free trade agreement and the EU–Canada Comprehensive Economic and Trade Agreement). These agreements have first-instance tribunals and appeal tribunals formed from standing panels of judges, who are appointed by the court president (not the parties) on a random rotational basis. The EU is also proposing a multinational investment court along similar lines.

In respect to the ECT itself, discussions are under way in respect of potential reforms. Again, it will be interesting to see how this plays out, but the authors believe that the issues set out in this article will surely play a role in that process. Could we see a carve-out of the availability of intra-EU investor–state arbitration? We suspect that this must, at the very least, be a distinct possibility.

Notes

1 For a more detailed review of the background to Spain's arbitral challenges and the awards in *Charanne*, *Eiser* and *Isolux*, see the 2017 and 2018 editions of *The European Arbitration Review*.
2 Ie, the difference between the costs of the subsidies paid to the renewable energy producers and the incoming revenue from energy sales.
3 Spain's application also alleges that the claimant's nominated arbitrator breached his obligation of independence and impartiality by failing to disclose a long-standing relationship with the claimants' valuation experts. In a further development, on 14 November 2017, a New York court set aside confirmation of the award (a preliminary step to enforcement) on a procedural technicality.
4 In fact, they were still achieving a reasonable rate of return.
5 *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. 2015/063, Award, paragraph 657.
6 Ibid, paragraph 694.
7 Ibid, paragraph 693.
8 *Antin Infrastructure Services Luxembourg SARL and Antin Energia Termosolar BV v Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, paragraph 147.
9 Ibid, paragraphs 132, 376 and 384.
10 Ibid, paragraph 526.
11 Ibid, paragraph 555.
12 Ibid, paragraph 538.
13 Ibid, paragraph 562.
14 Ibid, paragraph 667.
15 At the time of writing, the claimants' application for annulment of the award is yet to be determined.
16 *Antaris Solar GmbH and Dr Michael Göde v Czech Republic* (PCA Case No. 2014-01), Award, paragraph 366.
17 Ibid, paragraph 368.
18 Ibid, paragraph 418.
19 Ibid, paragraph 431.
20 Ibid, paragraph 435.
21 Ibid, paragraph 437.
22 *Antaris Solar GmbH and Dr Michael Göde v Czech Republic* (PCA Case No. 2014-01), Dissenting Opinion of Mr Gary Born, paragraphs 65–71.
23 Ibid, paragraph 73.
24 Ibid, paragraph 74.
25 Treaty on the Functioning of the European Union.
26 See *The European Arbitration Review 2017*, 'Energy Arbitrations'.
27 *Antin* award, paragraph 224.

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Clyde & Co is a leading, sector-focused global law firm with 390 partners, 2,000 legal professionals and 3,600 staff in nearly 50 offices and associated offices on six continents. Its core global sectors position it at the heart of global trade and commerce: insurance, trade and commodities, energy, transport and infrastructure. With a strong emerging markets focus, the firm has achieved compound average annual revenue growth of 12 per cent over the last five years, making it one of the fastest growing law firms in the world with ambitious plans for further growth. Clyde & Co was named Transatlantic Law Firm of the Year 2017 by *The American Lawyer/Legal Week*.

Joint Venture Disputes

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International commercial arbitration can provide a highly effective means of resolving disputes between commercial parties operating internationally. A large proportion of such commercial disputes arise in relation to joint ventures (JVs), which often involve partners from different countries operating in another country again. As JV partners will usually be unwilling to submit disputes to the state courts in each other's home jurisdiction, most international JV agreements (JVAs) provide for disputes to be resolved by means of international arbitration.

Arbitration is often the one acceptable neutral forum for the binding resolution of JV partners' disputes. Referring disputes to international arbitration has other benefits, such as the opportunity to choose arbitrators with the requisite experience and background, as well as allowing parties to tailor the procedure to the needs of the case. This article considers how parties in an international JV can best prepare and manage an international arbitration case, and provides an overview of some common issues that arise in JV disputes.

What is a joint venture?

A 'joint venture' is not a precisely defined legal concept.[1] *Black's Legal Dictionary*, for instance, defines a joint venture as 'a business undertaking by two or more persons engaged in a single defined project'.[2] Most JVs are based on the idea that each partner will contribute some special know-how or experience that the other partner or partners lack, and that all partners in a JV will work for a common benefit or goal. For example, several construction contractors may pool resources to complete a major project. A national oil company may work with an international company to explore for and exploit oil reserves. The local partner might have the necessary concession and manage regulatory matters, while the international partner would contribute know-how. For convenience, this article adopts a broad and non-technical definition.

JVs may take different legal forms. The form of the legal entity will vary depending on the jurisdiction. Some jurisdictions are more formal and require JVs to be registered and comply with local requirements. For instance, China not only regulates JVs in general, but also specific JVs – such as ones in the field of technology.[3]

In Switzerland, 'there is no statutory definition of the term', but scholars observed that the term JV 'covers a variety of short- or long-term cooperation arrangements between two or more parties for a common project or enterprise'.[4] The parties can opt either for a 'contractual joint venture', which is a 'purely contractual collaboration', or for a 'corporate joint venture', which represents a more complex undertaking: 'the creation of a common corporation'.[5]

Similarly, French legislation does not define the concept of JV. However, the commentaries describe a JV 'as an agreement of cooperation between independent parties (generally of similar economic weight) who venture into a common objective and who negotiate as equals'.[6] The parties to a JV share their expertise, their research capabilities, their distribution networks, etc.[7]

Further north, in England and Wales, the legal position is not very different as 'there exists neither a single body of UK law nor a distinct legal entity dedicated to the formation and operation of joint ventures'. Accordingly, a JV may be defined 'broadly as any arrangement between two or more unrelated parties to cooperate in the establishment and management of a commercial (including research and development) project or enterprise'.[8] English commentators identify subcategories of JVs: contractual JVs, partnership JVs and joint venture companies (JVCs).[9]

Under US law, the term JV 'refers to a legal form of business enterprise either identical to or derived from a partnership'.[10] Consequently, JVs are subject to the US legal provisions on contracts, partnerships and commercial transactions.[11]

Each JV is therefore qualified differently depending on jurisdiction, and may not always constitute a distinct legal entity. In most cases, however, a JV will be formalised in a JVA and a JVC will be set up in a country or countries where the JV would operate. Moreover, irrespective of the legal status of a JV, similar tactical considerations will arise in arbitration.

Because JVs take different forms and arise in a range of industry sectors, it is not always easy to capture them in the statistics of arbitral institutions.[12] However, it is clear that disputes arising from JV projects represent a significant portion of international arbitrations globally – for example, the London Court of International Arbitration announced in 2016 that 21 per cent of the disputes arbitrated under its rules stemmed from shareholders, share purchase or JV agreements. The Arbitration Institute of the Stockholm Chamber of Commerce recorded that disputes arising out of JV and partnership agreements made up 15 per cent of new cases in 2016, in comparison to 13 per cent in 2013. The International Chamber of Commerce Dispute Resolution Bulletin does not record JV disputes as such, but notes that a quarter of all cases initiated in 2015 arose out of construction and engineering projects, with another 18 per cent energy disputes.[13] These are industries in which JVs are common.

Anticipating JV disputes

As most commercial parties are painfully aware, disputes can arise at almost any stage of the parties' cooperation. They may be triggered as much by the project's commercial failure as its success, which may give rise to disputes over profit-sharing, for instance. Disputes vary considerably but they all have some contractual basis in the JVA, and often involve allegations of a failure to cooperate.

A JV may fail during the early stages, for example, where the partners are unable to agree on one or more essential conditions for completion under the joint venture agreement, or, in extreme cases, a JV will fail even before the JVA has been finalised and one party will accuse the other of having breached obligations to negotiate in good faith.

More often, disputes arise over the management of the JV. The commercial failure of the project often exacerbates or creates tensions between parties. This happens especially in the case of the bankruptcy of a JVC or one of the JV partners, which in turn adds to the legal complexity of the dispute. Areas of dispute include the following related categories:

- disputes over corporate governance;
- disputes over failures of cooperation;
- disputes arising from one partner's alleged failure to commit sufficient resources to the JV and making necessary investment in the JVC;
- disputes as to the fundamental viability of a project;
- allegations of fraud and dishonesty;
- misappropriation of proprietary information; and
- where the project succeeds, the sharing of profits.

Although disputes are notoriously difficult to predict (aside from perhaps in the construction industry) some techniques at the stage of drafting the contract may avoid and manage conflicts.

- Parties should try to define their respective obligations as precisely as possible. Where partners share a task, there is a danger neither will perform it. If it is not possible to say what exactly a party should do at a future date, and at what stage, the parties might define obligations in terms of specified outcomes, eg, complete a report allowing the management committee to make an investment decision.
- Even in well-run projects delays are common. In defining target dates parties should consider what should happen if a project falls behind schedule. They may want to include a mechanism for extending deadlines or imposing contractual penalties.
- The JV partners would do well to address the risk of currency fluctuations. Despite their considerable commercial impact, serious currency fluctuations are unlikely to qualify as force majeure. However, an attempt to limit this risk through a hardship clause may prove successful as the occurrence of a serious currency fluctuation could fundamentally alter 'the equilibrium of the contract'.[14]
- Although most parties use broad language in the force majeure clause, the parties often disagree as to whether or not a change of government may constitute such an event, should a dispute arise. For JVs, which rely on specific government approvals or support, defining the consequences of a change of government or of a state policy in advance often helps to resolve or avoid a later dispute.
- Parties should consider the termination of a JVA. They should address both when a partner becomes entitled to do so and what effect termination has. If there is a JVC, this may have to be dissolved, and the parties should define their mutual obligations when the company and its assets are dissolved.
- A clause providing for a 'tiered' dispute resolution clause, with a clear timetable for the resolution of disputes, often encourages partners to find solutions outside arbitration and, if necessary, to realign their expectations. For example, in the first place, the partners may agree to refer a dispute to mediation within a fixed period after it has arisen; only if the mediation proves unsuccessful will they then refer it to arbitration. Similarly, a contract may provide that only disputes above a minimum monetary value would be referred to arbitration at all. Smaller disputes would be subject to a quicker, more informal means of resolution. This might involve referring narrow technical questions to a technical expert for determination. Importantly, such clauses should also allow the JV itself to function, while the partners attempt the resolution of their disputes.

Whether or not a dispute arises, it is important to keep a good record of the negotiation processes at the beginning of the cooperation and throughout the operation of a JV. As will be seen below, documentary evidence is vital to a party's success in arbitration.

Putting forward and defending a claim – some practical considerations

Like any other claim, claims in JV disputes must be formulated with a view to obtaining a particular remedy. A claimant must first decide what it wants to achieve in the arbitration. For example, if it wants to recover substantial damages, there is no point in bringing a claim that will lead only to a declaration or order for specific performance. On the other hand, a declaration or a cease-and-desist order may be the suitable relief in cases where monetary damages would not be sufficient or appropriate. Equally, an award for damages against an impecunious respondent may be of no value.

One of the major attractions of arbitration is that parties can, to some degree, choose the arbitral tribunal and have a wide choice of counsel. It may be more desirable to involve arbitrators and counsel with a good knowledge of arbitral practice and the relevant industry sector than specialists in the applicable law alone. In particular, it is easier to explain a claim to an arbitrator who has a realistic view of how JVs work and who is comfortable with accounting principles and damages calculations. Sympathy with the party's commercial culture may be advantageous, too, because cultural tensions aggravate many disputes, for example, where there are differing views on hierarchies, levels of formality and maintaining written records.

Jurisdiction

A number of jurisdictional difficulties may arise in JV disputes. These include the scope of the arbitration agreement and in particular whether it extends beyond the main contract to ancillary contracts, and to non-signatories such as different companies in a group of companies. Parties should consider making more than one counterparty a party to the JVA, as well as expressly linking different contracts and possibly including arbitration agreements in all of them.

Sometimes a respondent will deny the arbitrability of a dispute. This may happen where contractual claims are linked to statutory claims or local law issues, such as tax and insolvency. Respondent state entities often rely on statutory constraints under local law to evade accountability to their contractual partners.

Interim relief or provisional measures

The leading national arbitration statutes and arbitral rules provide that arbitral tribunals can order interim relief or provisional measures. Typically, they confer a broad discretion to do so.[15] Such relief may also be available from national courts. The criteria for granting interim relief vary, but it is usual in international commercial arbitration to do so where an applicant can show urgency, a threat of irreparable or very serious harm (ie, harm that cannot easily be compensated with a payment of damages, such as a loss of good will or serious reputational harm), and a prima facie case on the merits and jurisdiction, and that the measures will not amount to a prejudgment of the case on the merits.[16]

Interim relief may be very important in JV disputes precisely because the fate of a company may well result in a loss that cannot

be compensated with monetary damages, especially where the company faces a loss of goodwill or of established client relationships, or there is a risk of confidential materials becoming public. Moreover, a JV partner may be more interested in the safeguarding of the operation of a JV and unblocking of the JV's accounts in case of a corporate governance dispute, than a declaration of liability and a damages award. Orders may be granted in the following cases:

- an order to preserve a preexisting state or status quo ante for the duration of the arbitration – where the dispute turns on whether the parties must carry on a business, the order might require the respondent to do so;
- an injunction preventing the respondent from selling or dissipating assets pending a final decision by the arbitral tribunal as to the parties' rights over the assets;
- an order requiring a party to keep certain information confidential; and
- in exceptional cases, an anti-suit injunction or order requiring a party to stop or refrain from parallel proceedings in local courts.

If a party must seek an urgent interim measure even before the constitution of an arbitral tribunal, in recent years, most of the major arbitration institutions have updated their rules to include an emergency arbitrator procedure.[17] A party seeking the appointment of an emergency arbitrator must demonstrate the urgency of its request,[18] and often satisfy a requirement that the date of the arbitration agreement occurred after the institutional rules were updated to allow for emergency arbitrator procedures.

An emergency arbitrator can order the same interim or provisional measures as an arbitral tribunal. The great advantage of the procedure is its availability prior to the constitution of the arbitral tribunal, which often takes at least a month or two. The order of the emergency arbitrator can be re-examined by the arbitral tribunal once it is constituted, however in the meantime, the party will have had a chance to safeguard its rights before an emergency arbitrator.

Legal bases of a claim

Typically, any claims will be formulated as claims for breach of the JVA in the first place, because the arbitration clause in the JVA will cover disputes arising out of and under that contract. The terms of the JVA, which may include addenda and additional agreements, will likely be central to the arbitration.

The JVA in turn, will be governed by the law of a particular jurisdiction, usually chosen by the parties. The law may include certain rights and remedies of stakeholders, prohibitions on self-dealing and rules of contractual interpretation.

On a second level of relations, a claimant may also need to take account of the JVC as distinct from the JVA. In JV arbitrations, the JVA is sometimes governed by the laws of Jurisdiction A, whereas the JVC may be incorporated in Jurisdiction B and thus subject to the corporate law of Jurisdiction B. A claimant may then bring claims under the JVA but will have to consider the laws of Jurisdiction B in doing so. The need may arise where the claims touch on areas subject to local law, such as the tax liability or insolvency of the JVC. A claimant may also need to consider the law of Jurisdiction B in relation to the governance of the JVC and, for example, the status of decisions by the board or supervisory board or the directors' personal responsibility for them.

JVAs seldom regulate the minutiae of how a JVC is to be run. Parties often do not know exactly how their relationship will evolve when they sign the JVA. They may fall back on boilerplate terms and adopt loosely worded obligations, for example, that the partners should cooperate or use best efforts. In practice, cases often turn on the precise meaning of an unclear term or on defining the precise content of general obligations. The governing law of the JVA may also offer tools to close gaps in the parties' express agreement. However, a statutory obligation to act in good faith and an implied obligation to act reasonably are broad and abstract, yet the harm alleged by a claimant will be attributable to specific events. The challenge to a claimant is often to bridge the gap between a general obligation and a specific breach that occurred in a particular case.

Putting forward claims

Claims in JV disputes differ from those in many other arbitrations. Typically, allegations of breach are based on a course of conduct consisting of many smaller events rather than a single failure of performance. The claimant may allege that the respondent continually refused to call a meeting of the management committee over a period of years. JV disputes usually turn on a failure of cooperation to a greater or lesser degree. Consequently, the arbitral tribunal will tend to judge the parties' conduct on the basis of reasonableness, fairness and good faith. Such criteria are more elusive than those applicable to many other types of dispute, where an arbitral tribunal may determine a delay based on a work schedule or a party's compliance with a technical norm. The risk in JV disputes is that a claimant's allegations will be vague and hard to substantiate. However, they also allow counsel to define breaches with some creativity and tell the vivid story of a commercial relationship. Often, the best approach is to develop a claim based on the facts of the case and with a view to what a party can realistically achieve.

The following points may help a party to formulate its claims.

- State every breach clearly – where an alleged breach involves a course of conduct by the respondent or point of local corporate law, the claim needs to be spelled out; one incident is not a course of conduct.
- Show the commercial impact of every breach – an arbitral tribunal will need to understand why, for example, a decision by a JV partner to block a project or investment was economically detrimental.
- Avoid making trivial allegations – JVs in developing economies are not for the faint of heart and arbitrators expect parties to face occasional difficulties: a series of cancelled meetings and a 'string-along' attitude may not amount to a lack of good faith.
- Keep claims simple – a claimant should use the most straightforward available legal basis in order to obtain the desired remedy; in particular, allegations of fraud, dishonesty and bad faith should be approached with caution as they can be difficult to prove, especially when the alleged conduct can be easily explained by extraneous circumstances or lack of business foresight or acumen. In practice, an arbitral tribunal may be reluctant to find that a poor business decision amounts to a breach of good faith or a best efforts obligation.

Defending claims

Some of the tactics for bringing a claim against a JV partner can also be adapted to defending a claim. Again, clear factual arguments that justify actions on the basis of commercial considerations are likely to convince an arbitral tribunal.

The following tactics may also assist a respondent in defending possible arbitration claims.

- Shifting the blame on the claimant or other partners in the JV – a JV requires the cooperation of all the parties: they are all responsible for its success. A respondent accused of acting uncooperatively in the management of the JVC may be able to argue that the claimant was really at fault or that actions of another partner acting uncooperatively caused the loss or damage in question.
- Putting a claim in context – to succeed a claimant must show that the respondent's breach of contract caused its losses. Given the many variables in running an international business, this is seldom easy. A respondent may be able to deflect blame by showing that wider changes in the market, industry sector or regulatory requirements in fact caused the JV to fail.
- Redefining obligations – as explained above, parties often describe their contractual obligations using general terms such as 'best efforts' and 'cooperation'. Usually a claimant will define such terms broadly, but it may be open to a respondent to redefine them more restrictively, thus limiting the scope of its obligations.
- Blaming a third party – a respondent may try to excuse its conduct on the basis that it was required to act or not to act in a certain way by a third party. It may rely on the doctrine of force majeure. This line of argument is sometimes used by state-owned parties that argue that they were prevented from discharging an obligation to their JV partners by a government agency or other public body.

JV arbitrations are frequently fact-heavy. In order to state their cases, JV partners may need to set out a history of cooperation spanning several years; industry standards and practices relating to the JV; and evidence of damage and loss.

Every JV arbitration is the story of a commercial collaboration, told in different ways by each party. Independent of any technical legal arguments, this story must be credible. It is a particular difficulty that JVs often last several years before an arbitration is started and the arbitration will concern multiple incidents. Often, the parties' commercial relationship will continue during the arbitration and they may want to set out past events in light of present developments. This makes JV arbitrations different from, for example, a straightforward sale of goods dispute. For this reason, good record keeping is important and advantageous, especially where a party acted uncooperatively or failed to apply the required best efforts over a long period of time.

Documentary and witness evidence

As part of the assessment of a claim, a party should analyse its chances, review, prepare and organise the documents in its possession and assess whether the opposing party or a third party is in possession of relevant documents. Usually, the procedural timetable of an arbitration will provide an opportunity for the parties to request the production of documents from each other.

Generally, arbitrators value contemporaneous documentary evidence. This may include the minutes and agenda of meetings, formal resolutions, objections to a party's conduct or reasoned responses to them. The failure of a party to record its position or respond to complaints at the time may undermine the plausibility of its subsequent position in arbitration. Email correspondence sometimes poses problems because emails are on occasion written in a condensed, casual style that is hard to understand years later. At the other extreme, letters that seem too deliberate and legalistic may appear defensive.

Witness testimony is a widely accepted feature of international arbitration and frequently invaluable in helping an arbitral tribunal to understand how decisions came to be taken at the time.

However, gathering evidence can be difficult. Company officers come and go, the witnesses may find it difficult to recount events that took place over several years, and, in some parts of the world, there may be cultural reluctance to giving evidence. Still, for the most part, arbitrators find it useful to hear witnesses' versions of events. Almost all cases involve questions of cooperation and reasonableness that will allow the arbitral tribunal a measure of appreciation. Witness evidence can be decisive to the outcome of the case. Credible witness evidence will give the arbitral tribunal a flavour of how the partners felt, worked together and viewed commercial challenges at the time. Poor, irrelevant witness evidence or a refusal to put forward key witnesses may be especially detrimental. For example, if the case concerned an accounting dispute, a party would usually do well to call its chief financial officer or other senior financial officer.

Expert evidence

Experts are invaluable in technically or scientifically complex cases, or cases involving heavily regulated industries, such as the mining and pharmaceutical industries, and cases involving accounting or valuation disputes. However, parties should consider whether the arbitrators will benefit from expert evidence or can form an opinion about an issue for themselves. Moreover, if expert evidence is deemed necessary, the parties should start working with the experts from the earliest stages of their claim in order to allow the experts to provide a detailed and complete report on the case.

Sometimes a single expert is appointed by the arbitral tribunal; but the parties are often well advised to appoint their own expert witnesses as they can better control the process.[19] Although expert witnesses must be independent and impartial,[20] they tend to support the position of the party that has appointed them. Nevertheless, despite the often expressed view that experts are simply 'hired guns' out to help the party paying them, their value to a party's case should not be understated. Well-qualified and experienced experts can be valuable to the party's assessment of its own position and the realistic analysis of the claim by the tribunal.

Remedies

Most often a claimant will seek to recover monetary damages for loss suffered as a result of the respondent's breach of contract. The measure of damages will vary according to the governing law of the contract but the following heads of damages are commonly encountered.[21]

- Loss of future profits – a claimant may seek to recover the profits that it would have earned from the JV had its partner or partners properly performed their obligations; this involves a calculation of the future performance of the JVC if properly run.
- Loss of value of the JVC driven by a loss of a particular contract or concession, imposition of taxes or a failed transaction.
- Reputational harm – sometimes a claimant may consider that its reputation has suffered as a result of its association with a failed JV. This may happen where the inventor of a new technology has worked unsuccessfully with an industrial company on adapting an ambitious new product for mass production. In practice, however, reputational harm is difficult to prove and quantify.
- Disgorgement damages – in cases of self-dealing or breach of obligations of trust and honesty, a respondent may be liable to pay any illicit benefits or profits to the claimant party.

Whatever the damages claimed, parties should set out their claim convincingly, taking into account the legal and factual bases of their claims. Usually, the parties will appoint damages experts, especially where profit calculations or valuations are involved. A serious arbitral tribunal will only award damages if it is persuaded of a claimant's entitlement. Claims should be sober and realistic. It may be useful to break them down in subsidiary and alternative claims so that, if a claimant prevails only on some issues, it will be easy for the arbitral tribunal to award it part of the damages.

Apart from claiming monetary damages, parties may be able to claim other remedies:

- declaratory relief – this may take many forms, including declarations that a particular decision was valid;
- specific performance – an order requiring a party to perform a contractual obligation, such as contribute to the capital of the JVC;
- orders for the sale or purchase of shares to give effect to call and put options;
- orders for the JVC to be wound up or sold; or
- orders for a trustee or mandataire ad hoc to be appointed to carry out a particular order or dissolution of a JV – this may be appropriate where cooperation between the parties has broken down totally and the respondent will not carry out an order by the arbitral tribunal.

Conclusion

International arbitration is well suited to resolving JV disputes. There is no need to depart from standard arbitral practice. However, a JV dispute of its nature brings with it a number of practical and legal challenges that arbitrators, counsel and the parties need to bear in mind. Advocacy in JV arbitration requires commercial and cultural understanding, because the history of a JV is the history of an international business venture. Counsel need to be good 'story tellers' who are able to provide context and structure to a relationship that may have lasted many years. This also involves some appreciation of the personalities involved and their psychology. Counsel and arbitrators alike need to understand the relevant industry sector and have a head for numbers. Because damages are often only part of the remedy sought, counsel and arbitrators may need to identify and develop suitable remedies. These may, for example, involve a share transfer or sale of the company. Only then will the arbitration also resolve the parties' dispute.

Notes

1 Jörg Risse in 'Disputes arising from joint venture agreements' in Edward Poulton (Ed), *Arbitration of M&A Transactions* (London, 2014), p 370.

2 Edward A Garner, *Black's Law Dictionary* (2nd Pocket Ed) (St Paul, 2001), p 376. An earlier edition defined a joint venture as 'a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit' (Joseph R Nolan et al, *Black's Law Dictionary*, West Publishing Co (St Paul, 1990), p 839.

3 Larry A DiMatteo, *International Business Law and the Legal Environment: A Transactional Approach*, Taylor & Francis, 2016, p 104.

4 Julian Ellison, Edward Kling, *Joint Ventures in Europe*, 2nd Edition, Butterworths, 1997, p 293.

5 Pierre Tercier, Marc Amstutz, Code des obligations II – Commentaire Romand, 2008, p 56.

6 Julian Ellison, Edward Kling, Joint Ventures in Europe, 2nd Edition, Butterworths, 1997, p 59.

7 Arnaud Lecourt, Groupe de sociétés, in Répertoire de droit de sociétés - Dalloz, 2015, paragraph 23.

8 Julian Ellison, Edward Kling, *Joint Ventures in Europe*, 2nd Edition, Butterworths, 1997, p 315.

9 Luis Morais, *Joint Ventures and EU Competition Law*, Bloomsbury Publishing, 2013, p 47.

10 Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual and International*, OUP Oxford, 2013, p 206.

11 Legal Information Institute, www.law.cornell.edu/wex/joint_venture, accessed on 18 August 2016.

12 Swiss Chambers' Arbitration Institution, for instance, reported that during the 10-year existence of the institution only 1 per cent of its cases stemmed from JVs. However, at the same time, it reported that other cases that may include a JV element (such as cases from construction, shareholders' agreements and IP disputes) total 12 per cent. See www.swissarbitration.org/sa/download/statistics_2014.pdf (accessed 11 December 2015).

13 ICC Dispute Resolution Bulletin, 2016 (Issue 1), p 17 and ICC Dispute Resolution Bulletin, 2015 (Issue 1), p 15.

14 For a detailed discussion, see Christoph Brunner, 'Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration', *International Arbitration Law Library*, Volume 18 (Kluwer Law International 2008).

15 For example, article 26 of the Swiss Rules (2012 edition) provides, inter alia: 'At the request of a party, the arbitral tribunal may grant any interim measures it deems necessary or appropriate'. Article 28 of the ICC Rules (2017 edition) empowers an arbitral tribunal to 'at the request of a party, order any interim or conservatory measure it deems appropriate' unless the parties have deemed otherwise. Article 25 of the LCIA Rules (2014 edition) and article 30 of the SIAC Rules (2016 edition) also give arbitral tribunals broad powers to order interim measures.

16 For a discussion, see Gary Born, *International Commercial Arbitration*, 2nd edition (Alphen aan den Rijn, 2014), pp 2468–2483.

17 For example, article 29 of the ICC Rules (2017 edition), article 9B of the LCIA Rules (2014 edition) and article 43 of the Swiss Rules (2012 edition) include provisions related to the possibility of demanding the appointment of an emergency arbitrator when an arbitral tribunal is not yet constituted.

18 Article 43 of the Swiss Rules (2012 edition) requires, inter alia, that the party demanding the procedure state the reasons for its demand, 'in particular the reason for the purported urgency', while article 29 of the ICC Rules (2017 edition) refers to 'urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal'. Article 9B of the LCIA Rules (2014 edition) provides that the emergency arbitrator proceeding can be initiated 'in the case of emergency at any time prior to the formation or expedited formation of the Arbitral Tribunal'.

19 On the differences between civil and common law approaches to expert witnesses, see, for example, Wolfgang Peter, 'Some Practical Thoughts about Expert Witnesses and Tribunal-Appointed Experts' in L'éclectique juridique – Recueil d'articles en l'honneur de Jacques Python (Zurich, 2011), pp 303–312; Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd edition (London, 2010), pp 350–353.

20 The notion of the independence of experts is enshrined in articles 5.2 and 6.2 of the IBA Rules on the Taking of Evidence in International Arbitration (2010 edition).

21 See generally, Yves Derains and Richard H Kreindler, 'Evaluation of Damages in International Arbitration', ICC Publication No. 668 (Paris, 2006).

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Limits to the Principle of 'Full Compensation'

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Introduction

Submissions dealing with damages often start with a reference to the 1928 *Chorzów* ruling by the Permanent Court of International Justice and a rehearsal of the principle of reparation:

> *reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*[1]

When this cannot be achieved through restitution, a financial compensation is sought. However, the mechanisms for assessing claimants' economic harm are not always straightforward, for example, in situations where the amount that achieves this objective varies over time and where what might look like an appropriate compensation at a certain point in time does not look as appropriate a few years later, a difficulty that was raised already in the 1920s in the widely discussed decision relating to the illegal seizure of the Chorzów factory.

In this article, we identify how objectives not strictly related to the pursuit of a 'full compensation', such as the perceived necessity to create adequate economic incentives not to breach international laws or to only compensate foreseeable losses also often intrude in decisions. These principles sometimes result in awards that, for better or worse, can sometimes fail to achieve this aim.

The difficult question of the evolution of damages over time

The passage of time and the unfolding of the events can result in changes in the perceived magnitude of a loss. An oil field might look like a highly attractive investment opportunity with a barrel at US$100 (as was the case in late-2014), or a much less exciting one with oil prices at US$50 per barrel (as was the case a few months later). The financial consequences of the expropriation of an oil field in 2014 will therefore be very different depending on whether they are considered at the time of the taking, or a few years later in a hearing room.

Unsurprisingly, the question of the date on which damages are assessed has been an important consideration in commercial disputes. A landmark decision in that respect is, of course, the *Chorzów* decision relating to the unlawful seizure by Poland of a German nitrate factory after World War I. In this decision, the tribunal identified two main questions for expert enquiry[2] leading observers to believe that it saw fit to award some sensible combination of the value of the factory at the date of the taking, the profits that the factory would have generated after the expropriation until the date of the indemnification, and the increases in the value of the factory after the illegal seizure.[3] However, the tribunal never finally decided in this issue as the case settled before an award was made.[4]

Starting in 2006 with the *ADC v Hungary* decision[5] (identified by some authors as a turning point in that regard),[6] several decisions to take of account developments postdating the expropriation were made.[7] These decisions usually referred to the *Chorzów* decision, and to article 35 of the International Law Commission articles, according to which:

> *[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed.*

In 2014, in the dispute between shareholders of the energy company Yukos and the Russian Federation, the tribunal articulated more explicitly the circumstances in which it considered appropriate to account for developments post-dating the breach in assessing a claimant's compensation. In the view of the tribunal, in cases of unlawful expropriation, 'investors must enjoy the benefits of unanticipated events that increase the value of an expropriated asset up to the date of the decision', but should receive no less than the value of their investment at the date of the taking because '. . . in the absence of the expropriation the investor could have sold the asset at an earlier date at its previous higher value.'[8]

Similarly, on the basis that a claimant could have sold its investment after the date of the taking, a tribunal (*Unglaube v Costa Rica*) opted for a valuation date that was neither the date of the unlawful measures nor of the award. In that case, the claimant was found to have been unlawfully expropriated from a plot of land in Costa Rica. The tribunal decided that an appropriate compensation should reflect the possibility that, absent the measures complained of, the claimant might have sold her property when the market conditions were most favourable, sometime after the expropriation, but before the date of the award.[9]

While meeting important objectives (such as ensuring that the claimant is rightly compensated for the loss of an opportunity to sell the investment after the taking, or ensuring the absence of windfall for the expropriating state) some have argued that this kind of ex post approach to the choice of the valuation date does not fully meet the 'full compensation' criteria.[10]

This reasoning is not unsupported by economic analysis: under this compensation regime and setting aside the pain, costs and uncertainty associated with arbitration proceedings, an unlawfully expropriated investor finds itself economically better off immediately after the expropriation than immediately before. After the expropriation, the investor holds, in addition to the market value of its investment (as would have been the case in the absence of expropriation), an option to potentially benefit from subsequent increases in the value of its investment without exposure to the risks until the date of the award. Arguably, the compensatory regime used by the *Yukos* tribunal therefore does not put back the claimant in the situation in which they would have been, but transports them into a more desirable economic situation.

The value of the use of ex post information in the Yukos case

In the *Yukos* decision, the tribunal held that, having been unlawfully expropriated, the claimants were entitled to the higher of the value of their shares in Yukos on the date of the expropriation or the date of the award.[11] Following this principle, the tribunal performed two assessments of the claimants' losses: one on the date of expropriation, which the tribunal decided had taken place in December 2004, and one on the date of the award, in June 2014.[12]

To do so, the tribunal identified a transaction in the shares of Yukos dating from 2007, which it decided provided a useful estimate of the value of the shares at that point (US$61.1 billion). The tribunal decided to extrapolate this estimate using the value of a Russian oil and gas equity stock index, both to the date of expropriation in 2004 and to the date of the award.[13]

Observing that the index stood at approximately 300 points in late 2007 when the relevant transaction took place, the tribunal was able to estimate the value of the shares in 2004 (when the index traded at approximately 125 points) at approximately US$21.2 billion, and in mid-2014 (when the index traded around 200 points) at approximately US$42.6 billion.

Accounting for the dividends and interest that the claimants would have received and taking into account the contributory breaches from the claimants, the tribunal concluded that damages were US$16.5 billion if assessed in December 2004[14] and US$50 billion if assessed in June 2014.[15] Consistent with the principles cited above, the tribunal awarded the higher of these figures, US$50 billion.

This asymmetric right to benefit from increases in the value of an asset without bearing the downside risks is akin to a 'call option'. Options can be readily valued using standard financial models based on parameters such as the price at which the option can be exercised, the volatility of the underlying asset (which determines the likelihood that it will increase over the exercise price) and the time before the expiry of the option.

In the *Yukos* case, the option granted to the investors by this compensatory framework can be estimated using simple option valuation models and the characteristics of the stock index used by the tribunal to extrapolate its estimate of the value of the shares. Using the Black Scholes model, the option granted to the investors can be valued at approximately US$11 billion at the date of the taking.[16] By the time of the award, with the favourable movement of energy asset prices between 2004 and 2014, the claimant's option had become worth some US$33.5 billion at expiry.[17]

The figures in the *Yukos* case are somewhat dramatic because of the high value of the shares in the first place, but in all instances becoming immune to downside risks on the value of an asset will make an investor economically better off. Sometimes, significantly so.

Interestingly, this 'option' to rely on ex post information for valuation purposes has been found appropriate where expropriations are unlawful (on the basis that restitution should be seen as the preferred mean of compensation, making the current value of the investment a suitable measure of the loss).[18] As a result, whereas some might argue that a claimant's loss is the same regardless of the legal qualification of the expropriation, an unlawfully expropriated investor will receive a greater compensation than a lawfully expropriated investor, all else being equal.

Transfer at below-market prices

Disconnects between the level of compensation awarded and the economic harm suffered by a claimant also sometimes arise where a claimant is contractually bound to transfer some of the economic wealth it creates to related entities that are not party to the dispute. This can be the case when a company is bound to sell its production under long-term contracts at prices below market.

For example, in the *Tenaris v Venezuela* case, the expropriated company had entered into below-market price agreements with affiliated companies, apparently to shift some of its profits to lower tax jurisdictions.[19] The issue faced by the tribunal was whether the investment should be valued on the basis of the lower profits that the claimant would realise by selling its production at below-market prices (the respondent's position), or of the higher profits that it could realise under normal economic circumstances (the claimant's position).[20] Using market prices in a discounted cash flow analysis would have resulted in a materially higher estimate of the value of the investment.

Although the tribunal concluded that the issue was moot given that it had rejected the discounted cash flow approach, it noted that, had the approach been relevant, then the value of the investment should have been based on market prices rather than actual selling prices. The rationale provided was that using below-market prices in the valuation would result in a windfall to the state, which would be able to sell the expropriated plant's production at market prices.[21] Here a tribunal was again prepared to address concerns of a potentially unjust enrichment from the respondent over what might be seen as a strict pursuit of full compensation.[22]

The case of not-for-profit companies

Similar issues can arise where claimants are not-for-profit organisations or utilities bound to sell production at cost. In such cases, tribunals have to decide whether claimants should be compensated where damages are, in effect, ultimately incurred by other economic entities not party to the arbitration.

The *Areva v TVO* case provides an interesting example. In this case, the respondent and counter claimant, TVO, a Finnish law cooperative, was bound to sell its production to shareholders at cost.[23] Yet the company reportedly brought a claim for lost profits against Areva.[24] Undoubtedly, this situation will have raised the question of whether non-for-profit organisations can recover 'profits' that would not, in fact, have been generated, even if the alleged breaches had not occurred.

At around the same time, Israel Electric Corporation (IEC, the Israeli publicly owned electricity utility bound to sell its electricity at cost)[25] brought a claim against Egypt's EGAS for the early termination of its gas supply under a long-term contract, which reportedly led IEC to purchase alternative, more expensive, fuels for its power plants.[26]

In that context, questions can arise as to whether companies selling at cost can suffer losses from higher costs as these higher costs would in principle simply translate into (and be automatically recovered in the form of) higher sales prices. At the same time, a finding of a breach, but an absence of remedy for the claimant, could be seen as unsatisfactory, because it would leave uncompensated those ultimately suffering the harm and not punish those having wrongly caused it. In this particular case, the tribunal decided to award damages to the IEC.[27]

'Passing on' defence

Similar dilemmas regularly arise in antitrust cases, where claimants affected by overcharges resulting from anticompetitive behaviours (eg, a cartel) sometimes recoup some of it by increasing their own selling prices.

In several jurisdictions across the world, courts have had to decide whether damages claimed by purchasers of overcharged goods should be reduced to account for the overcharge passed on to the claimant's own customers.

In Europe, a strict application of the 'full compensation' criteria has generally prevailed and courts will seek to ensure that a claimant receives no more than was lost, even if that results (as it frequently does) in a windfall for the respondent.[28] On the other hand, courts in the Unites States have applied a diametrically opposite approach to damages and usually award damages corresponding to the full overcharge, without consideration for any passing-on, thereby favouring the restitution of the unjust enrichment of the respondent, over the principle of full compensation of the claimant.[29]

Restitution of undue profits

Preventing unjust enrichment is often regarded as a general principle of international law.[30] In many cases, it has been found to give a party a right of restitution of what has been taken or received by a respondent without legal justification. Where this gain is higher than what the claimant has lost, damages based on disgorgement will lead to disconnects between the level of compensation awarded and the economic harm suffered by a claimant.

While tribunals can be reluctant to award damages on the basis of the respondent's financial gains where the resulting compensation is seen to constitute a source of undue enrichment for the claimant,[31] this measure of damages is not uncommon where the harm to a claimant is significantly harder to assess than the gain of the respondent. This can, for example, be the case in relation to infringement on intellectual property rights or counterfeits, where certain national courts award damages based on the gains of the infringer rather than on the loss actually suffered by the claimant.[32]

Limitation of compensation to a claimant's foreseeable harm

Several jurisdictions limit the available remedy from contractual breaches to the foreseeable financial consequences of the breach, which can sometimes prevent the full recovery of damages when the breach has caused losses unforeseeable at the time of the breach.[33] Interestingly, French law provides for exceptions to this principle where breaches are deemed particularly wrongful as in findings of 'dol'.[34] Under French law, which at the same time prohibits punitive damages, compensation can therefore differ depending on the severity of the breach.

In investment arbitrations, some have argued that unforeseeable developments post-dating the breach should be regarded as incidental causes of harm not directly flowing from the illegal act itself and, therefore, should not be taken into account in the assessment of the compensation.[35] However, as explained above, the question of the date on which damages should be assessed and the underlying tension between the desire to limit damages to the predictable harm, and that of 'fully compensating' a claimant by relying on the ex post knowledge of the actual consequences of the breach, has not yet been finally resolved in relation to arbitration proceedings.[36]

Contractual limitation of damages

Liquidated damages are yet another obvious example of potential disconnect between damages and the compensation provided by courts and tribunals. However, a number of national laws provide for provisions aimed at ensuring that the level of disconnect between liquidated damages and the actual harm suffered as a result of the breach is not excessively high.[37]

Remedies determined by national laws or investment treaties

The full compensation criterion can sometimes also conflict with treaty provisions or national legislation.

Many bilateral investment treaties provide that, in cases of expropriation, compensation should be assessed by reference to the 'market value' of the expropriated investment.[38] However, there can sometimes be disconnects between the market value of an investment and the harm actually suffered by an investor. This can arise, for example, where the investor is subject to specific tax liabilities – for example, on dividends by virtue of its citizenship (eg, US citizens) – which would not apply to a potential purchaser of the asset. In this situation, the expropriated investor, who was deprived of an after-tax stream of dividends, could be argued to have suffered a lower loss than the market value of the expropriated asset, which might not reflect that liability if the purchaser of the asset is not subject to this tax.

In all these situations, tribunals have had to decide which principles should prevail and whether the provisions of treaties of national law should be favoured over the general principle of full compensation under international law. Not all tribunals confronted with these issues have taken the same view, which has led to a variety of approaches and decisions where, for better or worse, full compensation sometimes appears as a second-order priority in the decisions that they render.

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Notes

1 This principle was set out in the *Chorzów* decision: *Germany v Poland*, 1928 PCIJ, Merits, Series A, No. 17, paragraph 124: 'The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.' This principle is also expressed in article 35 of the International Law Commission articles according to which '[a] State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible and (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.'

2 The questions for expert enquiry were (1) what was the market value of the factory at the date of the taking and what were the profits it would have generated had it been normally operated until the date of the award, and (2) what would be the present value of the

plant today, had it remained in the hands of its previous owner? *Factory at Chorzów (Germany v Poland)*, Merits, 1928 PCIJ, Series A, No. 17, page 51.

3 The latter is identified as 'lucrum cessans' in the decision, probably best described in this context as a loss of opportunity for the claimant to benefit from a potential increase in the value of the factory after the taking. *Factory at Chorzów (Germany v Poland)*, Merits, 1928 PCIJ, Series A, No. 17 'As regards the lucrum cessans, in relation to question II, etc.'

4 *Factory at Chorzów (Germany v Poland)*, Merits, 1928 PCIJ, Series A, No. 17, pages 53–54: 'In view of these difficulties, the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulae; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.'

5 *ADC v Hungary*, Award, ICSID Case No. ARB/03/16, 2 October 2006, see paragraphs 499 and 514.

6 See Floriane Lavaud and Guilherme Recena Costa in *The Journal of Damages in International Arbitration*: 'Valuation Date in Investment Arbitration: A fundamental Examination of Chorzów's Principle'.

7 *ConocoPhillips Petrozuata BV, Conocophillips Hamaca BV and Conocophillips Gulf of Paria BV v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits of 3 September 2013, paragraph 343, *Quiborax v Bolivia*, Award, ICSID Case No. ARB/06/2, 16 September 2015, paragraphs 370 to 374, *Von Pezold v Zimbabwe*, Award, ICSID Case No. ARB/10/15, 28 July 2015, (see paragraphs 761 to 764), *ADC v Hungary*, Award, ICSID Case No. ARB/03/16, 2 October 2006 (see paragraphs 499 and 514).

8 See *Yukos v Russian Federation*, Final Award, PCA Case No. AA 227, 18 July 2014: 1767 and 1768.

9 See *Marion Unglaube v Republic of Costa Rica*, ICSID Case No). ARB/08/1, Award paragraphs 305–306.

10 See, for example, the Partially Dissenting Opinion of Prof. Brigitte Stern dated 7 September 2015, paragraph 56, who considered that: '. . . the solution suggested by ADC and Yukos is biased in favor of the investors and that the solution which systematically applies the harshest damages on the Respondent State resembles punitive damages, which are excluded in international law. A legal solution cannot just be based on what is more favourable to one of the parties.'

11 *Yukos v Russian Federation*, Final Award, PCA Case No. AA 227, 18 July 2014, paragraph 1763: 'The Tribunal also holds that, in the case of an unlawful expropriation, as in the present case, Claimants are entitled to select either the date of expropriation or the date of the award as the date of valuation.'

12 *Hulley Enterprises Limited v Russian Federation*, Final Award, PCA Case No. AA 226, 18 July 2014, pages 543–564. As the claimants' valuation evidence had been largely rejected by the tribunal, and the respondents had not put forward any alternative valuation of the shares, the tribunal came up with its own assessments.

13 *Hulley Enterprises Limited v Russian Federation*, Final Award, PCA Case No. AA 226, 18 July 2014, paragraphs 1783, 1788 and 1789.

14 Comprising 70.5 per cent of US$2.4 billion (dividends) plus US$21.2 billion (value of Yukos shares) plus US$7.6 billion (interest) equals US$22.0 billion. After a 25 per cent reduction for the claimants' contributory fault, the tribunal concluded on losses of US$16.5 billion with a valuation in December 2004. See paragraph 1819.

15 Comprising 70.5 per cent of US$45 billion (dividends) plus US$42.6 billion (value of Yukos shares) plus US$7.0 billion (interest) equals US$22.0 billion. After a 25 per cent reduction for the claimants' contributory fault, the tribunal concluded on losses of US$50 billion with a valuation in June 2014.

16 Estimate based on the Black Scholes model assuming an exercise price equal to the value of the investment at the date of expropriation (US$21.2 billion), using the volatility of the index used by the tribunal to extrapolate the value of Yukos at different dates (37.5 per cent), assuming for the purpose of this exercise a time to expiry of 10 years consistent with the lag between the expropriation date and the date on which the award was made, and assuming an interest rate of 3 per cent. Note that this estimate assumes perfect hindsight on these parameters, which are here used as proxies for their estimated value as at the expropriation date.

17 Corresponding to the difference between the amount awarded of US$50 billion and the value of the shares at the time of their expropriation of US$16.5 billion.

18 See *Damages in International Investment Law*, Ripinsky and Williams, BIICL 2008, section 4.1.3 (c), 'Differences in compensation for lawful and unlawful expropriation'.

19 *Tenaris v Venezuela*, Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraph 535.

20 *Tenaris v Venezuela*, Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraphs 500 and 506.

21 *Tenaris v Venezuela*, Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraphs 547 and 548.

22 *Tenaris v Venezuela,* Award, ICSID Case No. ARB/11/26, 29 January 2016, paragraph 566.

23 TVO Interim Report, January–September 2016, page 2: 'TVO operates on a cost-price principle (Mankala principle). TVO's goal is not to make profit or pay dividends. The shareholders are charged incurred costs on the price of electricity and thus in principle the profit/loss for the period under review is zero, unless specific circumstances dictate otherwise.'

24 See, eg, 'TVO Gets Good News in Ongoing Dispute with Areva', *PowerMag*, 1 September 2017.

25 See, eg, the 2017 Financial Reports of IEC, page 163: 'In accordance with the Electricity Sector Law, the electricity charge rates and manners of update are determined exclusively by the Electricity Authority . . . . As a rule, the charge rate is determined in accordance with a mechanism of recognition of the costs that are required for fulfilling the duties of the Company as an essential service supplier, such as: fuels, operation and maintenance costs and capital costs (depreciation, financing and return on capital).' The case settled before the final award.

26 See, eg, 'Israel wins gas supply claim against Egypt', *Global Arbitration Review*, 7 December 2015: 'Israel Electric argued that the termination had forced it to resort to more expensive fuels and increase consumer electricity rates by as much as 30 per cent to cover the cost.'

27 'Israel wins gas supply claim against Egypt', *Global Arbitration Review*, 7 December 2015: 'The award, announced on 6 December, requires Egyptian General Petroleum Corporation and Egyptian Natural Gas to pay US$1.7 billion to Israeli state-owned Israel Electric Corporation.'

28 Directive 2014/104/EU of the European Parliament and of the Council, 26 November 2014, Chapter 1, article 3 (Right to full compensation): '1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm. 2. Full compensation shall place a person who has

suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. 3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.'

29 See, eg, 'Study on the Passing-on of Overcharges, European Commission', 2016, paragraph 48: 'On policy grounds, and as early as in 1968 and 1977, the US Supreme Court declared the allegation of pass-on inadmissible as a matter of Federal US antitrust law.' The Supreme Court has also reasoned that, as a matter of practicability, it would be too difficult to apportion damages down the distribution chain, a finding with which few economic experts confronted with these issues will disagree.

30 See, eg, Rutsel Silvestre J Martha, *The Financial Obligation in International Law*, Oxford University Press, 2015 edition, pages 434–437.

31 See, eg, *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No ARB/84/3, 20 May 1992, paragraph 247: 'Moreover, although unjust enrichment has on infrequent occasion been used by international tribunals as a basis for awarding compensation, it is generally accepted that the measure of compensation should reflect the claimant's loss rather than the defendant's gain. The question of whether the claimant was enriched by the project . . . is not, in the Tribunal's view, relevant to the amount of compensation to be awarded in the present case.'

32 See for instance *Guide to Damages in International Arbitration*, Global Arbitration Review, 2016 about *Quest Technologies v SARL Distrisud*: 'Recent cases have, however, shown the French courts, when assessing the level of financial recovery on the basis of the profits of the infringer, doing so without any reference to the actual loss suffered by the patentee.'

33 This is generally the case under English and French law. Article 1231–3 of the French civil codes provides that: 'A debtor is liable only of damages which were either foreseen or which could have been foreseen at the time of entering into the contract, except where non-performance was due to a gross or dishonest fault.' See also *Hadley v Baxendale* case, [1854] EWHC Exch J70,: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

34 Article 1231–4 of the French civil Code.

35 See, eg, the Partially Dissenting Opinion of Prof. Brigitte Stern dated 7 September 2015, paragraphs 83 to 101.

36 This question has often been raised and debated in expropriation cases (cf supra), but much less so in relation to other breaches of international law (such as breaches of the fair and equitable treatment standard) where a variety of approaches has been retained by tribunals (with valuation dates at the date of the breaches and at the date of the award, sometimes relying on ex post information, and sometimes not).

37 See, eg, article 1231–5: 'Where a contract stipulates that the person who fails to perform shall pay a certain sum of money by way of damages, the other party may be awarded neither a higher nor a lower sum. Nevertheless, a court may, even of its own initiative, moderate or increase the penalty so agreed if it is manifestly excessive or derisory . . .'.

38 Market value is commonly defined as the price at which well-informed buyers and sellers would transact in a notional sale of the asset.

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Austria

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Austria has successfully defended its position as one of the leading hubs of international arbitration in Europe over the past few years. Its strong reputation is based on a reliable legal framework dating back to the codification of the Austrian Code of Civil Procedure (ACCP) in the late 19th century. To satisfy the requirements of a modern approach to arbitration, the needs and demands of legal practice, and to be one step ahead of its competitors, Austria has amended its arbitration law twice since 2006. Prior to these major reforms, only a few minor changes had been introduced since 1895. Together with its arbitration-friendly case law, this modern legal framework has contributed to the high popularity of Austria as place of arbitration.

The strength and steady expansion of Austria's reputation are supported by its leading arbitration practitioners having an excellent reputation as both party representatives and arbitrators, but also on an academic level. The legal education in the field of arbitration and the training of thousands of students having an interest in international arbitration becomes obvious every year when the Willem C Vis International Commercial Arbitration Moot takes place in Vienna. The University of Vienna in particular has gained recognition as a leading academic centre in the field of investment and commercial arbitration. Moreover, the Danube University recently introduced a special LLM programme in international dispute resolution, with a focus on international arbitration. These efforts at the academic level will help to foster the strength and expand the international recognition of Austrian arbitration practitioners.

Aside from the legal framework and its background, the prominence of Austria as an arbitral seat is founded on its geographical location and stable political conditions, and Vienna and the other major cities in particular are easily accessible and provide a perfect infrastructure for accommodating the needs of users of international arbitration. Vienna, as the home of various international organisations, has maintained a significant position as a top venue for international arbitration for decades, which is attributable to the Vienna International Arbitral Centre, one of the world-leading arbitral institutions fostering the use of arbitration. Therefore, Vienna is one of the preferred places for arbitration, particularly for parties from central, eastern and south-eastern Europe.

Austrian arbitration law

The first codification on arbitration law was enacted as part of the ACCP in the 19th century. At that time, the legal environment was already arbitration-friendly. The former arbitration law already provided for arbitral awards having the effect of a final and binding court judgment, and furthermore, as an ancillary provision, the Austrian Enforcement Act already provided (and still provides) for an avoidance of exequatur proceedings for domestic awards.[1] The law proved to be a well-functioning framework, and – together with the neutral status of Austria – served to attract a large number of East–West disputes, and finally to sustain Austria's reputation as an arbitration-welcoming jurisdiction long after the fall of the Iron Curtain.

In 2006, the 1985 version of the UNCITRAL Model Law (the Model Law) was largely incorporated into the Austrian Arbitration Amendment Act 2006 to meet the recognised international standards of arbitration.[2] These provisions apply to arbitration agreements concluded and arbitral proceedings commenced on or after 1 July 2006. Therefore, provisions of the old law that provide for formal requirements may still be applicable today. Yet, according to section 583(3) ACCP, formal defects of an arbitration agreement are cured if they are not invoked by a party before entering into an argument on the substance of the dispute.

On 1 January 2014, the Austrian Arbitration Act 2013 came into force, providing for new proceedings for the challenge of an arbitral award, claims regarding the declaration of the existence and non-existence of an arbitral award, and for proceedings concerning the constitution of an arbitral tribunal. Since this latest revision, the Austrian Supreme Court is the first and final instance in relation to these proceedings in most cases. Austria is therefore one of the few countries where arbitral awards are subject to only a single instance of setting aside proceedings.

The current arbitration law is embedded in Part 4 ACCP and closely follows the structure of the Model Law, with Chapters 1 to 10 including provisions on:

- the law's scope of application;
- arbitration agreements;
- constitution of arbitral tribunals and the challenge of arbitrators;
- jurisdiction of arbitral tribunals (including jurisdiction for interim measures);
- conduct of arbitral proceedings;
- the making of awards (including the applicable law) and termination of the proceedings;
- proceedings on setting aside an award;
- recognition and declaration of enforceability of foreign awards;
- applicable procedural rules on state court proceedings relating to arbitration; and
- special provisions on consumer and labour law disputes.

Unlike the Model Law, the Austrian Arbitration Act does not distinguish between domestic and international arbitration and applies to all proceedings, irrespective of whether the dispute is of commercial character. Pursuant to section 577(1) ACCP, the Austrian provisions on arbitration apply to all proceedings having their seat in Austria. Furthermore, according to section 577(2) ACCP, a number of provisions are applicable even if the place of arbitration is abroad or has not yet been determined. These provisions mainly govern topics concerning court assistance and

court intervention in support of arbitration.[3] According to section 577(3) ACCP, certain provisions also apply where the place of arbitration has not yet been agreed upon and at least one of the parties has its seat, domicile or ordinary residence in Austria. This set of provisions concerns court assistance on issues relating to the constitution of the arbitral tribunal (and challenges of arbitrators).

Austria is a party to the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (the New York Convention) and the European Convention on International Commercial Arbitration. It is a member state of the International Centre for Settlement of Investment Disputes (ICSID) Convention, which entered into force for Austria in 1971, and of the Energy Charter Treaty and its subsequent documents, namely the Trade Amendment and Protocol on Energy Efficiency and related Environmental Aspects. In 2015, Austria signed the International Energy Charter. So far, the country has signed more than 60 bilateral investment agreements, mostly with capital importing states. Typically, they provide for investor–state arbitration under the UNCITRAL Rules, the ICSID or the International Chamber of Commerce (ICC) Rules. However, with the entry into force of the Lisbon Treaty, the competence to negotiate and conclude agreements on investment protection has been shifted to the European Union.

Arbitrability

Austrian arbitration law provides for a very broad scope of the notion of arbitrability. According to section 582(1) ACCP, any claim involving an economic interest – and therefore all pecuniary claims – that fall, within the jurisdiction of the courts of law, is arbitrable. Claims that do not involve such economic interest can only be subject to arbitration as far as they may be subjected to a settlement agreement between the parties. According to section 582(2) ACCP, claims in family law matters, claims based on contracts subject to the Tenancy Act, even if only partly so, or the Non-Profit Housing Act, and all claims relating to condominium property are non-arbitrable. However, section 582(2) ACCP does not contain an exhaustive list, and other statutes provide for further cases of non-arbitrability. For example, disputes arising out of collective labour agreements and matters of social security law are non-arbitrable according to section 9(2) of the Labour and Social Courts Act.

Content and form requirements of the arbitration agreement

Section 581(1) ACCP defines the term 'arbitration agreement' as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The arbitration agreement may be concluded in the form of a separate agreement or a clause within a contract. In other words, section 581(1) ACCP refers to minimum content requirements of a valid arbitration agreement. According to these minimum requirements, the parties must be defined or at least definable in the context of the contractual relationship, the arbitration agreement must refer to a defined legal relationship and the parties' will to have their dispute resolved by an arbitral tribunal must be expressed in the arbitration agreement.

Section 583 ACCP regulates the relevant form requirements and provides that an arbitration agreement must be contained either in a written document signed by the parties or in an exchange of letters, telefax letters, emails or other communication between the parties that provides proof of the existence of the agreement. In addition, when a contract that fulfils these form requirements refers to a document that contains an arbitration agreement, it shall also constitute an arbitration agreement, provided that the reference is such that it makes the arbitration agreement part of the contract (ie, the arbitration agreement referred to does not need to be attached to the signed document). Furthermore, a defect of form of the arbitration agreement is cured in the arbitration proceedings by entering into an argument on the merits of the dispute, unless an objection is raised no later than together with the first argument on the merits. Once the formal defect has been cured, the respective party is barred from relying on it in the course of the arbitral proceedings, as well as in pertaining proceedings before state courts.

Consumer and labour law disputes

Disputes where at least one party is a consumer are, in principle, arbitrable. However, Austrian arbitration law stipulates in section 617 ACCP numerous preconditions for the validity of respective arbitration agreements.

Such arbitration agreements have to be contained in a separate document, distinct from the main contract. This distinct document must be signed separately by the parties. Thus, incorporation by means of reference would not constitute a valid agreement (eg, in general terms and conditions, or conclusion by any other means of telecommunication such as email). Furthermore, the arbitration agreement with a consumer is only valid if it is concluded after the dispute has already arisen, and the place of arbitration must be expressly stipulated. The arbitral tribunal may only meet for an oral hearing and the taking of evidence at another place, if the consumer has consented thereto, or if significant difficulties hinder the taking of evidence at the place of arbitration. In addition, in case the arbitration agreement is concluded between an entrepreneur and a consumer, the consumer must, prior to submitting to arbitration, be provided with a written legal advice notice regarding the differences between arbitration and court proceedings. Moreover, if the arbitration agreement was concluded between an entrepreneur and a consumer, and where, either at the time of concluding the arbitration agreement or at the time the arbitral proceedings are commenced, the consumer did not have his or her domicile, ordinary residence or place of work in the country where the arbitral tribunal has its place of arbitration, the arbitration agreement is only binding if the consumer invokes it. Section 617(6) and (7) ACCP provide for additional grounds for the setting aside of an award in case one party to the arbitration was a consumer. As such, arbitration proceedings involving consumers rarely ever occur in Austria.

The same limitations apply to labour law disputes, with an exception for disputes involving the management board members of stock corporations and managing directors of limited liability companies.

The Austrian Supreme Court held that the notion of a consumer under section 617 ACCP corresponds with the definition under the Consumer Protection Act, and that section 617 ACCP applies to corporate transactions.[4] Whether a party may be qualified as a consumer has to be determined from an economic point of view (degree of influence on the management of the corporation).[5] Therefore, in the particular constellation where minority shareholders are involved and where Austrian law is applicable, corporate disputes may be considered consumer disputes and the arbitration clause may be invalid if it is incorporated in the articles of association.

Appointment of arbitrators

In deviation from the Model Law, Austrian arbitration law requires an uneven number of arbitrators pursuant to section 586(1) ACCP. Where the parties agree on an even number of arbitrators, the arbitrators appointed have to appoint another arbitrator to serve as chairperson of the tribunal. In the event that the parties have not agreed on the number of arbitrators, Austrian law stipulates that the tribunal shall consist of three arbitrators.

In addition, Austrian law provides for a default appointment procedure in multiparty proceedings, which is not covered by the Model Law. When several parties on one side of the proceedings fail to jointly appoint an arbitrator within the period of four weeks, any party to the arbitral proceedings is allowed to request the state court to appoint an arbitrator for this group of parties (section 586(5) ACCP). However, this does not lead to the opposing party losing its right to appoint an arbitrator of its own choosing. This provision lacks an equivalent in the Model Law.

Mandatory provisions, party autonomy and the discretionary power of the tribunal

Arbitration proceedings under Austrian arbitration law are characterised by significant party autonomy and, in matters not governed by party agreement, broad discretionary power of the arbitral tribunal regarding the conduct of the proceedings. This party autonomy and the discretion of the arbitral tribunal are naturally limited by mandatory rules. Among such mandatory rules are the parties' right to equal treatment, the right to be heard, objective arbitrability and the rules on challenging an arbitrator, applications for interim measures and setting aside an arbitral award. However, Austrian law does not contain an exhaustive list of mandatory provisions. Whether a provision is of mandatory nature or not has to be derived from its purpose.

Interim measures

In accordance with the Model Law, the Austrian Arbitration Act does not bar a party from applying for interim measures before a state court even if the dispute is subject to an arbitration agreement. However, the competence to issue interim measures does not lie primarily with the state courts. The arbitral tribunal may render interim or protective measures in accordance with section 593 ACCP.

This said, ex parte interim measures can only be granted by Austrian state courts as section 593 ACCP provides that a tribunal may issue interim measures only after hearing the other party.

The arbitral tribunal has the authority to render such interim measures as it deems necessary and even if such measures are unknown to Austrian law. Interim measures issued by an arbitral tribunal are enforceable before Austrian state courts and only subject to scrutiny on grounds similar to the grounds for refusal of enforcement of an arbitral award. Furthermore, Austrian courts enforce interim measures issued by arbitral tribunals having their seat outside Austria or in the event the seat of arbitration has not yet been determined without separate exequatur proceedings. Where the interim measure is of a type unknown to Austrian law, the courts may – after hearing the opposing party – transform it to a type of interim measure known under Austria law that most closely reflects the measure as issued by the tribunal.

Challenge of arbitral awards

Section 611 ACCP sets forth the grounds for the setting aside of an award as well as the applicable time limits. Accordingly, an award is to be set aside in the following circumstances:

- a valid arbitration agreement does not exist, or the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement, or a party was under an incapacity to conclude a valid arbitration agreement under the law governing its personal status;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was, for other reasons, unable to adequately present its case;
- the award deals with a dispute not covered by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement or the plea of the parties for legal protection – if the default concerns only a part of the award that can be separated, only that part of the award shall be set aside;
- the composition or constitution of the arbitral tribunal was not in accordance with a provision of this chapter (of the ACCP) or with an admissible agreement of the parties;
- the arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (public policy) – this provision is much narrower than the parallel provision contained in the UNCITRAL Model Law and many other jurisdictions, as violations of the agreed procedure constitute grounds for the setting aside of an award only if such violation is severe enough to constitute a violation of procedural public policy;
- certain requirements according to which a court judgment can be appealed by an action for reopening of the proceedings (certain criminal actions);
- the subject matter of the dispute is not arbitrable under Austrian law; or
- the arbitral award conflicts with the fundamental values of the Austrian legal system (public policy).

The grounds for setting aside based on non-arbitrability of the matter in dispute, and relating to the award conflicting with the fundamental values of the Austrian legal system (public policy), have to be considered ex officio. In general, an action for setting aside an award has to be brought within three months after the award has been received by the claimant.[6] Importantly, the setting aside of an arbitral award does not affect the validity of the underlying arbitration agreement.[7]

The most important amendment of the Austrian Arbitration Act 2013, which came into force on 1 January 2014, mainly concerns challenge proceedings – for almost all claims for the setting aside of an arbitral award, the Austrian Supreme Court is now the first and final instance (and also for claims regarding the declaration on the existence or non-existence of an arbitral award and state court assistance concerning the constitution of the arbitral tribunal). Only in disputes involving consumers and in matters of labour law do the former procedural rules of the Austrian Arbitration Act remain in force. Therefore, in these two matters, three instances are in principle available for the proceedings seeking the setting aside of the award.

Recognition and enforcement

Awards rendered by an arbitral tribunal having its seat in Austria are executory titles eo ipso under the Austrian Enforcement Act and do not require a declaration of enforceability of a domestic court. It is sufficient to attach a copy of an award with a confirmation of its final and binding nature and enforceability issued by the chairman, or if he or she is unable to do so, by any other arbitrator to the enforcement request.

The recognition and enforcement of foreign arbitral awards is governed mainly by the New York Convention. Austrian courts widely recognise the necessity for an internationally uniform application of the New York Convention.

Notably, where an arbitral award covered by the European Convention on International Commercial Arbitration of 1961 has been successfully challenged in the country of origin due to a violation of public policy, this does not by itself constitute a ground for refusal of enforcement in Austria, provided that the award is not incompatible with the Austrian legal order.

Recent decisions and cases

Requirements for the validity of arbitration agreements

Recently, the Austrian Supreme Court upheld the validity of an arbitration agreement concluded through the exchange of faxes that did not bear the respondent's signature.[8] Pursuant to section 583(1) ACCP, there are two equally valid ways of complying with the form requirements for arbitration agreements:

- a written document signed by the parties; or
- an exchange of letters, telefax, emails or other forms of communication.

The Austrian Supreme Court held that such an exchange must provide record of the agreement but does not have to bear the parties' signatures. Thus, the court resolved a debate in Austrian literature in favour of the prevailing opinion and set a more liberal approach towards the form requirements for arbitration agreements. As emphasised by the court, this is in line with an interpretation of article II(2) of the New York Convention 1958 and also with the prevailing opinion in German literature on section 1031(1) of the German Code on Civil Procedure, ie, a provision that is almost identical to section 583(1) ACCP and also takes its origin from article 7(2) of the UNCITRAL Model Law.

Challenge of arbitrators and arbitrators' obligations

The Austrian Supreme Court has had the opportunity to provide for more clarity as to the scope and nature of an arbitrator's obligations towards the parties on several occasions. The Supreme Court's case law on this issue is expected to further increase as, with the Austrian Arbitration Act 2013, the Supreme Court has been granted direct competence on all party challenges of appointments of arbitrators.

In a recent case, an arbitrator was successfully challenged before the Austrian Supreme Court.[9] The court found that a lunch attended by the arbitrator and a counsel representing the claimant in the arbitration was, against the background of the circumstances of the case, sufficient to raise doubts as to the arbitrator's impartiality and independence from a reasonable third-party perspective. The lunch meeting had taken place shortly after the Austrian Supreme Court had dismissed another challenge against the arbitrator. The first and unsuccessful challenge was based on a relationship between the arbitrator and the claimant that the arbitrator had failed to disclose. In this first decision on the arbitrator's impartiality and independence, the Austrian Supreme Court found that the relationship was not of the kind that would justify an arbitrator to be removed from office. In its decision on the second challenge, the one regarding the lunch meeting with the claimant's counsel, the court stated that professional contact on matters unrelated to the arbitration may be unavoidable for any well-connected lawyer. However, the work done by the arbitrator and the claimant's counsel could have been done via email or telephone whereas a lunch reveals certain personal connection. The Supreme Court also emphasised that the first challenge, though unsuccessful, had indicated loss of trust on the part of the respondent and that the arbitrator, therefore, should have been more sensitive.

In a separate decision, the Austrian Supreme Court reiterated what has been recognised as established case law in Austria, namely that the successful challenge of an arbitral award is a precondition for the arbitrator's liability for damages in relation to the parties to the arbitration.[10] An arbitrator contract that reflects this notion in its wording and expressly stipulates this precondition for compensation for damages, therefore, does not violate public morals and is valid.

This was reconfirmed in a recent decision by the Austrian Supreme Court, where it held that the successful setting aside of the arbitral award is a precondition for an arbitrator's liability, unless the arbitrator refuses to issue an arbitral award altogether or unduly delays its issuance.[11]

Res judicata and pending proceedings

In another case, the Austrian Supreme Court ruled that a conviction by a criminal court has binding effect on arbitral proceedings in the same way as it would bind a civil court.[12] An acquittal, on the contrary, would not be binding for an arbitral tribunal. The reason for this seemingly contradictory treatment of criminal convictions and acquittals is that the laws on criminal procedure provide the victim with some, but not all, procedural rights enjoyed by a party to a civil litigation or arbitration. Allowing acquittals to have binding force on dispute resolution proceedings would, therefore, result in denying the victim of a crime part of the rights he or she otherwise would be entitled to in a litigation or arbitration.[13]

Also, with the same decision, the Austrian Supreme Court had to assess whether an arbitration was still pending as this would have prevented a new arbitration on the same subject matter. The first arbitration had been initiated by the same claimant who had later withdrawn the claim. The claimant then raised the same claim again in a different arbitration. Pursuant to section 608 ACCP, once pending, an arbitration must be concluded formally and this may be done either by means of an arbitral award or by a formal order of the arbitral tribunal. This was not the case with respect to the first of the two arbitrations. It was simply discontinued without any formal decision. Both the arbitral tribunal and the Austrian Supreme Court, therefore, considered the first arbitration to be still pending. This would have blocked the claimant from raising the same claim anew in a different arbitration.

However, in the second arbitration, the arbitral tribunal confirmed its jurisdiction by invoking a statutory exception to the rule that blocks a new claim on the pending subject matter. This exception may be applied with respect to pending proceeding where objections have been raised against the jurisdiction of the arbitral tribunal (at the latest when entering into argument on the substance of the dispute) and, in addition, where a decision on this objection may not be obtained within a reasonable period of time. The arbitral tribunal held, and the Austrian Supreme Court subsequently confirmed, that 'a reasonable period of time' may be interpreted to apply to situations where a decision on the jurisdiction objection may not be obtained at all. In this instance, an arbitral tribunal in the first arbitration had not yet been constituted and the parties had not taken any measures to constitute it. This allowed the arbitral tribunal in the second

arbitration to predict that no decision may be expected at all and thus may not be expected within 'a reasonable period of time'. Therefore, even though the first arbitration was still pending, the claimant was not prevented from raising the same claim in the second arbitration.

Right to be heard

In another decision, the Austrian Supreme Court once more confirmed its strict stance regarding the alleged violation of a party's right to be heard.[14] The court had to assess whether the arbitrator, by failing to discuss his legal view with the parties, had violated the claimant's right to be heard pursuant to section 611(2) ACCP and reiterated that the right to be heard is only violated under Austrian law if one party to the proceedings has not been granted the right to be heard at all.

Review of arbitral awards

In a recent decision, the Austrian Supreme Court held an arbitration clause to be in breach of substantive ordre public and deemed it ineffective. The contract provided for the application of the national law of a non-EU jurisdiction allowing the arbitral tribunal to circumvent mandatory EU law (as transposed by Austrian national law).[15] The dispute involved a European commercial agent and its US principal. The commercial agent had been acting on behalf of the US company on the territory of the European Union and this is sufficient for the application of the commercial agent's right to indemnification under EU law, namely articles 17 and 18 of the Council Directive 86/653/EEC. This right is considered mandatory EU law. Neither the underlying contract nor the applicable law of New York entitled the commercial agent to indemnification. Since the arbitral tribunal had, in a partial award, rejected the applicability of mandatory rules of Austrian law, the Austrian Supreme Court saw no other way to ensure the applicability of the mandatory provisions of said EU directive, but to declare the arbitral clause ineffective.

With respect to procedural ordre public, the Austrian Supreme Court recently ruled that the requirement that an award should provide sufficient reasoning of its findings forms part of the fundamental values of Austrian law and, therefore, non-compliance constitutes a breach of procedural public policy.[16] This is true where, as it was in this case, the parties have not agreed to exclude the statutory requirement of reasoning. The Austrian Supreme Court also held that the required intensity of the reasoning depends on the extent to which the particular issue was discussed during the proceedings. Thus, with respect to issues that have been debated in the course of the proceedings, it is sufficient to simply refer to the position of one of the parties. However, where a matter has only been briefly mentioned in the arbitration, the arbitral award must state reasons in such detail as to allow the parties to understand why the tribunal has come to the particular conclusion.

Investment arbitration

As explained above, Austria has entered into more than 60 bilateral investment treaties (BITs). Three of these agreements, the ones with Bolivia, South Africa and India, have been terminated. They, however, will continue to apply (until 2023, 2027 and 2034 respectively) to investments made prior to their termination. Most recently, Austria signed a new BIT with Kyrgyzstan, which, however, has not yet entered into force.

Generally, the Lisbon Treaty transferred the competence to conclude investment treaties with third countries from the individual member states to the EU. With respect to such 'extra-EU BITs' that the member states have concluded before the Lisbon Treaty, EU Regulation No. 1219/2012 stipulates that they shall remain effective until they are replaced with new EU investment agreements. The regulation also sets out the conditions under which member states may negotiate amendments to such extra-EU–BITs or even conclude new ones.

With respect to BITs concluded between EU member states, ie, 'intra-EU BITs', the European Commission (EC) is of the opinion that they grant privileged status to investors of specific member states and, therefore, they are in breach of EU law. It has initiated infringement proceedings against Austria and a number of other member states that have refused to terminate their intra-EU BITs. Austria and a group of member states have put forward a 'non-paper' expressing their willingness to phase out such agreements provided that specific alternative steps are taken to ensure that the rights of EU investors are duly protected in all EU member states. In 2017, the EC issued a roadmap for an initiative that outlines the EC's plan to increase the clarity of the already existing EU standards of investment protection. The roadmap includes, among others, a plan to lay down the EC's own interpretation of such already existing standards. Meanwhile, the European Court of Justice has also issued a preliminary ruling on investor-state dispute settlement provisions in intra-EU BITs and their compatibility with EU law. In its landmark decision of 6 March 2018, the court declared the investor–state arbitration clause in a BIT between the Netherlands and Slovakia to be incompatible with EU law on the basis of its 'adverse effect on the autonomy of EU law'. Although the full implications of the Court's judgment are yet to be seen, it is likely to have wide impact on intra-EU BITs and investor–state dispute settlement in general.

Despite the large number of Austrian BITs, so far, there has only been one investment treaty claim brought against the Republic of Austria.[17] In this case, the holding company BV Belegging-Maatschappij (Far East) brought an ICSID claim over €200 million under the 2002 Austria–Malta BIT. Far East, which owns 99 per cent of Vienna-based private bank Meinl Bank, sought redress for damages allegedly caused through investigations and state court proceedings targeting the bank itself, as well as some of its executives. Julius Meinl V, chairman of the supervisory board of the bank, was subjected to criminal investigations in 2007. He had been accused of having caused considerable harm to investors by employing a stock buy-back scheme for manipulating the prices of a real estate investment fund. Far East accused Austrian state authorities of having appointed biased experts, conducting illegal house searches and improper surveillance, and thus having breached Meinl Bank's due process rights. Further, Far East alleged that the Republic of Austria had impaired its investment by arbitrary and discriminatory means and failed to provide full protection to its investment, committed direct as well as indirect expropriation by progressively dismantling the bank's operations and furthermore failed to attempt a settlement in good faith.[18] The claim was rejected by the ICSID tribunal in 2017 on the basis that it lacked jurisdiction to hear and decide the dispute.

Austrian investors, however, have made more frequent use of Austria's BITs with other countries. Currently, 11 investment arbitration proceedings involving Austrian investors are pending before investment tribunals, namely:

- *LSG Building Solutions and others v Romania, under the Energy Charter Treaty*, ICSID Case No. ARB/18/19;

- *Erste Group Bank AG and others v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/49;
- *Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/37;
- *Addiko Bank AG v Montenegro*, under the Austria–Federal Republic of Yugoslavia 2001 BIT, ICSID Case No. ARB/17/35;
- *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/34;
- *UniCredit Bank Austria AG and Zagrebacka Banka d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/16/31;
- *Kunsttrans Holding GmbH and Kunsttrans d.o.o. Beograd v Republic of Serbia*, under the Austria–Serbia BIT, ICSID Case No. ARB/16/10;
- *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, under the Energy Charter Treaty, ICSID Case No. ARB/16/5;
- *Strabag SE v Libya*, under the Austria–Libya BIT, ICSID Case No. ARB(AF)/15/1;
- *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, under the Argentina–Austria BIT, ICSID Case No. ARB/14/32; and
- *EVN AG v Republic of Bulgaria*, under the Austria–Bulgaria BIT and The Energy Charter Treaty, ICSID Case No. ARB/13/17.

In addition, 11 proceedings initiated by Austrian investors have already been concluded, namely:

- *Nabucco Gas Pipeline International GmbH in Liqu. v Republic of Turkey*, under the Austria–Turkey BIT, ICSID Case No. ARB/15/26;
- *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/12/39;
- *Club Hotel Loutraki SA and Casinos Austria International Holding GMBH v Republic of Serbia*, under the Austria–Serbia BIT and the Greece–Serbia BIT, ICSID Case No. ARB/11/4;
- *European American Investment Bank AG (EURAM) v Slovak Republic*, under the Austria–Slovakia BIT, PCA Case No. 2010–17;
- *EVN AG v The Former Yugoslav Republic of Macedonia*, under The Energy Charter Treaty and the Austria–Macedonia BIT, ICSID Case No. ARB/09/10;
- *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, under The Energy Charter Treaty, Arbitration Institute of the SCC, Case No. V (064/2008);
- *Austrian Airlines v The Slovak Republic*, under the Austria–Slovakia BIT, UNCITRAL Ad Hoc Arbitration;
- *Adria Beteiligungs GmbH v The Republic of Croatia*, under the Austria–Croatia BIT, UNCITRAL;
- *Alpha Projektholding GmbH v Ukraine*, under the Austria–Ukraine BIT, ICSID Case No. ARB/07/16;
- *ALAS International Baustoffproduktions AG v Bosnia and Herzegovina*, under the Austria–Bosnia and Herzegovina BIT, ICSID Case No. ARB/07/11; and
- *Erste Bank Der Oesterreichischen Sparkassen AG v Republic of India*, under the Austria–India BIT, UNCITRAL Ad Hoc Arbitration.

Conclusion

Austria is a very arbitration-friendly jurisdiction with a highly efficient law on civil procedure, modern arbitration provisions, sophisticated case law and an arbitration centre with excellent reputation (the Vienna International Arbitral Centre) that introduced up-to-date rules in 2018. State courts have traditionally always been very reluctant to intervene in arbitral proceedings, and now, due to the latest amendments providing for the sole and direct competence of the Supreme Court, arbitration-related matters lie almost exclusively in the hands of some of the jurisdiction's best judges. The expertise and experience of Austrian arbitration practitioners range from commercial arbitration through investment protection to the particularities of dispute resolution in practically any specific economic sector. Certainly, not only the Austrian arbitration experts, but also Austria's arbitration-friendly arbitration law together with the recently revised version of the Vienna Rules will continue to attract parties to choose Austria as their arbitral seat.

Notes

1 Cf. section 1.16. of the Austrian Enforcement Act, BGBl. I Nr. 69/20014.
2 One minor reform was that of 1983 updating the form requirements for arbitration agreements and incorporation of one provision concerning the challenge of an award on the grounds of the violation of public policy.
3 Section 577(2) ACCP enumerates the following provisions: section 578 (court intervention only in matters governed by the chapter on arbitration); section 580 (receipt of written communication); section 583 (form of arbitration agreement); 584 (arbitration agreement and action before court); section 585 (arbitration agreement and interim measure by court); section 593(3) to (6) (power of state courts to enforce interim or protective measures rendered by an arbitral tribunal); section 602 (judicial assistance in the taking of evidence); section 612 (declaration of existence or non-existence of an arbitral award) and section 614 (recognition and declaration of enforceability of foreign arbitral awards).
4 Austrian Supreme Court, 16 December 2013, 6 Ob 43/13m.
5 However, the mere fact that a shareholder sits in the board of directors does not automatically mean that his or her influence is significant: see Austrian Supreme Court, 25 August 2014, 8 Ob 72/14t.
6 Special time limits exist with regard to the grounds for the setting aside of an award based on criminal actions.
7 Where an arbitral award on the same subject matter has been finally set aside twice and if a further arbitral award regarding that subject matter is to be set aside, the court shall, upon request of a party, concurrently declare the arbitration agreement to be invalid with respect to that subject matter.
8 Austrian Supreme Court, 23 June 2015, 18 OCg/15v.
9 Austrian Supreme Court, 19 April 2016, 18 ONc 3/15h.
10 Austrian Supreme Court, 22 March 2016, OGH 5 Ob 30/16x.
11 Austrian Supreme Court, 22 March 2016, 5 Ob 30/16x.
12 Austrian Supreme Court, 28 September 2016, 18 OCg 2/16t.
13 Austrian Supreme Court, 20 November 1996, 7 Ob 2309/96a.
14 Austrian Supreme Court, 23 February 2016, OGH, 18 OCg 3/15p.
15 Austrian Supreme Court, 1 March 2017, OGH 5 Ob 72/16y.
16 Austrian Supreme Court, 28 September 2016, OGH 18 OCg 3/16i.
17 *BV Belegging-Maatschappij 'Far East' v Republic of Austria*, ICSID Case No. ARB/15/32.
18 This summary is based on an article by Lacey Yong published on *Global Arbitration Review*'s website: https://globalarbitrationreview.com/news/article/34032/austria-hit-first-icsid-claim.

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Konrad & Partners is a highly specialised law firm delivering premier international arbitration services. It has offices in Vienna, Prague, Bratislava, Skopje and London. The lawyers of Konrad & Partners serve both as advocates and as arbitrators in ad hoc and institutional proceedings, are qualified in multiple jurisdictions and have extensive expertise in handling high-profile arbitration cases before a wide range of international bodies.

Belgium

Johan Billiet
Billiet & Co and the Association for International Arbitration

On 1 September 2013, a revised Chapter 6 of the Belgian Judicial Code (articles 1676–1722), comprising the Law on Arbitration (the 2013 Law on Arbitration),[1] came into force. This revised version replaced the Law on Arbitration adopted in 1972. This previous law was based on the Uniform Law on Arbitration attached to the 1966 Strasbourg Convention on Arbitration. Interestingly, Belgium was the only state to ratify the convention. For this reason, the arbitration regime established by the Belgian law was quite unique. Although the Belgian Law on Arbitration was amended twice (in 1985 and 1998), national idiosyncrasies were abundant up until 2013.

In 2013, Belgium made a revolutionary step towards harmonising its legislation on arbitration by adopting the UNCITRAL Model Law (the Model Law).

The *Travaux Préparatoires* mention that the inspiration for the new law was drawn from the national arbitration laws of Germany, Switzerland and France.[2] The 2013 Law on Arbitration brought the arbitration-related proceedings before the Belgian courts to a qualitatively new level. Previously, the role of the courts in such proceedings was heavily criticised. The 2013 Law on Arbitration aimed to align the arbitration-related proceedings in national courts with the contemporary arbitration-friendly international approach and to make it easier for foreign parties to understand it. The revised provisions on the setting aside of an award, challenges to arbitration proceedings and interim measures are the most notable developments. Another aim of the revisions was to reduce the overall duration of proceedings by, inter alia, excluding a possibility to appeal at the Court of Appeal in setting aside proceedings and allowing only 'cassation' at the Supreme Court.

The first question that parties commencing proceedings before Belgian courts should examine is which law (the previous Law on Arbitration (the Previous Law) or the 2013 Law on Arbitration) is applicable. The differences between these two laws are significant.

The 2013 Law on Arbitration: important changes

If the seat of arbitration is Belgium, the 2013 Law on Arbitration applies to domestic and international arbitration proceedings that commenced from 1 September 2013, irrespective of the parties' nationality.

There are fewer grounds for setting aside an award

When parties include an arbitration clause in a contract, they do it with the aim to provide for an expeditious and final dispute resolution method. If an award is challenged, it may take a long time before a party obtains the awarded relief. Generally, the more distinctive the regime for setting aside an award at the seat of arbitration is, the longer it will take to obtain the relief. Hence, businesses avoid jurisdictions where they risk drowning in protracted legal battles at national courts. The provisions of the Belgian law on setting aside proceedings traditionally differed from article 34 of the Model Law. More grounds for a challenge and a potential three-tier setting aside procedure were among unfortunate points of difference. Following the revision, provisions relating to a setting aside of an award underwent significant changes and became as much in line as possible with the UNCITRAL regime. According to the *Travaux Préparatoires*, German, Spanish and Austrian arbitration laws served as an inspiration for the amendment of provisions on setting aside proceedings.[3]

The following grounds for setting aside an award were excluded by the 2013 Law on Arbitration:

- if an award contains contradictory provisions (former article 1704.2 (j));
- if the formalities prescribed in article 1701.4 have not been fulfilled (former article 1704.2 (h)) (article 1701.4 required that an award be arranged in writing and signed by the arbitrators);
- if an award is based on false evidence (former article 1704.3 (b)); or
- if one of the parties withholds a crucial piece of evidence (former article 1704.3 (c)).

However, the legislator still included three grounds for setting aside an award in addition to those provided in the Model Law:

- if an award does not state the reasons (article 1717.3 (a)(iv) of the 2013 Law on Arbitration);
- if an arbitral tribunal has exceeded its powers (article 1717.3 (a)(vi) of the 2013 Law on Arbitration); and
- if an award was obtained by fraud (article 1717.3 (b)(iii) of the 2013 Law on Arbitration).

As in the Model Law, article 1717.2 of the 2013 Law on Arbitration specifies that the listed grounds for setting aside are exhaustive.

An award must contain reasons but contradictory provisions in an award are no longer grounds for setting aside

The duty to state reasons is a part of the jurisdictional mission of Belgian judges. The same rule applies to arbitrators. An arbitral award rendered in Belgium may be challenged if it fails to state the reasons on which it is based. This ground distinguishes Belgian arbitration law from the Model Law. In the *Travaux Préparatoires*, the legislator explains that the reasoning of an award is a requirement of domestic public policy. However, the law does not prevent the recognition of an award without reasons in Belgium if the reasoning is not required under the law applicable to the proceedings.[4] Additionally, according to the UNCITRAL 2012 Digest of Case Law on the Model Law (the Digest), 'court decisions differ as to whether the failure to provide reasons

constitutes or not, on its own, a ground for setting aside (or refusing to enforce) an award.'[5] At the same time, the Digest explains that, in general, 'courts have rejected the view that the reasons given in an award must meet the standard applicable to court judgments.'[6] Thus, generally, a lower threshold prevails: 'the arbitral tribunal should state the facts and explain succinctly why, on the basis of such facts, the decision was rendered.'[7] For a Belgian legislator, the failure to state reasons is also related to another commonly recognised ground for a setting aside: if an arbitral tribunal exceeds its powers. The Digest explains that relation as: 'the failure of the arbitral tribunal to give any reasons seriously hampers a party's ability to determine if the award dealt with a dispute beyond the terms of submission.'[8] However, according to a 2015 decision of the Court of First Instance (Brussels), the requirement for an arbitral award to contain reasons is still a formal requirement and not a substantive one.[9] When deciding in setting aside proceedings, it is not within the judge's competence to evaluate the reasoning of an arbitral award.

An important change is that the 2013 Law on Arbitration abolished a ground that was a subject of controversy for a long time. Under the Previous Law, an arbitral award could also be set aside if it contained contradictory provisions. The common rationale for setting aside in such cases was that a contradictory award is not reasoned. This is because contradictory reasons are equivalent to no reasons at all. However, it was largely debated whether it includes the entire reasoning or only the operative part of the award. In 2011, the Belgian Supreme Court in *Havas & Euro RSCG Worldwide v Dentu Inc* (C.10.0302.F/1) ruled that a contradiction in the award's reasoning might constitute a basis for the setting aside of an award. Moreover, according to the Supreme Court, in such cases a judge is not required to check whether the decision is otherwise justified. Pursuant to the 2013 Law on Arbitration, the presence of contradictory provisions in an award is no longer a ground for setting aside. This put an end to the ongoing debate. Courts in other jurisdictions have also rejected the notion that awards may be set aside because they are internally inconsistent (eg, courts in France, Sweden and the United States).

Remission

Article 1717.6 of the 2013 Law on Arbitration corresponds to article 34(4) of the Model Law and provides for a possibility to 'save' an award (ie, the Court of First Instance may remit the award to the arbitral tribunal, so that the tribunal eliminate the ground for setting aside). According to the Belgian legislator, the interests of efficiency dictate such course of action and the setting aside of an award should remain the last remedy. If an irregularity can be corrected by a new intervention of the arbitral tribunal, it is preferable to use this procedure.[10]

The possibility to appeal twice the court's decision in setting aside proceedings is removed

The overall duration of the setting aside proceedings under the Previous Law was heavily criticised. The possibility to appeal a court's decision on a setting aside claim often led to protracting proceedings for several years. The 2013 Law on Arbitration abolished this possibility. Pursuant to article 1717.2 of the 2013 Law on Arbitration, setting aside proceedings are to be conducted before the court of first instance, with no possibility to go to the court of appeal. The only way to contest the decision of the court of first instance is to go to the Supreme Court.

The possibility to exclude in advance the recourse for setting aside an arbitral award

Like under the Previous Law, according to article 1718 of the 2013 Law on Arbitration, non-Belgian parties without any link to Belgium may exclude by an explicit declaration the possibility to set aside an award rendered in Belgium. The Model Law does not contain any similar provision. Equivalent provisions, however, may be found in article 192(1) of the Swiss Federal Act on Private International Law and in article 51 of the Swedish Arbitration Act of 1999. Interestingly, between 1985 and 1998, Belgium had a provision that automatically excluded setting aside proceedings for awards made in Belgium where none of the parties to the arbitration were Belgian. This rule was met with scepticism. In 1998, the law was amended and the waiver became optional.

Recognition and enforcement of arbitral awards

Apart from incorporating all Model Law grounds for refusing recognition or enforcement, the 2013 Law on Arbitration kept two additional grounds: lack of reasoning on which an award is based, and the excess of power by an arbitral tribunal. Important clarification was added to the former ground. Article 1721.1(a)(iv) of the 2013 Law on Arbitration expressly provides that the court will refuse to grant the recognition or enforcement of an award if it is not reasoned when such reasons are prescribed by the rules of law applicable to the arbitral proceedings under which the award is rendered. It is expected that this will put an end to the unfortunate application of that ground like in the case where the Court of First Instance of Brussels refused to recognise and enforce a US arbitral award that lacked reasoning, invoking a violation of Belgian international public policy.[11]

It is worth noting that when enforcing an award in Belgium, whether foreign or domestic, a registration duty of 3 per cent should be paid. The duty is payable by both parties jointly.[12]

Importantly, article 1722 of the 2013 Law on Arbitration provides that an arbitral award may be enforced for a period of 10 years as of the communication of the arbitral award.

Challenges of arbitrators

Inspired by article 13 of the Model Law, the legislator has made a number of important amendments to provisions regulating challenges of arbitrators. Many practitioners criticised challenge proceedings against an arbitrator for their duration and inconsistent case law. The most notorious example is the case *Republic of Poland v Eureko and Stephen M Schwebel*, in which arbitration was suspended for two years because the Republic of Poland challenged an arbitrator.[13]

The Previous Law did not provide for summary proceedings in case of a challenge against an arbitrator. However, what it provided for was the setting aside procedure with the Court of First Instance, the outcome of which could further be appealed at the Court of Appeal. This contributed even further to the delays. This system applied even to institutional arbitration.[14] It was not at the discretion of the institution to examine the challenge against an arbitrator, but it was reserved to the competence of a state court. Article 1687 of the 2013 Law on Arbitration expressly provides that the parties are free to agree on the procedure applicable to the challenge of arbitrators. For example, parties may agree on the application of certain arbitration rules.

Article 1687.2(b) of the 2013 Law on Arbitration also states that, in the absence of the parties' agreement on the procedure for a challenge against an arbitrator, the president of the Court of First Instance should decide on a challenge acting as in summary

proceedings. The president's decision cannot be appealed. While the challenge is pending, the arbitration may continue and the tribunal may even render an arbitral award. The legislator explains that the rationale of that provision is to prevent the abuse of the challenge against an arbitrator as a dilatory tactic and to ensure efficiency of arbitration. Additionally, the president has the jurisdiction to decide issues on the appointment or replacement of an arbitrator, to set a time limit for the arbitrator to render the arbitral award and to take necessary measures for collecting evidence (article 1680.2 of the 2013 Law on Arbitration).

Interim measures

Pursuant to article 1691, the arbitral tribunal may order any interim or conservatory measures it deems necessary, except for attachment orders, which remain within the exclusive jurisdiction of the state courts. Also, parties may agree to exclude or limit the possibility for arbitrators to decide on interim or protective measures. The 2013 Law on Arbitration aimed to bring the regulation of interim measures in line with the relevant part of the Model Law as amended in 2006. However, the 2013 Law on Arbitration still differs from the Model Law in some respects. For example, it does not provide a general definition of interim measures or set out the detailed conditions for granting interim measures, leaving this to the discretion of the arbitral tribunal. As the *Travaux Préparatoires* explain, the incorporation of the list of conservatory measures and the conditions for granting them was considered too rigid. The legislator was concerned that it would restrict current flexibility and impede the work of arbitrators.[15] Thus, for the sake of flexibility and efficiency, it was deemed necessary to keep the traditional Belgian approach and give the tribunal wide discretion in these matters.[16]

In addition, unlike the Model Law, the 2013 Law on Arbitration does not empower an arbitral tribunal to render attachment orders ex parte. The Belgian legislator explained that it is more effective to request this measure from the president of the Court of First Instance according to article 584.3 of the Belgian Judicial Code (BJC) since the implementation of such orders rendered by arbitrators may be problematic. Also, the *Travaux Préparatoires* point out that, if an arbitrator is given such powers, it might appear inconsistent with the consensual nature of arbitration. It may also jeopardise the independence of an arbitrator and the right of defence.[17]

On the other hand, articles 1692 to 1695 of the 2013 Law on Arbitration correspond to articles 17D–G of the Model Law. The key principles and rules contained in these provisions have already existed under the Belgian law, although they were not specific to arbitration. Thus, the legislator explains that the inclusion of such provisions adds valuable clarification to foreign colleagues and plays an educational role.

Another notable clarification is article 1696.1 stating that interim measures issued by an arbitral tribunal shall be recognised as binding and shall be enforced by the Court of First Instance. In Belgium, unlike in some other countries, it is recognised that interim measures ordered by an arbitral tribunal are enforceable. Thus, the express provision regarding the recognition and enforcement of interim measures provides useful information to foreign practitioners and to those unfamiliar with the Belgian law.

Arbitrability

Article 1676 of the Previous Law was often considered ambiguous with regard to the disputes that can be submitted to arbitration. Although the 2013 Law on Arbitration still does not provide a list of non-arbitrable disputes, it introduces a revised criterion of arbitrability. Pursuant to article 1676 of the 2013 Law on Arbitration, any dispute of a pecuniary nature may be submitted to arbitration. Non-pecuniary claims may also be submitted to arbitral proceedings if it is legally permissible to settle in their respect. As the *Travaux Préparatoires* explain, the Belgian legislator followed in this matter the example of the Swiss law (article 177(1) PILA) and the German law (article 1030(1) ZPO).[18] For instance, article 177(1) of the PILA provides: 'any dispute of financial interest may be the subject of an arbitration.' The Swiss Federal Court has interpreted 'financial interest' very broadly as involving all claims that present, at least for one party, an interest that can be assessed in monetary terms.

Restrictions on the arbitrability of certain types of disputes are set out in specific legislation. Pursuant to article 1676.5 of the 2013 Law on Arbitration, arbitration agreements in respect of the disputes belonging to the jurisdiction of the labour courts, without prejudice to the exceptions provided by law, are automatically null and void if concluded prior to the moment the dispute arises. Within the area of intellectual property, the Act on Patents of 28 March 1984, excludes disputes relating to mandatory licences from arbitration. Article 577.4 of the Belgium Civil Code on the mandatory co-ownership of buildings or groups of buildings regards any clauses in the regulations of the building that empower one or more arbitrators to resolve disputes regarding application of that section as void.

Under article 4 of the Belgian Law dated 27 July 1961 on Unilateral Termination of Exclusive Distribution Agreements of Indefinite Duration (the Law of 1961), if an exclusive distributor has suffered damage further to the unilateral termination of a distributorship agreement effective within all or part of Belgian territory, he or she may always initiate legal proceedings before the courts of Belgium. In such cases, the courts must apply Belgian law exclusively. Article 6 of the Law of 1961 adds that the provisions of the Law will prevail over any contrary stipulations of the parties, agreed upon prior to contract termination.

On 3 November 2011, the Belgian Supreme Court upheld the decision of the Brussels Court of Appeal. The Court of Appeal found the arbitration provision in the commercial agency agreement providing for the resolution of all disputes under Quebec law null and void because the protection of commercial agents under the chosen law was not equivalent to the provisions contained in the Belgian law. In particular, it contradicted the provisions of the Council Directive of 18 December 1986 on the coordination of the laws of the member states relating to self-employed commercial agents (86/653/EEC), implemented by Belgium in 1995.

Evidentiary rules

Unlike article 27 of the Model Law, article 1708 of the 2013 Law on Arbitration does not permit an arbitral tribunal to request a state court to assist in taking of evidence. According to the Belgian law, only a party may file such a request.

Pursuant to article 1680.4 of the 2013 Law on Arbitration, the president of the Court of First Instance is competent to take all necessary measures for the taking of evidence and this decision cannot be appealed.

No writing requirement for a valid arbitration agreement

Previously, article 1677 provided that an arbitration agreement must be in writing. Article 1681 of the 2013 Law on Arbitration mirrors the second option of article 7 of the Model Law, which defines the arbitration agreement in a manner that omits any formal requirement. Hence, an arbitration agreement does not have

to be concluded in writing in order to be valid under Belgian law. That means that an oral arbitration agreement is valid as long as it can be proven. The *Travaux Préparatoires* provide that witness testimonies can serve as a proof.[19]

Amendments to the 2013 Arbitration Law introduced by the Potpourri IV act

On 9 January 2017, amendments to the 2013 Law on Arbitration introduced by the Potpourri IV act came into force. These amendments include that:

- it is no longer necessary to indicate the place where the award is rendered, it suffices to mention the place of arbitration;
- the party who opposes the enforcement order and who also wishes to move to set aside the award must lodge its motion to set aside the award within the same proceedings; and
- the award must no longer be lodged to the clerk of the court, except in the enforcement proceedings.

Belgian law against 'vulture funds'

On 1 July 2015, Parliament adopted new legislation in a fight against 'vulture funds' – investment companies buying sovereign defaulted debts for bargain prices in order to sue the indebted countries for full repayment.[20] The law is directed against the enforcement of these claims on the territory of Belgium with the main purpose of preventing these funds from seizing any property of countries in peril. One of the cases that gave rise to this legal initiative was *NML Capital Management v The Argentine Republic*,[21] in which the company demanded Argentinian accounts to be frozen in Belgium.

The new law sets out the framework of how to identify a 'vulture fund' or, using the wording of the law, 'illegitimate advantages' of a creditor. The judge has to identify 'a manifest disproportion between the amount claimed by the creditor and national face value of the debt'. If a judge is confronted with a vulture fund, which intends to receive the full value of the bonds it acquired, the maximum that it receives is the discounted amount the company actually paid for the bonds. Belgium is not the first country to adopt a clear anti-vulture fund position. In 2010, the United Kingdom also adopted new legislation on this matter. Nevertheless, although Belgium and the United Kingdom clarified their positions via their legislation, a multilateral initiative towards curtailing the harmful functioning of vulture funds seems to be needed.

Institutional arbitration rules

Various Belgian arbitration institutes changed their arbitration rules, following the 2013 Law on Arbitration.

2018 Standard Dispute Rules adopted by the Institute of Arbitration

The Institute of Arbitration (the Institute) is a neutral and independent non-governmental organisation. One of its distinguishing features is that an arbitral award can be appealed within the Institute before another arbitral tribunal. Following article 6 of the 2018 Standard Dispute Rules (SDR),[22] the arbitral tribunal is expressly given powers to propose mediation. This provision aims to open a door for Arb-Med-Arb proceedings. Article 9 of the SDR also explicitly mentions that the settlement agreement is included in the award. This contributes even further to the promotion of mediation and demonstrates the modern approach towards alternative dispute resolution taken by the Institute. Part IV.3 specifies that the 'cost for arbitration is reduced to half of the already paid provisions' if arbitration ends in first instance before the parties are notified about the composition of the Arbitral Tribunal.

Chapter V provides that in ad hoc arbitration parties can entrust the Institute with the tasks of the clerk's office and the appeal level. Article III.3 allows to request the Institute to arrange for the translation of the award to the language of the country of enforcement. The official version of the SDR is available in eight languages.

CEPANI 2013 Arbitration and Mediation Rules

The most recent Arbitration and Mediation Rules (the Rules) of the Belgian Centre for Mediation and Arbitration (CEPANI) came into force on 1 January 2013.[23] The Rules underwent substantial revision and were inspired to a large extent by the 2012 ICC Arbitration Rules. The most significant innovations relate to the inclusion of provisions on multiparty and multi-contract arbitration, joinder and consolidation. Provisions on interim and conservatory measures as well as the liability of CEPANI and the arbitrators were also reviewed.

The 2013 Rules provide that an arbitration can take place between more than two parties and claims arising out of various contracts can be brought in a single arbitration (articles 9 and 10). Intervention of a third party is also possible if the arbitral tribunal has not yet been appointed or confirmed (article 11). When multiple arbitrations are related or indivisible, the parties or the arbitral tribunal can request CEPANI to order consolidation (article 13).

Furthermore, according to article 26 of the 2013 Rules, it became possible to request interim and conservatory measures before the tribunal is constituted. CEPANI will appoint an emergency arbitrator within two days after the request and this arbitrator will render a decision within 15 days. The emergency arbitrator cannot be appointed as arbitrator in the proceedings on the merits and the award on the interim and conservatory measures will not bind the tribunal.

Additionally, article 37 of the 2013 Rules provides for a limitation of the liability of an arbitrator. Liability is excluded for an act or omission when a tribunal is carrying out its functions of ruling on a dispute (with the exception of fraud). For any other act or omission by the arbitrator or the CEPANI, liability can arise in cases of gross negligence or fraud.

Finally, another important initiative of CEPANI is the launch of *b-Arbitra* in May 2013. *b-Arbitra* is the Belgian Review of Arbitration that welcomes contributions in English, as well as in Belgium's three official languages: Dutch, French and German. It aims, inter alia, to provide a dynamic forum for the exchange of information on a European scale.

Brussels International Business Court

Following the proposition by the Minister of Justice, the Council of Ministers approved in the second reading the draft law establishing the Brussels International Business Court (BIBC) where proceedings are conducted in English. The law was submitted to Parliament on 15 May 2018. The BIBC is being created in order to strengthen the role played by Brussels as the hub of political, business and international life in Europe.

BIBC judges will consist of career judges invited on an ad hoc basis from the Belgian courts and tribunals, as well as lay judges. The cases will be heard by ad hoc panels of three judges: one professional and two lay judges assisted by the Registrar of the Court of Appeal. As the judges will comprise of eminent specialists in international commercial law, the BIBC shall act as a court of first

and last resort without any possibility of appeal. One can still go to the Court of Cassation but the scope of issues that can be referred to this court is limited and the proceedings then will need to be conducted in one of the official languages of Belgium rather than English. As the BIBC is to be self-financed, the parties shall pay a registration fee that is expected to cover the fees of the lay judges and the administrative personnel made available to the BIBC.

As for the procedure, the draft law is based on the UNCITRAL Model Law on international commercial arbitration. The parties will only be able to resolve their disputes at the BIBC if they all agree to its jurisdiction either before or after the dispute arises. Although the BIBC model and arbitration share many features such as specialised decision makers, choice of procedure and no possibility of appeal, the BIBC is a state court. The parties cannot choose their judges like they would in arbitration and there is no option of confidentiality available to the parties. Unlike awards rendered in arbitration, judgments given by the BIBC will not benefit from the New York convention's recognition and enforcement mechanism. The Belgian government intends to ensure the entry into force of the law on the BIBC in January 2020 at the latest.

Recent case law

The following arbitration related decisions of Belgian courts rendered in 2016–2017 appear to be the most interesting:

Constitutional Court

- On 16 February 2017, the Constitutional Court found that the application of article 1122 of the BJC to civil and criminal proceedings but not to arbitration is discriminatory. Article 1122 specifies that third-party opposition is an extraordinary recourse that may be filed by the third party who is prejudiced by a judgment. According to the Constitutional Court similar possibility should be provided to third parties who are prejudiced by an arbitral award.
- On 27 April 2017, the Constitutional Court generally upheld the new law of 23 August 2015 regarding the seizure of goods belonging to foreign states or to international organisations. Following this new law, article 1412-quinquies was added to the BJC. This article provides that assets that are the property of a foreign state and that are located on the territory of Belgium are not subject to seizure. A seizure of assets is possible only if one of the conditions of article 1412-quinquies section 2 is satisfied, such as when the foreign power explicitly and specifically consents to the seizure or when the judge of the seizure allows such a seizure. It is possible that article 1412-quinquies was added to the BJC in the aftermath of the enforcement proceedings in *Yukos Universal Limited (Isle of Man) v The Russian Federation* case to avoid further diplomatic incidents with the Russian Federation and other countries. The new law is of high importance due to the fact that many countries have their assets on the territory of Belgium. Belgium is also the seat of many international organisations.

Decisions related to investment arbitration cases against the Russian Federation, Moldova and Romania

- On 8 June 2017, Brussels Court of First Instance lifted the freezing order on the assets of the Russian Federation in Belgium. This happened following the setting aside in April 2016 of the Permanent Court of Arbitration award by The Hague District Court. Brussels Court of First Instance lifted the freezing order because, in its view, the ground for the existence of the enforcement order (a valid arbitral award) ceased to exist.
- The Republic of Moldova with its air traffic security company MoldATSA successfully resisted the enforcement of the arbitral award in Belgium. The arbitral award in *Komstroy (Ukraine) v the Republic of Moldova* was rendered on 25 October 2013 in Paris pursuant to the UNCITRAL Arbitration Rules. Komstroy sought the enforcement of the award in Belgium. Relying on the award, Brussels Court of First Instance issued an enforcement order on 17 February 2015. However, following the setting aside of the award by the Court of Appeal of Paris on 12 April 2016, Brussels Court of First Instance annulled the leave to enforce the award on 22 June 2016. As a consequence, the judge of the seizure ruled on 28 July 2016 that Komstroy (formerly Energoalliance Ltd) could not enforce the award and the seizure of Moldova's assets was to be lifted with the immediate effect. The Court of Appeal of Brussels upheld that decision on 13 December 2016.
- On 27 January 2016, Brussels Court of First Instance found that the ICSID award rendered against ROMATSA and Romania could not be enforced in Belgium because taking into account new circumstances of the case, the enforcement order would fail to meet the requirements of legality and regularity. The reason for this court's finding was the earlier decision of the European Commission that the payment of damages by ROMATSA and Romania to Mr Micula pursuant to the ICSID award would constitute illegal state aid and Romania should not proceed with this payment.

Other cases

- On 12 July 2017, the judge of the seizure at Brussels Court of First Instance rendered one of the first decisions on remission. The judge started by observing that article 1717.6 of the BJC allowed the judge in setting aside proceedings to suspend these proceedings to give the arbitral tribunal an opportunity to take action to eliminate the grounds for setting aside an award. Following this observation and taking into account the balance of interests of the parties involved in the proceedings, the judge of the seizure decided, however, not to suspend the enforcement of the award. According to the judge, the creditor could enforce the award at his own risk as it was clear that the creditor would be able to reimburse all damages to the debtor in case the award is set aside by the judge in setting aside proceedings.
- On 9 June 2017, Brussels Court of First Instance set aside a CEPANI arbitral award in *Strube v Sesvanderhave*. The court found that the tribunal acted ultra petita in awarding a remedy that none of the parties had requested in the arbitral proceedings. In particular, the arbitral tribunal's decision led to the annulment of the disputed cooperation agreement, although none of the parties ever sought this. The court applied the 2013 Law on Arbitration but neither commented nor made use of the possibility to send the award back to the tribunal to eliminate the ground for setting aside, as provided under article 1717.6 of the 2013 Law on Arbitration.
- Under the BJC, an award can be set aside on grounds of the invalidity of the arbitration agreement. The Court of First Instance in Brussels specified that the aforementioned ground can only be used when the arbitrator declares him or herself competent (Brussels Court of First Instance, 11 March 2016).

Notes

1 Document 005, Texte Adopte, dated 16 May 2013, available at www.lachambre.be/kvvcr/showpage.cfm?section=/flwb&language=fr&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=53&dossierID=2743. English translation available at www.cepani.be/en/arbitration/belgian-judicial-code-provisions.

2 Document 003 (No. 53-2743/003), 'Rapport fait au nom de la commission', Stefaan De Clerck, dated 8 May 2013, p 8, available at www.lachambre.be/kvvcr/showpage.cfm?section=/flwb&language=fr&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=53&dossierID=2743.

3 Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 40, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

4 Ibid.

5 The UNCITRAL 2012 Digest of Case Law on the Model Law, p 154, available at www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.

6 Ibid, p 158.

7 Ibid.

8 Ibid, p 154.

9 Decision of the Brussels Court of First Instance, dated 28 January 2015, Judgment No. 35, 4 Chamber, AR/2014/7806/A.

10 Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 41, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

11 Decision of the Brussels Court of First Instance dated 30 March 2011, RDC, 2012/2, pp 186–189. See also C Verbruggen, 'Le refus d'exequatur d'une sentence arbitrale étrangère dépourvue de motivation', RDC, 2012/2, p 189 et seq.

12 See more in Yves Hendrix, 'Droits d'enregistrement et sentence arbitrales', b-Arbitra, 2013/2, examining the situation where the winning party, who had had to pay the registration duty, sought recovery of such duty against the debtor.

13 Court of Appeal of Brussels, 29 October 2007, RG 2007/AR/70.

14 Court of Appeal of Brussels, 21 June 2005, RG 2004/AR/3106, unreported.

15 Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 24, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

16 'prendre toute mesure provisoire ou conservatoire qu'il juge nécessaire en ce qui concerne l'objet du différend', ibid.

17 Ibid, pp 24–25.

18 Document 001 (No. 53-2743/001), Dépôt, dated 11 April 2013, p 9, available at www.lachambre.be/FLWB/pdf/53/2743/53K2743001.pdf.

19 Ibid, p 15.

20 Document 005 (No. 54-1057/005) Dépôt, dated 1 July 2015, available at www.lachambre.be/FLWB/PDF/54/1057/54K1057005.pdf.

21 *NML Capital, Ltd v Republic of Argentina*, 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014).

22 Available at www.euro-arbitration.org/resources/en/sdren.pdf.

23 Available at www.cepani.be/en/rules.

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England & Wales

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We continue to live in interesting times. If anything, the crystal ball has grown foggier over the course of 2018. In important respects, the UK's near future in 2019 is even more uncertain now than it seemed a year ago. Brexit negotiations between the United Kingdom and the European Union have made less progress than many would have hoped. Although others would argue this was to be expected, few would welcome this degree of uncertainty.

As it stands, international commercial arbitration may represent the nearest London has to a sure thing. While commerce has been forced to carry on in a climate of insecurity, at a high level, commercial arbitration has continued its business as usual. Arbitration clauses have been agreed, arbitrations commenced, awards made. Meanwhile, the English courts have handed down judgments broadly embodying their goal of 'Maximum support. Minimum interference.'[1]

The pillars of London's strength and appeal as an arbitral seat are independent of the UK's membership of the EU. Those pillars will stand untouched by Brexit – in principle. They existed before and so, the theory goes, they should exist after. But commercial arbitration is not an ivory tower whose inhabitants are sequestered from the real world. As Brexit approaches, there may be increasing doubt, even if that doubt remains unspoken, particularly in a world where other arbitral seats make no secret of their aspiration to take London's lead.

Here, we update you on developments since the publication of our last review in November 2017,[2] focusing on the future for arbitration in the UK,[3] not least in light of Brexit.

2018 developments

Third-party funding of arbitration

Third-party funding of claims continues to have an important and expanding role within arbitration in the UK. The established funders are evolving and raising ever larger amounts from their investors. Investment funds and managers are looking at the returns being made. Arbitration is increasingly being seen as an investment or asset class. There has also emerged a secondary market in claims, and particularly in judgments and awards. For corporates with high volumes of litigation, third-party funding represents a way to de-risk their balance sheets. For some, at least, disputes are no longer just cost centres, something that just happens because you have no choice. Instead, disputes are becoming part of the business.

Some research suggests that the UK has the highest rate of growth, compared to the US and Australia, of the use of third-party funding.[4] The UK market is among the most developed, not least because such funding has long been legal and there is no statutory regulation. By comparison, Hong Kong's amendments to legalise and regulate third-party funding are expected to take effect in the latter half of 2018. In the UK, leading funders self-regulate as members of the Association of Litigation Funders (the Association). The Association's membership has expanded and now includes members registered outside of the jurisdiction.

Their Code of Conduct (the Code), first published in 2011, was amended in January this year, with little fanfare or discussion by commentators. While the substantive bulk of the Code was untouched, the Code is now expressed to apply to 'disputes whose resolution is to be achieved principally through litigation procedures in the Courts of England and Wales',[5] rather than as formerly 'disputes within England and Wales'. The previous reference to arbitration was also deleted.[6] The Code states also that it 'shall only apply to a Funder in relation to the funding of the resolution of [disputes to be achieved principally through English court litigation] and does not purport to regulate the activities of a Funder if it engages in any other kind of financial or investment transaction.'[7] As a result, although it does not quite say so expressly, the Code no longer applies to arbitration (and it is unclear whether it would apply to court litigation arising out of arbitration, such as challenges and enforcement proceedings).

This new and seemingly deliberate omission will be troubling to many. It leaves third-party funding of arbitration broadly unregulated in the UK (except to the limited extent a funder's activities also fall incidentally into the domain of the Financial Conduct Authority or its employees are members of regulated professions, such as solicitors or barristers). Last year, the government stated that it did 'not believe that the case has been made out for moving away from voluntary regulation', but that it 'is ready to investigate matters further should the need arise.'[8] In April this year, it was stated that 'the matter of third-party litigation funding is of course a matter of contract between two parties, and the Government would be slow to interfere in that contractual process'.[9] While these statements refer to litigation funding, it is not clear that any distinction was being made from arbitration funding. The government's present position is that self-regulation is working. This is a harder position to maintain if there is no self-regulation. If third-party funders of arbitration do not regulate themselves, they may open the door to other forms of regulation.

Despite the vigour of the market, since our last review there has been no English High Court judgment arising out of the third-party funding of commercial arbitration. Nevertheless, there have been cases whose principles are of potential application in arbitrations. In *Sandra Bailey v GlaxoSmithKline*, a pharmaceutical group litigation, the claimants' funder was required to pay security for costs of the defendant in an amount substantially in excess of its facility commitment to the claimants.[10] It was viewed as relevant that the funder was not a member of the Association of Litigation Funders and its balance-sheet insolvency prevented it from complying with the Association's Code of Conduct. In *Estera Trust v Singh*, minority shareholders bringing unfair prejudice proceedings were permitted to redact and withhold documents from their negotiation to secure funding because those documents would give clues as to the legal advice the claimants

had received on their case.[11] In *Progas v Pakistan*, arising from an investor-state arbitration, the judge 'struggle[d] to see why, as a matter of principle, there should be any special or different position where third party funders are involved' in an application for sums payable under an arbitral award to be secured pending determination of a challenge against it.[12]

In soft law, although of international significance, the International Council for Commercial Arbitration – Queen Mary University of London task force has now published its report on third-party funding in international arbitration.[13] The report aims to provide guidance on issues arising, but is not intended to be definitive. Whether or not you take issue with any of its contents, there is little doubt that it will be a recurrent reference in arbitrations, and potentially national courts, in an area where this was previously scant.

Challenges to arbitrators

Challenges to arbitrators continue to attract great interest, despite or perhaps due to their relative infrequency – and perhaps giving the impression that challenges are more common than they are in reality. The Arbitration Act gives parties the right to apply to the English courts to remove an arbitrator on the grounds that there are justifiable doubts as to his or her impartiality or for not possessing the qualifications required by the arbitration clause.[14]

The importance of this right to apply to the courts is reflected in the fact that it cannot be excluded by agreement.[15] But a party must only go to court as a last resort having exhausted any available recourse to the arbitrator or arbitral institution.[16] There is no way to measure how many challenges are resolved confidentially before members of the tribunal itself. The number of challenges coming before arbitration institutions in 2017 appears remarkably similar to 2016. In 2017, 48 challenges were filed before the International Chamber of Commerce (ICC), of which six were accepted (compared to 810 cases commenced in 2017).[17] Six challenges were made before the London Court of International Arbitration (LCIA) (compared to 285 new cases). Three were rejected; one arbitrator resigned; and two decisions were pending at the time of the last published information.[18] As part of the move toward greater transparency, the LCIA has now published digests of 32 challenge decisions made from 2010 to 2017, of which its court rejected 25. During this period, challenges were heard in less than 2 per cent and were successful in only 0.4 per cent of over 1,600 cases.[19]

Since our last review, only two arbitrator challenges have proceeded to a judgment of the English courts.[20]

Halliburton v Chubb Bermuda Insurance arose from insurance claims following the explosion on the Deepwater Horizon oil rig in the Gulf of Mexico. The Court of Appeal considered the extent to which an arbitrator could, without disclosure, be appointed by the only common party in multiple arbitrations concerning overlapping facts without thereby giving rise to an appearance of bias.[21] The Court accepted that 'inside information and knowledge may be a legitimate concern',[22] but that 'the starting point is that an arbitrator should be trusted to decide the case solely on the evidence or other material adduced in the proceedings in question.'[23] The Court supported a lower threshold for early disclosure, including in borderline cases,[24] but said that 'You can only disclose what you know and there is no duty of inquiry.'[25] The Court of Appeal's reasoning may well become the first port of call when questions about conflicts and disclosure arise in the future.

In *Tonicstar v Allianz*, the Commercial Court and then the Court of Appeal considered the rarer issue of an arbitrator's qualifications.[26] This reinsurance arbitration arose from the Port of New York's losses from the attack on the World Trade Centre on 11 September 2001. When the insurer challenged the reinsurer's appointment of an English barrister of over 30 years' call, the Court had to decide whether his experience in the law satisfied the arbitration agreement that each arbitrator should have 'not less than ten years' experience of insurance or reinsurance.' The first instance judge removed the lawyer arbitrator, reluctantly following an unreported extempore Commercial Court decision from 2000, and so gave permission to appeal. The Court of Appeal, unconstrained by the earlier decision, reinstated the arbitrator, concluding: there is 'no such thing as insurance or reinsurance "itself" which is separate and distinct from the law of insurance and reinsurance . . . a person who has practised as a barrister specialising in the field of insurance and reinsurance for more than 10 years would naturally be regarded as qualified for appointment as an arbitrator.' The Court of Appeal weighed the importance of judicial consistency against the ability of the appellate system to correct previous judicial errors: 'a commercial party should be able to rely on [natural] meaning without having to scour legal textbooks in order to find out whether the clause has been given a different and unnatural meaning by a court.'[27]

Brexit – still looking good for arbitration in the UK?

In our last review, we set out how the foundation of arbitration in London is independent of the UK's membership of the EU. The arbitral law and supervisory court will continue to be as business-friendly, neutral and supportive. English contractual law will continue to be as commercially practical and predictable: the 'river of the common law of contract will flow on regardless.'[28] English arbitration awards will remain enforceable in the EU. (And English-qualified advocates and arbitrators will remain as hard-working and effective!) Because that all remains true, London should remain as good a forum to shop in and a seat of choice.

'The fundamentals are sound' has come to represent a largely consistent cross-party line among the government, judiciary, institutions and practitioners.[29] In Lord Justice Hamblen's words, 'Brexit will not impact on the essential reasons for [choosing English law, English jurisdiction and English arbitration] and you should ignore the mythmakers.'[30]

That said, there is also a note of caution. There is a heightened awareness that dispute resolution in the UK cannot rest on its laurels. Even if '[i]t seems obvious that Brexit will not affect the popularity of London . . . as an arbitral centre',[31] that theory has yet to be put fully to the proof by reality. Commercial arbitration is not insulated from commerce. If people do less business with and in the UK, they are less likely to arbitrate in the UK. Conversely, if – as can only be hoped – Brexit does promote greater trade with a greater range of countries, it should stimulate English law and dispute resolution.[32] As Lord Justice Gross put it, 'CityUK and LegalUK enjoy a symbiotic relationship.'[33]

Perceptions can influence reality. If the future of arbitration in the UK is perceived as uncertain – however wrong in principle that perception may be – then the future of arbitration in the UK will be rendered uncertain. Instability may be a self-fulfilling prophecy.

Furthermore, Brexit itself is not the only factor. A number of jurisdictions were keen to attract legal business away from the UK even before Brexit. The newly instituted International Chamber within the Paris Court of Appeal, for example, can use the English language and some quasi-English procedures. Frankfurt, Brussels

and Amsterdam have also announced their plans to establish their own English-speaking commercial courts. As other jurisdictions 'are throwing a great deal of money at the problem', as the Chancellor of the High Court said, 'If one were a cynic, one might think that some of them were hoping to capitalise on the uncertainties created by Brexit'.[34]

For now, London appears to remain the most preferred seat of arbitration (followed by Paris, Singapore, Hong Kong, Geneva, New York and Stockholm). So far, London's popularity as a seat has not obviously fallen in the two years since the Brexit referendum. Indeed, Queen Mary University of London's International Arbitration Survey in 2018 suggests that London may even have lengthened its lead on Paris in the past couple of years since the 2015 survey.[35] Asked for their view on the impact of Brexit, 55 per cent of respondents (a larger majority than those who voted leave in the referendum) thought that Brexit was unlikely to bring about any change as far as the use of London as a seat is concerned.[36] But 37 per cent thought London would suffer to some degree, great or small. 9 per cent said London would experience a positive impact.

As the UK-EU withdrawal negotiations stretch out, is arbitration the safer choice?

Research suggests that enforcement persists in being the most valued characteristic of international arbitration (closely followed by the desire to avoid particular legal systems or national courts).[37] In principle, at least, an arbitral award from any one of the 159 states party to the New York Convention can be enforced in any of the other 159 states.[38] Every EU member state is a party to the New York Convention, making this wider treaty the mechanism by which arbitral awards are enforced between EU states. Brexit does not touch this.

By contrast, the primary mechanism for the enforcement within the EU of the judgments of EU member state courts – the Recast Brussels Regulation – is itself a creature of EU law. When we wrote a year ago, there was uncertainty about the basis on which judgments could be enforced between the EU and the UK after Brexit. Writing now, there is still uncertainty. Under the EU's February 2018 draft of the Withdrawal Agreement, the existing regime would apply only to judgments handed down before the end of a two-year post-Brexit transition period. Subsequently, in June, EU and UK negotiators jointly announced that they had instead reached agreement that the existing regime will continue to apply to judgments given in legal proceedings begun before the end of the transition period.[39]

What happens thereafter is yet to be agreed. The UK government desires 'a new, bespoke agreement across the full range of civil judicial cooperation', including whose courts will have jurisdiction and the cross-border enforcement of judgments.[40] Taken in isolation, this would seem in both sides' interests to agree. But if 'nothing is agreed until everything is agreed', there is the possibility that negotiation about future judicial mutual recognition becomes a hostage to politics. Reaching no agreement on jurisdiction and enforcement may be 'a recipe for confusion, expense and uncertainty.'[41] This risk may not be high perhaps – some see this as a storm in a teacup – but, until everything is agreed, the risk will remain.

If enforcement is a real concern for your business, why take that chance? Last year, we suggested that arbitration may represent a safe haven. An early 2018 study suggests that there had been a degree of movement in practice away from the uncertainty and toward arbitration.[42] Of the hundred or so respondents, 10 per cent had replaced litigation with arbitration in their clauses. Within this minority, most favoured London as the seat and half were significantly influenced by uncertainty about the future enforcement of UK–EU judgments. A 65 per cent majority of respondents, however, had not yet altered their approach to dispute resolution; but of these, 40 per cent were intending to think again if no significant progress was made in the Brexit negotiations and 20 per cent of these suggested they would switch to arbitration (the majority of whom would choose London).

If the negotiators shortly agree to clone the existing enforcement regime, then the influence of Brexit on businesses' choice between arbitration or litigation is likely to be relatively minor and temporary. Alternatively, the longer the issue is left unresolved, the more it will affect decision-making. By the time you read this, hopefully matters will be clearer.

When the UK leaves the EU, will the English courts be free to injunct litigation in the EU to protect an arbitration agreement?

Anti-suit injunctions from the English court are available to assist defendants faced by foreign litigation wrongly brought in breach of an arbitration agreement. In 2009, however, the interpretation in *West Tankers* by the Court of Justice of the European Union (CJEU) (disagreeing with the UK's highest court) brought anti-suit injunctions to an end between EU states.[43] One EU state's court could no longer prevent a party from proceeding in another EU state's court.

There has been some argument that revisions to the EU Regulation since 2009 had the effect of enabling intra-EU anti-suit injunctions once again in the context of arbitration.[44] This year, in the first reported judgment on this question, Mr Justice Males dismissed that argument.[45] Males J ordered a recently nationalised Russian bank to discontinue Russian court proceedings that belonged in arbitration, but concluded he had no power to restrain related court proceedings in Cyprus. The Court of Appeal refused permission to appeal from his decision. From an English perspective at least, the CJEU decision in *West Tankers* 'remains an authoritative statement of EU law'.[46]

The result is that the EU-law position may be clearest in a jurisdiction in which this law may cease to apply soonest. The UK courts lost their power as a result of EU law. Leaving the EU may return that power. Many in the UK at least would look forward to this. Recently, Lord Justice Gross described the CJEU's decision in *West Tankers* to curtail this 'robust common law remedy' as one of the more obvious 'troubling aspects of the CJEU jurisprudence, perhaps appearing to place doctrinal purity ahead of commercial practicality.'[47] Again, however, all depends on the actual form taken by Brexit. The current draft of the Withdrawal Agreement suggests there would be no change until at least the end of a transition period on 1 January 2021. If the UK and EU also agree to replicate existing regulation thereafter, then Brexit may change nothing in this particular respect.

Will Brexit benefit investor-state dispute settlement in the UK?

By far the most discussed, and divisive, judicial decision of the year has been that of the CJEU itself in *Slovak Republic v Achmea*.[48] Achmea succeeded in 2012 in obtaining a damages award against Slovakia under the Netherlands–Slovakia bilateral investment treaty (BIT). Slovakia had argued in vain to the tribunal that the investor-state dispute settlement (ISDS) provisions in the BIT were unlawful under EU law. Slovakia's argument met with as

little success in the Frankfurt court, the seat of the arbitration. On appeal, the German Federal Court of Justice was also minded to disagree with Slovakia, but made a preliminary reference to the CJEU given the significance of the issue. In 2016, the CJEU was asked whether the dispute resolution provisions in investment protection treaties entered into between two EU member states – intra-EU BITs – are incompatible with EU law.

The CJEU disagreed with the tribunal, the court at first instance and the appeal court – ruling that the ISDS provisions in the Netherlands-Slovakia BIT were precluded by the Treaty on the Functioning of the European Union (TFEU). The CJEU was concerned that ISDS under the BIT removed the interpretation of EU law from the jurisdiction of the CJEU: 'it is for the national courts . . . and the Court of Justice to ensure the full application of EU law in all member states and to ensure judicial protection of the rights of individuals under that law'.

An analysis of the rights or wrongs of the CJEU's reasoning is beyond the scope of this chapter and we do not take a position. But it is fair to say that the CJEU's answer has raised many questions. Is it the end of ISDS in all 196 intra-EU BITs? Or just those with ISDS provisions worded like the Netherlands-Slovakia BIT? Where do the 1,400 BITs stand between EU states and non-EU states? And what about multilateral agreements? And commercial arbitration? In Lord Justice Gross's words, 'the decision and its reasoning could aptly be described as troubling more generally'.[49] Ironically, the CJEU, in its desire to ensure the uniformity of EU law, has disrupted its interpretation more than any ISDS arbitral tribunal ever could.

This year, the English Court of Appeal was forced to navigate between the UK's obligations as an EU member state on the one side and its obligations as a party to the ICSID Convention on the other. In *Micula v Romania*,[50] the Court upheld a stay of enforcement of the Micula brothers' ICSID award against Romania under the Sweden–Romania BIT, pending the decision of the General Court of the European Union whether to annul a decision of the European Commission that enforcement of the arbitral award would constitute prohibited state aid. The three Lord Justices arrived at the same decision, but reached it by differing paths – testifying to the difficulty of the questions asked of them.

After any Brexit transition period (or, if no such agreement is reached, Brexit itself), the EU Treaty provisions at issue in *Achmea* and *Micula* will no longer bind the UK. This would not cut the Gordian knot and unravel all the complexity – indeed, it would raise novel questions and the EU may seek to negotiate away any consequential competitive advantage to the UK – but, to the extent Brexit makes any difference, it can only increase the attraction of the UK to investors claiming against EU states.

No reform, quite yet

Last year, it was unclear whether England's 20-year old Arbitration Act was to be reformed. The Law Commission had sought views on whether changes to the Arbitration Act could help preserve the UK's position and help it 'compete with other jurisdictions'.[51] Progress was delayed by the general election following the Brexit referendum; and when the Commission eventually launched its 13th programme of law reform, some six months after it had originally planned, arbitration was not included on the list.

But reform may still be coming. The Law Commission was unable to secure the necessary cross-government support in time for the start of its reform programme. The Commission, nevertheless, remains hopeful that it will be able to work in this area. In particular, the Commission is interested in 'the use of a statutory summary judgment style procedure' and 'including in the Act a wider range of summary powers for arbitrators, for example to strike out an unmeritorious claim or defence'.[52] As the Commission recognises, it is arguable that such power already implicitly exists, but there has been a historic conservatism about adopting summary procedures. This reluctance may arise from the insecurity of not having an express power and hence that it is better to have an enforceable award later, than an unenforceable award earlier.[53]

Change comes at an inherent price of certainty. As most English cases show, English arbitral law has settled over the years and attained a high degree of certainty. The Arbitration Act 1996 has generally well served English arbitration and the parties who choose to use it. It is hard to imagine that if 'rival jurisdictions such as Hong Kong, Singapore, Paris and Dubai could soon "catch up"' (as the Law Commission is concerned), this will be due to the state of the Arbitration Act. Many consider that 'If it ain't broke, don't fix it'. But there may be sense in tinkering. The Commission is not looking for wholesale change but rather considers 'small changes could make a difference'[54] and there is room for 'reform [that] could have a subtle but positive impact on London's attractiveness as an arbitration venue.' [55] Although there is debate about their scope in practice, few would disagree with these general statements of principle. If England amends its Arbitration Act, other jurisdictions are watching closely.

Balancing arbitration and the Court

Last year, we reported how a speech by Lord Thomas, then Lord Chief Justice, had sent waves of concern through the arbitral community by suggesting that there should be greater access to appeal from arbitrations to the English courts on points of law.[56] In fact, as we explained, his proposal to rebalance the relationship between court and arbitration was more nuanced than sometimes made out and Lord Thomas himself arguably softened his initial position.[57]

This year, Lord Justice Gross of the Court of Appeal gave a speech in which he publically 'part[ed] company with the approach canvassed by Lord Thomas'.[58] Again, these were his own views, not official judicial policy. Lord Justice Gross cautions that a 'balance which reflects an arbitral and litigation culture of "maximum support: minimum interference" could all too easily be lost',[59] and considers 'Broadly speaking, we have the balance right':[60] 'If the careful balance struck in the 1996 [Arbitration] Act were to be upset, there would be a risk that both the courts and arbitration in London would be harmed.'[61]

It is fair to say that the storm of commentary sparked by Lord Thomas has subsided without changing anything. Lord Thomas has since retired as a judge. Indeed, he is now practising as an arbitrator. Lord Thomas's initial comments were also made before the Brexit referendum. Although similar suggestions will remain a recurring feature of debate, for now it seems less likely that any senior figure will wish to cast any unnecessary doubt over one of the more certain things that the UK has. But, if Brexit – once the meaning of Brexit is known – precipitates a large shift from litigation toward arbitration, then the balance of power will be called into question once again.[62]

Notes

1 'Commercial Dispute Resolution – Courts and Arbitration', Lord Thomas, National Judges College, Beijing, 6 April 2017, paragraph 25, quoted and affirmed by Lord Justice Gross in 'Courts and Arbitration', Jonathan Hirst QC Commercial Law Lecture, 1

May 2018, and 'A Good Forum to Shop in: London and English Law Post-Brexit', 35th Annual Donald O'May Maritime Law Lecture, 1 November 2017.

2 As at the time of writing.

3 Strictly, England and Wales. The United Kingdom also includes the jurisdictions of Scotland and Northern Ireland, which have separate arbitration statutes. We refer to the 'UK' loosely for convenience.

4 '2017 Litigation Finance Survey', Burford Capital, p 10.

5 'Code of Conduct for Litigation Funders', Association of Litigation Funders, November 2014 & January 2018, paragraph 1.

6 See paragraph 2.2.

7 Paragraph 17.

8 'Parliament: Civil Proceedings: Third party financing: written question – HL4216', Lord Keen, 24 January 2017.

9 'Legal Aid', Lord Keen, *Hansard*, 19 April 2018.

10 *Sandra Bailey & Others v GlaxoSmithKline UK Ltd* [2017] EWHC 3195 (QB).

11 *Re Edwardian Group Ltd aka Estera Trust (Jersey) Ltd v Singh* [2017] EWHC 2805 (Ch).

12 *Progas Energy Ltd v Pakistan* [2018] EWHC 209 (Comm).

13 'Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration', International Council for Commercial Arbitration, April 2018.

14 Arbitration Act 1996, s24(1)(a), (b).

15 Arbitration Act 1996, s4.

16 Arbitration Act 1996, s24(2).

17 *ICC Dispute Resolution Bulletin*, 2018, Issue 2, pp 52, 57. The challenges figures were almost identical to the previous year: the ICC received 50 challenges and accepted five (*ICC Dispute Resolution Bulletin*, 2017, Issue 2, pp 109-110).

18 'Facts and Figures 2017: Casework Report', LCIA, p. 17. The same number as 2016 cf. 'Facts and Figures – 2016: A Robust Caseload', p 22.

19 'LCIA Releases Challenge Decisions Online', LCIA, 12 February 2018.

20 The principles of the Privy Council in *Almazeedi v Penner* [2018] UKPC 3 (with Lord Sumption dissenting) are also relevant to arbitration, but the judgment itself arose out of a challenge to a judge in the Grand Court of the Cayman Islands, not an arbitrator. The Court of Appeal in *Halliburton v Chubb Bermuda Insurance* took the Privy Council's judgment into account.

21 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817, the appeal of H v L [2017] EWHC 137 (Comm) noted in our last review.

22 [2018] EWCA Civ 817, paragraph 49.

23 Paragraph 50.

24 Paragraphs 65–66, 83–91.

25 Paragraph 69.

26 *Tonicstar Ltd v Allianz Insurance Plc (formerly Cornhill Insurance Plc)* [2017] EWHC 2753 (Comm); *Allianz Insurance Plc (formerly Cornhill Insurance Plc) v Tonicstar Ltd* [2018] EWCA Civ 434.

27 See also 'Challenging an Arbitrator for Lack of Required Qualification' and 'Challenging an Arbitrator for Lack of Required Qualification – Revisited', *International Arbitration Law Review*, 21(1) (February 2018) / 21(4) (August 2018), by John Mathias and Thomas Wingfield.

28 'Myths of Brexit', Lord Justice Hamblen, Brexit Conference, Hong Kong, 2 December 2017, paragraph 7.

29 'A Good Forum to Shop in: London and English Law Post-Brexit', Lord Justice Gross, 1 November 2017, paragraph 1. See also, for example, 'English Law, UK Courts and UK Legal Services after Brexit: the View Beyond 2019', Judicial Office, 13 June 2017; 'The Strength of English Law and the UK Jurisdiction', LegalUK, August 2017; 'The UK Jurisdictions After 2019', Sir Geoffrey Vos, 20 June 2017; 'The Future for the UK's Jurisdiction and English Law after Brexit', Sir Geoffrey Vos, Legal Business Seminar, Frankfurt, 28 November 2017; 'Opening of the Business and Property Courts for Wales', Lord Thomas, 24 July 2017; 'Myths of Brexit', Lord Justice Hamblen, 2 December 2017.

30 'Myths of Brexit', paragraph 35.

31 'Myths of Brexit', paragraph 43.

32 cf. 'Myths of Brexit', paragraphs 19, 44.

33 'A Good Forum to Shop in: London and English Law Post-Brexit', paragraph 3.

34 'The UK Jurisdictions After 2019', paragraph 6.

35 '2018 International Arbitration Survey: The Evolution of International Arbitration', Queen Mary University of London (QMUL), p. 9; cf. '2015 International Arbitration Survey: Improvements and Innovations in International Arbitration', p 12.

36 '2018 International Arbitration Survey', p 11.

37 '2015 International Arbitration Survey', p 6; '2018 International Arbitration Survey', p 7.

38 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

39 'Joint statement from the Negotiators of the European Union and the United Kingdom Government on Progress of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union', 19 June 2018.

40 'Framework for the UK-EU Partnership: Civil Judicial Cooperation', UK Government presentation, 13 June 2018.

41 'Dispute Resolution in Uncertain Times', Lord Briggs, The Hague, 22 January 2018, paragraph 23.

42 'The Impact of Brexit on Dispute Resolution Clauses – Survey Report', Thomson Reuters, 23 July 2018. The survey itself was open from 31 January 2018 to 27 February 2018.

43 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* (C-185/07); *West Tankers Inc (Respondents) v RAS Riunione Adriatica di Sicurta SpA and others (Appellants)* [2007] UKHL 4. For further background, see our 2018 chapter.

44 See, e.g., Advocate General Wathelet's opinion in '*Gazprom*' OAO (C-536/13).

45 *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm).

46 [2018] EWHC 1343 (Comm), paragraph 99.

47 'Courts and Arbitration', Lord Justice Gross, 1 May 2018, paragraph 37.

48 *Slovak Republic v Achmea B.V.* (Case C-284/16), 6 March 2018.

49 'Courts and Arbitration', Lord Justice Gross, 1 May 2018, paragraph 38.

50 *Micula v Romania* [2018] EWCA Civ 1801.

51 'Should we include these projects in the 13th Programme? Arbitration – could the Arbitration Act 1996 be improved to make arbitrations less costly or lengthy?' Law Commission, 13th Programme of Law Reform, October 2016.

52 'Thirteenth Programme of Law Reform', Law Commission, printed 13 December 2017, paragraph 4.54.

53 See 'Summary Awards In International Arbitration – Slow Getting Up to Speed?' *Mealey's International Arbitration*, December 2017, by Charlie Lightfoot, James Woolrich and Thomas Wingfield.

54 'Should we include these projects in the 13th Programme?' Law Commission.

55 'Thirteenth Programme of Law Reform', paragraph 4.54. The Commission also considers that 'where trust law and arbitration meet, this jurisdiction is lagging behind its international competitors.'

56 'Developing Commercial Law Through the Courts: Rebalancing the

Relationship Between the Courts and Arbitration', Lord Thomas, Bailii Lecture, 9 March 2016.

57 'Commercial Dispute Resolution – Courts and Arbitration', Lord Thomas, 25 April 2017, paragraph 29.

58 'Courts and Arbitration', Lord Justice Gross, 1 May 2018, paragraph 21.

59 'Courts and Arbitration', paragraph 22.

60 'Courts and Arbitration', paragraph 14.

61 'Courts and Arbitration', paragraph 22.

62 Compare 'Dispute Resolution in Uncertain Times', Lord Briggs, 22 January 2018, paragraphs 31-35: "If the advance of 'us first', whether because of Brexit or other moves away from sharing jurisdiction, does lead to private arbitration and private ADR taking over from public courts as the main means for the resolution of cross-border commercial and financial disputes, then ways will need to be found to remedy the deficit in transparency that will come to pass as a result. [...] These problems of reduced transparency lie, at the moment, in the future."

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Charlie has appeared as advocate both in the English High Court and in many arbitral proceedings. His recent experience includes advising on international disputes in a variety of sectors, including energy, defence, infrastructure and telecommunications.

Charlie is listed in the annual *Who's Who Legal: Arbitration* guide featuring the foremost arbitration practitioners aged 45 and under, which notes that he is 'a well-known and effective advocate' endorsed for his 'brilliant strategic mind and masterful advocacy'. He is also recommended in *The Legal 500 UK*, with clients noting that he 'cuts to the chase', 'listens to clients' needs' and displays 'impressive advocacy skills'.

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Finland

Jussi Lehtinen and Heidi Yildiz
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The 107-year old Arbitration Institute of the Finland Chamber of Commerce (FAI),[1] established in 1911, is a world-class arbitration centre that has a long and distinguished pedigree in arbitration. The FAI's current state-of-the-art Arbitration Rules were launched on 1 June 2013 (the FAI Rules)[2] following a substantial reformation process to bring the FAI Rules in line with the best international arbitration norms and practices. More recently, on 1 June 2016, the FAI launched new Mediation Rules (the FAI Mediation Rules),[3] which cater for a simple, cost-efficient, flexible and user-friendly mediation framework. The FAI has further initiated discussions with the Ministry of Justice in 2016 with respect to the revision of the current 1992 Arbitration Act to implement the UNCITRAL Model Law in full in Finland. This chapter provides an introduction to the current arbitration landscape in Finland.

The 2013 FAI Rules operate at the cutting edge of international arbitration practice

The FAI Rules comprise a combination of the recent amendments to the 2012 ICC Rules, 2010 UNCITRAL Arbitration Rules and Swiss Rules of International Arbitration 2012. Accordingly, the FAI Rules establish a comprehensive, expeditious and cost-efficient procedural framework for international and domestic arbitration, while respecting party autonomy and preserving the necessary flexibility to the proceedings.

The FAI Rules impose a number of obligations on parties and tribunals that are designed to reduce time and costs of the proceedings. In line with the Swiss Rules, parties and tribunals have an overall good faith obligation 'to make every effort to contribute to the efficient conduct of the proceedings in order to avoid unnecessary costs and delays'.[4] The tribunal is further authorised to order cost sanctions on a party that fails to comply with this overall duty.

In the spirit of the overall duty to conduct the proceedings expeditiously and cost-efficiently, the FAI Rules obligate tribunals to: arrange a preparatory conference at an early stage of the proceedings;[5] establish a procedural timetable at the outset of the proceedings;[6] and, as soon as possible after the last hearing date or the date on which the tribunal receives the last authorised written submission, declare the proceedings closed and inform the parties and the FAI of the date by which it expects to issue the final award.[7] The arbitral tribunal is, however, obligated to render the final award within nine months from the receipt of the case file.[8] The FAI may nevertheless extend this limit 'upon a reasoned request of the arbitral tribunal'.[9]

The FAI Rules also enable the tribunal to control the length of the proceedings in a number of ways, such as:

- by setting cut-off dates for the presentation of new claims, arguments or evidence or the introduction of new witnesses;[10] or
- by ordering any party at any time to identify the documentary evidence that the party intends to rely on, specify the circumstances that the party intends to prove by such evidence and to produce any documents or other evidence that the tribunal may consider relevant to the outcome of the case.[11]

The FAI Rules further provide for effective administration of multiparty and multi-contract arbitrations on even more liberal conditions than the ICC Rules[12] and allow the parties access to the emergency arbitrator procedure prior to the appointment of the tribunal,[13] as well as for arbitrator-oriented interim relief after the tribunal's appointment.[14]

Moreover, the FAI Rules impose an obligation on the parties, the tribunal and the FAI to maintain confidentiality of the arbitration and the award,[15] and provide for a number of other recently debated arbitration issues, such as the tribunal's use of a secretary,[16] the taking of evidence[17] and the challenge of arbitrators following the tribunal's participation in the parties' settlement negotiation.[18]

The FAI Rules apply to FAI arbitrations commenced on or after 1 June 2013, with the exception of the emergency arbitrator procedure, the provisions for the joinder of additional parties, claims between multiple parties, and certain provisions concerning the appointment and revocation of arbitrators in the event of consolidation of the proceedings. Unless parties have agreed otherwise, these provisions only apply to arbitrations commenced under arbitration agreements concluded after 1 June 2013.[19]

The upward trend of arbitration in Finland

The FAI's launch of the current Rules in 2013 prompted a rapid increase in the number of arbitration cases filed with the FAI. According to the FAI statistics, the FAI had an all-time record of 80 requests for arbitration filed in 2013.[20] Conversely, 2017 was the second most prolific year in the FAI's history, with 79 requests filed.[21] In addition, 32 per cent of all FAI arbitration cases in 2017 had an international dimension (ie, at least one party is domiciled abroad).[22] The upward trend appears to be continuing in 2018: as of August 2018, the FAI has received 36 requests for arbitration.

Along with the FAI Rules, Finland's progressive and pro-arbitration legislative framework contributes towards making Finland an attractive and arbitration-friendly seat. Both domestic and international arbitration proceedings in Finland are governed by the 1992 Arbitration Act, as amended (the Arbitration Act).[23] The Arbitration Act largely mirrors the provisions of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006). However, as stated above, the FAI has initiated discussions with the legislator to replace the 1992 Arbitration Act with the UNCITRAL Model Law. Finland has further ratified and enacted the 1958 New York Convention, and ratified the ICSID Convention.

The FAI drives gender diversity when appointing arbitrators

In conjunction with the reformation of the FAI Rules, the FAI also considerably internationalised the composition of its Board by appointing a number of distinguished and prominent international arbitration practitioners from various jurisdictions. Consequently, the current FAI Board has considerable expertise in appointing high-quality arbitrators in domestic and cross-border disputes.

In the appointment of arbitrators, the FAI Rules require the FAI Board to consider:

- any qualifications required of the arbitrator by the agreement of the parties;
- the nature and circumstances of the dispute;
- the nationality of the parties and of the prospective arbitrator;
- the language of the arbitration;
- the seat of arbitration and the law or rules of law applicable to the substance of the dispute; and
- any other relevant circumstances.[24]

Where the parties are of different nationalities, the FAI Rules now confirm the FAI's established practice of not appointing a sole or a presiding arbitrator from the same domicile as one of the parties.[25]

In addition to ensuring that all arbitrators appointed in both domestic and international disputes have sufficient experience, expertise and other relevant qualifications to serve as an arbitrator in the specific case, the FAI Board has proclaimed to be 'mindful of the importance of expanding the 'pool of arbitrators' to include 'younger arbitration practitioners who are known for their talent, efficiency and user-friendliness' and dedicated to promoting gender diversity.[26] In fact, the FAI statistics show that 29 per cent of the arbitrators appointed by the FAI Board in 2017 were female.[27]

Finnish arbitration has traditionally been expeditious and cost-efficient

The first Arbitration Rules of the FAI, dated November 1910, already centred on such contemporary principles of arbitration as expeditious dispute resolution,[28] impartiality of arbitrators[29] and confidentiality of the proceedings.[30] One of the key objectives of the 1993 Rules was to also enable an expeditious and economic arbitration process.

In fact, the FAI has a track record of promoting resolution of disputes expeditiously and in a cost-effective manner. Even before the launch of the current FAI Rules, for several consecutive years, the average duration of a case resolved under the auspices of the FAI was less than a year.[31] The statistics of the FAI show that the average duration of a case in 2016 was just eight months.[32] In fact, the FAI Rules require the tribunal to render its final award within nine months from the receipt of the case file from the FAI.[33]

The new FAI Mediation Rules strengthen the FAI's standing as an attractive arbitration centre

On 1 June 2016, the FAI launched new Mediation Rules, which apply to all FAI mediations commenced on or after that day, unless the parties agree otherwise.[34] The launch of the FAI Mediation Rules will strengthen the FAI's standing as an attractive arbitration centre by extending the array of its services into the broader field of alternative dispute resolution and, thus, providing the disputing parties an opportunity to efficiently mediate their dispute before or during arbitration or litigation proceedings.

The FAI Mediation Rules enable parties to resort to FAI mediation on the basis of a written agreement of the parties to refer their dispute to mediation under the FAI Mediation Rules, or 'any other type of understanding between the parties to resort to FAI mediation.'[35]

In line with the ICC and many other well-known mediation rules, the FAI Mediation Rules further cater for the parallel conduct of mediation and arbitration or litigation to enable a mediation window to be included in parallel arbitration proceedings.[36] The FAI Mediation Rules provide that '[u]nless otherwise agreed by the parties, an agreement on FAI mediation does not constitute a bar to any judicial, arbitral or similar proceedings'[37] and '[s]ubject to applicable laws, orders, regulations and rules of the competent judicial authorities, arbitral tribunals, arbitral institutions or similar authorities, the parties may agree to stay any judicial, arbitral or similar proceedings' for the purposes of initiating FAI mediation.[38]

The FAI Mediation Rules provide only a light regulatory framework for the mediation process, offering the parties and the mediator great flexibility in tailoring the mediation process to suit each particular case. Accordingly, the FAI Mediation Rules permit the parties to deviate from the FAI Mediation Rules in their agreement to mediate.[39] The FAI may nevertheless decline to administer the mediation if it considers that the parties' deviations are not compatible with the characteristics of the FAI mediation and the FAI Mediation Rules.[40]

The parties are particularly given the freedom to agree on the language and place of mediation, any number of mediators, jointly nominate the mediators for the FAI's confirmation within 15 days from the date of filing the request for mediation[41] and, subject to the approval of the mediator, the manner of conducting the arbitration.[42] Furthermore, both parties are, at any time, able to request the termination of the mediation, provided that such request is made in writing.[43] The FAI Mediation Rules nevertheless provide default provisions for the setting of the language and place of mediation meetings, the number of mediators as well as the procedure for the appointment of the mediator.[44]

All parties' nominations of mediators are subject to confirmation by the FAI.[45] However, the FAI will only decline to confirm the nomination if the prospective mediator fails to fulfil the requirements of impartiality and independence of article 6.1, or the nominated mediator is otherwise unsuitable to serve as mediator.[46] The FAI Mediation Rules require a mediator to fulfil similar independence and impartiality requirements as the FAI Rules and accordingly submit a statement of acceptance, availability, impartiality and independence.[47]

In the spirit of the FAI Rules, the mediator is also obligated to conduct the mediation 'expediently and in such manner as he or she considers appropriate, having regard to the preferences of the parties.'[48] All participants in FAI mediation are additionally obligated to 'act in good faith' and make 'sincere efforts to reach an amicable settlement in the matter'.[49]

The FAI Mediation Rules further set out an express confidentiality obligation on the parties and the mediator, unless the parties have agreed otherwise or the applicable law provides otherwise.[50]

Upon successful settlement of the parties' dispute, the parties may, under article 12, subject to the consent of the mediator, agree to appoint the mediator to act as an arbitrator and request the arbitrator to confirm the settlement agreement in an arbitral award in accordance with section 44.2 of the FAI Rules.[51]

The FAI Board's recorded decisions illustrate that the FAI Rules work well in practice

Since the launch of the current FAI Rules in 2013, the FAI has published several decisions of the FAI Board as well as summaries of Arbitral Awards rendered in FAI arbitrations. The published

decisions of the FAI Board provide a useful guidance on the practical application of the FAI Rules, particularly in the context of multi-contract and multiparty arbitrations,[52] and illustrate that the FAI Rules work well in practice. The published summaries of the recent Arbitral Awards further serve as a fundamental legal source and, thus, enable the arbitration law and practice in Finland to develop.[53] Some of the most noteworthy, recently published arbitral awards in FAI arbitrations and decisions of the FAI board are summarised below.

FAI Award clarifies the recoverability of the costs of injunction proceedings in the subsequent FAI arbitration

In a recent FAI Award, published on 3 March 2017, the arbitral tribunal decided that the costs of injunction proceedings at national courts were recoverable in the subsequent FAI arbitration on the merits of the dispute.[54] In the reported case, A had sought and obtained an injunction order against B, who in A's view had not been entitled to terminate the parties' cooperation agreement.

The Finnish Procedural Code stipulates that the costs of the injunction proceedings are recoverable in conjunction with the ruling on the merits of the dispute in the main proceedings. The Finnish Procedural Code further provides that an applicant who has unnecessarily resorted to injunction proceedings shall be liable to compensate the opposing for the damage caused by the injunction order. The arbitral tribunal considered that 'the decisive matter here is whether the injunction proceeding initiated by A was unnecessary in light of the outcome of this arbitration.' On the facts of the case, the arbitral tribunal found that B had not been entitled to terminate the agreement and, therefore, A's application for the injunction order had been necessary to prevent the unlawful termination. Consequently, the arbitral tribunal ordered B to pay A's costs in the related injunction proceedings.

Arbitral Tribunal's ruling on a breach of confidentiality obligations

In a recent FAI arbitral award, the summary of which was published on 25 November 2016, the Arbitral Tribunal held that a party B had breached confidentiality provisions in two separate contracts between party B and party A.[55] Party B had provided a copy of party A's Statement of Claim filed in the arbitration to a third party 'X' for the purposes of obtaining an expert opinion from X. Party B had entered into a non-disclosure agreement with X. X was a competitor of A but, in B's view, it would not have been possible to obtain expert opinion in the given particular field from a more neutral party. In addition, B had disclosed A's pricing information to another competitor of A, a party Y, for the purposes of conducting an expert evaluation of A's pricing. B and Y had also concluded a non-disclosure agreement.

A claimed that through B's disclosure, the key market players, X and Y, had not only gained knowledge of the arbitration proceedings between A and B, which alone had a detrimental effect on A's business, but had also gained confidential information on A's business strategy, financial standing and pricing. B argued that it was a fundamental right of any party to a dispute to have a fair opportunity to present its case, which included a party's right to choose witnesses and experts at its discretion. Due to the nature of the parties' dispute, the persons with best knowledge of the issues at hand were also active in the same industry as A and consequently A's potential competitors. B further argued that by entering into non-disclosure agreements with X and Y, it had taken appropriate measures to ensure that the information that X and Y gained was not disclosed beyond the group of persons necessary for the purposes of preparing the expert opinion for the arbitration proceedings.

The Arbitral Tribunal held that B could have acquired credible expert opinions from neutral third parties, or without disclosing the content of the dispute, and that B could have requested a price comparison without disclosing A's pricing information to its competitors. The fact that B had taken precautions in mitigating the effects of its actions by limiting the information that was disclosed, and by requiring non-disclosure commitments from X and Y, was not in the Arbitral Tribunal's opinion sufficient to release B from the liability for a breach of its contractual confidentiality obligations. Accordingly, the Arbitral Tribunal declared that B had breached its confidentiality obligations and ordered B to cease and desist from disclosing confidential information to any third party to the extend such disclosure breached the provisions in the parties' contracts.

The FAI Board's decision on the non-consensual consolidation of arbitrations under article 13 of the FAI Rules

Article 13 of the FAI Rules provides for consolidation of closely connected arbitrations on conditions that resemble those of article 10 of the ICC Rules.[56] However, in contrast with the ICC Rules, article 13 of the FAI Rules allows the consolidation of arbitrations irrespective of whether the arbitrations are between the same or different parties. Article 13, thus, caters for a relatively flexible consolidation regime.

Article 13 entitles a party that is involved in multiple arbitrations to request the FAI Board to have the arbitrations consolidated into a single arbitration if:

- all the parties agree;
- the claims are made under the same arbitration agreement; or
- the claims are made under different agreements but in connection with 'the same legal relationship' and the agreements do not contain 'contradictory provisions that would render the consolidation impossible'.[57]

The FAI Board has sole discretion to decide on the consolidation of arbitration proceedings. The FAI Rules nevertheless oblige the FAI Board to take into account:

- the identity of the parties;
- the connections between the claims made in the different arbitrations; and
- whether the arbitrators have been confirmed or appointed in any of the arbitrations, and if so, whether the same or different persons have been confirmed or appointed.[58]

Where the Board accepts the request for joinder or consolidation, 'all parties will be deemed to have waived their right to nominate an arbitrator,' and the Board has the power to revoke the confirmation or appointment of arbitrators and proceed to appoint the tribunal in accordance with article 19.[59]

In a recently reported FAI Board's decision concerning the consolidation of closely connected arbitrations, the FAI Board ordered two separate arbitration proceedings to be consolidated under article 13, irrespective of objection by respondents in the respective arbitrations.[60]

Pursuant to an asset purchase agreement, 'A' had acquired certain business from 'B'. The asset purchase agreement in question contained a standard FAI arbitration clause and prescribed Finnish law as the law governing the agreement. The asset purchase agreement between A and B further contained a signed undertaking

from B's parent-company, 'C'. C's undertaking in the asset purchase agreement further expressly provided that the arbitration clause in the asset purchase agreement also applied to C's undertaking. A subsequently initiated arbitration proceedings against B in relation to certain intellectual property rights. Some time after, A also initiated separate arbitration proceedings against C in relation to C's undertaking. In the request for arbitration against C, A sought effectively the same relief as in the arbitration against B and requested the proceedings against C to be consolidated with the arbitral proceedings between A and B. Both respondents B and C objected to consolidation on the basis of alleged lack of a valid and binding arbitration agreement.

The FAI Board was prima facie satisfied that a valid and binding arbitration agreement may exist between the parties and allowed both arbitrations to proceed. Following consultation of all the parties and the arbitrator nominated by A, the FAI Board ordered the consolidation pursuant to article 13 of the FAI Rules, primarily on the basis that:

- the parties in the two proceedings were closely related (C was B's parent company), albeit formally different;
- the disputes in both proceedings arose from the same legal relationship and economic transaction (namely the asset purchase agreement between A and B, which incorporated C's undertaking);
- both proceedings were based on the same FAI arbitration agreement; and
- the relief sought by A was essentially the same in both proceedings.[61]

Consequently, the FAI Board reasoned that the arguments and evidence that A, B and C were likely to put forward in both proceedings could be expected to be virtually identical. The consolidation would in those circumstances, thus, enable unnecessary extra expenses as well as conflicting decisions to be avoided. Therefore, the consolidation was in the FAI Board's view justified in the interest of procedural efficiency and farness, and in order to avoid conflicting decisions on effectively the same dispute under the same arbitration agreement.

Although the FAI Board's decision represented the first ever order of 'non-consensual' consolidation, the decision appears to be largely in line with the FAI Board's previous decisions on consolidations, in which the FAI Board has taken somewhat cautious approach in applying article 13. In general, the FAI Board has advised that:

> *The Board is likely to accept a request for consolidation mainly in cases where the arbitrations are pending between the same parties and they are based on the same arbitration agreement. Conversely, unless all parties expressly agree to consolidation, it may be anticipated that arbitrations will rarely be consolidated if the parties are different and the proceedings are based on different arbitration agreements. Consolidation is also unlikely if different arbitrators have already been confirmed in the different arbitrations, absent special reasons to the contrary.*[62]

The FAI Board's reported decisions on the determination of jurisdiction under article 14 of the FAI Rules

Since the launch of the FAI Rules in 2013, the FAI Board has rendered a number of jurisdictional decisions both in relation to claims presented in single arbitration as well as in multiparty and multi-contract arbitrations. In relation to the FAI Board's jurisdiction in the case of multi-contract arbitrations under article 14.2 of the FAI Rules, the FAI Board has remarked that:

> *The closer (i) the substantive relatedness between the different contracts containing the different arbitration agreements, and (ii) the connectivity between the different claims based on the different contracts and arbitration clauses, the higher the likelihood that the Board will find that the prima facie test under Article 14.2(b) is satisfied.*[63]

Article 14 determines the conditions for the FAI Board's jurisdiction to administer a case under the FAI Rules. The wording of article 14 largely mirrors that of article 6(4) of the ICC Rules. Article 14.1 applies where claims are brought in a single arbitration under one arbitration agreement. In such case, the Board must be '*prima facie* satisfied that an arbitration agreement under the Rules that binds the parties may exist'.[64]

Conversely, article 14.2 determines the FAI Board's jurisdiction to administer a case under the FAI Rules, where claims are made under multiple contracts or different arbitration agreements. In such cases, the FAI Board must be *prima facie* satisfied that:

> *a) the arbitration agreements under which those claims are made do not contain contradictory provisions; and*
> *b) all the parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.*[65]

The FAI Rules nevertheless preserve the arbitral tribunal's *Kompetenz-Kompetenz* to decide on its own jurisdiction by providing that the Board's decision to allow the arbitration to proceed under article 14 is not binding on the arbitral tribunal.[66] However, if the Board rejects the request for joinder, the applicant's only remedy is to request a domestic court to rule on the jurisdiction of the arbitral tribunal.

One of the reported FAI Board's jurisdictional decisions concerned a dispute between a Finnish company A (the claimant) and an Indian company B and a guarantor of B's loan, company C (together, the respondents) arising from a loan agreement between A and B (the loan agreement).[67] The loan agreement between A and B contained a FAI arbitration clause, whereas the first demand guarantee issued by C as a security of B's obligations under the loan agreement (the guarantee) designated the jurisdiction over the guarantee to the Finnish courts.

However, the third amendment to the loan agreement (the amendment agreement) provided that the arbitration agreement contained in the loan agreement also applied to the amendment agreement. The amendment agreement further contained a signed undertaking from company C to guarantee the loan amount specified in the amendment to the loan agreement.

Following B's failure to repay its loan under the loan agreement, the claimant initiated FAI arbitration against B and C. The respondents raised a jurisdictional plea on the basis that certain other agreements concluded in connection with the loan agreement were governed by Indian substantive law and conferred jurisdiction to the courts of Chennai, the various amendments to the loan agreement had rendered it void, thus preventing the claimant from invoking the arbitration clause in the loan agreement, and that the second respondent, company C was not a signatory to the arbitration agreement contained in the loan agreement.

The FAI Board was *prima facie* satisfied that a valid and binding FAI arbitration agreement between A, B and C may exist and, thus, allowed the arbitration to proceed against both respondents pursuant to article 14 of the FAI Rules. The sole arbitrator appointed by the FAI Board decided the jurisdictional plea as a preliminary matter and issued a separate procedural ruling finding that the sole arbitrator had jurisdiction to adjudicate all claims

raised against both respondents and dismissing the respondents' jurisdictional objection. The sole arbitrator reasoned that both respondents were bound by the arbitration agreement on the basis that the loan agreement and the guarantee were closely related agreements, the claimant's claims against both respondents were also closely related and it was evident that by signing the amendment agreement the second respondents, company C had become involved in the execution of the loan agreement on a de facto basis and was, thus, deemed to have consented to be bound by the arbitration agreement in the loan agreement.

Notes

1 http://arbitration.fi.
2 2013 Arbitration Rules of the Finland Chamber of Commerce (2013 FAI Rules), available at http://arbitration.fi/rules_eng.
3 2016 Mediation Rules of the Finland Chamber of Commerce (2016 FAI Mediation Rules), available at http://arbitration.fi/mediation/mediation_rules/.
4 2013 FAI Rules, at article 25.3.
5 2013 FAI Rules, at article 29.1.
6 2013 FAI Rules, at article 30.1.
7 2013 FAI Rules, at article 39.1.
8 2013 FAI Rules, at article 42.
9 2013 FAI Rules, at article 42.
10 2013 FAI Rules, at article 33.3.
11 2013 FAI Rules, at article 33.2.
12 2013 FAI Rules, at articles 10–14.
13 2013 FAI Rules, at article 36.5 and Appendix III.
14 2013 FAI Rules, at article 36.
15 2013 FAI Rules, at article 49.
16 2013 FAI Rules, at article 25.5.
17 2013 FAI Rules, at article 33.
18 2013 FAI Rules, at article 25.6.
19 2013 FAI Rules, at article 52.1.
20 FAI 2017 Statistics, available at http://arbitration.fi/the-arbitration-institute/statistics.
21 FAI commentary on 2017 statistics, available at https://arbitration.fi/2018/02/07/review-fais-year-2017/.
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25 2013 FAI Rules, at article 21.6.
26 FAI commentary on 2014 statistics, available at http://arbitration.fi/2015/03/13/fai-statistics-2014.
27 FAI 2017 Statistics, available at http://arbitration.fi/the-arbitration-institute/statistics.
28 First Arbitral Rules of the FAI dated 1910, at section 11.
29 First Arbitral Rules of the FAI dated 1910, at section 10.
30 First Arbitral Rules of the FAI dated 1910, at section 16.
31 http://arbitration.fi/en/statistics. The 1993 Rules already provided for a rather ambitious time limit of 12 months for the rendering of the final award (1993 FAI Rules, at section 38).
32 FAI 2016 Statistics, available at http://arbitration.fi/the-arbitration-institute/statistics.
33 2013 FAI Rules, at article 42. The FAI may nevertheless extend the arbitral tribunal's nine-month time limit for the rendering of the final award upon a reasoned request of the arbitral tribunal.
34 2016 FAI Mediation Rules, available at http://arbitration.fi/mediation/mediation_rules/.
35 2016 FAI Mediation Rules, at article 2.2.
36 2016 FAI Mediation Rules, at article 11.
37 2016 FAI Mediation Rules, at article 11.1.
38 2016 FAI Mediation Rules, at article 11.2.
39 2016 FAI Mediation Rules, at article 1.1.
40 2016 FAI Mediation Rules, at article 9.
41 2016 FAI Mediation Rules, at article 5.
42 2016 FAI Mediation Rules, at article 8.
43 2016 FAI Mediation Rules, at article 10.
44 2016 FAI Mediation Rules, at articles 5, 8 and 9.
45 2016 FAI Mediation Rules, at article 5.6.
46 2016 FAI Mediation Rules, at article 5.7.
47 2016 FAI Mediation Rules, at article 6.
48 2016 FAI Mediation Rules, at article 8.1.
49 2016 FAI Mediation Rules, at article 8.5.
50 2016 FAI Mediation Rules, at article 15.
51 2016 FAI Mediation Rules, at article 12.1.
52 The reported FAI Cases, available at http://arbitration.fi/category/fai-cases.
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54 FAI award addressing the recoverability of the costs of injunction proceedings in the subsequent FAI arbitration, published on 3 March 2017, available at https://arbitration.fi/2017/03/03/fai-award-addressing-recoverability-costs-injunction-proceedings-subsequent-fai-arbitration.
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60 FAI Board's Recent Practice on the Consolidations under the FAI Rules, published on 19 February 2018, available at https://arbitration.fi/2018/02/19/fai-boards-recent-practice-consolidation-arbitrations-fai-rules/.
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63 FAI Board's Negative Jurisdictional Decision under article 14.2 Refusing to Allow the Counterclaim to Proceed in the Arbitration, published on 2 March 2015, available at http://arbitration.fi/2015/03/02/fai-boards-negative-jurisdictional-decision-article-14-2-refusing-allow-counterclaim-proceed-arbitration.
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Georgia

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Introduction

The current arbitration legislation in Georgia is the Law on Arbitration (the Law on Arbitration or LGA). The Parliament of Georgia passed the Law in 2009, and it went into force on 1 January 2010. The Law replaced the previous 1997 Law on Private Arbitration.

The Law on Arbitration, unlike its predecessor,[1] is based on the language and spirit of the UNCITRAL Model Law on International Commercial Arbitration, as amended in 2006 (the Model Law).[2] The new legislation represents an important step forward in implementing a modern and effective arbitration system in Georgia. The Law on Arbitration establishes rules to govern arbitration proceedings, including the making of awards, and the recognition and enforcement of arbitration awards. It applies to both domestic and international arbitrations.

Since 2010, the Law on Arbitration has been amended, with most of the amendments adopted in March 2015. The amendments brought the legislation further in harmony with international standards. The arbitration legislation in Georgia now principally follows the Model Law, but with certain peculiarities and differences. Georgia is also a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the NewYork Convention).[3]

In addition to the legislative revamping, in December 2013 the first international arbitration institution in the region opened its doors in Tbilisi. The Georgian International Arbitration Centre (GIAC) aspires to serve as the premier international arbitration institution in Georgia and, indeed, for the entire Caucasus and Black Sea-Caspian region. The institution's mission also includes the development and promotion of arbitration as the dispute resolution method of choice for domestic and international disputes. If the parties have agreed to apply the GIAC Arbitration Rules, GIAC is the institution that will administer the arbitration. Likewise, if the parties have agreed to GIAC arbitration, this means that the arbitration will be conducted pursuant to the GIAC Arbitration Rules.[4]

The recent developments in Georgia are good reasons for parties to be confident that Georgia now has an arbitration-friendly legal framework. With its new arbitration legislation and new international arbitration centre, Georgia is well positioned to promote arbitration and serve as a hub of international arbitration in the region. Building its reputation and attracting international arbitration market players will take time for Georgia and GIAC to realise their full potential.

With a continued commitment to establishing and maintaining an effective pro-arbitration legal framework and a high-quality international arbitration institution based on the best modern practices, the potential to serve as the regional arbitration hub is Georgia's to realise.

Application of the Law on Arbitration

Georgia has a single legislative scheme governing domestic and international arbitrations. The Law on Arbitration applies to both international and domestic disputes – that is, to arbitrations conducted in Georgia, as well as to the recognition and enforcement of arbitration awards rendered outside of Georgia. See LGA, article 1(1).[5]

The scope of arbitrable subject matter is defined to include 'property disputes of a private character' that are 'based on an equal treatment of the parties' and that the disputing parties are able to settle between themselves. See LGA, article 1(2). The outer limit of arbitrable subject matter is not entirely clear from this definition. The language does not necessarily suggest a scope that is less restrictive than the Model Law's formulation, which applies to 'commercial arbitration' covering 'matters arising from all relationships of a commercial nature, whether contractual or not'.[6] Nevertheless, any uncertainty in scope is potentially problematic because one of the few bases for refusing recognition and enforcement of an arbitration award includes the situation where the subject matter of the dispute is not arbitrable under Georgian law. See LGA, article 45(1)(b)(a). Therefore, further clarification of the scope of arbitrable subject matter by the legislature or the courts would be a welcome development.[7]

Arbitration agreement

The definition of an 'arbitration agreement' closely tracks the Model Law language. An arbitration agreement is an agreement in which the parties agree to submit to arbitration all or certain disputes that have arisen or which may arise between them based on a contractual or other legal relationship. See LGA, article 8(1).[8]

An arbitration agreement must be in writing. See LGA, article 8(3). However, the writing requirement can be satisfied by various means. See LGA, article 8. For example, an agreement is considered to be in writing if its content is recorded 'in any form', regardless of the form of the parties' underlying business agreement, whether established orally, by conduct, or by other means.[9] See LGA, article 8(4). An electronic notification also complies with the writing requirement (as long as the information presented in the notification is accessible for future use). See LGA, article 8(5). Further, an agreement is deemed to be in writing if the existence of an agreement is alleged by one party and not denied by the other in an exchange of statements of a claim and a defence. See LGA, article 8(6). An arbitration agreement can also be incorporated into a contract by sufficient reference to a document containing an arbitration clause. See LGA, article 8(7).

With respect to such flexibility on the form of the arbitration agreement, the provisions are based on the definition of the arbitration agreement in option I of article 7 of the Model Law. However, Georgian legislation adds one peculiarity. The relaxed means of satisfying the writing requirement do not apply in cases where one of the contracting parties is a natural person or an

administrative body. In such cases, the agreement must be made in writing in a traditional way – in the form of a document signed by all the contracting parties. See LGA, article 8(8). This provision is intended to protect consumers (and the government).[10]

In addition, until recently, the enforceability of agreements providing for ad hoc arbitration was in question. Before recent amendments, the Law on Arbitration required that the agreement include a reference to the specific arbitration rules of a specific permanent arbitration institution that the parties designated to administer their disputes.[11] Now the parties 'may' agree on the rules of arbitration proceedings. Thus, the parties do not have to choose in their agreement an arbitration institution to administer an arbitration of their disputes, and can submit disputes to an ad hoc arbitration governed by the rules as specifically chosen or later agreed to by the parties. Further, if the agreement refers to a specific arbitration institution (without a specific reference to its arbitration rules), the parties are deemed to have agreed to the rules of that arbitration institution. This change enhances the enforceability of arbitration agreements. See LGA, article 2(2).

If a party brings in court a dispute that is subject to an arbitration agreement, the court is 'obliged' to terminate the proceedings and direct the parties to arbitration, unless the court finds that the arbitration agreement is void, invalid or incapable of being performed. See LGA, article 9(1).[12] Further, the arbitration proceedings can be commenced or continued to the final award while this issue is pending in court – the party does not have to wait for the court's determination to direct the parties to arbitration. See LGA, article 9(3). These provisions also promote enforceability of arbitration agreements, and are based on similar provisions in the Model Law.[13]

Arbitration tribunal

The parties are free to agree on the number of arbitrators, as well as the method for appointing arbitrators. See LGA, articles 10, 11; GIAC Rules, articles 12, 13.

Absent the parties' agreement, a three-member tribunal is the default rule under the Law on Arbitration. LGA, article 10(4). In arbitrations conducted under the GIAC Arbitration Rules, if parties have not agreed on the number of arbitrators, the default rule provides for a sole arbitrator, save where due to the complexity of the dispute, it appears to the GIAC Arbitration Council that the case warrants a three-member tribunal. See GIAC Rules, article 12(2).[14]

If the parties agreed on a three-member tribunal but not on a method for appointing arbitrators (or the rules that provide for the method of appointment), then the Law on Arbitration provides that the three-member tribunal will be constituted by each party appointing one arbitrator, and the two party-appointed arbitrators selecting the presiding arbitrator. If the parties or the party-appointed arbitrators fail to follow this (or another agreed procedure, including designation of arbitrators by an institution, where the parties have agreed to institutional arbitration), the court is empowered to make the required appointments upon the request of one of the parties. See LGA, article 11(3)(a). Likewise, absent the parties' agreement on the appointment of a sole arbitrator, the court will make the appointment upon any party's request. See LGA, article 11(3)(b). The court's decisions on the appointment of the arbitrators are final and not subject to appeal. See LGA, article 11(4).[15] However, the court must take into consideration any qualifications or other requirements agreed upon by the parties and must ensure the appointment of independent and impartial arbitrators. See LGA, article 11(6).[16]

Where the parties have agreed to submit their dispute to an arbitration institution, and thereby adopt the arbitration rules of that institution, those rules govern the appointment of the tribunal members (as they form part of the parties' agreement) unless the parties specifically agree to a different appointment method and procedure. Thus, in arbitrations administered by GIAC and governed by the GIAC Arbitration Rules, the Arbitration Council of GIAC would be the appointing authority should the parties or party-appointed arbitrators fail to make the necessary appointments. See GIAC Rules, article 13.[17]

The Law on Arbitration does not contain provisions or restrictions regarding the nationality of candidates that may be considered for appointment as an arbitrator. This lack of specificity is understandable, given that the legislation applies to domestic as well as international arbitrations. Nothing in the arbitration legislation precludes a party from arguing in a particular case that the nationality of an arbitrator should be considered by the court as a relevant factor in ensuring the appointment of an independent and impartial arbitrator.[18]

The GIAC Arbitration Rules, on the other hand, do provide that where the parties are of different nationalities, the sole arbitrator or the presiding arbitrator 'shall be' of a nationality other than those of the parties (absent the parties' agreement to the contrary). See GIAC Rules, article 16(1). However, the Rules also provide that the Arbitration Council 'may', if it deems appropriate, appoint a sole or a presiding arbitrator of the same nationality as one of the parties, provided that none of the parties objects to such appointment within the time limit fixed by the Arbitration Council. See GIAC Rules, article 16(1). Further, the rules specify that when serving as an appointing authority, the Arbitration Council 'shall' take into consideration the nature of the dispute, the applicable law, and the seat and the language of the arbitration, as well as the availability of the candidate to conduct proceedings according to the GIAC Arbitration Rules. See GIAC Rules, article 16(2).

The arbitration legislation also sets forth the grounds and the procedures for challenging an arbitrator. Under the Law on Arbitration, a party may challenge an arbitrator if she or he does not meet the qualifications agreed upon by the parties, or if circumstances exist giving rise to justifiable doubts as to the arbitrator's impartiality or independence. See LGA, article 12(1). The arbitrator is obligated at the time of appointment, as well as during the arbitration, to notify the parties and the tribunal about any circumstances that create doubts about her or his impartiality and independence. See LGA, article 12(3). Further, if a ground for challenge exists, the arbitrator is obligated to step down. See LGA, article 13(5).

Likewise, pursuant to the GIAC Arbitration Rules, the arbitrators must be and remain at all times impartial and independent. See GIAC Rules, article 15(1). Each arbitrator has to sign a statement of impartiality and independence and disclose any facts or circumstances that could give rise to justifiable doubts as to his or her impartiality or independence. See GIAC Rules, article 15(2), (3).

The arbitration legislation provides that a party challenging an arbitrator must first submit a written statement setting forth the grounds for challenge to the arbitral tribunal.[19] See LGA, article 13(2). If the tribunal denies the challenge, the challenging party may petition a court to remove the arbitrator. See LGA, article 13(2)1.[20] Unlike the Model Law, the Georgian arbitration legislation further provides that when arbitration is conducted by a sole arbitrator, a party may seek removal directly in court. See

LGA, article 12(3). This exception is potentially helpful, considering that having the sole arbitrator decide on her or his own challenge may turn out to be futile. The court's decision on the removal of an arbitrator is final and not subject to an appeal. The arbitration proceedings may continue while the court is considering the arbitrator challenge. LGA, article 13(4). The courts' authority to assist in arbitrator challenges is an important new feature that was not available under the previous legislation.[21]

Arbitrator impartiality and independence are a subject of special sensitivity in Georgia. To foster trust and promote arbitration as a reliable method of dispute resolution, it is imperative for Georgia to overcome scepticism about the integrity and independence of arbitrators. Georgia has embarked on that road. The current legislative provisions on the appointment and challenge of arbitrators, are largely based on the Model Law, and provide a distinct improvement over the previous legislation. In addition, the Georgian Association of Arbitrators, the first professional body of arbitrators in Georgia established in 2013, has developed and adopted a Code of Ethics for Arbitrators. This initiative could be further supported and promoted by the arbitration institutions and the legal community. Nevertheless, faithful and consistent application and enforcement of the independence and impartiality requirements by the courts and the arbitration institutions over time will be imperative to building and maintaining confidence in potential users of arbitration and displacing any lingering scepticism of the arbitration process in Georgia. Consistent application of agreed-upon ethical standards is also a must. Gaining such trust and confidence is an uphill battle that will not be won overnight in a country where everyone knows everyone and the belief that arbitrators (as well as the domestic private arbitration institutions) are partial seems to be common for the moment. Likewise, gaining trust and confidence from the international commercial community may be an uphill and time-consuming battle for a nation that is not perceived to have a long tradition of impartial and independent administration of dispute resolution mechanisms.

Jurisdiction of the tribunal

The Law on Arbitration also follows the Model Law in incorporating the competence-competence and separability doctrines. Thus, an arbitration tribunal has the authority to determine its own jurisdiction, including any challenge to the existence or validity of an arbitration agreement. The arbitration agreement is independent and separate from the parties' contract in which it is contained. Therefore, the tribunal's decision that the contract is void does not affect the validity of the arbitration clause, which maintains independent vitality. See LGA, article 16(1).

Any challenge to the tribunal's jurisdiction may be made before the statement of defence is filed. See LGA, article 16(2).[22] Furthermore, any challenge that the tribunal has exceeded or is exceeding the scope of its authority must be made within seven days after the circumstances giving rise to the challenge become known. See LGA, article 16(3).[23] The tribunal may make a determination on its jurisdiction either before the final award or in the final award. When the tribunal determines as a preliminary matter that it has jurisdiction, either party may within 30 days challenge that jurisdictional determination in court. See LGA, article 16(5).[24] The court shall decide on the challenge within 14 days, and the court's determination is final and not appealable. See LGA, article 16(5). The arbitration proceedings may be commenced or continued during the court's consideration of the tribunal's decision on jurisdiction. LGA, article 16(5).

Interim measures

Another important improvement brought about by the Law on Arbitration is with respect to the parties' ability to seek and enforce interim measures. The availability of interim measures was not addressed in the previous legislation. The current legislative provisions on interim measures closely track those in the Model Law.

Specifically, interim relief may be requested from the tribunal at any time before the final award is rendered.[25] See LGA, article 17(1). The tribunal may order the following types of interim measures:

- to maintain or restore the status quo before the final award is rendered;
- to take measures that could prevent damage to the other party or the arbitration proceeding;
- to provide means of preserving assets out of which the ultimate award may be satisfied; or
- to preserve and maintain evidence that may be relevant in the resolution of the dispute. See LGA, article 17(2).

The grounds for granting interim measures are also similar to those set forth in the Model Law. The party seeking interim relief must demonstrate that:

- if the interim relief is not granted, the resulting harm would not be adequately compensated for by an award of monetary damages;
- the harm caused by refusing to order an interim measure substantially outweighs the harm that is likely to result to the opposing party if the measure is granted; and
- there are reasonable grounds to believe that the requesting party would prevail in the arbitration. See LGA, article 18(1).[26]

The party seeking interim relief may be required to post appropriate security. See LGA, article 18(3).[27]

Importantly, Georgian courts (specifically, the courts of appeals)[28] are also empowered to grant interim measures in relation to arbitration, as well as enforce interim measures ordered by arbitration tribunals. See LGA, articles 21, 23. The courts have the authority to issue interim measures in aid of arbitration, irrespective of the place of arbitration. See LGA, article 23(2).[29] Likewise, the courts can enforce interim measures ordered by a tribunal, irrespective of the country in which the tribunal's order was made. See LGA, article 21(1).[30] Further, the court may refuse the recognition and enforcement of the tribunal's interim measure only in limited circumstances. See LGA, article 22(1).[31]

The GIAC Arbitration Rules also provide that before the commencement of arbitration or at any time thereafter, a party may apply to the court to issue an interim measure or to enforce the arbitrator's interim measure. See GIAC Rules, article 32(2).

The provisions in the Law on Arbitration on interim measures are important for the development of an arbitration-friendly system in Georgia. However, it is largely up to the judiciary to fulfil the spirit of the legislation.[32]

Arbitration proceedings

The parties are free to determine the rules of procedure to be applied by the tribunal in conducting the arbitration proceedings.[33] Absent the parties' agreement, the tribunal may conduct the proceeding in the manner it considers appropriate. See LGA, article 24. Equality of the parties must be preserved, and each party must be given a full opportunity to present its case. See LGA, article 3.[34]

Unless the parties agree on the form of the arbitration proceedings, the tribunal may determine to hold an oral hearing or decide the case solely on the basis of the documents and other evidence submitted by the parties. See LGA, article 32(1).[35] Arbitration proceedings are closed, and documents, evidence, and written and oral statements shall not be published or used in other judicial or administrative proceedings. See LGA, article 32(4).[36]

The tribunal is authorised to determine the admissibility and weight of any evidence. See LGA, article 35(1). The tribunal may (subject to contrary agreement of the parties) require a party to submit or to provide to the other party any documentation or evidence related to the dispute. LGA, article 35(2)(a), (c). Moreover, the tribunal (subject to contrary agreement of the parties) may summon and, if necessary, require the examination of the party's witness before the hearing, and use the testimony in arbitration proceedings. See LGA, article 35(2)(b).

Judicial assistance may also be sought in obtaining evidence. Specifically, at any stage of the arbitration proceeding, a tribunal may request the court's assistance in the taking of evidence. A party can also seek assistance from the courts, but only with the prior consent of the tribunal. See LGA, article 35(3). This provision is in line with the Model Law.[37] However, under the Georgian arbitration legislation, the tribunal may also ask the court to ensure the attendance of witnesses – there is no such provision in the Model Law. See Id.[38]

The provision in the Law on Arbitration on the substantive law governing the dispute is similar to the one in the Model Law. The parties have a right to determine the rules of law applicable to the substance of their dispute. Absent the parties' agreement, the tribunal makes the determination. See LGA, article 36(2).[39] Also in line with the Model Law, the Law on Arbitration provides that in all cases, the tribunal takes into account the terms of the contract and the trade usages and practices that are applicable to the type of transaction at issue. See LGA, article 36(4).[40] The Law on Arbitration does not contain the provision found in the Model Law that the tribunal has the authority to decide ex aequo et bono or as amiable compositeur in cases where the parties have expressly authorised it to do so.[41] Likewise, the GIAC Arbitration Rules also do not contain a provision empowering a tribunal to assume the powers of an amiable compositeur or to decide ex aequo et bono.

Arbitration award

The Law on Arbitration provisions on the tribunal's decision-making, the rendering of an award, and the form and content of the award also closely track the Model Law provisions. When the tribunal is composed of more than one arbitrator, any decision of the tribunal shall be made by a simple majority. See LGA, article 37(1). The legislation further provides that an arbitrator is not allowed to abstain from voting. See LGA, article 37(2).

The award must be in writing and must be signed by all or by a majority of the arbitrators. The award must state the place and date of the award, and must also identify the decision- making arbitrators and the parties.[42] If an arbitrator refuses to sign an award or has a dissenting opinion, a statement to that effect must also be made. See LGA, article 39(2).[43] The Law on Arbitration requires a reasoned award, unless the parties have agreed to an unreasoned award or the award itself is in the nature of a settlement (or consent) award. See LGA, article 39(3).[44]

The Model Law does not set forth a time limit for rendering an award. However, a number of jurisdictions impose time limits – Georgia is one of them. The Law on Arbitration specifies that unless the parties agree otherwise, the award must be rendered within 180 days following the commencement of the arbitral proceedings – this is the date on which a request for arbitration is received by the respondent. See LGA, articles 39(1), 26.[45] The tribunal may extend the 180-day limit by no more than an additional 180 days, if necessary. See LGA, article 39(1).

Alternatively, time limits could be imposed by the arbitration institution's rules applicable to the proceedings. In arbitrations conducted under the GIAC Arbitration Rules, the award shall be rendered within six months from the date of the signing of the terms of reference, unless the time limit is extended by the GIAC Arbitration Council upon the tribunal's reasoned request or its own initiative. See GIAC Rules, article 35.[46]

In arbitrations administered by GIAC and governed by the GIAC Arbitration Rules, before signing the award, the tribunal must submit the draft award to the Arbitration Council for review. The GIAC Arbitration Council may modify the award as to the form (without affecting the tribunal's 'liberty of decision'). The Council may also draw the tribunal's attention to points of omissions or errors in the substantive part of the award. The tribunal can render the award only after it has been approved by the Council as to its form. See GIAC Rules, article 40. Thus, this award scrutiny procedure is similar to the one adopted under the Arbitration Rules of the International Chamber of Commerce, and is designed to promote reliability and enforceability of GIAC awards.

Recognition and enforcement of arbitration awards; setting aside awards

The LGA makes breakthrough improvements with regard to recognition and enforcement of arbitration awards. The framework set forth in the Law on Arbitration on the recognition and enforcement of awards is applicable to both domestic and foreign awards, and is based on the language and the spirit of the New York Convention and the Model Law.

Pursuant to the Georgian arbitration legislation, the award, regardless of the country where it was rendered, shall be binding, and the Georgian courts may refuse to recognise and enforce the award only on the basis of specific limited grounds. Those grounds largely track the grounds set forth in the New York Convention and the Model Law. See LGA, articles 39(2), 44, 45.[47] Courts of appeals have jurisdiction to enforce the awards rendered in Georgia, and the Supreme Court of Georgia has jurisdiction to enforce the awards rendered outside of Georgia. See LGA, article 44(1).[48] No statute of limitations is provided for seeking recognition and enforcement of an award.

The Law on Arbitration states that once an application to set aside an award is made, any pending enforcement proceedings can only be suspended as set forth in article 45(3).[49] Specifically, article 45(3) mirrors the Model Law provision on the suspension of enforcement proceedings, and provides that if an application to set aside an award has been made to the court of the country in which, or under the law of which, the award was made, the recognition and enforcement court in Georgia may adjourn its decision (for no longer than 30 days) if the court considers it proper to do so.[50] The court may also, upon the request of the party seeking enforcement, order the other party to provide appropriate security. See Id.[51]

The Georgian courts 'may' refuse to enforce an award only in the following circumstances set forth in article 45(1) of the Law on Arbitration:

- if the party resisting enforcement applies to the court and establishes one of the following grounds:

- the party lacked the legal capacity (or a guardian was appointed, but the support was not obtained) when executing the arbitration agreement; or the arbitration agreement is not valid or is null and void under the law to which the parties have subjected it or, failing such indication, under the law of the country where the award was rendered;
- the party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case (to present its position and defend its interests);
- the arbitration award deals with a dispute that was not submitted to the arbitral tribunal by the parties, or it contains decisions on matters that go beyond the scope of the submission to the arbitration;
- the composition of the arbitral tribunal or the arbitral procedure did not comply with the agreement of the parties, or, in the absence of such an agreement, did not comply with the law of the country where the arbitration took place;

- the arbitration award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made;[52] or
- if the court finds that:
  - under the laws of Georgia, the subject matter of the dispute may not be settled by arbitration; or
  - the recognition and enforcement of the award is in conflict with public order.

The New York Convention, as well as the Model Law, provide that public policy may be a ground for refusing the recognition and enforcement of awards where the recognition and enforcement of the award would be contrary to the public policy of the enforcing country. This formulation of the public policy ground is widely used. However, the arbitration legislation in Georgia uses the term 'public order' rather than the term 'public policy' and further, does not specify that the recognition and enforcement of awards has to be in conflict with Georgia's public order, but rather more generally, in conflict with public order.[53]

The Georgian courts (specifically courts of appeals)[54] may set aside an award rendered in Georgia upon a party's request, but may do so only on the basis of the same limited grounds that are provided for refusing the recognition and enforcement of the award. See LGA, article 42.[55] The statute of limitations for seeking the set aside of an award is 90 days after the award is served on a party. See LGA, article 42(3).[56]

A party applying to a court in Georgia to recognise and enforce an award shall provide a duly authenticated original award or a duly certified copy, and the original arbitration agreement or a duly certified copy (if any). If the award or the agreement is not in the Georgian language, the applicant shall provide a duly certified translation of both. See LGA, article 44(2); Civil Procedure Code, article 35621(1).[57] These requirements are in line with the requirements set forth in the New York Convention, article IV. In addition, however, Georgian courts have asked award creditors to produce evidence that the award has not yet been enforced in the country where it was rendered. It is not clear what the basis is for requiring such evidence, but it does appear to have been a prerequisite for the courts' determinations on the recognition and enforcement of foreign awards.[58] Georgian courts have also required that the 90-day statute of limitations for seeking to set aside an award rendered in the territory of Georgia must pass before the award creditor can seek recognition and enforcement of the award.[59] Such application of the legislation is out of line with the text and the purpose of the legislation. The law strives to ensure that in those instances where the 90-day period has in fact expired or where a court has refused to set aside an award, the same grounds are not reargued in another court in an application seeking refusal to recognise and enforce an award.

Once an award debtor is notified of the recognition and enforcement proceedings, it will have an opportunity within seven days to provide the court with proof of one of the grounds for refusing recognition and enforcement of awards. See Civil Procedure Code, article 35621(2)1. Georgian courts have to make a ruling on recognition and enforcement within 30 days after the award debtor makes its submission or after the seven-day period expires. See Id., article 35621(3). There is no requirement to hold an oral hearing, and generally, the decision is made without any oral hearing. See Id., article 35621(2).[60] The 30-day period may only be extended by the court in the circumstances contemplated under article 45(3) of the Law on Arbitration – that is, when the court suspends the proceedings on the basis that an application to set aside or suspend an award has been made to a court in the jurisdiction where the award was rendered. See Id., article 35621(3).

The court makes the determination on the application to set aside an award also within 30 days. The court may extend the 30-day period by an additional 30 days to provide the tribunal with an opportunity to resume the consideration of the case or to take any other measures that the tribunal considers necessary to avoid the grounds for setting aside an award. See Civil Procedure Code, article 35624(3); LGA, article 43.

The court fee for seeking recognition and enforcement or set aside of arbitration awards has been decreased and currently is set at 150 lari.[61] See Civil Procedure Code, article 39. The award creditor who brings a successful recognition and enforcement proceeding can recover its costs, as well as reasonable attorneys' fees, from the unsuccessful award debtor. See Id., article 53.[62] Once the court rules on the recognition and enforcement of an award, the court will issue an enforcement writ, and the award can be executed pursuant to the procedural rules and laws applicable to execution of Georgian court judgments. See Civil Procedure Code, article 35621(4), (5).[63]

There may be no better way to demonstrate the jurisdiction's pro-arbitration orientation than in the area of award enforcement, and specifically, in view of the track record of enforcement of arbitration awards. Georgia has come a long way in this respect.[64] However, the judiciary continues to be criticised for relatively broad application of the grounds for refusing enforcement, specifically, on the basis of public order violations.[65] One recent study analysed court decisions from Tbilisi, Batumi and Kutaisi City Courts, Tbilisi and Kutaisi Courts of Appeal and the Supreme Court, and observed that the most common grounds for refusing recognition and enforcement or setting aside arbitral awards are public policy and inappropriate notification of a party of arbitration proceedings. The study also highlights the inconsistencies in the courts' application of the arbitration legislation and discusses the areas in need of improvement.[66]

The cases that attract criticism appear to represent exceptions rather than trends in Georgia. Nonetheless, the judiciary has work to do in this respect to bring Georgia in line with other arbitration-friendly jurisdictions, so that it reliably follows the letter of the law and consistently and predictably implements the provisions and the spirit of the Law on Arbitration.

The Georgian International Arbitration Centre

As noted above, GIAC is an international arbitration institution located in Tbilisi, the capital of Georgia. GIAC was established in 2013. The first GIAC Arbitration Rules were approved in September 2014. The new revised GIAC Arbitration Rules were adopted by the GIAC Board and took effect on 10 March 2017. The structure of GIAC, as well the GIAC Arbitration Rules, are modelled after the prominent international arbitration institutions, and primarily on the International Chamber of Commerce and its Arbitration Rules.[67] GIAC offers arbitration rules that are designed with international disputes in mind, but can also be utilised by parties in domestic disputes. As a non-profit entity, GIAC promotes its independence and neutrality in all of its activities.[68] GIAC can administer arbitrations seated in or outside of Georgia. The case management is handled by the GIAC Secretariat and the GIAC Arbitration Council.[69] The Board of Directors leads the corporate management of GIAC.

The GIAC Arbitration Rules reflect the best modern international practices and innovations.[70] The Rules are based on party autonomy, flexibility, impartiality and independence of the tribunal, detailed mechanisms for the appointment and challenge of arbitrators, efficient time frames for conduct of the proceedings, fairness and equality of the parties and fairness and integrity of the proceedings, availability of interim measures, and confidentially of the proceedings. As is the case under other well-established international arbitration rules, in arbitrations conducted under the GIAC Arbitration Rules, the parties may determine many aspects of the arbitration proceedings, including the number of arbitrators and the method of their selection, applicable law, and the place and the language of the arbitration. GIAC serves as an appointing authority when parties fail to agree on the appointment of arbitrators or fail to appoint arbitrators. See GIAC Rules, articles 13, 14. The new rules include shorter time limits for appointment of arbitrators to prevent delays. The GIAC Arbitration Rules also address recent developments with respect to multi-party and multi-contract arbitrations and include rules on the joinder of third parties and consolidation of proceedings. See GIAC Rules, article 11.

GIAC promotes efficient resolution of disputes, and sets prompt time frames for various aspects of the proceedings. The final award is expected within six months from the date of signing of the terms of reference, unless the time limit is extended by the GIAC Arbitration Council upon the tribunal's reasoned request or its own initiative. See GIAC Rules, article 35.[71] The GIAC Arbitration Rules also provide that the tribunal shall ensure that the proceedings are conducted in an expeditious and cost-effective manner. For the effective management of the proceedings, the tribunal may adopt any procedural measures considered necessary (in accordance with the GIAC Arbitration Rules and upon consultation with the parties). See GIAC Rules, article 21(1), (2).

The GIAC Arbitration Rules expressly provide for confidentiality of the proceedings. Unless otherwise agreed by the parties, the parties, the tribunal, GIAC and any other person involved in the arbitration proceedings shall at all times treat all matters and all documents related to the proceedings and the award as confidential. GIAC awards may be made public only with the consent of all parties, or to the extent disclosure is required by legal duty, to protect or pursue one's rights, or in relation to legal proceedings. See GIAC Rules, article 44.

Similar to the system established under the ICC Arbitration Rules, to enhance the enforceability of awards, the GIAC Arbitration Council scrutinises the tribunal's draft award and approves it before the award is rendered. This award scrutiny process is designed to enhance the fairness, quality and reliability of the GIAC arbitration process and GIAC awards. See GIAC Rules, article 40.

GIAC administrative costs and arbitrator fees are also based on the ICC model, with a view to promoting cost-effectiveness and predictability.[72] The Secretariat fixes administrative costs and arbitrator fees in accordance with a set fee schedule. The administrative costs, as well as arbitrator fees, are calculated based on the amount in dispute. See GIAC Rules, Annex I, articles 2, 3.[73]

Among the revisions in the new GIAC Arbitration Rules the most significant one is the adaptation of Fast Track Arbitration Procedures for matters where the amount in dispute does not exceed US$100,000 on the day the statement of claim is filed. See GIAC article 34(1), GIAC Annex IV, article 1(1). However, upon the parties' request at any time during the proceedings, the Arbitral Tribunal (or Arbitration Council before composition of the Arbitral Tribunal) shall continue the conduct of the arbitration proceedings under the GIAC Arbitration Rules. See GIAC Annex IV, article 1(2). The parties may also explicitly exclude Fast Track Arbitration Procedures in their arbitration agreement. Further, the fast track procedure does not apply if the arbitration agreement was concluded before the Fast Track Arbitration Procedures entered into force (unless the parties agree otherwise). See GIAC article 34(2).

The fast-track rules incorporate various forms of expedited procedures. Any party wishing to commence arbitration under the Fast Track Arbitration Procedures must file a statement of claim with the Secretariat. See GIAC Annex IV article 2. The Respondent has ten days after the receipt of the Statement of Claim from the Secretariat to submit the Statement of Defense. See GIAC Annex IV, article 3. The rules provide that apart from the Statement of Claim and Statement of Defense, the parties may not submit more than one additional written submission. See GIAC Annex IV, article 5(2). The Arbitral Tribunal will decide whether to accept any new claims presented. See Id.

The Fast Track registration fee is set at US$150, and arbitrators' fees and administrative fees will be fixed in accordance with a schedule of fees set for fast track arbitration procedures. See GIAC Annex I.

Under the Fast Track Arbitration Procedures, a sole arbitrator will conduct the proceedings regardless of any contrary arrangement in the parties' arbitration agreement. See GIAC Annex IV, article 4(1). The parties may jointly nominate the sole arbitrator; any failure to do so within 10 days after respondent's receipt of the Statement of Claim will result in the Arbitration Council appointing the sole arbitrator 'within the shortest time possible.' See GIAC Annex IV, article 4(2).

The Arbitral tribunal may, after consultation with the parties, decide a dispute based solely on the submitted documents, without examination of witnesses or experts. See Annex IV, article 5(4). If a hearing is to be held, the arbitrator may decide to conduct the hearing in person or via electronic telecommunication. See Id.

The Tribunal must render its award within three months from the date the case was transferred to the Arbitral Tribunal. See GIAC Annex IV, article 6. The Arbitration Council may extend this time limit on the basis of a reasoned request. See Id.

The new rules also include an amended standard arbitration clause, and new rules on advance on costs. Specifically, if both parties fail to pay the advance on costs, the case shall be dismissed,

with the claimant retaining the right to assert the same claims in a new proceeding. See GIAC Rules, article 42(7).

The central objective of GIAC is to establish neutral, efficient and reputable forum for the settlement of the domestic and international disputes by arbitration and mediation. GIAC is also determined to develop and promote the alternative dispute resolution mechanism in Georgia and the region. GIAC's constitutive bodies are comprised of both local and international experts and practitioners. GIAC's list of arbitrators includes practitioners and experts from across the globe. GIAC has been chosen as a forum for dispute resolution in various investments agreements between foreign investors and the government of Georgia.

Most recently, GIAC was granted an observer status by UNCITRAL and has been included in the list of non-governmental organisations eligible for invitation to UNCITRAL Working Groups II and III sessions on dispute settlement and investor–state dispute settlement reform. Alongside GIAC, the observer organisations for these Working Groups include:

- the American Arbitration Association/International Centre for Dispute Resolution), American Bar Association;
- the American Society of International Law;
- the China International Economic and Trade Arbitration Commission, International Bar Association;
- the Institute for Transnational Arbitration; and
- the International Chamber of Commerce.

In addition, GIAC regularly hosts educational events and workshops. For example, in June 2017, GIAC headed a Regional Arbitration Campaign across Georgia in cooperation with the Georgian Chamber of Commerce and Industry, with assistance from the European Union and United Nations Development Programme. The campaign focused on raising awareness about arbitration as an alternative dispute resolution mechanism and introduced the newly adopted Fast Track Arbitration Rules. GIAC also held sector-specific arbitration workshops with business representatives to encourage the use of arbitration in construction, infrastructure and energy sectors. Continued and consistent exposure, outreach and activities will be important to help achieve the institution's success.

In sum, GIAC has attracted attention from the international arbitration community. The institution has been featured in *Global Arbitration Review*'s news and publications. GIAC has held arbitration conferences, and plans to continue to hold them in the future. One of the main events of the institution is GIAC Arbitration Days – an annual international arbitration conference, the largest in the region, held in Tbilisi. Every year GIAC Arbitration Days hosts local and international arbitration experts, practitioners, industry representatives, government officials and judges. The conference helps promote Georgia's and GIAC's place on the international arbitration map. GIAC is also continuously cooperating with other well-known institutions, and has most recently signed the cooperation agreements with the Permanent Court of Arbitration and the Vienna International Arbitration Centre, designed, among others, to exchange the services and facilities.

GIAC can take advantage of the revamped arbitration-friendly legal system in Georgia, Georgia's location in the region at the crossroads of Europe and Asia, Georgia's investment- and business-friendly environment and the government's commitment to promotion of a liberal economy and a modern arbitration system. At the same time, GIAC can be expected to continue to work together with the local legal community to promote the development of arbitration in Georgia and in the region, while offering a regional forum for resolution of cross-border disputes. GIAC can also be expected to continue to support legal reforms as needed and to promote the development and application of ethical standards in international arbitration.

At the opening of the GIAC Arbitration Days in Tbilisi 2018, the Minister of Justice of Georgia Ms Tea Tsulukiani welcomed the participants and expressed her belief that, for business-to-business disputes, it is the court that should be the alternative forum and indeed the last resort for dispute resolution. She also explained the government's vision and the steps undertaken to make Georgia the arbitration hub in the region. The Supreme Court Justice Nino Bakakuri echoed these views and noted the judiciary's readiness and support for arbitration in Georgia.

An effective legal framework, together with an effective international arbitration institution, and supporting government and judiciary provide Georgia with the opportunity to become an important partner in the international arbitration community and the arbitration hub in the region.

Notes

1 The 1997 Law on Private Arbitration was Georgia's first attempt at adopting a workable arbitration law. However, it was widely criticised. Due to many gaps and flaws, the legislation did not measure up to the expectations of an effective arbitration-friendly jurisdiction.

2 The UNCITRAL Secretariat recognises Georgia as a Model Law country whose legislation is based on the UNCITRAL Model Law, as amended in 2006. See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

3 Georgia is also a contracting state to the ICSID Convention. Georgia's investment treaty regime and the local legislation on the promotion of foreign investment is beyond the scope of this chapter.

4 However, GIAC will administer arbitrations in accordance with other rules, such as the UNCITRAL Rules, as may be agreed by the parties. See GIAC Rules, article 2.

5 The Model Law as drafted applies only to international commercial arbitrations (as defined in article 1(1) of the Model Law). However, the Model Law contemplates that countries may consider extending their enactment of the Model Law to also cover domestic disputes, as a number of Model Law states already have done. Explanatory Note by the UNCITRAL Secretariat, at paragraph 10.

6 Model Law, article 1(1), n. 2.

7 The concepts 'property', 'private nature' and 'based on an equal treatment of the parties' are referenced in the Civil Code of Georgia, which regulates 'property, family and personal relations of a private nature, based on the equality of persons'. Civil Code of Georgia, article 1. Therefore, the arbitration law appears to cover disputes arising from property (and not family or personal relations) of a private nature under the Civil Code of Georgia. 'Property', according to the Civil Code, is 'every thing, as well as any intangible property benefit, which may be possessed, used and disposed of by natural and legal persons, and which may be acquired without restriction, unless this is prohibited by law or contravenes moral standards', and includes moveable and immoveable property. Id, articles 147, 148. The Civil Code also states that an object of private legal relationship may be a material or non-material good, of property or non-property value, which has not been excluded from commercial circulation by law. Any natural or legal person may be a subject of private law. Id, articles 7, 8.

8 Model Law, article 7(1) (disputes 'in respect of a defined legal relationship, whether contractual or not'). An arbitration agreement

can be a provision in a contract or can be executed as a separate agreement. LGA, article 8(2).

9 How the contract can be made is set forth in the Civil Code of Georgia.

10 For example, in a dispute involving an electronically executed loan agreement, Tbilisi Court of Appeals concluded that a consumer's review of an arbitration agreement in an electronic loan application form and electronic confirmation of the loan agreement did not result in an arbitration agreement in accordance with article 8. Matter No. 2ბ/3594-15 (30 March 2016) (Tbilisi Court of Appeals).

The new legislation contained another restriction. Specifically, for arbitration agreements between natural persons, the agreement had to be countersigned by the parties' attorneys or certified by a notary. LGA, former article 8(9); Law No. 4046, dated 15 December 2010. This provision was removed as part of the recent amendments, thereby making the execution of arbitration agreements less burdensome and costly. Law No. 3218, dated 18 March 2015.

11 LGA, former article 2(2), replaced by Law No. 3218, dated 18 March 2015.

12 The party seeking the termination of judicial proceedings must request the dismissal no later than the time when the party's responsive papers are due. LGA, article 9(1). Before the recent amendments, the party had to notify the court about the commencement of the arbitration. To the extent that provision may have required the commencement of arbitration before the termination of the court proceeding, this is no longer required – the existence of a valid arbitration agreement should be sufficient. LGA, former article 9(2), removed by Law No. 3218, dated 18 March 2015. One recent study of court practices on this matter confirms that the courts indeed follow the legislative mandate by terminating the proceedings and notifying the parties that the dispute is subject to arbitration as provided in the parties' relevant agreements. See *Legal and Practical Aspects of Arbitration in Georgia*, Report by Caucasus Research Resource Center, Georgia (February 2018).

13 Model Law, article 8.

14 Under the Law on Arbitration, if the parties' agreement calls for an even number of arbitrators and the parties have not agreed otherwise, the party-appointed arbitrators shall appoint one more arbitrator. LGA, article 10(3). This provision suggests that, if the parties so agree, the tribunal composed of an even number of arbitrators is in principle allowed, although not very likely in practice, and may not have been intended by the legislature. The GIAC Arbitration Rules do not contemplate an even number of arbitrators. Under the GIAC Arbitration Rules, disputes 'shall be decided by a sole arbitrator or by a tribunal of three arbitrators'. GIAC Rules, article 12(1).

15 The courts that are competent for arbitrator appointments are the 'district (city)' courts. LGA, article 2(1)(a).

16 The Law on Arbitration states that no person can be appointed as an arbitrator without the arbitrator's written consent. LGA, article 11(1). The Law also provides that upon the request of the parties and the arbitral tribunal, the arbitrator must provide written information about her or his educational background and any experience as an arbitrator. LGA, article 11(5).

17 Further, the sole arbitrator nominated by the parties, or the presiding arbitrator nominated by the party-appointed arbitrators, is subject to confirmation by the Arbitration Council. See GIAC Rules, article 13(2), (4). There is no similar provision for party-appointed arbitrators sitting on a three-member tribunal. See GIAC Rules, article 13(2). The GIAC Arbitration Rules provide that arbitrators may be appointed from outside the GIAC list of arbitrators. See GIAC Rules, article 13(5). However, it is not clear whether this provision applies only to party-appointed arbitrators or also pertains to arbitrators appointed by the Arbitration Council. In any event, this is a useful provision considering that the list of GIAC arbitrators is not extensive. GIAC has noted that negotiations are under way for the addition of new arbitrators to the list. GIAC Report on Formation of the Georgian International Arbitration Centre (2014).

18 Unlike the Model Law, the Georgian legislation sets forth the circumstances that serve as the basis for refusing an arbitrator's appointment. Specifically, an arbitrator shall not be denied appointment unless she or he (i) has limited legal capacity or is a beneficiary of support, unless otherwise established by court judgment; (ii) is a state employee, a state political official, a political official, or a public servant; or (iii) has been convicted of a crime where the conviction has not been vacated or dismissed. LGA, article 11(7)(a-c). Thus, the Georgian legislation does not expressly state that no person shall be precluded from serving as an arbitrator by reason of her nationality unless otherwise agreed to by the parties, which is the formulation adopted in the Model Law, article 11(1). However this is implied in the legislation, as nationality is not included as one of the grounds for refusing an arbitrator's appointment.

19 The tribunal makes the determination on the challenge unless the challenged arbitrator steps down or the other party consents to the challenge. LGA, article 13(2).

20 The courts that are competent for arbitrator challenges are the local regional courts. LGA, article 2(1)(a).

21 The parties are free to agree on a procedure for challenging an arbitrator. The procedure set forth in the legislation is applicable in the absence of such an agreement. LGA, article 13(1), (2). In arbitrations administered by GIAC and governed by the GIAC Arbitration Rules, the challenge is submitted to the GIAC Secretariat. The Secretariat transmits the party's statement of challenge to the other parties and the members of the tribunal, including the arbitrator being challenged, and gives them an opportunity to submit written comments within a period of time established by the Secretariat. If the challenged arbitrator does not resign or the other parties in the arbitration do not agree with the challenge, the Arbitration Council makes the determination on the arbitrator challenge. The rules do not set forth a time limit for making the determination. GIAC Rules, article 17. Further, the arbitration legislation does not specify whether or not a party can turn to the court after an arbitration institution (ie, the GIAC Arbitration Council) makes the decision on the arbitrator challenge. The GIAC Arbitration Rules do state that the decisions made by the Arbitration Council with regard to the appointment and challenge of an arbitrator shall be final. GIAC Rules, article 19.

22 The Model Law uses 'shall'. Model Law, article 16(2) ('A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense.').

23 The tribunal may also consider late challenges if the delay is found to be justified. LGA, article 16(4).

24 The courts that are competent for this purpose are the courts of appeals. LGA, article 2(1)(a).

While there have been instances of courts interfering with the tribunal's competence to decide on its jurisdiction, some courts have demonstrated that they will not accept the application of a party regarding the competence of the arbitral tribunal before such an application is decided by the tribunal. See *Legal and Practical Aspects of Arbitration in Georgia*, Report by Caucasus Research Resource Center, Georgia (February 2018).

25 The Law on Arbitration states that a party may seek interim measures 'before commencement of the arbitration'. LGA, article 17(1).

However, this likely means that the party may seek such measures from a court in aid of arbitration or from an emergency arbitrator where the arbitration is being administered under institutional rules that provide for such option or a similar mechanism. The GIAC Arbitration Rules do not provide for an emergency arbitrator.

26 The tribunal may decide not to apply these requirements when a party is seeking an interim measure for the preservation and maintenance of evidence. LGA, article 18(2).

27 Further, if the interim relief is later determined to be unjustified, the requesting party will be liable for any damages caused. LGA, article 18(4). The tribunal may, as it considers necessary, modify, suspend or terminate an interim measure upon a party's request or on its own initiative. LGA, article 19.

28 The courts that are competent with respect to interim measures are the courts of appeals. LGA, article 2(1)(a). A recent study of judicial practice in Georgia notes that courts of appeals have issued interim relief, including injunction, in relation to arbitrations. See *Legal and Practical Aspects of Arbitration in Georgia*, Report by Caucasus Research Resource Center, Georgia (February 2018).

29 The courts have the same authority with respect to the issuance of interim measures in relation to an arbitration as in relation to proceedings in court. LGA, article 23(2).

30 An interim measure issued by a tribunal is binding and enforceable. LGA, article 21(1).

31 The opposing party has the burden of demonstrating one of the grounds for refusing the recognition and enforcement of an interim measure. LGA, article 22(1). And, those grounds include the grounds for refusing to recognise and enforce arbitration awards. See id. Further, in ruling on the recognition and enforcement of the tribunal's interim measures, the courts must not review the merits of the tribunal's decisions. LGA, article 22(3).

32 Currently, the Law does not contain specific provisions that would allow a party to seek from the tribunal an ex parte preliminary order that would direct a party not to take any action that would frustrate the interim measure sought. See Model Law, article 17. This does not mean that a party would not be able to use local civil procedural laws to obtain a similar remedy from the competent courts in Georgia.

33 The parties in the arbitration have the right to be represented by an attorney or other representative. LGA, article 28.

34 The GIAC Arbitration Rules provide that the tribunal 'shall ensure' that the proceedings are conducted in an expeditious and cost-effective manner, and that in all cases, the parties are given an equal and reasonable opportunity to present their case. GIAC Rules, article 21(1), (3). The tribunals may adopt procedural measures considered necessary for the effective management of the proceedings. GIAC Rules, article 21(2).

35 However, a party may request an oral hearing at any stage of the proceeding, and the tribunal shall hold the hearing unless the parties have agreed that no hearing shall be held. Id. Under the GIAC Arbitration Rules, the tribunal 'shall hold a hearing if it considers appropriate or either party requests it to do so'. GIAC Rules, article 30(1).

36 The GIAC Arbitration Rules also provide that unless the parties agree otherwise, hearings shall be held in private and any information, documentation, recordings or transcripts relating to the hearings shall be confidential. GIAC Rules, article 30(4).

37 Model Law, article 27. In arbitrations under the GIAC Arbitration Rules, the tribunal determines the admissibility and weight of the evidence. The tribunal may order a party to provide any additional evidence, on its own motion or at the request of another party. The tribunal may, after consultations with the parties, appoint one or more experts on a specific issue. GIAC Rules, article 29.

38 The rights and duties of a witness summoned by the court would be determined in accordance with the Civil Procedure Code of Georgia. Id.

39 However, the Model Law specifies that the tribunal's determination is made by applying the conflict of laws rules which the tribunal considers applicable. Model Law, article 28(2). The GIAC Arbitration Rules provide that the tribunal shall apply to the merits of the dispute any law or rules of law agreed upon by the parties. In the absence of such agreement, the tribunal shall apply any law or rules of law that it considers most appropriate for the purposes of the dispute. GIAC Rules, article 24(1).

40 The Georgian version of 'takes into account' appears to be less obligatory than the Model Law's 'decide in accordance', although no material difference may have been intended. Model Law, article 28(4).

41 Model Law, article 28(3).

42 Unlike the Model Law, the Georgian legislation does not expressly state that the award shall be deemed to have been made at the place of the arbitration indicated in the award. Model Law, article 31(3). The GIAC Arbitration Rules state that the award shall be deemed to have been rendered at the seat of arbitration. GIAC Rules, article 22(3).

43 To make a respective note regarding any omitted signature likely means that a reason for the absence of the signature shall be stated. The GIAC Arbitration Rules provide the same. GIAC Rules, article 37(2).

44 The GIAC Arbitration Rules require a reasoned award. GIAC Rules, article 37(1).

45 Pursuant to the GIAC Arbitration Rules, the arbitration is deemed to commence on the date the request for arbitration is received by the GIAC Secretariat. GIAC Rules, article 6(2). The award is deemed to be rendered on the date stated in the award. Id, article 36(2).

46 Under the Law on Arbitration, if the parties settle the dispute, the tribunal shall terminate the proceedings, and upon the parties' request, the tribunal has the authority to record the settlement in the form of an award. LGA, article 38(1). The GIAC Arbitration Rules expressly provide that the tribunal has full discretion whether to accept the parties' request regarding the settlement award. GIAC Rules, article 38. The Law on Arbitration notes that the settlement award has the same legal force as any other award. LGA, article 38(3). It also provides the time limitation for rendering settlement awards – the tribunal shall render an award based on the settlement within 30 days after the parties' request. LGA, article 38(2).

47 Georgian legislation also specifies the date of entry into force of the award. Unless otherwise agreed by the parties or provided by law, the award enters into force on the date it is rendered. LGA, article 39(5).

48 Georgia adopts a territorial approach. All awards rendered in Georgia are treated as domestic awards. Provisions on the correction and interpretation of the award, and on rendering additional awards, follow the Model Law provisions. LGA, article 41; Model Law, article 33.

49 Before the latest legislative amendments, the court had the authority to suspend enforcement (for no longer than 30 days) if the party resisting enforcement sought such suspension and provided appropriate security. That provision has been withdrawn, and now the suspension of enforcement proceedings can only be obtained pursuant to article 45(3) as noted above. Law No. 3218, dated 18 March 2015 (withdrawing former article 44(3)).

50 See Model Law, article 36(2).

51 The LGA Article 45(3) suggests that the court may suspend

enforcement if the court considers it proper to do so, even without a request from the party. However, in practice, the party resisting enforcement would likely have to alert the court in Georgia about the other set-aside proceedings, and hence, there would likely be a request from the award debtor.

52 Although the language in the Georgian legislation is similar to the New York Convention and grants courts discretion ('may refuse') to recognise an award set aside in the country in which it was made, commentators have noted that there is no such practice established in Georgia and that Georgian courts generally would refuse recognition in such circumstances.

53 Before the recent legislative amendments, the public order ground for refusing enforcement and recognition, as well as for setting aside of an award, required a showing that the award (rather than the enforcement of the award) was in conflict with public order. The current provisions indicate that the enforcement of the award must be in conflict with public order.

54 The courts of appeals have jurisdiction to set aside awards rendered in Georgia. LGA, article 2(1)(a).

55 One distinction in the list of set-aside grounds is the formulation of the public policy ground. The court may set aside an award if it is contrary to the public order of Georgia. LGA, article 42(2)(b.b).

56 If a court has rendered a decision to recognise and enforce an arbitration award rendered in Georgia, that award cannot be set aside on the same grounds that the award debtor has already raised unsuccessfully in the recognition and enforcement proceedings. LGA, article 42(5). In such an event, the request to set aside the award would be inadmissible, or if already accepted, the proceedings would be terminated. Id. Likewise, a party may not object to the recognition and enforcement of an award rendered in Georgia on the same grounds the party advanced to set aside the award, or where the party did not seek to set aside an award within the applicable time limitations – 90 days after the date on which the award was served on the party. LGA, articles 45(2), 42(3).

57 The LGA suggests that if the award was not rendered in Georgia, a duly certified original is required. The Civil Procedure Code indicates that either a duly certified original or a copy is sufficient. Translations would need to be notarised. If the certification is done outside of Georgia, it would need to be apostilled. Georgia is a signatory to the Hague Apostille Convention, which entered into force in Georgia in May 2007. Convention Abolishing the Requirement of Legalization for Foreign Public Documents concluded 5 October 1961.

58 Matter No. -508-ð-12-2015 (22 July 2015) (Supreme Court of Georgia) (noting that the evidence submitted by the award creditor demonstrated that the Ukrainian Chamber of Commerce and Industry, International Commercial Arbitration Court award has entered into force and has not been enforced); Matter No. -456-ð-9-2015 (30 March 2015) (Supreme Court of Georgia) (noting that the award creditor was asked to produce within 10 days a document regarding the award's non-enforcement in the territory where it was rendered, and that the award creditor produced a letter to this effect from the Ukrainian Chamber of Commerce and Industry, International Commercial Arbitration Court, and thereafter the application for recognition and enforcement was received for consideration by the court). The courts have referred to similar evidence when enforcing foreign court judgments. Matter No. - 4982-ð-99-2015 (23 May 2016) (Supreme Court of Georgia) (noting that the foreign judgment has entered into force and has not been enforced on the territory of the Russian Federation). If the enforcement, for this purpose, means execution and satisfaction of the award, requiring such proof from the award creditor may be an unnecessary burden, when the award debtor is a party more appropriately tasked to prove the opposite – that the award has been executed and satisfied, or that the award has not become binding. If enforcement is used in the sense of recognition and enforcement, requiring proof of no recognition and enforcement in the place of arbitration seems to serve no purpose when the pro-arbitration framework created by the New York Convention contemplates that an award can be recognised and enforced in more than one jurisdiction.

59 Matter No. 2ბ/998-15 (3 April 2015) (Tbilisi Court of Appeals) (the court did not explain the rationale for this requirement, but did reference article 45(2) of the Law on Arbitration, pursuant to which the recognition and enforcement of the award will not be refused on the same ground that the award debtor unsuccessfully sought to set aside that award, or where it did not seek to set aside an award within the applicable 90-day period. The court also noted that the award creditor could not demonstrate that the final award was communicated to all the parties in the arbitration and refused to consider the application for recognition and enforcement as inadmissible. The court explained that the award creditor can reapply when the conditions for consideration of its application would be satisfied); Matter No. 2ბ/1101-15 (3 April 2015) (Tbilisi Court of Appeals) (refusing to consider application for recognition and enforcement of the domestic award where the 90-day period for seeking to set aside the award had not yet passed).

60 The court may schedule an oral hearing when it considers such a hearing necessary and helpful for the court's decision, in which case the parties would be notified of the hearing, but their absence would not delay the proceedings. Id., article 35621(2).

61 Before the recent legislative amendments, the fee was substantially higher – it was calculated at 3 per cent of the value of the award, with no upper limit, and no less than 300 lari.

62 When the award creditor is partially successful, the order for costs and fees would be assessed in accordance with the relative success of the party. Matter No. -544-ð-17-2014, *E-R Ltd v F-G Ltd* (9 July 2014) (Supreme Court of Georgia) (ordering the unsuccessful award debtor to pay the court fees in the amount of 8,000 lari, as well as the award creditor's attorneys' fees in the amount of 1,960 lari); Matter No. -3938-ð-101-2013 (27 February 2014) (Supreme Court of Georgia) (ordering recognition and enforcement of the Ukrainian Chamber of Commerce and Industry, International Commercial Arbitration Court award; ordering the unsuccessful award debtor to pay the court fees in the amount of 8,000 lari, but not ordering payment of the award creditor's attorneys' fees as they were not substantiated by documentary evidence). Attorneys' fees are capped at 4 per cent of the value of the claim. Civil Procedure Code, article 53; Matter No. -456-ð-9-2015 (30 March 2015) (Supreme Court of Georgia) (awarding only 875.30 lari in reasonable attorneys' fees, and not 1,000 lari requested as the amount sought was above the 4 per cent cap).

63 The National Bureau of Enforcement assists with the execution process. The Law of Georgia on Enforcement Proceedings.

64 Matter No. -544-ð-17-2014, E-R Ltd v F-G Ltd (9 July 2014) (Supreme Court of Georgia) (enforcing the London Maritime Arbitration Association arbitration award) (noting that there is no procedure initiated in the United Kingdom with respect to the enforcement of the award); Matter No. -311-ð-10-2014 (1 December 2014) (Supreme Court of Georgia) (refusing to entertain respondent's arguments that challenged the merits of the award, and recognising the Russian International Commercial Arbitration Court arbitration award). Matter No. 2ბ/5858-13 (25 March 2014) (Tbilisi Court of Appeals) (The court explained: with respect to public order, both

theory and practice confirm that public order does not encompass substantive review of the arbitration award and an assessment of the correctness of the tribunal's reasoning, as this would be contrary to the Law on Arbitration. Therefore, the court cannot reconsider or reassess the documentary evidence submitted to the tribunal. Public order does not encompass any and all kinds of error, but rather a departure from fundamental principles of natural justice. To set aside an award as contrary to public order, the award must conflict with such fundamental values. Otherwise, the public order exception would be turned into a vehicle for appealing an arbitration award, and that would be contrary to the goal of achieving finality of arbitration awards except in very limited circumstances. Accordingly, an award debtor's argument that the arbitration award was based on false documents and the tribunal's incorrect assessment of the evidence would not be sufficient to refuse recognition and enforcement of an award).

65 In this regard, commentators have reported on cases where the courts have refused enforcement of arbitration awards based on an excessively high penalty amount as against public order. In such circumstances, courts have adjusted the amount of the fee, and therefore, have in effect enforced the award only to the extent of the adjusted penalty fee. Thus, for example, in the Matter No. 2ბ/2220-11 (30 June 2011), the Tbilisi Court of Appeals approved in part the application for recognition and enforcement of the award. The court found that the tribunal's award of a penalty in the amount of 2,825.35 lari was inappropriately high, and was contrary to the established legal principles, and therefore, public order. The court enforced the penalty only in the amount of 500 lari. The court did not explain its reasoning behind the determination that the penalty amount in the award was high, or that 500 lari was the appropriate amount. More importantly, the court did not explain the rationale behind its declaration that the excessively high penalty amount contravenes public order. Similarly, in the Matter No. 2ბ/227-11 (28 February 2011), the Tbilisi Court of Appeals approved an application to recognise and enforce a domestic award, except with respect to the tribunal's determination of a penalty for non-payment. The court found that daily interest of 0.3 per cent was excessively high and thus contrary to public order. The court enforced a penalty only at a daily rate of 0.07 per cent.

66 See *Legal and Practical Aspects of Arbitration in Georgia*, Report by Caucasus Research Resource Center, Georgia (February 2018).

67 The GIAC Arbitration Rules were approved by the GIAC Board on 9 September 2014, with the Annexes, including the schedule of fees, effective as of 1 January 2016. The amended Arbitration Rules were approve on 10 March 2017. For more information about GIAC, visit www.giac.ge.

68 GIAC also notes that it is independent from its founder, the Georgian Chamber of Commerce and Industry.

69 GIAC offers modern facilities for arbitration hearings or related meetings and proceedings (without charge). GIAC can also assist with other logistics, including with securing court reporters and interpreters.

70 Working groups behind the project forming GIAC and its arbitration rules included international arbitration experts and practitioners, representatives of the Ministry of Justice, Finance, and Economy and Sustainable Development of Georgia, the Supreme Court of Georgia, non-governmental organisations, and other leaders in the area.

71 The GIAC Arbitration Rules do not provide for an emergency arbitrator mechanism. GIAC also has not developed mediation rules.

72 The filing fee is US$300 for disputes with values below US$20,000 and US$1,000 for disputes with values exceeding US$20,000.

73 Separate fee arrangements between the parties and the tribunal members are not allowed. In fixing arbitrator fees, the Secretariat takes into account the complexity of the dispute, the experience of the arbitrators, and other relevant circumstances. If not otherwise determined by the tribunal, in cases with a three-member tribunal, the co-arbitrators' fee is 60 per cent of the fee of the presiding arbitrator. GIAC Rules, Annex I.

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The international law firm Sheppard, Mullin, Richter & Hampton LLP serves as counsel to the world's leading businesses, organisations and state entities on their most significant legal needs and business opportunities.

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- oil, gas, natural resource and energy projects and agreements;
- power generation (nuclear, gas, coal, renewable);
- technology and telecommunications;
- aviation, aerospace and defence;
- financial services and banking;
- joint ventures;
- investment agreements;
- investment treaties;
- international sales agreements;
- mergers and acquisitions;
- life sciences;
- intellectual property;
- government procurement contracts;
- media and entertainment licensing and investment;
- sports;
- trade; and
- marine.

Germany

Jan Erik Spangenberg and Simon Manner
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In recent years, the public perception of arbitration in Germany has been shaped by the ongoing discussion about the future of investment arbitration. This debate has been sparked by the not yet decided case of *Vattenfall AB and others v Federal Republic of Germany*, in which the Swedish-German electricity producer claims compensation in relation to the German government's decision to phase out nuclear energy.[1] The tribunal's recent rejection of Germany's jurisdictional objection in light of the judgment of the European Court of Justice (ECJ) in the *Achmea* case will certainly continue to fuel this debate.[2]

While the debate on investment arbitration has been very politicised, emotional and at times escaped reality, commercial arbitration remains unaffected and a preferred dispute resolution mechanism for cross-border disputes. Germany maintains an excellent reputation as a reliable place of arbitration, both in domestic and in international arbitrations.

The success of commercial arbitration in Germany is driven by the reliable and efficient legal framework, the continuing growth and innovation of German arbitral institutions, first and foremost the German Arbitration Institute, and the generally arbitration-friendly jurisprudence of the German courts.[3]

The German arbitration law

Germany is a member state of the New York Convention of 1958 and, in 1997, enacted an arbitration framework in the 10th Book of the German Code of Civil Procedure (sections 1025–1066 ZPO), which is closely modelled on the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law). With very few exceptions, arbitration practitioners from other jurisdictions will therefore find that the legal framework for arbitration in Germany is very much aligned with international standards.

Contrary to many other jurisdictions and article 1(1) Model Law, the German arbitration law does not differentiate between international and domestic arbitration proceedings. Pursuant to section 1025(1) ZPO, the applicability of the German arbitration law is governed by the territoriality principle, ie, it is determined by the seat of the arbitration. Notably, German law specifically provides that the seat of the arbitration and the venue of hearings do not have to be identical. Section 1043(2) ZPO foresees that the arbitral tribunal may hold hearings, examine witnesses or deliberate at any place it deems fit.

However, German arbitration law does differentiate between foreign and domestic awards, when it comes to annulment and enforcement. Awards are not per se enforceable in Germany, but require a court order declaring the award to be enforceable.[4] The enforcement of foreign arbitral awards is directly governed by the New York Convention. To this end, section 1061(1) ZPO declares the New York Convention directly applicable. The enforcement of domestic arbitral awards is governed by sections 1060 and 1059 ZPO, which are closely modelled after article V of the New York Convention. Small differences do exist, however. For example, violations of procedural rules only justify annulling the award if the procedural violation, at least potentially, affected the outcome of the arbitration (section 1059(2) No. 1(d) ZPO). Mere formalities without any possible effect on the outcome of the arbitration therefore do not suffice to annul an award. Annulment proceedings are only admissible against domestic awards.[5]

Jurisdiction for the enforcement or annulment of arbitral awards lies directly with the responsible courts of appeals. Germany currently has 24 courts of appeals. The competent court of appeals is either the court named in the arbitration agreement or at the seat of arbitration.[6] In case of a foreign seat, the court of appeals at the seat of the party against whom enforcement is sought or at the location of the assets has jurisdiction.[7]

German arbitration law also contains some minor peculiarities when it comes to the validity of arbitration agreements. First of all, section 1059(2)(1)(a) ZPO specifically provides that the parties may choose the law applicable to the arbitration agreement and that otherwise the law at the seat applies. Most agreements will merely contain a general choice of law clause, but not a separate specific choice of law clause for the arbitration clause. In this situation, the German Federal Court of Justice (FCJ) confirmed that the choice of law for the main agreement would also apply to the arbitration clause.[8] Secondly, German law contains very few restrictions on arbitrability.[9] Thirdly, German law also adopts a liberal approach with regard to the form of arbitration agreements. Any form of written documentation of the arbitration agreement is sufficient.[10] Only in the case of arbitration agreements with consumers, does the agreement need to be contained in a separate and personally signed document, which must not include any additional agreements, ie, an arbitration clause included in the main contract would be invalid.[11] This is particularly relevant in the case of arbitration agreements for shareholder disputes in corporate statutes of publicly owned companies, where shareholders may be considered consumers.[12] Importantly, however, any formal defects in the arbitration agreement are waived, once the respective party engages on the substance of the arbitration.[13] Generally, German courts tend to enforce arbitration agreements, even if the clause is erroneous and refers, for example, to a non-existing arbitral institution.[14]

Under German law, arbitral tribunals decide on their own jurisdiction, but such decision is subject to full review by the state courts – ie, ultimate *Kompetenz-Kompetenz* does not rest with the arbitral tribunal.[15] Before an arbitral tribunal is constituted, parties may also seek a declaratory decision from the competent German court on the admissibility of arbitration.[16] Once the arbitral tribunal is constituted, any jurisdictional objections must be made, at the latest, with the statement of defence.[17]

German arbitration law does not contain a specific rule providing for the confidentiality of arbitration (which should therefore be separately agreed, to the extent it is not included in the applicable arbitration rules, if any).

The new 2018 DIS Arbitration Rules

The predominant arbitration institution in Germany is the German Arbitration Institute (DIS). It administers arbitration and other alternative dispute resolution proceedings under a variety of rules. In addition, its yearly spring and fall conferences are also a hub of the vibrant German arbitration practitioner community.

In spring 2018, the DIS released the new DIS Arbitration Rules, which include a number of important innovations in comparison to the previous 1998 DIS Arbitration Rules. The new rules were developed over a period of 18 months in a structured process, which collected input and feedback from nearly 300 arbitration practitioners, organised into three committees. The 'consolidation committee', which functioned as a 'sounding board' for the drafting committee, also included representatives from major corporations and took a keen interest in contributing to the development of modern and efficient arbitration rules.

The new DIS Arbitration Rules are available in German and English and include guidelines for:

- increasing procedural efficiency (annex 3);
- supplementary rules for expedited proceedings (annex 4);
- supplementary rules for corporate disputes (annex 5); and
- dispute management rules (annex 6).

They continue to embrace a 'civil law touch' to arbitration while at the same time adopting accepted international standards that had not been part of the old rules. The major changes are outlined below.

Electronic communication

Article 4.1 now provides for electronic communication of all submissions apart from the initial request for arbitration. It also requires that the DIS be included in all communications, which was not the practice under the old rules, and is a prerequisite for the more active role the DIS takes under the new rules.

Streamlined initiation of the arbitration

The process for the initiation of the arbitration and constitution of the arbitral tribunal has been revised and streamlined. Under the old rules, following the initiation of the arbitration with the statement of claim, the time limit for the respondent's statement of defence was set by the arbitral tribunal after its constitution. This practice could lead to significant delays; usually it took two to three months to constitute an arbitral tribunal. Under article 7 of the new rules, the respondent now must file an initial response including a nomination of its co-arbitrator within 21 days (article 7.1) and submit a statement of defence within 45 days, both from the time of the receipt of the request for arbitration (article 7.2). The DIS or, after its constitution, the arbitral tribunal, may extend the deadline for the statement of defence (article 7.3; see also article 4.9, which now generally allows the DIS to extend all deadlines apart from those set by the arbitral tribunal). Counterclaims, if any, shall be submitted together with the statement of defence (article 7.5). The revised process is intended to allow for the 'front-loading' of the arbitration process and should result in the arbitral tribunal receiving an initial set of submissions at the time of its constitution or shortly thereafter.

Constitution of the arbitral tribunal

Article 10 now allows the parties to agree that the arbitral tribunal constitutes any uneven number of arbitrators. Absent any such agreement, three arbitrators remain the default rule (article 10.2). However, any party may request that the newly established Arbitration Council decides that a sole arbitrator shall be appointed instead of a three-member tribunal. This change should help reduce costs and be useful, in particular, in smaller cases. In order to profit from this mechanism in appropriate cases, parties should consider leaving the number of arbitrators in the arbitration agreement open, in particular, if they expect the possibility of smaller claims. The new arbitration rules also no longer require, by default, that the president of the arbitral tribunal or sole arbitrator be a qualified lawyer.[18] The time limit for the joint nomination of the president by the co-arbitrators has been shortened from 30 to 21 days (article 12.2). In case of a sole arbitrator, the new DIS Arbitration Rules do not contain any default time limit, but instead provide for the DIS to set a deadline (article 11).

Multiparty and multi-contract arbitrations

A significant change is the introduction of a set of provisions on multiparty and multi-contract arbitrations as well as on the consolidation and joinder of proceedings.

Multiple contracts

Claims arising from multiple contracts may be arbitrated in one proceeding if the parties have agreed so (article 17.1). If such claims are based on multiple arbitration agreements, the arbitration agreements must be compatible with each other (article 17.2), eg, not stipulate different seats or numbers of arbitrators. If the later requirement is in dispute the compatibility is decided by the arbitral tribunal, unless the DIS finds that it cannot constitute an arbitral tribunal at all, in which case the proceedings are terminated (article 42.4(ii)). Parties expecting multi-contract scenarios should therefore make sure that the arbitration clauses in all contracts are compatible with each other and explicitly stipulate that multi-contract arbitrations should be possible.

Multiparty arbitrations

Similarly, claims involving more than two parties may be arbitrated in one proceeding if the arbitration agreements for all parties stipulate so, or if the parties have otherwise agreed so (article 18.1). If this is in dispute, in particular absent an express agreement, the arbitral tribunal decides on the admissibility of multiparty proceedings. Again, parties expecting such circumstances should provide for an express agreement in their arbitration clauses to avoid any uncertainties.

Joinder

Article 19.1 now also allows the joinder of an additional party, but only before the appointment of the first arbitrator.

Consolidation

Finally, article 8.1 allows for the consolidation of several arbitrations into one proceeding if all parties agree to it. In this case, the DIS may (but does not have to) consolidate the later arbitrations into the first proceeding, unless the parties agreed differently.

Interim relief

Article 25.1 now explicitly provides for the authority of the arbitral tribunal to grant interim relief. While the introduction of an emergency arbitrator mechanism was discussed intensively during the revision process, the revised rules ultimately do not contain such a mechanism.

Case management

The new rules also introduce and further regulate a mandatory case management conference. Pursuant to article 27.1, a first case management conference must be held within 21 days after the constitution of the arbitral tribunal. During this conference, the tribunal must discuss with the parties whether:

- the rules for expedited proceeding set out in annex 4 shall apply;
- whether any measures from a catalogue of measures to increase the efficiency of the proceedings set out in annex 3 shall apply; and
- whether a resolution of the dispute in mediation proceedings is possible (article 27.4).

In the first or a later case management conference, the arbitral tribunal should also discuss whether experts should be employed and, if so, how to efficiently conduct the expert procedure (article 27.7). During or following the first case management conference, the arbitral tribunal is supposed to issue its first procedural order and a procedural timetable (article 27.5).

Measures for increasing procedural efficiency

Annex 3 suggests that the parties and the tribunal consider and adopt, as appropriate, the following measures for increasing procedural efficiency:

- limiting the length or the number of submissions;
- conducting only one oral hearing;
- dividing the proceedings into multiple phases;
- rendering partial awards or procedural orders on specific issues;
- limiting document production;
- providing the parties with a preliminary non-binding assessment of factual or legal issues in the arbitration, provided all of the parties consent thereto; and
- making use of information technology.

Expedited proceedings

Under application of the procedure for expedited proceedings in annex 4, the final award shall be made no later than six months after the initial case management conference (article, 1 annex 4), each party may only file one further submission after the request for arbitration and initial answer (article 3, annex 4) and the arbitral tribunal shall only hold one oral hearing, which may be dispensed with if all parties so agree (article, 4 annex 4).

Encouraging settlements

The 'civil law touch' remains notable in article 26, which encourages the arbitral tribunal to facilitate an amicable settlement of the arbitration at every stage of the proceedings, unless any party objects to this. The later limitation is new and intended to alleviate potential concerns of international parties not used to tribunals actively engaging in settlement discussions.

Costs of the arbitration

The administration of the arbitrators' fees and expenses and the costs of the arbitration underwent significant changes in order to relieve the arbitral tribunal from having to administer advances on costs and, in particular, setting its fees itself. The new DIS Arbitration Rules maintain the principle of determining the arbitrators' fees relative to the amount in dispute. While the amount in dispute is initially determined by the arbitral tribunal (article 36.2), any party may challenge the tribunal's determination within 14 days and request that the Arbitration Council review it (article 36.3). The Arbitration Council also may reduce the arbitrators' fees in case the draft award is delivered late, eg, after the default time limit of three months after the hearing or last submission (article 37). Similarly, the arbitral tribunal may take into account the efficient conduct of the proceedings by the parties in its decision on the allocation of costs (article 33.3).

Introduction of limited scrutiny

Article 37 introduces a limited scrutiny of the draft award by the DIS. While the DIS had not reviewed draft awards under the old rules, it now reviews them for formal errors and may also suggest other modifications on a non-mandatory basis to the arbitral tribunal (article 39.3). There was broad agreement during the revision process, however, that the newly introduced limited review should not reach the level of scrutiny exercised by other arbitral institutions, in particular the International Chamber of Commerce.

Challenge of an arbitrator

The decision on challenges of arbitrators is shifted from the arbitral tribunal to the new Arbitration Council (article 15.4). This is another example of strengthening the independence of the arbitral process and improving the public perception of arbitration. Parties should note the short time limit for challenges in article 15.2 of 14 days from the time of first obtaining knowledge of the facts and circumstances giving rise to the challenge is rather short.[19] The Arbitration Council may also remove arbitrators it considers unfit to fulfil their office (article 16.2).

Incorporation of alternative dispute resolution methods

Should the parties resolve their dispute by means of an alternative DIS dispute resolution mechanism (mediation, conciliation, adjudication or expert determination), the resulting decision or settlement may be recorded in an arbitral award on agreed terms (article 41.2). This mechanism strengthens these alternative dispute resolution mechanisms by ensuring the enforceability of their outcome.

Confidentiality

In line with international practice, the DIS rules now allow the publication of the award, if all parties consent to it (articles 44.1, 44.3).[20]

Conclusion

Overall, the new DIS Arbitration Rules constitute a significant change and improvement from the old arbitration rules, which were very closely modelled on the ad hoc arbitration procedure prescribed in the ZPO. The new rules adopt a much more international approach and incorporate provisions and well-established concepts, which will be familiar to international arbitration practitioners from other jurisdictions. The DIS itself takes a more proactive approach under the new rules, allowing for more flexibility and increasing the efficiency and speed of proceedings. In particular, the DIS also took over the administration of the arbitrators' fees and expenses – a change that has been welcomed by the arbitrator community and aims to improve the public perception of arbitration. As a consequence of its new role, the DIS had to grow its case management team and develop new practices. The success of the new rules will also depend on the DIS's continuing efforts to implement the goals of the rules revision process in daily case management. The new, modern and efficient rules certainly provide the foundation for further developing arbitration in Germany and for attracting more international users to considering DIS arbitration.

Notes

1 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12.
2 ECJ, *Slowakische Republik v Achmea BV*, Case C-284/16, Judgment, 6 March 2018; *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue, 31 August 2018.
3 The caseload at the German Arbitration Institute continues to steadily grow from an average of 117 new arbitrations in 2005–2010 to 146 new arbitrations per year in 2010–2015 and, most recently, an average of 157 new arbitrations per year in the last three years (2015–2017) (www.disarb.org/en/39/content/statistik-id72; last accessed 6 September 2018).
4 Sections 1060(1), 1061(2) ZPO.
5 This follows from section 1059(2)(1)(a) ZPO, which stipulates that arbitration agreements must be valid under German law if the parties have not agreed a different law. Consequently, section 1059 ZPO assumes that the seat of arbitration is in Germany. See also Wilske/Markert, Beck Online Commentary on the ZPO, 29th ed., 1 July 2018, Section 1059, paragraphs 9–10.
6 Section 1062(1) ZPO.
7 Section 1062(2) ZPO.
8 FCJ, Case No. XI ZR 349/08, Judgment, 8 June 2018, paragraph 30.
9 Disputes about permanent housing rental agreements are not arbitrable (section 1030(2) ZPO).
10 Section 1031(1) ZPO.
11 Section 1031(5) ZPO.
12 Voit, Musielak/Voit, Commentary on the ZPO, 15th ed. 2018, Section 1031, paragraph 9.
13 Section 1031(6) ZPO.
14 The Berlin Court of Appeals enforced an arbitration agreement, which referred to the 'German Chamber of Commerce'. However, there is no 'German Chamber of Commerce', but only a number of regional chambers. The court interpreted this clause to refer to the German Arbitration Institute, Kammergericht, Case No. 20 SchH/12, Order, 3 September 2012, published in German Arb. J. 2012, 337.
15 Section 1040(1) and (3) ZPO; FCJ, Case No III ZR 265/03, Judgment, 13 January 2015, published in *German Arbitration Journal* 2012, 95, at p 96.
16 Section 1032(2) ZPO.
17 Section 1040(2) ZPO.
18 Such requirement was contained in article 2.2 of the 1998 DIS Arbitration Rules.
19 Article 14 of the ICC Arbitration Rules, for example, provides for a time limit of 30 days.
20 Under article 42 of the 1998 DIS Arbitration Rules the consent of the DIS was required in addition to the consent of all parties.

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Manner Spangenberg is a law firm dedicated to business litigation, arbitration, alternative dispute resolution and commercial contracts.

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Italy

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Introduction

Recourse to arbitration for the resolution of domestic and international disputes in Italy is on the rise. Arbitration in Italy is seen as a valid alternative to state court proceedings, often perceived as excessively lengthy and cumbersome. Indeed, although litigation before national courts remains the most-used means of dispute settlement, there has been a significant growth of arbitration, both ad hoc and institutional.

It is not possible to collect reliable figures on the overall use of arbitration in Italy: the only available data are those pertaining to arbitrations administered by institutions, whereas the number of ad hoc arbitrations remains unknown. The statistics published by the Institute for the Study and Diffusion of Arbitration and International Commercial Law show a 40 per cent increase between 2006 and 2016 in arbitral proceedings administered by arbitral institutions (708 proceedings in 2016 versus 505 in 2006).[1] The same trend is evidenced by the data published by the Chamber of Arbitration of Milan (CAM) on cases registered over the last decade (131 in 2017 versus 99 in 2007).

The growing success among users has been encouraged and fostered by several legislative reforms adopted over the past 15 years aimed at updating the relevant legal framework, mainly contained in articles 806–840 of the Italian Code of Civil Procedure (ICCP).

In 2003, Legislative Decree No. 5/2003 introduced special provisions governing arbitration in corporate matters, applicable to arbitration proceedings commenced pursuant to arbitration clauses inserted in the articles of associations of unlisted companies.

In 2006, by Legislative Decree No. 40/2006, the Italian legislator enacted a comprehensive reform of arbitration law, revising the general regime of articles 806–840 ICCP. The law, currently in force, is not based on the UNCITRAL Model Law, but recognises and implements most of its inspiring principles and rules. By departing from the previous dualistic approach, the reform adopted a unitary system that, but for one exception, does not distinguish between domestic and international arbitration. As further detailed below, the only residual difference between the two systems regards the powers entrusted with the domestic courts following the annulment of an award. Pursuant to article 830, paragraph 2, if, upon entering into the arbitration agreement, one of the parties had its residence outside Italy, the Court of Appeal is empowered to decide the merits of the dispute following the annulment of the award only if the arbitration agreement so provides or if the parties have so agreed at a later time.

In 2014, in an attempt to deflate the number of state court proceedings, Law No. 162/2014 introduced the possibility – upon the parties' joint request – to transfer the proceedings pending before the court to an arbitral tribunal, leaving the substantive and legal effects of the original legal action unaffected.

Finally, in 2017 a proposal for a new reform was submitted to the Ministry of Justice by a commission of leading professionals and academics, created a year earlier to evaluate possible amendments to the existing legal framework of alternative dispute resolution in Italy. Among all the proposed innovations, two are the most relevant. First, the proposal addressed the question of interim measures, finally empowering arbitrators to grant such orders (a power that arbitrators currently lack in Italy). Second, it attempted to speed up the process for challenging awards, by introducing the possibility of a direct challenge before the Supreme Court, without prior recourse to the Court of Appeal. However, such proposal has not yet been submitted to Parliament, and it is currently uncertain whether and when it will be enacted.

The following brief legislative overview shows that Italian arbitration law can certainly be improved (as the most recent unaccomplished initiatives described above confirm), but also that users can count on a generally reliable and friendly legal framework.

Multiparty proceedings

Addressing the implications of complex multiparty contractual relations in arbitration proceedings, the 2006 reform has included two provisions, articles 816-quater and 816-quinquies ICCP, governing multiparty arbitration. These provisions are to be welcomed as they allow for disputes between multiple parties to be conducted in a single proceeding, thus limiting the costs and time of separate proceedings and avoiding the risk of conflicting awards.

More specifically, article 816-quater ICCP establishes the conditions upon which multiple parties can commence multiparty arbitration and regulates the appointment of the arbitral tribunal. Article 816-quinquies ICCP governs the joinder and intervention of third parties in already pending proceedings.

Under article 816-quater ICCP, if two or more parties are bound by the same arbitration agreement, each party may summon all or some of the other parties in the same proceedings provided that, alternatively:

- the arbitration agreement defers to a third party the appointment of arbitrators;
- the arbitrators are appointed with the consent of all parties; or
- if one party has already appointed its arbitrators, the remaining parties jointly appoint an equal number of arbitrators or defer such appointment to a third party.

If the parties are not able to agree on a joint appointment, and the arbitration agreement does not confer the power of appointment to a third party, two scenarios are possible. If the parties are not all necessary parties to the dispute, the arbitration is separated into as many proceedings as the number of respondents. However, when the participation of all parties is required, article 816-quater, paragraph 3, provides that the arbitration shall not proceed.

Article 816-quater ICCP only regulates multiparty arbitration arising out of the same arbitration agreement. It does not

contemplate the possibility of multiparty proceedings deriving from multiple contracts. Such possibility has been, however, recognised by the Supreme Court to the extent that the various arbitration clauses are contained in related contracts.[2]

Special provisions are established under article 34 of Legislative Decree No. 5/2003 to regulate multiparty arbitration arising out of an arbitration agreement contained in the articles of associations of unlisted companies. Under this provision, arbitrators are to be appointed by a third party unrelated to the company, on which the arbitration agreement confers such power. This rule thus mirrors one of the possible means for the appointment of arbitrators under article 816-quater ICCP. However, unlike article 816-quater ICCP, article 34 provides that unless the third party's power to nominate the arbitrators is provided for in the arbitration agreement, the latter is null and void. Moreover, unlike in the ordinary regime of article 816-quater, if the third party fails to make the appointment, the parties may seek the assistance of the president of the court at the place where the company has its headquarters, who may proceed to the appointment.

Article 816-quinquies ICCP governs the intervention and joinder of a third party not bound by the arbitration agreement, subjecting the participation of such party in the arbitration proceedings to the consent of the original parties, the arbitrators and the third party itself. More specifically, under article 816-quinquies, paragraph 1, ICCP, such consent is required only when the third party intervenes to raise claims against one or all of the original parties.

Conversely, article 816-quinquies, paragraph 2, provides that the party's intervention is always allowed when such party:

- acts as a side intervenor (ie, in support of one of the original parties); or
- is a necessary party for the adjudication of the dispute.

The rationale of this provision is self-evident. The side intervenor is, in fact, a party that could be adversely affected by the arbitration award and which, therefore, is entitled to challenge the arbitral decision under article 404 ICCP (third-party opposition). By allowing its intervention and defence during the proceedings, article 816-quinquies, paragraph 2, ICCP enhances the stability of the arbitral award by reducing the risk of a subsequent challenge.

Interim measures

One of the best-known, and infamous, features of Italian arbitration law is the arbitrators' lack of power to grant interim measures. Pursuant to article 818 ICCP, '[a]rbitrators may not grant attachments or other interim measures, unless the law provides otherwise'.

The vast majority of jurisdictions,[3] including those that follow the approach of the UNCITRAL Model Law,[4] provide that arbitrators may issue interim measures. The Italian legislator has thus opted for a minority position among Westerner jurisdictions. Article 818 ICCP is considered a mandatory rule, applicable when the place of arbitration is in Italy despite any contrary agreement of the parties.[5] Therefore, an arbitration agreement purporting to empower an arbitral tribunal seated in Italy to grant interim relief, even by reference to arbitration rules that recognise the arbitrators' powers, would be considered ineffective.[6] Having regard to this limitation, article 22(2) of the CAM Rules provides that '[t]he arbitral tribunal may issue all urgent and provisional measures of protection, also of an anticipatory nature, that are not barred by mandatory provisions applicable to the proceedings'.

The rationale of the prohibition for arbitrators to issue interim relief is generally identified in the following considerations:

- Arbitrators lack the coercive powers required to grant interim relief, which is reserved to state courts. Arbitrators should therefore not be empowered for issue decisions, as is the case of some interim measures, which may be directly enforced by organs of the state. This argument can easily be rebutted by noting that arbitrators are empowered to render awards on the merits, which potentially affect the parties' positions in a more serious and permanent manner. This concern may easily be addressed by providing for appropriate mechanisms for the recognition of arbitral decisions on interim measures, such as those existing in most modern arbitration statutes.
- Given the summary nature of interim measures proceedings, the national judicial system is deemed to offer more guarantees than arbitration. In this respect, the prohibition reflects a persistent attitude of mistrust towards arbitrators, which is obsolete and isolated in the international context. The availability of appropriate enforcement mechanisms may guarantee state control before the measures become enforceable.

Because of the prohibition, parties to arbitration proceedings seated in Italy may only seek interim relief from state courts on the basis of the provisions governing the granting of interim measures in ordinary judicial proceedings. The competent judge is the one which, absent the arbitration agreement, would be competent to hear the merits of the case or the judge of the place where the measure is to be enforced.

Although the most recent reforms have confirmed the prohibition, there is limited scope for arbitrators sitting in Italy to issue provisional and conservatory measures. The current version of article 818 ICCP, resulting from the 2006 reform, is less strict than the pre-2006 text, insofar as it introduced a narrow exception to the prohibition, by empowering arbitrators to order interim measures in specific cases identified by the law ('unless the law provides otherwise'). The only exception that can be currently identified is provided by the Legislative Decree No. 5 of 2003, which regulates arbitration in corporate matters. Pursuant to article 35 of the decree, the arbitrators are empowered to suspend the effectiveness of a shareholders' resolution pending final adjudication of the dispute relating to that resolution's validity.[7] Obviously, since an arbitral tribunal can only issue an interim order after it has been constituted, the courts' power to order a stay of the shareholders' resolution would still be exclusive before the constitution of the arbitral tribunal.

Despite the prohibition of article 818 ICCP, limited effects can be attached to interim measures issued in Italian-seated arbitrations. First, if the arbitration agreement or the arbitration rules referred to therein provide for the arbitrators' power to grant interim relief, any measure rendered, though not enforceable, would be binding on the parties on the basis of their agreement. Second, arbitrators are not prevented from rendering 'self-executing' measures – ie, measures which do not require enforcement since they can be implemented without need for cooperation by state organs or the other party (eg, declaratory measures).

If the place of arbitration is outside Italy, the parties may still seek interim relief from Italian courts in support of the foreign-seated proceedings.

Challenge to awards

Under article 827 ICCP, three remedies are available against an arbitral award: application for setting aside, revocation and third-party opposition.

Only awards that decide, in whole or in part, the merits of the disputes may be subject to these remedies. Therefore, interim awards that decide on issues arisen during the course of the arbitration, but do not dispose of the merits of the dispute, may only be challenged together with the final award.

The ordinary and most common form of recourse available to obtain the setting aside of an award is the request for annulment provided under articles 828–830 ICCP.

Article 829 ICCP lists the grounds on which the annulment of an award can be obtained. As part of the 2006 reform, the number of grounds has raised from nine to 12, which corresponds to the double the grounds set out in the UNCITRAL Model Law. However, the departure from the Model Law is not as great as it might seem: for example, while article 34 of the UNCITRAL Model Law states that awards may be set aside 'if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties', article 829 ICCP provides for two separate grounds for setting aside relating to the irregular composition of the arbitral tribunal.

The 12 grounds listed in article 829, paragraph 1, relate to procedural issues and apply notwithstanding any waviers of the parties. An award may be challenged for procedural violations only if the party challenging the award has not itself caused the violation. For most of the grounds to be validly invoked, it is also required that the ground be promptly raised as an objection, and that the right to invoke the objection is not waived, during the arbitration.

In addition to the 12 grounds listed in article 829, paragraph 1, ICCP, an award may be challenged based on the violation of the substantive law governing the merits of the dispute if:

- the parties expressly so agreed, or the law so provides;
- the violation of the law resulted in a breach of public policy;
- the arbitration relates to labour law disputes; or
- the violation concerns the determination of a preliminary issue in a matter that cannot be subject to arbitration.

The current regime of annulment for violation of the law was introduced in 2006. Before the 2006 reform, article 829 ICCP provided that awards could always be set aside for violation of the law, unless the parties had authorised the arbitrators to decide ex aequo et bono or had agreed that the award could not be challenged on this ground. The current regime has thus reversed the previous rule, making the right to seek the annulment of the award, and not its exclusion), subject to the parties' agreement.

The 2006 reform set out a transitional regime providing that the new rules on the annulment for violation of the law would apply to all cases in which an arbitration agreement was entered into before the entry into force of the 2006 reform, but the arbitration was commenced after that date.[8]

The Italian Supreme Court, however, held that even if the arbitration agreement was entered into before the 2006 reform and the arbitration proceedings were commenced after the entry into force of the new law, the award could nonetheless be challenged on this basis even in the absence of an express agreement of the parties.[9] The Supreme Court held that, since the new article 829 ICCP provides that the award cannot be challenged for violation of the law 'unless the parties expressly so agreed or Italian law so provides', the previous regime shall nonetheless apply to those cases, because the law applicable ratione temporis to the arbitration agreement is the law in force at the time when it was concluded.

The Milan Court of Appeal referred the matter to the Constitutional Court for a preliminary ruling on whether the transitional regime and the new article 829 ICCP, as interpreted by the Italian Supreme Court, complies with Italian constitutional principles. In early 2018, the Italian Constitutional Court dismissed the application and confirmed that the interpretation of the Italian Supreme Court is respectful of the Italian Constitution.[10]

As mentioned, article 829, paragraph 2, ICCP provides that the setting aside of an award can always be obtained if the violation of the law amounts to a breach of public policy, without specifying what notion of public policy is relevant in this context. There is consensus among scholars that the relevant notion differs depending on the applicable substantive law. If Italian law is not applicable to the substance of the dispute, the relevant notion is international public policy, which comprises a limited number of fundamental principles of the Italian legal system that must in any case be respected for the award to have effects in Italy. If, on the other hand, Italian substantive law applies, the relevant notion of public policy is that of Italian domestic public policy, which is also determined based on the fundamental principles of Italian law, but comprises a broader spectrum of principles.[11] In both cases, Italian courts may determine ex officio whether an arbitral award is in breach of public policy.

In any event, arbitral awards cannot be challenged for the allegedly erroneous appreciation of the facts by the arbitral tribunal, as fact-finding can never be reviewed by Italian courts in setting aside proceedings.

In all cases, the time limit for the filing of an application for annulment is 90 days from its notification to the parties, or, in the absence thereof, one year from its signature.

Pursuant to article 831 ICCP, awards can also be challenged through two extraordinary recourses: revocation and third-party opposition.

- Revocation is an extraordinary means available to obtain the setting aside of an award affected by serious irregularities (as set out in article 395 ICCP), such as fraud committed by a party or an arbitrator, forgery or discovery of unknown documents.
- Third-party opposition constitutes a significant departure from international practice.This remedy can be used in those exceptional cases in which a third party establishes that the award affects its rights, as may be the case of creditors of one of the parties when the award is the result of fraud carried out to their detriment (articles 831 and 404 ICCP).

Given the peculiar nature of these remedies, the time limit to file applications for revocation and third-party opposition is 30 days from the day the challenging party was informed of the circumstances on which it relies.

Recognition and Enforcement of Foreign Awards

An award is considered 'foreign' if the place of arbitration is outside Italy. Under article 839 ICCP, a party seeking the recognition of an award in Italy shall file an application before the competent Court of Appeal, to be determined based on the place of residence of the other party.

With the application for recognition, the applying party shall deposit the original or a certified copy of both the award and the arbitration agreement on which it is based, accompanied by a translation if the original language is not in Italian. The exequatur can be obtained ex parte, by means of a decree, on the mere basis

of the documents filed by the applicant. The court shall declare the recognition of the award unless such:

- does not comply with fundamental formal requirements set out in article 825 ICCP;
- concerns a dispute that may not be submitted to arbitration under Italian law; or
- the award contains provisions that are contrary to public policy.

The first two points above correspond to the grounds for refusing recognition under article V(2) of the New York Convention.

The party resisting the exequatur, or the applicant in case of rejection, may file an opposition within 30 days from notification of the decree in case of the recognition or from communication of the decree in case of rejection.

The grounds for opposition set out in article 840 ICCP mirror the seven grounds set out in article V of the New York Convention.

Parallel proceedings pending before Italian courts

Pursuant to articles 39 and 40 ICCP, in ordinary court proceedings, when the same action is brought before different courts, the court seized second dismisses the case based on lis pendens.[12] In deciding whether to dismiss the second case, courts will apply the 'triple identity test', ie, the two cases must involve the same parties, the same cause of action and the same relief sought.[13]

Article 39 and 40 ICCP and the above-mentioned principles are not directly applicable to parallel proceedings before state courts and arbitral tribunals. In this case, if the same action is brought both before state courts and an arbitral tribunal, the second action will not be dismissed.

If, despite the applicability of an arbitration agreement, a party commences proceedings before state courts, the other party may raise a jurisdictional objection, which is subject to specific time limits.[14] In particular, the objection to the jurisdiction of a court based on the existence of an arbitration agreement must be raised in the first brief filed in the court case. Likewise, under article 817, paragraph 2, ICCP, the objection to the jurisdiction of the arbitral tribunal has to be raised in the first brief filed after the appointment of the arbitrators.

If no objection is raised within the deadline set under article 819-ter ICCP, the right to have the dispute resolved in arbitration may be considered waived. The waiver, however, applies only to that particular dispute, and not to the arbitration agreement. Therefore, it does not prevent the parties from to filing other disputes before an arbitral tribunal constituted on the basis of the same arbitration agreement.

Thus, although the law does not provide for the dismissal of parallel proceedings on the basis of lis pendens, it provides the parties with an opportunity to raise jurisdictional objections before either the state court or the arbitral tribunals. If the objection to the state court's jurisdiction is successful, the arbitration can continue. If, however, no objection is raised in a timely fashion, and both proceedings continue in parallel, the risk of conflicting decisions cannot be excluded. In this case, if the arbitral award is rendered after the court ruling, it may be set aside for contrariness to a previous final judgment between the same parties.[15] Conversely, if the award is rendered before the court decision, the latter may be annulled as being contrary to a previous decision having res judicata effect between the parties.[16]

Notes

1 ISDACI, 10th Report on the Diffusion of Alternative Justice in Italy (Decimo rapporto sulla diffusione della giustizia alternativa in Italia), (2018).

2 Italian Supreme Court (Civil Division No. I), Decision No. 12321 dated 25 May 2007.

3 Article 183(1) of the Swiss Federal Act on Private International Law (PIL) states: 'Unless the parties have agreed otherwise, the arbitral tribunal may, at the request of a party, grant interim relief and conservatory measures'. See also section 593 of the Austrian Arbitration Law: '(1) Unless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party and after hearing the other party, order against the other party such interim or protective measures it deems necessary in respect of the subject-matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded, or there were a risk of irreparable harm. . .'.

4 See article 17 UNCITRAL Model Law. In particular, article 17(1) provides 'Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures'.

5 Italian Supreme Court, Judgment No. 9909 dated 27 April 2009.

6 The choice of the Italian legislator not to grant the arbitrators the power to issue interim measures has been subject to criticism by the scholars. See for example, A Briguglio and L Salvaneschi, 'Regolamento di arbitrato della Camera di Commercio Internazionale', *Giuffrè Editore* (2005) p 413.

7 Article 35, paragraph 2, of Legislative Decree No. 5 of 2003.

8 Article 27, paragraph 4 of Legislative Decree No. 40/2006.

9 Italian Supreme Court sitting en banc, Decisions No. 9341, 9285 and 9284 of 9 May 2016.

10 Italian Constitutional Court, Decision No. 13 of 30 January 2018.

11 F Emanuele and M Molfa, 'Selected Issues in International Arbitration: the Italian Perspective', p 198, (2014) *Thomson Reuters*.

12 Article 39 ICCP.

13 Moreover, lis pendens requires that the two (or more) proceedings are brought before the same judicial authority (civil versus criminal courts) of equal level of review (first instance or appeal).

14 Article 819-ter ICCP.

15 Article 829, para. 1, No. 8 ICCP.

16 Article 395, No. 5 ICCP.

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BonelliErede is the market leader for legal and tax services in Italy, covering all areas of business and corporate criminal law. Thanks to its offices in Europe, Africa and the Middle East and to the partnerships with independent law firms around the world, BonelliErede is a true international player. By combining the skills of its professionals, the firm also offers support through specialised working groups organised by sector and practice: the focus teams. The focus teams are organised by sector and practice area and pool their individual legal expertise and their in-depth sector knowledge to offer clients assistance with all aspects of their businesses. BonelliErede is always at their clients' side, attentive to their every need.

Montenegro

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Introduction

On 31 July 2015, Parliament adopted the Law on Arbitration.[1] With it, Montenegro became one of 90 states that has implemented the UNICTRAL Model Law. The law came into force in August 2015. As the provisions from the Law on Civil Procedure had been applied before the Law on Arbitration was passed, it had been noticed that the Law on Civil Procedure was not suitable for the current needs of businesses, investors and other interested parties as the Law on Civil Procedure was incomplete, and in certain provisions contradictory.[2] In addition, one of the provisions, inter alia, stipulated that in case the arbitration court was composed of persons among which one person was a judge at one of the state courts, he or she had to be the chairperson of the arbitral tribunal or a sole arbitrator.[3] With the adoption of the Law on Arbitration the distinction between domestic disputes and disputes with a foreign element was eliminated. Soon after the enforcement of the Law on Arbitration, drafting of the new arbitration rules commenced.[4] Prior to the adoption of Rules on Arbitration of Montenegro (Montenegrin Rules) before the Chamber of Commerce of Montenegro (CCM), the Assembly of the Chamber of Commerce of Montenegro (ACCM) brought the decision on the constitution of the arbitration court before the CCM, which means that the previous two arbitration courts were abolished: the Permanent Elected Court and the Foreign Trade Arbitration Court. The permanent list of arbitrators was abolished according to the new regulation that contains only a list of arbitrators having the informative character.

While drafting the Montenegrin Rules,[5] the working group carried out examinations regarding comparative resolutions and concluded that in the past few years, drafting and adoption of new arbitration rules occurred with the following:

- the UNCITRAL Rules (2010);[6]
- the International Chamber of Commerce (ICC) Rules (2012);[7]
- the Rules of Lewiatan Court of Arbitration (2012);[8]
- Vienna International Arbitral Centre (VIAC) Rules (2013);[9]
- the Abu Dhabi Commercial Conciliation and Arbitration Centre Rules (2013);[10]
- the Beijing Arbitration Commission Rules (2013);[11]
- the London Court of International Arbitration Rules (LIAC) (2014);[12] and
- the Ljubljana Arbitration Rules (2014).[13]

There was also the adoption of Arbitration Rules of Zagreb by the end of 2015,[14] as well as the Arbitration Rules of the Permanent Elected Court before the Chamber of Commerce of Serbia in June, 2016.[15] There is a good example of Singapore International Arbitration Centre (SIAC) that originally adopted its arbitration rules in 2013 and after three years new rules were adopted indicating the awareness of how important it is to achieve more efficient and thorough dispute resolution through arbitral proceedings and continuous adjustments to current trends. New SIAC Rules (2016) will obtain consolidation of disputes and will give a chance for parties to join the existing arbitrations and by doing so to provide resolution of proceedings at an early stage. These modifications contributed to more expedient and more efficient proceedings of SIAC arbitration.[16]

When it came to the drafting new Montenegrin Rules, the Ljubljana Arbitration Rules, the VIAC Rules, the new ICC Rules and UNICTRAL Rules were all compared. Since the adoption of modifications and amendments to the UNICTRAL Model Law, new provisions have been established such as:

- interim measures;
- emergency arbitration;
- emergency arbitrator; and
- multiparty arbitration.

There was caution as to whether to accept the amendments to national law or to enact new laws on arbitration on the basis of the adopted amendments to the UNICTRAL Model Law.[17]

In this article, special attention will be paid to the following sections prescribed by the Montenegrin Rules:

- the number of arbitrators;
- the appointment of arbitrators;
- the impartiality and independence of arbitrators;
- the confirmation of arbitrators;
- the challenge of arbitrators; and
- the release and replacement of arbitrators.

All these sections as prescribed by Montenegrin Rules will be compared to the arbitration rules of leading arbitration institutions.

Number of arbitrators

In the great majority of international commercial arbitrations, parties appoint either one or three arbitrators. Appointing two arbitrators (or any even number of them) or more than three arbitrators is far less common, but not completely unheard of in IP disputes resolved by means of international arbitration.[18] A few other institutional rules contain a presumption in favour of three arbitrators (Stockholm Chamber of Commerce Rules, article 12 and the China International Economic and Trade Arbitration Commisssion Rules 2015, article 25(2)). Article 7(1) of the UNCITRAL Rules provides that, where the parties have not otherwise agreed, 'the number of arbitrators shall be three'. Similarly, the Montenegrin Rules on arbitration provide that:

> *Where the parties have not agreed on the number of arbitrators, the dispute is to be decided by a panel of three arbitrators unless the Presidency, taking into account the complexity of the case, the amount in dispute or other circumstances, decides that the dispute is to be decided by a sole arbitrator.*[19]

In expedited proceedings disputes shall be resolved by a sole arbitrator unless the Presidency determines, with respect to the complexity and other circumstances of the case, that the dispute shall be resolved by an arbitral tribunal consisting of three arbitrators.[20] The Presidency shall appoint an emergency arbitrator as soon as possible, albeit within 48 hours of receiving the application. After the appointment has been made, the Secretariat shall transmit the application to the emergency arbitrator without delay. Article 18 of the Montenegrin Rules shall apply to the emergency arbitrator, with the exception of the time limit referred to in article 18(2) of these rules, which is three days.

In contrast, many institutional rules (including the ICC, SIAC, LCIA, Swiss and American Arbitration Association (AAA) Commercial Rules) provide presumptively for a sole arbitrator, with the institution being granted discretion to appoint three arbitrators in larger (or otherwise more complex) cases.[21] Other rules do not presumptively provide for one or three arbitrators; the institution will decide the appropriate number of arbitrators by taking into account the circumstances of each case (Hong Kong International Arbitration Centre Rules 2013, article 6(1); Netherlands Arbitration Institute Rules 2015, article 12(2); VIAC Rules 2013, article 17(2)).[22]

The German Arbitration Institute (DIS) Rules 2018 promote flexibility by, inter alia, including more open regulations on the number of arbitrators, even permitting any odd number. Flexibility is also reflected in regulations addressing consolidation, multiparty and multi-contract situations (article 8 and articles 17–20).[23]

Appointment of arbitrators

Appointment of arbitrators commences by filing a request by a claimant within which the arbitrator has to be proposed.[24]

Article 7 of the Montenegrin Rules prescribes that:

> *The Secretariat shall send the statement of claim to the respondent and invite the respondent to submit a statement of defense within 30 days from the date of receiving the statement of claim. Statement of defense should contain the proposal of appointment of one or more arbitrators if that is prescribed by the agreement on arbitration.*[25]
>
> *If the arbitral tribunal has not been appointed within the time period agreed by the parties or, where the parties have not agreed on a time period, within the time period set by the Secretariat, the arbitrators shall be appointed pursuant to Articles 14 and 15 of these Rules. In appointing an arbitrator under these Rules, the Presidency shall consider the nature of the dispute, the substantive law, the place of the arbitration, the language of the proceedings, the nationality of the parties and other circumstances of the case.*[26]
>
> *Where a dispute is resolved by more than one arbitrator, each party shall nominate an equal number of arbitrators. The arbitrators thus nominated shall, after their confirmation, within 15 days of being invited to do so by the Secretariat, nominate the arbitrator who is to act as the Chairperson of the Arbitral Tribunal.*[27]

According to DIS Rules:

- new and stricter time limits are prescribed (eg, the respondent must now nominate its arbitrator no later than 21 days after the receipt of the request for arbitration and the president must be nominated within 21 days after the co-arbitrators were notified by DIS to do so, in both cases instead of 30 days);
- new procedural management techniques (eg, case management conference 21 days after constitution of tribunal); and
- cost sanctions in the event of a delay.[28]

In Australia, if the parties have not previously agreed on the number of arbitrators and if within 30 days after the receipt by the Respondent of the Notice of Arbitration the parties cannot agree, the Australian Centre for International Commercial Arbitration shall determine the number of arbitrators (section II, article 10, ACICA Rules 2016).

Pursuant to the International Centre for Settlement of Investment Disputes (ICSID) Rules, parties have 60 days from registration of the request in which to reach an agreement. This time limit may be, and often is, extended by agreement. If the parties cannot agree within the deadline on the parameters for constituting a tribunal, Rule 3 provides that either party may invoke the default formula for a three-member panel set out in article 37 (2)(b) of the ICSID Convention: each party names one arbitrator and the two parties then agree on the third arbitrator, who becomes president of the tribunal.[29]

Appointment of arbitrators in multi-party proceedings

Article 15 of the Montenegrin Rules reads that:

> *Where there are multiple claimants and/or respondents, the arbitrators shall be appointed pursuant to Article 14 of these Rules unless otherwise provided by these Rules.*
>
> *Where a dispute is resolved by more than one arbitrator and there are multiple claimants and/or respondents, all multiple claimants, jointly, and all multiple respondents, jointly, shall nominate an equal number of arbitrators. If either side fails to make such joint nomination within the time period, agreed upon by the parties or set by the Secretariat, the arbitrator or arbitrators shall be appointed by the Presidency. In such case the Presidency shall revoke the appointments already made and appoint one arbitrator or all arbitrators and designate an arbitrator among them who is to act as the chairperson of the arbitral tribunal.*

The LCIA Rules, like other prominent arbitration institutions,[30] contain a specific provision for the appointment of arbitrators in a multiparty context (ie, if there are more than two parties to the dispute).[31]

Impartiality and independence of the arbitrators

According to Montenegrin and ICC Rules every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.[32] According to Codes of Ethics of Montenegro a person nominated as an arbitrator shall submit to the Secretariat a signed declaration of acceptance, availability, impartiality and independence. In that declaration the person nominated as an arbitrator shall disclose any circumstances which may give rise to justifiable doubts as to his or her impartiality or independence. The Secretariat shall send a copy of the declaration to the parties and the other arbitrators and set a period of time, within which they may submit comments.[33]

National ethical rules and enforcement regimes are firmly entrenched in cultural expectations and national procedural traditions. International arbitration, by contrast, has special procedures designed to transcend national legal cultures and procedural traditions.[34] Therefore, it can be assumed that independence is understood as an objective criterion for the connection of the arbitrator to the parties, and impartiality as a subjective criterion for the mental attitude of the arbitrator to the case to be decided (Lionnet 2005: 246).[35]

Confirmation of arbitrators

Article 17 of the Montenegrin Rules provides that:

> *The confirmation of nominated arbitrators shall be decided upon by the Secretariat. In doing so, the Secretariat shall consider the declaration referred to in Article 16(2) of these Rules and all circumstances which may give rise to doubts as to an arbitrator's impartiality or independence, availability and ability to perform his functions properly and with due dispatch and any comments by the parties. The Secretariat has no obligation to give reasons for its decision.*

ICC Rules prescribe that the Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the court.[36]

According to Swiss Rules, all designations of an arbitrator made by the parties or the arbitrators are subject to confirmation by the court, upon which the appointments shall become effective. The court has no obligation to give reasons when it does not confirm an arbitrator.

Where a designation is not confirmed, the court may either:

- invite the party or parties concerned, or, as the case may be, the arbitrators, to make a new designation within a reasonable time-limit; or
- in exceptional circumstances, proceed directly with the appointment.

In the event of any failure in the constitution of the arbitral tribunal under Swiss Rules, the court shall have all powers to address such failure and may, in particular, revoke any appointment made, appoint or reappoint any of the arbitrators and designate one of them as the presiding arbitrator.[37]

Pursuant to VIAC Rules, after an arbitrator has been nominated, the Secretary General shall obtain the arbitrator's declarations pursuant to article 16, paragraph 3. The Secretary General shall forward a copy of these statements to the parties. The Secretary General shall confirm the nominated arbitrator if no doubts exist as to the impartiality and independence of the arbitrator and his ability to carry out his mandate. The Secretary General shall inform the board of such confirmation at the subsequent meeting of the board.[38]

Challenge of arbitrators

Article 18 of the Montenegrin Rules prescribes that:

> *A party may challenge an arbitrator within 15 days after the circumstances referred to in paragraph 1 of this Article became known to that party. Failure by a party to challenge the arbitrator within this time period constitutes a waiver of the right to make a challenge. The party challenging the arbitrator shall send the request for its challenge to the Secretariat. The request shall be made in writing and contain the reasons for the challenge. The Secretariat shall notify the challenged arbitrator, the other parties and the other arbitrators of the challenge and set a time period within which they may submit comments on the challenge.*

The majority of arbitration laws and rules recognise both the lack of independence and impartiality as justifiable reasons for a challenge.[39] Under the UNCITRAL Rules, the application must be sent within 15 days directly to the parties and all members of the arbitration tribunal.[40]

The LCIA Rules do not dictate the manner in which submissions may be made to the LCIA Court in respect of a challenge. Parties, however, should not expect that they will have unlimited discretion in this matter. The terms of article clearly give power to the LCIA Court to decide how and when such submissions may be made.[41]

Release and replacement of arbitrators

Article 19 of the Montenegrin Rules reads that:

> *The Presidency shall release an arbitrator from appointment where:*
> - *all parties agree to the release of the arbitrator;*
> - *or the arbitrator is de jure or de facto unable to perform his or her functions or fails to perform them in accordance with these Rules; or it accepts the withdrawal of the arbitrator; or it sustains a challenge of the arbitrator.*

In international commercial arbitration a replacement for a party-appointed arbitrator should be by the same party to ensure that both parties have the same influence on the appointment of the tribunal that will finally render the award.[42]

According to LCIA Rules any party may apply to the LCIA Court for the expedited appointment of a replacement arbitrator under article 11.

Such an application shall be made in writing to the Registrar (preferably by electronic means), delivered (or notified) to all other parties to the arbitration; and it shall set out the specific grounds requiring the expedited appointment of the replacement arbitrator.

The LCIA Court shall determine the application as expeditiously as possible in the circumstances. If the application is granted, for the purpose of expediting the appointment of the replacement arbitrator, the LCIA Court may abridge any period of time in the arbitration agreement or any other agreement of the parties (pursuant to article 22.5).[43]

Pursuant to Swiss Rules, in all instances in which an arbitrator has to be replaced, a replacement arbitrator shall be designated or appointed pursuant to the procedure provided for in articles 7 and 8 within the time-limit set by the court. Such procedure shall apply even if a party or the arbitrators had failed to make the required designation during the initial appointment process.

In exceptional circumstances, the court may, after consulting with the parties and any remaining arbitrators:

- directly appoint the replacement arbitrator; or
- after the closure of the proceedings, authorise the remaining arbitrators to proceed with the arbitration and make any decision or award.[44]

In accordance with the Stockholm Rules, the board shall appoint a new arbitrator where an arbitrator has been released from appointment pursuant to article 20, or where an arbitrator has died. If the released arbitrator was appointed by a party, that party shall appoint the new arbitrator, unless the board otherwise deems it appropriate. Where the arbitral tribunal consists of three or more arbitrators, the board may decide that the remaining arbitrators shall proceed with the arbitration. Before the board takes a decision, the parties and the arbitrators shall be given an

opportunity to submit comments. In taking its decision, the Board shall have regard to the stage of the arbitration and any other relevant circumstances. Where an arbitrator has been replaced, the newly composed arbitral tribunal shall decide whether and to what extent the proceedings are to be repeated.[45]

SIAC Rules prescribe that in the event of the death, resignation, withdrawal or removal of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed in accordance with the procedure applicable to the nomination and appointment of the arbitrator being replaced.

In the conclusion, it can be noticed that, with regard to the crucial and sometimes sensitive issue on arbitrators, the Montenegrin Rules are generally aligned to the UNICTRAL Rules. Consequently, the Montenegrin Rules are similar to arbitration rules of almost all institutions worldwide while keeping the record of all modifications applied in arbitration rules of leading arbitration institutions in the world.

Notes

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As the founder and the owner of the law office VMB, and an attorney-at-law, Mr Vesko M Božović is the president of the Montenegro Arbitration Court within the Montenegrin Chamber of Commerce, he is also a member of the LCIA, ICCA, SAC, BAC and Arb | Aut. He is a representative in the arbitration proceedings that took place before the LCIA arbitration and ad hoc arbitration, as well as in domestic arbitrations. Mr Vesko Božović is an arbitrator, not only in Montenegro, but also in arbitration institutions of other countries. Mr Božović had worked in the oldest company in Montenegro, Trebjesa Brewery, for 24 years, which is the first privatised company in Montenegro. This company became privately held by the conclusion of contracts between the state funds and the former company Interbrew of Belgium, later Anheuser-Busch InBev group. Mr Božović spent his working life in the economy, thus it is logical that his main interest was advocacy with the special focus on corporate–commercial law. He participated in the conclusion of the first Agreement on Sale and Purchase of Shares, the conclusion of licence agreements with Schweppes, the purchase of equipment and, moreover, he took part in the first land privatisation in the country. Lately, due to his long experience, he continues to provide regular and ad hoc consulting and legal service for Trebjesa Brewery and other companies that are part of the company Molson Coors – Canada.

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Cherishing the tradition of being pioneers in dealing with new legal issues in our country makes us unique. We were first in the privatisation business, intellectual property and arbitration while cooperating with offices from London, Paris, Nicosia, Belgrade, Zagreb and other cities. We emphasise that this firm has specialised in the field of franchise agreement, and in this capacity, we attended the International Franchise Fair in New York. Innovation is one of our advantages as well as recognising the primary interest of our clients, and, through mutual trust and our extensive experience and expertise, we achieve the most effective results. VMB Law Firm cooperates with renowned law firms in the region and throughout the world. We are especially pleased that in the recent years we have taken on leadership role in the development of alternative dispute resolution, with particular focus on cooperation with the arbitration centres from the region such as the German Institute of Arbitration and UNCITRAL in Vienna. Our firm had a leading role in drafting the Law on Arbitration of Montenegro, based on Model Law UNCITRAL Rules. We were also the initiators and active participants in making the rules that are applied to the arbitration before Montenegro Arbitration Court. We have cooperation with all arbitration institutions in the region; Serbia, Bosnia, Macedonia, Slovenia, Albania, Kosovo, as well as with the most important international arbitration institutions such as the London Court of International Arbitration. We follow the changes that take place in the arbitral proceedings through symposiums, conferences and joint meetings with related firms.

Netherlands

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In the Netherlands, arbitration has traditionally been the most important form of dispute resolution (along with court litigation), particularly for the resolution of construction or trade disputes. Such disputes are usually brought before the Netherlands Arbitration Institute (NAI) or the Arbitration Board for the Building Industry. The Netherlands is also renowned as a place for arbitration of international disputes. There are many reasons why the Netherlands is an attractive seat for international arbitrations; as the host state of many international courts and tribunals – including the International Court of Justice, the Permanent Court of Arbitration and the International Criminal Court, as well as many specialised arbitration institutions – the Netherlands offers a favourable legal and logistical environment for accommodating, administering and conducting international arbitral proceedings.

Recently, the Court of Arbitration for Art (CAA) was established by the NAI together with Authentication in Art, a not-for-profit foundation that promotes best practice in art, particularly in art authentication. The CAA will administer domestic and international arbitrations conducted by arbitrators with significant art and art law expertise. Another welcome addition is The Hague Hearing Centre, which recently opened its doors a short distance away from the Peace Palace. This dedicated hearing centre offers state-of-the art hearing facilities and is meant to serve various purposes including the further facilitation of international arbitration in the Netherlands while supplementing the under-capacity of the Peace Palace and the accommodation of the Dutch local division of the Unified Patent Court. A much-welcomed added benefit of seating arbitral proceedings in the Netherlands is that it has cost advantages over more expensive European venues such as Paris, Geneva or London.

Another important factor is that the Dutch legislature and the judiciary have a favourable attitude towards arbitration. Dutch arbitration law affords the parties considerable freedom to determine the rules of procedure, and the state courts take a liberal approach to arbitration. The state courts act as a safety net if issues arise that parties or arbitrators are unable to resolve, without interfering excessively in the arbitral process. They will decline jurisdiction if a party invokes a valid arbitration agreement that is applicable to the subject matter in dispute before that party raises all its other defences.

The Netherlands has a modern Arbitration Act (revised in 2015), securing efficiency and flexibility of the arbitral process by providing an extensive degree of party autonomy and limiting administrative burdens and procedural delays. The main features of the legal framework for arbitration in the Netherlands under the Dutch Arbitration Act will be discussed below. Subsequently, the most recent arbitration developments in the Netherlands will be addressed.

Legal framework for arbitration in the Netherlands

Each arbitration taking place in the Netherlands, regardless of the nationality of the parties or the subject matter of the arbitration, is subject to Book 4 of the Dutch Code of Civil Procedure (DCCP), also referred to as the Dutch Arbitration Act.[1] Most provisions are of a regulatory, non-mandatory nature. The Dutch Arbitration Act contains common provisions on the arbitration agreement, the appointment of arbitrators, the disclosure and challenge of arbitrators, procedure, witness and expert hearings, joinder and consolidation, competence–competence, the content of the award, correction and addition of the award, and recognition and enforcement.

No restrictive requirements for the arbitration agreement

All disputes are capable of being decided by arbitration, unless the subject matter would lead to legal consequences of which the parties cannot freely dispose.[2] Strictly speaking, the Dutch Arbitration Act does not impose special requirements on arbitration agreements beyond the general rules applicable to the formation of contracts. However, if an arbitration agreement is contested, its existence must be proven by an instrument in writing (or by electronic data fulfilling certain requirements). For this purpose, an instrument in writing that provides for arbitration or that refers to standard conditions providing for arbitration is sufficient, provided that this instrument is expressly or implicitly accepted by or on behalf of the other party.[3]

An arbitration agreement is considered and decided upon as a separate agreement. The arbitral tribunal has the power to decide on the existence and validity of the contract in which the arbitration agreement is incorporated, or to which the arbitration agreement is related.[4]

Remedies

The Dutch Arbitration Act distinguishes between three legal remedies that may be available to challenge an arbitral award: arbitral appeal, setting aside and revocation.

Appeal of the arbitral award to a second arbitral tribunal is possible only if the parties have agreed to this. Parties usually do not provide for the remedy of an arbitral appeal in their arbitration agreement and neither do the rules of recognised arbitration institutes. A noteworthy exception in this are the rules of the Arbitration Board for the Building Industry, which do provide for the possibility of arbitral appeal.

Recourse to a court against a final or partial final arbitral award that is not open to appeal in arbitration, or a final or partial final award rendered on arbitral appeal, may be made only by an application for setting aside or revocation.[5]

The setting aside of arbitral awards is considered an extraordinary and restricted legal remedy. The available grounds for setting aside closely resemble those laid down in the New York Convention. The court may set aside the award only if:

- a valid arbitration agreement is lacking;
- the arbitral tribunal was constituted in violation of the applicable rules;
- the arbitral tribunal has manifestly not complied with its mandate;
- the award is not signed or does not contain any reasons whatsoever; or
- the award, or the manner in which it was made, violates public policy.

The setting aside proceedings of arbitral awards are limited to a maximum of two instances. The application for setting aside must be addressed to the Court of Appeal of the district of the seat of arbitration. A legislative proposal is currently pending to institute a Netherlands Commercial Court of Appeal, an appeals court with English as its working language. Under this proposal, the Netherlands Commercial Court of Appeal can, if the seat of arbitration is located in Amsterdam and the parties so agree, hear setting aside applications in English. After the Court of Appeal has rendered a decision on the application for setting aside, the parties can appeal in cassation to the Supreme Court. The parties may, however, agree to exclude the possibility of cassation, and by doing so, limit the review by state courts to a single instance.

Revocation can be sought in case of fraud, forgery or withheld documents. However, granting this remedy is exceptional in practice.

Partial setting aside

Under the Dutch Arbitration Act, it is possible to have an arbitral award set aside only in part, provided that the remainder of the award is not inextricably linked to the part of the award that is to be set aside. In the event that the arbitral tribunal has awarded in excess of, or otherwise differently from, what was claimed, the arbitral award shall be partially set aside to the extent that the part of the award that is in excess of, or different from, the claim can be separated from the remainder of the award.[6] The Supreme Court has ruled that an application for the setting aside of an arbitral award implicitly also entails an alternative application for a partial setting aside.[7] This means that, in practice, an award may be set aside in part even where the applicant has not explicitly requested the court to partially set aside the award.

Remission

The jurisdiction of the state courts revives only if the arbitral award is set aside due to the absence of a valid arbitration agreement.[8] In the event that the award is set aside for another reason, the court will refer the case back to the arbitral tribunal.

The Dutch Arbitration Act also provides for the possibility for the Court of Appeal to suspend the setting aside proceedings to allow the arbitral tribunal to correct a wrong by resuming the arbitral proceedings or by taking another measure that the arbitral tribunal deems appropriate. Such a decision of the Court of Appeal cannot be appealed.

Recognition and enforcement

The Netherlands has signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in respect of which it has elected to enforce only awards from other contracting states – the 'reciprocity' reservation.

If no treaty concerning recognition and enforcement is applicable, or if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought, recognition and enforcement may be sought on the basis of the Dutch Arbitration Act. The grounds for refusal resemble those in the New York Convention. Leave for enforcement may be denied, if:

- the party against whom recognition or enforcement is sought asserts and proves that a valid arbitration agreement under the applicable law is lacking;
- the arbitral tribunal is constituted in violation of the applicable rules;
- the arbitral tribunal has manifestly not complied with its mandate;
- the arbitral award is still open to an appeal to a second arbitral tribunal or to a court in the country in which the award is made;
- the arbitral award has been set aside by a competent authority of the country in which that award is made; or
- the court finds that the recognition or enforcement would be contrary to public policy.

The Dutch Arbitration Act provides for an asymmetric system of appeal regarding enforcement decisions. Only decisions denying leave for enforcement can be appealed. In other words, the decision to grant leave for enforcement cannot be appealed. The rational for this is that the remedy of setting aside is considered an adequate safeguard for the party opposing recognition and enforcement. On the basis of article 3 of the New York Convention, which provides that '[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Treaty applies than are imposed on the recognition or enforcement of domestic arbitral awards,' the Supreme Court has held that the asymmetric system of appeal also applies in case of enforcement of foreign arbitral awards in the Netherlands pursuant to the New York Convention.[9]

Interim measures

The Dutch Arbitration Act contains quite distinctive provisions relating to interim measures. There are three ways for parties to obtain interim relief under the Dutch Arbitration Act. First, parties are allowed to request that an arbitral tribunal that has already been constituted takes interim measures at any stage of the proceedings on the merits.[10] The interim measures should relate to the claim or counterclaim in the pending arbitral proceedings, and shall only apply for the duration of the proceedings. Second, parties to an arbitration agreement may agree that a separate arbitral tribunal may be appointed, irrespective of the arbitral proceedings on the merits pending, with the power to award interim relief at the request of one of the parties.[11] Third, interim measures can be obtained through state court proceedings if the requested measure cannot be obtained, or cannot be obtained in a timely manner, in arbitration.[12] Only state courts can provide for prejudgment attachment or precautionary seizure. In the context of the International Chamber of Commerce (ICC) Arbitration Rules, the Amsterdam District Court held in a January 2017 decision that if interim measures can be obtained pursuant to the Emergency Arbitrator Rules, the Dutch state courts do not in principle have jurisdiction to order such measures.[13]

The provisions in the Dutch Arbitration Act regarding interim measures in arbitration are based on the strong and

long-standing Dutch tradition of *kort geding*, which can be characterised as provisional or preliminary relief proceedings before the state courts. Through these proceedings, which can be initiated prior to the proceedings on the merits, a party can obtain provisional relief for the preservation of rights or a status quo. The interim measures that are obtainable through a *kort geding* are generally much broader than those typically available in other jurisdictions. They can include, for instance, enforcement of a contract, specific performance, freezing of assets, blocking of a share transfer, payment into escrow accounts or providing a bank guarantee. Courts provide for speedy and easy access, and generally show little hesitation in granting interim measures. When the requesting party can show that the requested interim measure is of a provisional nature and that, taking the interests of the parties into consideration, an immediate interim measure is required, the court is likely to award such measure.[14] Once awarded, the requesting party is not required to initiate proceedings on the merits. The interim measure is enforceable regardless of whether further proceedings are initiated.

The stand-alone arbitral summary proceedings are a fairly unique and successful feature of NAI arbitration that has been incorporated into the revised Dutch Arbitration Act. Similar provisions were introduced in the 2012 ICC Arbitration Rules (known as Emergency Arbitrator provisions). However, there are a number of significant differences. The 2012 and 2017 ICC Arbitration Rules enable parties to seek 'urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal' (article 29 and appendix V to the 2017 ICC Arbitration Rules). By contrast, the Dutch Arbitration Act merely requires that the interim measure requested is urgent. An advantage of the Dutch Arbitration Act, therefore, is that the parties do not need to demonstrate that the relief sought 'cannot await constitution' of the arbitral tribunal. Furthermore, the ICC emergency arbitrator can only issue an order, which is not an arbitral award and for that reason arguably not enforceable under the New York Convention. The Dutch Arbitration Act, however, allows the tribunal in summary proceedings to render an arbitral award, which can be declared enforceable simply by leave of enforcement granted by the competent state court. Finally, under the 2012 and 2017 ICC Arbitration Rules, the ICC emergency arbitrator's order must be followed by arbitral proceedings on the merits at all times. Under the Dutch Arbitration Act this follow-up is not compulsory. The party seeking urgent interim relief is not required to initiate arbitral proceedings on the merits. The parties may therefore use stand-alone arbitral summary proceedings as their only means of dispute resolution, and in practice, do so on a regular basis.

It should be noted that summary arbitral proceedings are only available when the seat of the arbitration is in the Netherlands. In contrast, interim measures can be obtained through the Dutch state courts if parties are bound by an arbitration agreement, regardless of the seat of the arbitration.

Maximised party autonomy

Parties choosing the Netherlands as a forum for the resolution of their arbitral disputes enjoy broad freedom in determining the procedural rules to be followed by the arbitral tribunal in conducting the proceedings. Examples include the parties' right to exclude the authority of the arbitral tribunal to order the disclosure of documents or to order the appearance of a witness or expert.

Reduced administrative burden

The compulsory filing of arbitral awards with the District Court has been abolished by the 2015 revision of the Dutch Arbitration Act; such filing is only required if the parties have agreed to it. The possibility for parties to use electronic means where the law requires a written form has also been introduced with the revised Dutch Arbitration Act. These features help reduce the costs involved in arbitration and further enhance the competitive position of the Netherlands as a venue for both domestic and international arbitration.

Confidentiality

Although confidentiality is a generally accepted principle in arbitration, there is no specific provision for it in the Dutch Arbitration Act. The Minister of Justice, in response to questions posed by parliament on the 2015 revision of the Dutch Arbitration Act, reiterated that confidentiality is the rule and public access the exception. It nevertheless remains for the parties to decide whether to include a confidentiality provision in their arbitration agreement, to opt for a set of arbitration rules that includes such provision or request the arbitral tribunal to impose confidentiality obligations on the parties.

Challenging arbitrators

The Dutch Arbitration Act provides for the District Court to decide on the merits of any challenge to an arbitrator.[15] In accordance with international best practices, parties can agree on an alternative procedure such as authorising the arbitration institute administering the dispute to rule on such challenge.[16]

Noteworthy recent developments

The enforcement of annulled arbitral awards: Maximov v NMLK and Diag v the Czech Republic

As follows from our contributions to previous editions of *The European and Middle Eastern Arbitration Review*,[17] there is a significant amount of recent case law regarding the circumstances under which state courts can recognise foreign awards annulled at the seat of arbitration.

Article V of the New York Convention lists the exclusive grounds for refusing recognition and enforcement of an arbitral award. Recognition and enforcement 'may be refused', among others, if the arbitral award 'has been set aside . . . by a competent authority of the country in which . . . that award was made'.[18] The ambiguous 'may be refused' in article V – similar language is included in articles 1075 and 1076 DCCP – has prompted the question as to whether a court may nevertheless decide to enforce an annulled award.[19]

In the current academic debate over the enforcement of annulled arbitral awards, the *Yukos Capital v Rosneft* case is often mentioned as an example of the enforcement of a foreign arbitral award that has been set aside in the place of the seat. In that case the Amsterdam Court of Appeal granted leave for enforcement of arbitral awards that had been set aside by the Russian state courts.[20] Since the Dutch Arbitration Act provides for an asymmetric system of appeal pursuant to which only decisions denying leave for enforcement can be appealed in cassation, the decision of the Amsterdam Court of Appeal to grant leave for enforcement was not tested by the Supreme Court.

The Supreme Court had the opportunity to provide more guidance regarding the possibilities to grant leave for enforcement of an annulled arbitral award, and the room for judicial discretion in this respect, in its recent decision in the *Maximov v*

NLMK case.[21] The case concerned the attempts of Maximov to enforce an arbitral award against NMLK that had been set aside by the competent courts of the seat of the arbitration in Moscow. Notwithstanding the setting side of the arbitral award, Maximov was seeking enforcement of the arbitral award in several jurisdictions, including the Netherlands.

The Amsterdam Court of Appeal initially held that an arbitral award that has been set aside in the place of the seat of the arbitration can only be enforced in exceptional circumstances under the New York Convention as well as Dutch arbitration law.[22] The court subsequently held that there were no such exceptional circumstances present and denied Maximov leave for enforcement of the arbitral award. Maximov filed an appeal in cassation against this decision, arguing that article V of the New York Convention does not limit the enforcement of an annulled arbitral award to exceptional situations, but instead gives the competent state courts wide discretion to grant leave for the enforcement of an annulled award.

The Supreme Court upheld the decision of the Amsterdam Court of Appeal. Interpreting article V of the New York Convention in accordance with the customary rules of international law on interpretation codified in articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), the Supreme Court considered that the different authenticated translations of the New York Convention provide for diverging meanings of this provision. Whereas the English text with the phrase 'may be refused . . . only if' seems to provide the court hearing an enforcement application for an annulled arbitral award with some room for discretion, the French text rather suggests that this provision leaves no room for discretion. The Supreme Court considered that subsequent practice of states parties regarding the article's interpretation and application is equally divergent, and that the New York Convention's negotiating history, likewise, does not provide a decisive answer as to which of the different meanings should take precedence. As such, in accordance with article 33 VCLT, the Supreme Court held that the different authenticated texts are best reconciled if article V is interpreted to mean that courts enjoy some discretion in their decision to recognise and enforce a foreign arbitral award, even if one of the grounds for refusal listed in this article has materialised. The court attached weight in this regard to the fact that the purpose of the New York Convention is to further facilitate and expand the possibilities for the recognition and enforcement of foreign arbitral awards. According to the court, this interpretation is in accordance with the English text, while not excluded by the French text, since the phrase 'ne seront refuses . . . que si' should be taken to merely stress the limitative character of the grounds for refusal listed by article V. The Supreme Court agreed with the Amsterdam Court of Appeal that the discretion that accordingly exists under article V forms an exception to the general system for recognition and enforcement provided under this article, and that, as such, its use should be limited to exceptional circumstances. As examples of such exceptional circumstances, the Supreme Court mentions the case in which the foreign arbitral award has been set aside at the seat of arbitration on grounds other than those provided for by article V New York Convention, or on grounds otherwise unacceptable by international standards. Relying on the Court of Appeal's finding that no such circumstance characterised the Russian setting aside of the award that Maximov was seeking to enforce, the Supreme Court concluded that, in accordance with article V, Maximov should therefore be denied leave for enforcement.

The Supreme Court reaffirmed this approach in a subsequent decision in the *Diag v the Czech Republic* case.[23] In this case, Diag requested the recognition and enforcement of part of a series of interim, partial and final arbitral awards that had all been subject to a review procedure foreseen by the parties in the arbitration agreement. While the interim award and partial award had in relevant part been upheld upon review, the outcome of the review of the final award was the issuance of a 'resolution' discontinuing the arbitral proceedings on the ground that the partial award had exhaustively and finally settled the dispute between the parties. Consequently, the resolution explained, the partial award acquired res judicata effect, preventing further hearing of the matter, and rendering later decisions on the same issues without effect. The Amsterdam provisional relief judge, and later the Amsterdam Court of Appeal, therefore denied Diag's request for the recognition and enforcement of the final award, which as a result of the resolution could no longer qualify as a valid, final and binding arbitral award susceptible to recognition and enforcement in accordance with article III New York Convention. Diag appealed this decision in cassation, arguing (among other points) that the Court of Appeal had wrongly relied on article III of the New York Convention, whereas it should have based its decision on and should have granted leave for enforcement pursuant to article V(1)(e) of that convention. The Supreme Court, however, upheld the decision of the Amsterdam Court of Appeal. It considered that even if the Court of Appeal had based its decision on article V(1)(e) of the New York Convention, it would still have reached the same conclusion. In the Supreme Court's view, the effect of the resolution was the setting aside of the final award, and the recognition and enforcement of this award should therefore, in accordance with article V(1)(e), in principle be refused. No meaning should be attached in this regard, the Supreme Court considered, to the fact that the resolution did not explicitly state that its effect would be the setting aside of the final award. The Supreme Court continued, confirming its decision in *Maximov v NLMK*, that in exceptional circumstances the Court of Appeal nevertheless could have decided to recognise and grant leave for the enforcement of the final award. It concluded, however, that Diag had not argued for this exception, and that in any case it did not consider that any such circumstance had occurred in the present case.

Ecuador v Chevron and TexPet

A case worth mentioning is *Ecuador v Chevron and TexPet*. From the 1970s until the early 1990s, TexPet operated a consortium for the exploration and extraction of oil in Ecuador. Following its withdrawal from Ecuador, a group of indigenous people claimed to have suffered damage resulting from severe environmental pollution. The indigenous people first lodged proceedings in New York, but after TexPet had successfully sought the dismissal of those proceedings on forum non conveniens grounds, the claimants refiled their action in the Lago Agrio Court in Ecuador. In 2009, Chevron and TexPet started an arbitration in The Hague under the US–Ecuador Bilateral Investment Treaty, claiming that the Lago Agrio proceedings breached Chevron's and TexPet's rights under a settlement agreement with Ecuador. Later, Chevron and TexPet added a due process complaint, alleging that the indigenous people were supported by Ecuador, and that the Lago Agrio proceedings were tainted by fraud. Until now, the arbitral tribunal has declined to make any substantive decision on these due process allegations.

In February 2011, by way of a procedural order, the arbitral tribunal ordered Ecuador to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against Chevron in the *Lago Agrio* case. Later that month, the Lago Agrio Court awarded a multibillion-dollar judgment against Chevron. That judgment became enforceable when Chevron's appeal was rejected by an Ecuadorian court of appeal. At Chevron's request, the tribunal subsequently converted its procedural orders into two interim awards, and made it explicit that its orders were also directed to the Ecuadorian judiciary. After the indigenous people had sought to enforce the Lago Agrio judgment in Argentina, Brazil and Canada, the arbitral tribunal declared that Ecuador had violated these two interim awards because Ecuador, including its judicial branch, had not prevented the enforcement of the Lago Agrio judgment by the indigenous people.

In January 2014, Ecuador requested the setting aside of four interim awards and the first partial award. For the arbitration community, two of Ecuador's grounds for setting aside are particularly interesting. Ecuador argued that, even if a valid arbitration agreement existed, the power under the BIT to adjudicate on the state liability of Ecuador does not bring with it the power to give binding instructions on how to resolve civil proceedings between private parties pending in its courts. Ecuador also argued that the tribunal cannot lawfully decide on the right of the indigenous people to enforce the *Lago Agrio* judgment, without them being a party to the arbitration.

The Hague District Court largely overstepped these legal issues and justified any adverse effects of the interim awards on the rights of the indigenous people on the basis of special circumstances. The District Court considered that the arbitral tribunal must have had serious indications that Chevron's and TexPet's fraud allegations were true. According to the District Court, the arbitral tribunal therefore did not exceed its mandate, nor do the awards violate public policy within the meaning of article 1065 DCCP.

The decision of The Hague District Court was upheld by The Hague Court of Appeal in its decision of 18 July 2017.[24] The Court of Appeal held that the arbitral tribunal's interim measures did not violate public order, because the interim measures did not require Ecuador to exert any influence over the Ecuadorian courts in respect of the outcome of any legal proceedings or on the content of any judgment rendered. An order directed at a state to (merely) suspend or to have suspended a judgment does not in itself violate public order, in the Court of Appeal's view. Although the Court of Appeal acknowledged that the interim relief measures imposed by the arbitral tribunal may well have adversely affected the Ecuadorian citizens who have an interest in execution of the *Lago Agrio* judgment and who may have suffered losses as a consequence of the suspended execution, this, according to the Court of Appeal, does not imply that the arbitral tribunal should have refrained from the contested interim relief measures. According to the Court of Appeal, the arbitral tribunal's interim measures imposed the (implicit) obligation on Ecuador to take the rights and interests of the Ecuadorian citizens into account in the execution of the interim measures.

The decision of The Hague Court of Appeal is currently under cassation appeal. It is expected that the Supreme Court will decide the cassation appeal in late 2018 or at the latest by early 2019.

Notes

1 For an extensive commentary on important elements of arbitration law in the Netherlands, see B van der Bend, M Leijten and M Ynzonides (eds), *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law*, Kluwer Law International, 2009. A new edition, incorporating the revision of the Dutch Arbitration Act, is forthcoming.
2 Article 1020 DCCP. Restrictions may apply in cases concerning, eg, intellectual property rights, bankruptcy law and company law.
3 Article 1021 DCCP.
4 Article 1053 DCCP.
5 Article 1064 DCCP.
6 Article 1065(5) DCCP.
7 Supreme Court, 25 April 2009 (International Military Services/Iran II), NJ 2010/171, ECLI:NL:HR:2009:BH3137.
8 Article 1067 DCCP.
9 Supreme Court, 25 June 2010, case No. 09/02566, ECLI:NL:HR:2010:BM1679, NJ 2012/55 and Supreme Court, 31 March 2017, case No. 16/02825, ECLI:NL:HR:2017:555.
10 Article 1043b(1) DCCP.
11 Article 1043b(2) DCCP.
12 Article 1022a DCCP.
13 District Court of Amsterdam, 12 January 2017 (*Cygne/COFCO*), ECLI:NL:RBAMS:2017:282.
14 An award may be rendered within a matter of days after submission of the request.
15 Article 1035(2) DCCP.
16 Article 1035(7) DCCP.
17 *The European and Middle Eastern Arbitration Review*, 2011–2017 editions.
18 Article V paragraph 1 sub (e) of the New York Convention.
19 See also B Van der Bend, M Leijten and M Ynzonides (eds), *A Guide to the NAI Arbitration Rules: Including a Commentary on Dutch Arbitration Law*, Kluwer Law International 2009, p 312.
20 Amsterdam Court of Appeal, 28 April 2009, case No. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5.
21 Supreme Court, 24 November 2017 (*Maximov/NLMK*), TvA 2018/16, ECLI:NL:HR:2017:2992.
22 Amsterdam Court of Appeal, 27 September 2016, ECLI:NL:GHAMS:2016:3911.
23 Supreme Court, 15 June 2018 (*Diag/ The Czech Republic*), ECLI:NL:HR:2018:918.
24 The Hague Court of Appeal, 18 July 2017, ECLI:NL:GHDHA:2017:2009.

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Norway

Gaute Gjelsten, Aadne M Haga and Ola Ø Nisja
Wikborg Rein

Norway has established itself as a source of high-quality counsel and arbitrators for international disputes, in particular in the petroleum and shipping industries. The Norwegian Oil and Energy Arbitration Association aims to make this competence visible and available worldwide. Norwegian arbitration law also has some unique features that may prove attractive for those seeking arbitrators with highly specific fields of competence. Historically and today, ad hoc arbitration was the norm in Norway. The Oslo Chamber of Commerce (OCC) aims to increase the popularity of institutional arbitration with new, modern rules. Similarly, the newly established Nordic Offshore and Maritime Arbitration Association (NOMA) offers institutional arbitration with a light touch, as well as best practice guidelines for those who still prefer ad hoc arrangements.

Norwegian excellence in oil and gas disputes

Since 2013, lawyers from Norwegian law firm Wikborg Rein (including one of these authors) have made a mark on the pages of *GAR* with the successful representation of European buyers of natural gas,[1] most remarkably as lead counsel to Ukrainian Naftogaz in their multibillion-dollar disputes with Gazprom. The observant reader may have wondered why a Norwegian law firm represents a Ukrainian company in disputes with no relation to Norway; the parties are Ukrainian and Russian, the governing law and arbitration venue are Swedish, and the goods and services traded originate in Central Asia, Russia and Ukraine. Equally, other observers of the global oil and gas industry may have wondered why another Norwegian law firm played a key role in negotiating an agreement on oil processing and transportation between Sudan and South Sudan in 2012.[2]

The answer is found in Norway's development as a major producer of oil and gas since the early 1960s. As late as February 1958, Norway's Geological Survey reported that '[o]ne can exclude the possibility of finding coal, oil or sulphur on the continental shelf bordering the Norwegian coastline'.[3] A more amusing, but possibly mythical, twist on the same theme is the story about the head geologist of a major oil company who, in the mid-1960s, quipped that he would drink all the oil that would be found on the Norwegian continental shelf.[4] However, that pessimistic view on North Sea geology started to change with the 1959 discovery of the Groningen gas field in the Netherlands, and in 1962 Phillips Petroleum Company requested exploration rights from the Norwegian government.[5]

The government immediately went about to establish a legal basis for the administration of the (potential) petroleum resources on the Norwegian Continental Shelf, starting with a 1963 Royal Decree, and the rest is, as they say, history. Today, Norway is the eighth-largest producer of oil and the third-largest producer of gas in the world.[6]

Norway was also a wealthy, democratic and highly developed industrial country even before it became a producer of oil and gas. Norway's well-established shipping and ship-building industry took advantage of the opportunities provided by the exploration and production of the new-found natural resources, and branched out into the oil and gas service and supply industry. Norway's service and supply industry has also developed cutting-edge expertise and is internationally competitive.[7]

And like the 'nuts and bolts' part of the Norwegian oil and gas service industry, its lawyers could also benefit from their colleagues in the shipping industry, who had led the way in the internationalisation of the Norwegian legal profession. For example, Wikborg Rein established the first foreign office of any Norwegian law firm in New York City in 1956, serving Norwegian insurers and shipowners.[8]

Finally, the development of the Norwegian oil and gas industry went in parallel with developments in the public international law of the sea and natural resources, where Norway's geography and maritime resources led it (and its lawyers) to play a central role. Many readers may, for example, be familiar with the 1993 International Court of Justice judgment on maritime delimitation between Jan Mayen (Norway) and Greenland (Denmark), or the 1976 Norway–UK treaty on cross-border unitisation of the Frigg Field.

Against this background of more than 50 years of building oil and gas industry competence on the back of a well-established maritime industry, it is probably unsurprising to see Norwegian lawyers retained in international oil and gas disputes for their cutting-edge expertise, rather than due to a need for local counsel.

The Norwegian Oil and Energy Arbitration Association

In November 2013, a group of Norwegian lawyers with extensive experience in dispute resolution established the Norwegian Oil and Energy Arbitration Association (NOEAA). The NOEAA is not an arbitration institute, but rather a professional organisation which aims to promote the expertise of Norwegian oil and gas lawyers as arbitrators, mediators and counsel in disputes worldwide, as well as Norway as a venue for arbitration.[9]

Membership in the NOEAA is subject to certain minimum requirements in respect of expertise and experience. Information about the members' qualifications are available at NOEAA's website.

Norway as a venue for arbitration and enforcement

Norway is a politically stable, democratic and transparent society that shares a third place with Finland and Switzerland on Transparency International's Corruption Perceptions Index 2017.[10] Interrupted only by the occupation in 1940–45, Norway has been a parliamentary democracy since 1884 with universal suffrage since 1913. The courts are and are perceived to be independent and foreign players can successfully challenge the 'national champions', as shown for example by China Oil Field Services Limited's recent victory against Statoil (now Equinor) in a rig contract termination dispute in Oslo City Court.[11]

Norwegian law can be described as based on civil law with strong common law influences.[12] The Norwegian Arbitration Act from 2004[13] (the NAA) is based on the 1985 UNCITRAL Model Law. Norway ratified the 1958 New York Convention in 1961, and arbitral awards may generally be enforced in the same manner as domestic judgments, in practice regardless of where they have been handed down.[14]

Practically all Norwegians with higher education are fluent in English. An arbitral award that has been rendered in English, Danish or Swedish does not have to be translated for the court to recognise and enforce it.

Joint appointment of arbitral tribunals as the default rule

In addition to the generally 'arbitration-friendly' features described above, Norwegian arbitration law has a particular feature that may be of particular interest for parties seeking arbitrators with highly specific competence, namely the joint appointment of arbitral tribunals.

Pursuant to section 13, second paragraph of the NAA, '[t]he parties shall appoint the arbitrators jointly, if possible'. The NAA provides for a procedure where each party appoints one arbitrator only if the parties fail to do so. Both procedures may be deviated from by agreement.

This procedure seems to be a specifically Norwegian invention. Joint appointment of arbitrators is not found in the UNCITRAL Model Law, in the Swedish or Danish Arbitration Acts, the German Code of Civil Procedure, the 1996 Arbitration Act for England, Wales & Northern Ireland, or any institutional rules the authors are familiar with, other than the Rules of the Arbitration and Dispute Resolution Institute of the OCC (since 2005) and the 2017 Rules of the Nordic Offshore & Maritime Arbitration Association.

Internationally, the default rule appears to be that each party appoints one arbitrator, and that the arbitrators so appointed, or the arbitral institution, appoints the chairperson. That was also the rule in Norway prior to the NAA in 2004.

The reason for the rule on joint appointment of arbitrators in section 13 NAA is simple and attractive:

> *It is advantageous if the parties can agree on the arbitral tribunal in its entirety. The tribunal then gets generally less attached to the parties and a stronger character of independence than when the parties appoint one arbitrator each.*[15]

The arrangement has been well received in practice, and parties increasingly appoint all arbitrators jointly in Norwegian-based arbitrations.[16] The adoption of the rule by NOMA also seems to attest to its success.

In an international context, the importance of this salient feature of Norwegian (and perhaps Nordic maritime) arbitration is that it proposes a possible solution to the 'repeat appointment' problem within highly specialised fields of law.[17]

Most legal systems, rightly, appreciate that repeated appointments by the same party, counsel or law firm of the same person as arbitrator may create doubts concerning that person's impartiality and independence. In the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (2014) this rule has been codified in sections II, 3.1.3 and 3.3.8, concerning party and counsel appointments respectively.

Numerous and frequent appointments by one party of one person may reasonably create the impression that the person appointed has some kind of special sympathy for the appointing party. If arbitrator fees from one party, or channelled through one counsel or law firm, constitute a significant share of a person's income, that person's independence may be at risk. The flip side of that coin is that highly qualified arbitrators within highly specialised areas of law with a small number of actors risk becoming victims of their own success, and risk being excluded from the field just as they have accumulated the experience necessary to solve seemingly complex disputes correctly and efficiently.

At least to some extent, the consistently joint appointment of arbitral tribunals envisaged by section 13 NAA (and equivalent provisions in the OCC and NOMA Rules) may resolve the above dilemma. The point is that, if handled appropriately, a joint appointment should seriously reduce the risks concerning arbitrators' impartiality or independence outlined above.

The Stockholm Court of Appeal, which handles all challenges of awards rendered in Stockholm-seated arbitrations,[18] has reasoned that even if the parties are given a measure of influence on the selection of the chairperson, because the party-appointed arbitrators usually consult with 'their' appointing party or counsel during the process, such appointments as chairperson shall not count as party appointments for the purpose of assessing the arbitrator's impartiality and independence.[19] That reasoning should hold true also for a jointly appointed tribunal.

The ad hoc tradition and the shift towards more institutional arbitration

Traditionally, most arbitrations in Norway have been ad hoc, in the sense that no arbitration institute is involved. The tribunal will base itself on the NAA, which leaves quite a bit of discretion with the tribunal. This ad hoc tradition has worked well, but has at the same time been unfamiliar with international players present in Norway. For anyone not knowing the Norwegian arbitration market well, ad hoc arbitration can be perceived as something of a 'black box'.

Thus, one shift seen in Norway is that international arbitration institutions, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration, the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Centre and the China International Economic and Trade Arbitration Commission, are seen more often. Along with the general trend that these institutions have modernised themselves and their rules, the common view among the leading dispute lawyers is no longer that such institutes are necessarily slow and expensive. For instance, quite to the contrary, the ICC and SCC's scrutiny of costs are viewed as very positive by the users of arbitration.

Based on this general trend, it would have been surprising if one wouldn't see growth and development of institutional arbitration in Norway.

The new rules of the Oslo Chamber of Commerce

The only truly Norwegian arbitration institute is the Arbitration and Dispute Resolution Institute of the OCC. The OCC's new rules for arbitration and mediation came into force from 1 January 2017.[20] With modern regulation such as a cap on costs, joint appointment and a very accessible form of fast-track arbitration, the institute has taken a step up in the international arbitration community. The rules give a good basis for sleek and cost-effective arbitrations, and have been very positively received within the dispute resolution community.

The NOMA Rules

Norway and the Nordic countries have strong traditions within the maritime and offshore oil and gas industries. These industries have, however, always had a strong link to London, including when it comes to resolving disputes through arbitration. The Nordic countries have long traditions for settling disputes within the maritime and offshore industry by arbitration. In the globalised shipping and offshore oil and gas industry, the Nordic industry and the Nordic legal community recognised that it would be useful to develop an even more common approach to Nordic arbitration. In this context, the Nordic Maritime Law Associations together with the industry has developed the Rules of the Nordic Offshore and Maritime Arbitration Association, in order to promote transparent and cost-efficient arbitrations.

The project, where lawyers from Norway, Sweden, Finland and Denmark decided to sit down and develop one Nordic set of arbitration rules to be used throughout the Nordic countries was ambitious. But they made it. The Nordic Offshore and Maritime Arbitration Association was established 28 November 2017 on the initiative of the Danish, Finnish, Norwegian and Swedish Maritime Law Associations.

A high-quality set of rules[21] has been developed and is already in use. Today, NOMA can be described as semi-institutional, but given its increasing popularity, it appears likely that a secretariat will be established at some point.

The NOMA Rules emphasise speed and simplicity, and take a light touch approach to institutional arbitration.

In terms of speed and efficiency, the NOMA Rules have shorter time-limits and omits certain procedural steps compared to the UNCITRAL Arbitration Rules on which they are based. For example, the deadlines for appointing arbitrators are shorter, and there is no requirement for a response to the notice of arbitration.

Further, the possibility to request an interpretation of an award from the tribunal has been removed, eliminating another possibility for delays. Obviously, this also requires the parties to present clearly formulated requests for relief, and the tribunal to draft the award succinctly and clearly, and hence front-loads possible clarification issues to the arbitral proceedings as such.

The NOMA Rules also lack an explicit provision on tribunal-appointed experts. This reflects the adversarial tradition in Nordic dispute resolution, where it is for the parties to adduce the evidence, and may also save on time and costs by avoiding debates over the need to appoint such experts and their potential terms of reference.

A final point where the NOMA Rules take a light touch approach to institutional arbitration and goes against the international trend towards ever-increasing powers for arbitral institutes, is the lack of explicit provisions on consolidation. To many, this may be a welcome deference to party autonomy.

In addition to the arbitration rules as such, NOMA has developed three further documents aimed at promoting efficiency:

- the NOMA Best Practice Guidelines (the Guidelines);
- the NOMA Matrix (the Matrix); and
- the NOMA Rules on the Taking of Evidence (the Rules).

The Guidelines are attached to the Rules, which provide that the tribunal and the parties shall perform the arbitration taking into account the Guidelines. However, the Guidelines may also be used on a stand-alone basis, as an expression of commonly accepted practice in Nordic-seated arbitrations.

The Guidelines are intended to assist tribunals and parties on certain procedural points. For example, the Guidelines list issues to be considered in relation to or at the case management conference. These include whether:

- time should be allocated for settlement discussions;
- a written procedure is possible; and
- written witness statements or expert reports are necessary.

The Guidelines also contain default procedural deadlines and a default structure for the oral hearing.

The Matrix is a more detailed, tabular checklist of matters to be discussed and agreed at the case management conference. For each matter, the Matrix indicates the best practice and, for some matters also practical recommendations.

The Rules are simpler than the International Bar Association Rules on the Taking of Evidence in International Arbitration. This reflects the Nordic tradition of immediacy and emphasis on oral evidence, and scepticism to discovery procedures. Notably, the default rule is that written witness statements shall not be used. Also, while there is a possibility to request documents from the other party, the tribunal may not order document production unless the parties agree or the tribunal decides otherwise.

In the authors' experience, the NOMA Rules are already finding their way into numerous contracts in the Nordic shipping and offshore oil and gas industry. This is not least due to the involvement of the Nordic Maritime Law Associations in the development of the Rules and the support of the industry itself. For example, both the Norwegian[22] and Danish[23] shipowners' associations have welcomed the launching of the Rules.

Whether the Guidelines, Matrix and Rules will find their way into the toolbox of counsel and arbitrators as sources of best practice beyond proceedings under the NOMA Rules and the Nordic shipping and offshore oil and gas industry remains to be seen. Based on the widespread adoption of similar instruments like the International Bar Association's various rules and guidelines by the arbitration community, our expectation is that they will do so.

Notes

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Wikborg Rein is an international law firm with headquarters in Oslo and offices in Bergen, London, Singapore and Shanghai. Our lawyers have expert knowledge in most disciplines and industries. Providing clients with first-class legal assistance is the firm's top priority. Through our 100 years of history, we have gained a unique international experience, and we are highly ranked in leading international legal ratings, such as *Chambers and Partners* and *The Legal 500*. Our purpose is to cultivate the sharpest minds in order to make an impact on business and society.

Wikborg Rein was founded as a one-man shipping law firm in Oslo in 1923 by Erling Wikborg, later Norway's foreign minister. The other named partner, Norwegian resistance fighter Alex Rein, joined after the end of the Second World War. The firm expanded to cover energy, banking and other industries as the firm followed its Norwegian clients abroad. It opened an office in London in 1987 and set up outposts in Singapore and Shanghai in the early 2000s.

International arbitration has therefore been part of the fabric of the firm from the very beginning, with shipping disputes still a mainstay of the practice.

In 2010, the London office recruited three experienced English disputes lawyers from city firms: Clare Calnan, Chris Grieveson and Robert Jardine-Brown. Two further partners joined in London in 2016, Mike Stewart from K&L Gates and Nick Shepherd from Ince & Co, both with substantial arbitration experience. The firm is the only Norwegian firm with a significant English law dispute capability.

Poland

Beata Gessel-Kalinowska vel Kalisz, Natalia Jodłowska, Joanna Kisielińska-Garncarek and Konrad Czech
GESSEL

Is Poland an arbitration-friendly place? How does one avoid the pitfalls of Polish law? How are challenge and enforcement proceedings conducted? When is an arbitral award likely to be set aside by a Polish court? Many foreign practitioners may pose these, and similar, important questions while considering Poland as an arbitration venue. In order to dispel these doubts and to give readers an overview of the Polish arbitration landscape in recent months, we would like to tackle several areas: assessment of the 2016 reform of the Polish Code of Civil Procedure; legislative changes in the field of investment arbitration; the most interesting cases in arbitration-related proceedings; as well as activities aimed at the popularisation of arbitration in Poland.

Legislative changes

Polish arbitration reform from a two-year perspective

The consequences of significant changes introduced to Polish arbitration law on 1 January 2016 might be observed from a longer perspective at the turn of 2017 and 2018.

The amendments to Part V of the Polish Code of Civil Procedure regard challenges to arbitral awards before state courts, as well as recognition and enforcement proceedings. First, the deadline for filing challenges to arbitral awards has been shortened from three to two months. Second, the Polish legislature decided to 'flatten' the post-arbitral proceedings by eliminating one court instance. Currently, applications to set aside an award and to recognise and enforce it may be submitted only to a court of higher instance, ie, the Court of Appeal. In limited circumstances, recourse against a judgment of the Court of Appeal is available before the Polish Supreme Court in cassation proceedings – solely on grounds encompassing infringements of substantive law or infringements of procedural law, if the infringement could have affected the result of the proceedings. Additionally, the case must involve an important legal question that requires the Supreme Court's ruling, that the complaint is obviously justified or that the proceedings were void.

Prior to 1 January 2016, post-arbitral proceedings were held in two instances, with limited possibilities to file a complaint in cassation to the Supreme Court. This two-instance system made the proceedings considerably lengthy and inefficient, particularly bearing in mind the need for speed in both international and domestic arbitration. Therefore, the main purpose of the above-mentioned legal reform was to shorten post-arbitral proceedings and to improve the quality of state court rulings. The 11 Courts of Appeals functioning in Poland are now expected to develop more expertise in arbitration-related cases, gain more experience in this field and to make relevant jurisprudence more consistent. In other words, Poland as a place for arbitration shall be more friendly and more predictable for parties making such a choice in arbitration clauses. Analysis of recent judgments and post-reform statistics might reflect whether this aim was, or is going to be, accomplished.

1 January 2016 also brought a significant amendment affecting arbitration in Poland in the realm of Polish bankruptcy law. Under the previous regulations, all arbitration clauses executed by a party that has since become insolvent lost their effect, and all arbitration pending at the time of initiation of bankruptcy proceedings had to be terminated. Following the 2016 amendment, arbitration clauses concluded by an insolvent debtor remain in force and pending arbitration proceedings may be continued; if arbitration is not commenced before the declaration of bankruptcy, such a possibility remains open. This amendment of Polish bankruptcy law has been welcomed by Polish arbitration practitioners.

Post-reform setting aside statistics

According to official statistics of the Ministry of Justice,[1] attempts to set aside arbitral awards have been successful in only a very small percentage of cases. In 2016, 56 applications to challenge arbitral awards were submitted, 21 of which were decided in 2016. Only two arbitral awards were set aside by the Courts of Appeal.

In 2017, 76 challenge proceedings were initiated before the state courts. The Courts of Appeal rendered 96 rulings, including decisions in outstanding cases from the year 2016. Only six arbitral awards were annulled as a result of these proceedings.

An important conclusion might be drawn from the presented statistics made available by the Ministry of Justice. Namely, over a two-year-period, only 6 per cent of arbitral awards (ie, eight out of 132 challenged by the Parties) were set aside by the Courts of Appeal. These statistics show that state courts are not eager to set aside the arbitral awards, which makes the arbitral awards relatively stable and increases confidence of the parties in Poland as a place of arbitration.

Extraordinary complaint

On 3 April 2018, a new statute on the Polish Supreme Court came into force. The bill introduced a new legal instrument into the Polish legal field: an extraordinary complaint. Although this new instrument does not refer directly to arbitration proceedings, but might be applied to different kind of procedures before Polish state courts, it may affect post-arbitration proceedings as well.

Pursuant to the new statute, the extraordinary complaint might be submitted against a final award of a state court if it is necessary for the protection of the public order and social justice, in case the award may not be set aside or changed by means of any other extraordinary legal instruments, as well as if:

- the award violates the rules or freedoms and rights of citizens and individuals specified in the Polish Constitution;
- the award grossly violates substantive law involving the misinterpretation or misapplication thereof; or
- there is obvious contradiction between significant finding of the court and content of evidence gathered in the case.

The extraordinary complaint might be submitted solely by the General Prosecutor, the Ombudsman or, within the scope of their competence, the President of the State Treasury Solicitor's Office, the Ombudsman for Children, the Patient Ombudsman, the Chairman of the Financial Supervision Authority, the Financial Ombudsman, the Ombudsman for small and medium-sized enterprises, and the President of the Office of Competition and Consumer Protection. The extraordinary complaint might be submitted within five years after the contested award has become final or, if the cassation complaint has been filed in the relevant case, within one year after the cassation complaint has been decided by the Supreme Court. In addition, in the course of three years after the entry into force of the new bill, the extraordinary complaint might be submitted also against rulings that became final after 17 October 1997. The extraordinary complaint is decided by the separate division of the Supreme Court.

The new regulation has been widely criticised by the Polish legal community. Due to its novelty, no extraordinary complaint has yet been recognised by the Supreme Court.

Goodbye to intra-EU BITs

The judgment of the Court of Justice of the European Union (CJEU) of 6 March 2018 in case *C 284/16 Slovak Republic v Achmea BV* triggered a discussion of the future of intra-EU bilateral investment treaties (BITs) among Polish arbitration practitioners. However, even before the aforementioned judgment, and following recommendations of the European Commission, significant legislative changes in the field of arbitration might have been observed in Poland as regards investment arbitration (ie, in 2017 Poland started terminating intra-EU BITs). Combined with the outcome of the *Achmea* case, this begs the question of the availability of treaty protection to foreign investors from the EU member states.

After Italy (2012) and Ireland (2013) terminated their intra-EU BITs, and after it was reported that the president of Romania submitted to Romanian parliament draft legislation approving the termination of Romania's intra-EU BITs (2015), it was reported (in February 2016) that the Polish government would likewise review the usefulness of its intra-EU BITs, bearing in mind their likely incompatibility with EU primary law. In January 2017, the prime minister of Poland issued regulation by which a special working group was formally appointed to this end.

During 2016 and 2017, several sources reported that Poland was considering the mutual termination of its intra-EU BITs with the Czech Republic, Denmark, Estonia, Latvia and Romania. None of the official sources of legal information have so far reported their termination, however. Having said that, in September 2017, a bill was announced that empowered the president of Poland to unilaterally terminate the intra-EU BIT with Portugal and, in November 2017, a notice of the termination of the intra-EU BIT with Portugal was issued. Moreover, in April and June 2018, a number of similar bills empowered the president of Poland to unilaterally terminate the intra-EU BITs with Austria, Belgium and the Grand Duchy of Luxembourg, Bulgaria, France, Croatia, Cyprus, Germany, Greece, Finland, Hungary, Lithuania, the Netherlands, Spain, Sweden and the United Kingdom. The notices of termination of those intra-EU BITs have not been published in the *Journal of Laws* yet. However, their publication can be expected soon. This means that most of the intra-EU BITs will be terminated by Poland within the next couple of months.

The justifications of the respective bills emphasise that the European Commission has requested that all EU member states terminate their intra-EU BITs. The Polish government also emphasised the fact that the termination of bills would not have negative implications for the economic relationships between Poland and other EU member states, including the volume of foreign direct investments in Poland and the volume of Polish direct investments abroad. According to the Polish government, the intra-EU BITs have outlived their useful function already during the transition period after 1989 and are no longer necessary after 2004. Interestingly, none of the five national commercial chambers that were approached by the Polish government to comment on the plan to terminate the intra-EU BITs stood firmly against that move. The chambers considered the intra-EU BITs to be helpful for Polish business enterprises (even though they rarely launch investor-state arbitrations) but, at the same time, the social partners duly noted the EC position on the intra-EU BITs in the process of preparatory consultations. Therefore, it appears that the *Achmea* case was only a nail in the coffin of Poland's intra-EU BITs – which, after Poland joined the EU in 2004, generated 13 intra-EU disputes against Poland and caused a further two disputes launched by Polish investors against EU member states – although it did not constitute the direct (or only) reason for their termination.

What implications will the termination of the intra-EU BITs have on the rights of foreign investors in Poland? In the short term, realistically, any changes caused by termination of the intra-EU BITs considered by itself are unlikely to be dramatic to foreign investors. This is to say, during the notice period as stipulated in the intra-EU BITs, all the obligations assumed by Poland thereunder will remain in force. Moreover, most of the intra-EU BITs contain sunset clauses that prolong the treaty protections (however, in the cases of the mutual termination of intra-EU BITs with the Czech Republic, Denmark, Estonia, Latvia and Romania, one can assume that the relevant sunset periods may be shortened).

As proved by the *Airbus* case, which has withdrawn its intra-EU investment treaty claim against Poland over a cancelled contract with the Ministry of Defence, it is the *Achmea* ruling (referred to by the government in its announcement summarising the *Airbus* decision), rather than the termination of the intra-EU BITs itself, that is keeping investors awake at night. Enforceability of awards issued on the basis of intra-EU BITs in the EU member states, including Poland, has become questionable after *Achmea*.

Significant case law

Below, we present several interesting decisions rendered by Polish courts in 2017 and 2018, including precedent-setting rulings, decisions confirming positions consistently presented by the Polish courts, as well as solutions of problems not tackled in Polish arbitration practice so far.

Wide scope of arbitration clause

Polish courts take an arbitration-friendly stance as regards the validity of arbitration clauses. In its decision of 21 November 2017, case *No. I ACz 1823/17*, the Court of Appeal in Cracow confirmed the validity of an arbitration clause according to which all disputes that have any relation to the relevant agreements shall be referred to arbitration.

In this case, the Court of Appeal refused to decide the case submitted to a state court due to the existence of the arbitration agreement whose validity was denied by a claimant. The claimant alleged that the dispute resolution clause was too broad and failed to identify an arbitrable dispute. The Court, following previous judicial authority on the matter, decided that a dispute resolution clause in an agreement is generally considered to cover all disputes

that arise in connection with, or out of, the legal relationship that might be identified. The court also confirmed that, where the parties referred disputes arising out of a contract to arbitration, the arbitral tribunal is competent to decide all claims regarding the performance of the contract, non-performance or improper performance of that contract, reimbursement of unjust enrichment occurring in the event of invalidity or termination of the contract, as well as tort claims arising from events that constitute also non-performance or improper performance of the contract.

This judgment is bound to be warmly welcomed by the arbitration community. This broad interpretation of the arbitration clause must be assessed as an arbitration-friendly approach of the state courts, enabling realisation of the parties' intent to submit their dispute to arbitration to the broadest possible extent.

No substantive re-settlement of the dispute in setting aside proceedings

It is also well established in Polish jurisprudence that in the course of proceedings for setting aside an arbitral award, a general court does not examine appropriateness of the manner of dispute resolution adopted by the arbitral tribunal, in particular as regards assessment of the evidence or correctness of the facts established. In other words, the proceedings for setting aside an arbitral award do not lead to substantive reconsideration of the dispute between the parties to the arbitration.

The above position was upheld by the Polish Supreme Court in its judgment of 24 May 2018 in case *No. V CSK 6/18*. An application for the setting aside of the arbitral award was made by the respondent in arbitral proceedings, who cited the public policy clause in the context of an evidentiary agreement concluded between the parties.

It was stressed by the Supreme Court that the public policy clause, having as it does a general character and leaving wide discretion to the state court, does not entitle this court to re-examine the case pending earlier before the arbitral tribunal. While applying the public policy clause, the state court is not entitled to assess whether the judgment is consistent with all applicable legal provisions. Only the fundamental rules of the Polish legal order might be taken into account, without substantive evaluation of the decision rendered by arbitral tribunal. The procedural public legal order might be taken into account in two aspects: compliance of steps leading to issue of the arbitral award with basic procedural rules of legal order; and compliance of the arbitral award's effects with basic rules of procedural order (such as res iudicata).

The above judgment upholds the existing line of rulings concerning public policy clause and the extent of setting aside proceedings. Dotting the final 'i' by the Supreme Court in this regard increases the stability of jurisprudence and builds confidence among entities choosing Poland as the place of arbitration.

Detriment to a third party as a basis for refusal to enforce an arbitral award

Following the approach that general courts do not examine the merits of the case in setting aside proceedings, one may pose a question in what kind of situations arbitral awards are likely to be challenged or refused to be enforced in Poland. In its decision of 19 March 2018, case *No. V AGo 3/18*, the Court of Appeal in Katowice refused to enforce an arbitral award due to possible detriment to a third party, contradictory to public policy clause.

In the view of the Court of Appeal, the business activities conducted by and between the parties to the arbitration were questionable as to their factual goals and legal effects. The Court ruled that there was no real dispute between the parties and that the conduct of the parties was in fact meant to hinder enforcement conducted by other creditors against one of the parties to the arbitration. As a consequence, enforcement of the award would be detrimental to third parties (the other creditors) and, therefore, circumvent the applicable law.

The Court of Appeal indicated that, within the scope of the public policy clause, a court is empowered to verify the existence and validity of the acknowledgement of debt that constituted the basis of an arbitral award. The purpose of the public policy clause is not to protect the interests of a party to arbitration, but to protect the state's public order.

Lack of diligent consideration of the case as grounds for setting aside the arbitral award

Despite the fact that, as a rule, the state court is not entitled to re-examine the arbitration case, the award might be set aside in Poland if the arbitral tribunal has failed to diligently consider the substance of the case, as set forth in the Supreme Court's decision of 7 February 2018, case *No. V CSK 301/17*.

The application to set aside the arbitral award cited lack of diligent consideration of the case and of the gathered evidence, as well as incorrect apportionment of the burden of proof, which led to the violation of public policy clause. The Supreme Court, admitting that the application was justified and that the arbitral award should be annulled, pointed out several important issues.

The evidence submitted by parties to the arbitral proceedings shall be assessed within the arbitral award regardless of whether it supports the final decision of the tribunal or not – it enables the parties and the state courts to retrace the reasoning of arbitral tribunal. It is even more important in light of the fact that arbitration proceedings are mainly conducted at one instance. If the justification for the arbitral award does not reflect the reasons of the decision, the tribunal appears unreliable to both parties to the proceedings – especially for the party losing the case. Obviously, it is not necessary to describe every single piece of evidence separately, especially if the number of documents is large. However, significant evidence (including expert opinions) cannot be simply ignored by the arbitral tribunal, even if it is assessed as unreliable.

The mere fact that the justification of a partial award is, at approximately 100 pages, voluminous does not, in and of itself, mean that the arbitral tribunal has duly heard the case on its merits. The motives presented in the arbitral award must be convincing and must always address the substance of the case. This necessity of comprehensive consideration of the case, including diligent assessment of all circumstances and evidence gathered in the course of the proceedings, must be upheld as a fundamental rule of the Polish procedural legal order.

In general, this decision of the Supreme Court presents a very balanced approach towards the public policy clause. On the one hand, it is confirmed that the state court cannot control the merits of the case pending before the arbitral tribunal. On the other hand, there remains the possibility of setting aside an award that does not address the substance of the case. This case marks the first occasion that the view emphasising the necessity to consider the case diligently by the arbitral tribunal was expressed so categorically in Polish jurisprudence. However, as the content of arbitral award is unknown, it is impossible to express the view whether the Supreme Court made a proper assessment of arbitral proceedings. The question also arises of how far the general courts will go in the future in determining whether the substance of the case was addressed by arbitral tribunals.

Procedural irregularities in appointment of the sole arbitrator

Procedural irregularities in the appointment of the sole arbitrator might also lead to a challenge of the arbitral award, as decided by the Court of Appeal in Wrocław in a decision dated 31 August 2017 (case *No. I Aca 536/17*), on the basis of interesting factual background.

The arbitral proceedings in question were initiated under the Rules of the International Chamber of Commerce against a Polish municipality in connection with a construction project. As the parties failed to jointly appoint a sole arbitrator, a candidate was proposed by the ICC Court on the basis of article 13(4)(a) of the ICC Rules. According to the aforementioned provision, the ICC Court may appoint directly (without the necessity of obtaining a proposal of a National Committee or Group of the ICC) to act as arbitrator any person whom it regards suitable where one or more of the parties is a state, or may be considered to be a state entity. The Court of Appeal expressed the view that a municipality constitutes neither a state nor a state entity and that, accordingly, the arbitrator should be appointed in compliance with article 13(3) of the ICC Rules – at the proposal of a National Committee or Group of the ICC.

These irregularities in the appointment procedure, in the opinion of the Court of Appeal, violated the principle of equality between the parties. By acceding to the view of the claimant as regards the arbitrator's appointment, the ICC Court favoured the claimant over the municipality. In addition, the Court of Appeal observed that the parties had been treated unequally as regards the possibility of submitting evidentiary motions, in that the respondent had been deprived of fair possibility to submit its statements and supporting evidence.

As GESSEL Attorneys at Law was involved in the abovementioned dispute, this decision of the Court of Appeal cannot be commented on by the authors. In this regard, we defer to other voices in the legal doctrine.[2]

Violation of the procedural rule nemo iudex in causa sua

Another interesting example of violation of procedural rules leading to challenge of arbitral award is the infringement of rule *nemo iudex in causa sua* found by the Court of Appeal in Łódź in a decision dated 3 March 2017 (case *No. I Aca 1139/16*). In the Court's view, the arbitral tribunal had not complied with requirements regarding the composition of the arbitral tribunal and the fundamental rules of procedure before such tribunal (article 1206, section 1, point 4 of the Polish Code of Civil Procedure).

In the factual circumstances of the case, a unique connection between the arbitration court and one of the parties could be observed. To wit, the institutional arbitration court was functioning at the entity acting as the claimant in these arbitral proceedings. The president of the arbitration court was taking actions on behalf of the claimant while performing the contract constituting the object of the dispute. Due to this fact, the president of the arbitration court was familiar through and through with the factual and legal background of the case, being at the same time the shareholder and president of the management board of company operating the arbitration court.

The Court of Appeal came to the conclusion that, in this respect, the principle *nemo iudex in causa sua* had certainly been violated, leading also to a violation of the fair trial standard. Additionally, the respondent had been deprived of a real and fair possibility to challenge the appointed arbitrator. The challenge procedure had not been properly followed – the respondent's application was rejected without even initiating relevant actions before giving the final judgment. The circumstances raised in the application were not checked, and the arbitrators did not submit their impartiality statements while the application was, in the view of the Court of Appeal, fully justified.

Bearing in mind that the connection between the claimant and the arbitration court was of an institutional and permanent nature, and the arbitration clause specified only one arbitration court, the arbitration clause fell to be deemed as void or, at least, ineffective.

The Court of Appeal faced an unusual situation of tight personal and factual connections between the arbitration court, the appointed arbitrators and one of the parties. Setting aside of the arbitral award in such a case takes a stand against the ideas to create arbitration courts functioning as entities being parties to the proceedings and develops the fair trial standard in a proper way.

Conclusions

The analysis of the recent judgments presented above leads to the conclusion that the Polish state courts generally respect the wide autonomy of arbitral tribunals and show little inclination to interfere with their decisions as to the merits of the case. The arbitral awards are likely to be set aside only in extreme cases (eg, as a result of violation of the fundamental principle *nemo iudex in causa sua*). As a rule, in post-arbitral proceedings, Polish courts do not address the merits of the cases decided by the arbitral tribunals – the established lines of authority are clear in this respect. An arbitration-friendly approach is also visible in other aspects, such as broad interpretation of arbitration clauses which influences the competence of arbitral tribunals to hear the case in a positive manner.

Popularisation of arbitration in Poland

In recent years, numerous efforts of arbitration community aimed at popularisation of arbitration in Poland might be easily observed.

May 2018 witnessed the first edition of the Warsaw Arbitration and Mediation Days[3] and, due to its success, plans are now afoot to hold this conference on a regular two-year basis. The event was jointly organised by all major Polish arbitration institutions, including ICC and ICC Poland, the two main institutional Polish arbitration courts – the Court of Arbitration at the Polish Chamber of Commerce in Warsaw and the Lewiatan Court of Arbitration, as well as leading Polish law firms. The WAMD conference attracted a number of great speakers and participants from Europe and is likely to become one of the most important arbitration events in the CEE region.

Warsaw is also well known to arbitration practitioners in the area of post-M&A disputes due to the Dispute Resolution in M&A Transaction Conference.[4] This event attracts speakers and participants from all over the world. The fifth edition of the conference will take place on 23 and 24 May 2019.

The increasing popularity of arbitration in Poland is reflected in professional publications in this area. In recent years, the two main institutional arbitration courts published official commentaries to their arbitration rules; the Court of Arbitration at the Polish Chamber of Commerce in Warsaw launched its commentary in 2017, and the Lewiatan Court of Arbitration in 2016.

In 2018, the Court of Arbitration at the Polish Chamber of Commerce in Warsaw, the biggest permanent arbitration court in Poland, adjusted its arbitration rules to the latest international standards, implementing new provisions on expedited procedure.

The Polish arbitration community also focuses on training young practitioners and on the promotion of arbitration among young lawyers. In 2018, the seventh edition of the Lewiatan Arbitration Moot took place. A number of arbitration events for students and young practitioners are also organised each year by Polish arbitration institutions, universities and law firms.

These various initiatives of the Polish arbitration community are focused on promotion of arbitral proceedings among legal practitioners as well as businesspeople making decisions about including arbitration clauses in agreements.

Notes

1 The statistics were made available by the Ministry of Justice on 20 August 2018 at the specific request of the authors of this article, submitted on the basis of Act on Official Statistics of 29 June 1995, and have not been officially reported.

2 See, eg, S Wilske, T J Fox, R Kos, 'The view from Europe. What's new in European arbitration?', *Dispute Resolution Journal* 2017, vol. 72, p. 82 et seq.

3 More information available at www.warsawarbitration.pl.

4 More information available at www.sadarbitrazowy.org.pl.

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GESSEL

Beata Gessel-Kalinowska vel Kalisz is a founding and senior partner at GESSEL. She is an expert practitioner in arbitration, M&A, private equity and commercial law. Beata Gessel is also honorary president of the Lewiatan Arbitration Court (since 2017), a member of the ICC International Arbitration Court (since 2015) and is chair of the Audit Committee of the Polish Private Equity Association.

Beata Gessel has acted as an arbitrator or counsel in cases under rules of the ICC, FCC, IAA, SCAI, UNCITRAL, Lewiatan, KIG and National Depository for Securities. She is an adjunct professor in commercial arbitration as well as M&A transactions at the Cardinal Stefan Wyszynski University. Between 2015 and 2017 she ran comparative law research on breach of M&A transactions as a visiting academic at the Oxford University Law Department and at Cambridge University Law Department within the Herbert Smith Freehills Visiting Professors Scheme, which she now continues as a visiting scholar at Wolfson College, Oxford University.

For many years, she has been recognised in *Chambers Global* and *Chambers Europe* in the most in-demand arbitrators category and by the *The Legal 500* as a Leading Individual in Dispute Resolution. She has been praised for her 'inquisitive style', 'effectiveness' and 'strong business sense', as well as 'exceptional business acumen and second-to-none legal knowledge'.

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A managing associate at GESSEL arbitration team, Natalia Jodłowska's practice encompasses arbitration and litigation in the fields of commercial and civil law in a broad range of subject areas, in particular M&A, construction and energy disputes. She also advises clients on construction and infrastructure projects. Her practice has been consistently focused on arbitration and litigation. She has represented Polish and foreign clients in domestic and international arbitration proceedings before, among other bodies, the ICC, LCIA, IAA, FCC, the Polish National Chamber of Commerce (KIG), the Lewiatan Court of Arbitration, and in ad hoc arbitration. In a number of cases, she has served as administrative secretary to arbitration tribunals in Polish and international arbitration proceedings before the ICC, the Polish National Chamber of Commerce (KIG), the Lewiatan Court of Arbitration and in ad hoc arbitration. She has represented clients in several dozen proceedings before Polish general and administrative courts. Natalia graduated from the Faculty of Law and Administration at Jagiellonian University in Krakow (2010). She was admitted to practice as an attorney in 2015.

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A senior associate at GESSEL arbitration team, Joanna Kisielińska-Garncarek specialises in commercial arbitration and dispute resolution, acting as counsel in domestic and international arbitral proceedings (before, inter alia, the ICC, IAA, Lewiatan Court of Arbitration and Arbitration Court at the Polish Chamber of Commerce) as well as commercial and civil proceedings pending before the state courts. Joanna represents Polish and foreign clients in a wide range of cases, including M&A and construction disputes. She serves as administrative secretary of arbitral tribunals in Polish and international proceedings.

She is the author of numerous publications in the field of obligation law and is preparing PhD thesis at the Law Faculty of Nicolaus Copernicus University in Toruń, titled 'Legal effectiveness of actio Pauliana in Polish and German legal system'.

Joanna graduated from the Faculty of Law of Nicolaus Copernicus University in Toruń (2014). She completed a course in English and European law as well as German law programme offered by the University of Gdańsk in cooperation with the University of Cologne. She was admitted to practise as an attorney in 2018.

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An associate at GESSEL arbitration team, Konrad Czech specialises in commercial and investment arbitration, and dispute resolution. He also advises on international trade and investment matters. He has built up comprehensive experience in international arbitration participating in a number of investment and commercial arbitration cases (under, among other rules, the ICC, UNCITRAL, SCC, Copenhagen Arbitration). Before joining GESSEL Konrad worked for the Office of General Counsel to the Republic of Poland, he was a member of the International & European Law Department. He is a graduate of the Faculty of Law and Administration at the University of Warsaw (summa cum laude, 2010) and also holds a dual LLM degree in global business law from the New York University School of Law and in International & Comparative Law from the National University of Singapore Faculty of Law (2014). He received his PhD (cum laude) in legal studies from Kozminski University in Warsaw in 2016. His recent monograph, which is the publication of his PhD dissertation, titled 'Evidence and Evidentiary Proceedings in International Commercial and Investment Arbitration. Selected Issues' (original title: Dowody i postępowanie dowodowe w międzynarodowym arbitrażu handlowym oraz inwestycyjnym. Zagadnienia wybrane, Wolters Kluwer Poland 2017), is the most comprehensive Polish-language writing on evidence in arbitration.

Portugal

Pedro Metello de Nápoles
PLMJ Lawyers

Considered by its investors as 'the best place in the world to invest',[1] Portugal seems to have found an answer to its economic and financial crisis. By offering incentives to businesses and favourable tax regime for foreign nationals, it has been able to attract a substantial number of foreign citizens, both from the European Union and the rest of the world. What about arbitration?

A Model Law country

Arbitration in Portugal is governed by Law 63/11 of 14 December (the Law),[2] which came into force in March 2012.[3] Drafted by local practitioners[4] and subject to wide public discussion before its final approval, the Law clearly – and intentionally[5] – follows the standard established by UNCITRAL Model Law (the Model Law). In order to better define some of the Model Law's solutions (deemed too vague), several changes were implemented to the latter's text in order to accommodate Portugal's legal tradition, but maintaining the Model Law matrix. The Law generally applies to both domestic and international arbitration, although some minor additional provisions regulate specific aspects of the latter. It is therefore a monist law.

Seven years after its enactment, arbitration practitioners around the world have praised its content, and it is safe to say that there are no major application problems. Moreover, arbitration continues to grow steadily as the favourite dispute resolution method. If the choice of arbitration was, in a large scale on its early days, a consequence of the inefficiency of state courts, the same no longer holds true. Arbitration currently represents the best suitable way to resolve commercial disputes, particularly in relation to complex disputes requiring a reasonable degree of specialisation.

Trends and recent developments

Arbitration involving corporate disputes

Although hardly anyone disputes the arbitrability of these cases, some scholars defend they have particular characteristics that may make it impossible, in practice, for arbitration to function with all the necessary security.

Once again, the arbitral community decided to take the initiative and proposed an amendment to the arbitration regime. In 2016, a task force was set up within the Portuguese Arbitration Association, which resulted in a draft law regulating arbitration involving corporate disputes. This text was subject to discussion in the legal community and was subsequently sent to the Ministry of Justice, for further discussion in the parliament.

Together with that project, a draft regulation for institutionalised arbitration for these kinds of disputes was also prepared and subject to public discussion.

The project was well-received and further developments on the passing of the legislation are expected over the course of next months.

Public law

There is a long-standing tradition of arbitration in the administrative field, with the Portuguese state actively promoting the inclusion of arbitration agreements in all sorts of administrative contracts. As a consequence, many state-related disputes have been solved through arbitration over the past years.

Specifically, the state and state entities may enter into arbitration agreements involving private law disputes (as opposed to public law), as long as the concerning entities are authorised by law.

Criticisms have been raised against administrative arbitration – which are not alien to the left-wing government currently in office – which led recently to a change to Portuguese public contract's law.[6] It now provides the possibility of an appeal in all arbitration cases exceeding €500,000. This new provision was not supported by the arbitration community, as it represents an exception to the voluntary arbitration regime, where parties have to expressly opt in for the right to appeal. Because of its importance, Portuguese practitioners are mobilised to revert the present situation.

Importantly, despite this step against one of the main characteristics of arbitration (a final and binding award), Portuguese public law can still be considered as pro-arbitration, since arbitration clauses are possible in virtually all contracts. As a result, the Portuguese system continues to be considered as one of the most advanced in relation to public law.

Non-commercial arbitration

Arbitration's success is so meaningful that it has extended to other fields of law. For example, tax disputes between private citizens, or companies, and tax authorities[7] are now being solved through arbitration. Even though the state, in this particular case, maintains some degree of control over the appointment of arbitrators, it is nonetheless a good sign of favor arbitratis in Portugal.

Following the same trend, since 2011[8] a category of patent disputes over medical drugs are mandatorily resolved through arbitration. Although these types of procedures cannot be seen as voluntary arbitration (particularly because the purpose of the measure was to clear these disputes from state courts), it is again evidence of how arbitration is perceived as an efficient alternative dispute resolution mechanism.

These last types of disputes, often involving global pharmaceutical companies and generic drugs manufacturers, have given rise to hundreds of disputes in recent years. Despite its specific characteristics, they were able to generate a substantial number of decisions from state courts of appeal, creating a steady flow of case law addressing arbitration issues.

Institutional arbitration

Despite the fact that institutional arbitration centres have existed for many years, and that international centres are widely accepted, ad hoc proceedings continue to be quite popular in Portugal.

Although not measurable by official statistics, practitioners state that ad hoc arbitrations continue to lead the preference of parties to new cases.

In an effort to change that situation, the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry (the national leading centre) (the Centre) under the chairmanship of PLMJ's founding partner and international arbitrator José-Miguel Júdice, has substantially revised its arbitration rules. The new version of the rules came into force on 1 March 2014.[9] The main goal was to adapt the rules so they would reflect those commonly used in international proceedings, contributing to accelerating proceedings and making them more cost-effective.

Together with the new rules, a Code of Ethics was also adopted, making express reference to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration.

Moreover, in 2015, the Centre implemented more transparent rules for the selection of arbitrators, in accordance with the best international practices.

Finally, fast-track arbitration rules and mediation rules were approved and came into force in 2016.[10]

Besides the Portuguese Chamber of Commerce and Industry, other institutions administrating arbitration exist, notably the Centre for Conciliation, Conflict Mediation and Arbitration and the Commercial Arbitration Institute of the Oporto Commercial Association.

Approach of state courts of appeal

Since the enactment of the law, we have started to see appellate court's decisions setting aside awards on the grounds of conflicts of interest, making wide reference to international standards such as the International Bar Association (IBA) Guidelines on Conflicts of Interests in International Arbitration.[11]

Although this may seem at first glance a Pandora's box, this example is actually evidence of the positive contribution of the new Law to the improvement of arbitration practice and to the maturity of the arbitral community.

Furthermore, the new legislation has been serving the purpose of evidencing the support given by state courts of appeal to arbitration, highlighting a clear favor arbitratis.

The subjects addressed in each case vary substantially, but there are some matters recurrently being addressed and, fortunately, consistently decided.

Kompetenz-kompetenz

State courts have systematically refused to analyse allegations of nullity of arbitration clauses, on the grounds that such competence belongs exclusively to arbitral tribunals; only in cases where it is evident that there is no valid and operative arbitration clause may a state court decide on the matter directly.[12]

Conflicts of interest, independence and impartiality

There is a substantial number of recent judicial decisions setting aside awards on the grounds of conflicts of interest, but also addressing independence and impartiality, and making wide reference to international standards such as IBA Guidelines on Conflicts of Interests in International Arbitration.[13]

Portuguese international public policy

State courts have been careful in highlighting the exceptional nature of Portuguese international public policy (as opposed to internal mandatory rules) as grounds to set aside or refuse enforcement.[14]

Costs and arbitrators' fees

The previous legislation did not address the issue of the arbitrator's fees. The new arbitration law requires that they are agreed upon and provides the parties with the opportunity to challenge the amount charged if there is no prior agreement. As a consequence, many decisions have been issued on the matter.[15]

Access to justice

The financial crisis was instrumental to generate a number of situations in which respondents (or even claimants) tried to avoid arbitration based on lack of financial conditions to resort to the proceedings. Precedents are very case-specific.[16]

Set aside

Courts have been reaffirming that the scope of the proceedings to set aside an arbitral award is limited and cannot entail a review of the merits or a rehearing of the case.[17]

Law 63/11 of 14 December

Arbitrability

Under the Law, any dispute regarding economic interests may be submitted to arbitration (article 1). In addition, non-economic matters may also be referred to arbitration, provided they concern issues that the parties have the right to settle. Finally, arbitral tribunals may also be requested to interpret, complete, adapt or supplement existing contracts.

Besides dealing with disputes involving the state and state entities, as seen above, the Portuguese legislation extends the possibility of arbitration to other fields of law, such as tax disputes and, in limited cases, employment disputes.

Arbitral clause and negative effect of the arbitration agreement

The Law reproduces the doctrine arising out of the New York Convention and the UNCITRAL Model Law. Although it demands a written agreement, it also interpret the term 'written' in the widest possible way (article 2).

As to the negative effect of the arbitration agreement, the principle of *Kompetenz-Kompetenz* is firmly established in articles 5, 18 and 19, except in cases where the state court concludes that the arbitration agreement is clearly null and void, became inoperative or is incapable of being performed. Special emphasis is given to the fact that, regardless of any proceedings in state courts, arbitration may commence or continue, and the parties cannot file a claim in the state courts with the sole purpose of discussing the validity of an arbitration agreement. Judicial courts widely accept this system and have been consistently upholding arbitration clauses,[18] even when non-signatory parties are involved.[19]

The arbitral tribunal

The constitution of the arbitral tribunal (articles 8 to 16) has received special attention in the Law and several changes were adopted in comparison with the previous legislation. However, one could say that such changes simply reflect what has been the recent trend in international arbitration.

The tribunal will be composed of an uneven number of arbitrators or, if the parties are silent, three. These arbitrators must be independent and impartial, and have the duty to reveal any circumstances that, in the eyes of the parties, may affect such independence and impartiality.

If the parties fail to appoint one or more arbitrators, then, unless they have designated another entity for this purpose

(such as an arbitration centre),[20] state courts will have the power to make the appointment at the request of the most diligent party. When making appointments, judicial courts shall take into account all relevant circumstances to ensure that an independent and impartial arbitrator is appointed. In the case of international arbitrations, the law establishes that state courts, if requested to appoint the chairman or a sole arbitrator, should consider the convenience of appointing arbitrators with a different nationality from that of the parties, applying the 'neutrality' rule.

In the case of multiple parties (article 11) and failure of one of the sides to agree on the name of the arbitrator, state courts will appoint the missing arbitrator. This rule, in principle, will not compromise the appointment of the arbitrator chosen by the other party. As an exception, if the state court is convinced that the parties have conflicting interests and that justice will be better served, it may appoint all the arbitrators. Therefore, the *Dutco* doctrine is accepted to a certain extent.

If a party wants to challenge an arbitrator (and he or she is not the sole arbitrator), the challenge request shall be submitted to the arbitral tribunal (articles 13 and 14). If the challenged arbitrator does not step down, the tribunal will decide with the participation of the challenged arbitrator. In case of rejection of the request, the challenging party may resort to state courts, but the arbitral proceedings may follow their normal course.

The legislation also contains a specific provision on arbitrators' fees (article 17), which requires the parties to settle this question in writing before the tribunal is fully constituted. If that agreement is not concluded but the proceeding continues, the arbitrators will rule on their own fees, but the parties are entitled to challenge them in the state courts.

Interim measures and provisional orders

This specific matter generated some discussion, to the extent that there were doubts in face of the 1986 law as to whether arbitral tribunals could issue interim measures and, in the affirmative, what types of measures could be ordered.

One of the main concerns when drafting the new law was to avoid any links to the Civil Procedure Law (to the extent that many practitioners applied those rules directly to arbitration, thus strangling the procedure). Thus, it was agreed that the interim measures should be regulated independently from the procedural law. As a result, Chapter IV of the UNCITRAL Model Law text was fully adopted, making it part of the arbitration legislation (articles 20 to 29).

Ultimately, the solutions now established in the arbitration law can, in some cases, go beyond what is possible under civil procedural rules.

Conduct of the proceedings

As mentioned above, the drafters had the intention of setting a clear line between arbitration and civil procedure, in order to avoid a tendency in applying civil procedure provisions in arbitration proceedings.

Therefore, Chapter V of the Law (articles 30 to 38) reflects this dissociation. The parties are free to agree on the rules of the procedure and, failing such agreement, the tribunal will conduct the proceedings as it deems fit, in accordance with the principles of due process.

Taking a clear stand in a long worldwide tradition, the Law expressly states that arbitral proceedings are confidential (article 30.5), without prejudice to the possibility of publishing final awards and other decisions, provided that all elements identifying the parties are removed.

Article 35 addresses default by one party and states that the failure of a party to contest a pleading or appear at a hearing will not be deemed an admission of facts. Therefore, the arbitral tribunal should continue the proceedings on ex parte basis.

Article 36 focuses on third-party intervention – which is permitted, provided the third party is bound by the arbitration agreement. If the third party is not an original party to the arbitration agreement, its intervention shall only be valid if accepted by the other parties to the arbitration, for the purposes of those arbitration proceedings. The intervention may take place before or after the constitution of the tribunal, but in the latter case, the intervening party is prevented from challenging the constitution of the arbitral tribunal. In any event, the tribunal may always refuse the intervention if it considers that it may disrupt the conduct of the proceedings.

Article 37 regulates tribunal appointed experts. Although this was an issue covered by the UNCITRAL Model Law, it is a substantial evolution in view of what would happen in accordance with civil procedural law, where the parties would each appoint an expert and the tribunal a third expert, and the three would agree on the result of the joint work.

Finally, article 38 regulates assistance by state courts, particularly in the production of evidence. The parties may apply for such assistance, but only after obtaining the leave of the arbitral tribunal.

Award and closing of the proceedings

Unless the parties authorised the tribunal to decide ex aequo et bono, the award will be taken in accordance with the applicable law (article 39) and the decision can only be appealed if the parties expressly agree so (except in cases involving public contracts, as referred above). As we will see below, in international arbitration, the solution has specific characteristics.

Article 43 deals with the time limit to render the award. Contrary to the previous legislation, the Law establishes a 12-month limit for arbitrators to render an award. They are also entitled to extend the time limit, unless both parties oppose. Finally, the arbitration agreement remains valid even if the time limit to render the award is exceeded.

Similarly, within the 30 days following the notification of the award, the parties may ask for the correction of the award (in respect of clerical and similar errors) and for the interpretation of any part of the award that it considers obscure or ambiguous (article 45.1 and 45.2). More interesting is the possibility of the parties to ask the tribunal to render an additional award regarding claims or parts of claims they consider not to have been addressed in the award (article 45.5).

Challenging the award

Except when the parties explicitly admitted the possibility of appeal, as well as in arbitrations involving public contracts, awards are final and not subject to any review by state courts. Therefore, the only possible judicial intervention is through an annulment proceeding. The grounds for setting aside an award are in line with the principles established by the New York Convention regarding the recognition and enforcement of foreign awards. The proceedings will take the form of an appeal and be judged by the appellate court.

After extensive debate, the Law included the possibility for the courts to set aside an award on public policy grounds (but limited to the international public policy of the country).

Article 46.8 states that, at the request of one of the parties, state courts have the power to send the award back to the arbitral tribunal so it has the opportunity to address a specific matter, avoiding the setting aside of the award. This is a provision without precedent in the Portuguese system, but one that may be an effective solution that benefits the parties and avoids the need to start a new arbitration after the setting aside of an award.

International arbitration

Chapter IX of the Law covers international arbitration. As mentioned above, and despite the existence of this chapter, the Portuguese system cannot be classified as dualist, to the extent that the regime applicable to domestic and international arbitration is substantially the same (as expressly determined by article 49.2). Therefore, this chapter is a good evidence of how committed the Portuguese legislation was in enacting an arbitration-friendly regime, aiming to attract international disputes to its territory.

Following French law, Portuguese law considers that international arbitration is the one that concerns interests of international trade (article 49.1).

Article 50 addresses the inadmissibility of pleas based on the domestic law of a party. This means that a state or a state-controlled entity cannot invoke provisions of its internal law to challenge the arbitration agreement.

Similarly, article 51 sets the substantial validity of the arbitration agreement. Under this article, an agreement may be submitted to arbitration if the requirements established in that respect are fulfilled, either by:

- the law chosen by the parties to govern the arbitration agreement;
- the law applicable to the merits of the case; or
- Portuguese law.

The law applicable to the merits is regulated by article 52. The tribunal shall apply the law chosen by the parties and, failing such choice, the law having the closest connection with the dispute. The article also makes express reference to the contractual terms agreed by the parties and the relevant trade usages.

Regarding the possibility of appeal, the rule is once more that there is no appeal unless the parties expressly agree otherwise (article 53). However, even if such agreement exists, the appeal has to be brought before another arbitral tribunal, and the rules and terms applicable have to be set in advance (this provision is not applicable to cases involving public contracts). This is an innovative provision that aims to limit the intervention of state courts in international arbitration.

Recognition and enforcement of foreign awards

All foreign awards must be recognised (ie, an exequatur must be obtained) before they can become effective in Portugal. This matter is covered by the New York Convention, so the scope of application of article 55 is reduced. In any event, the provisions of articles 55 to 57 are very similar to the ones contained in articles IV, V and VI of the New York Convention.

State courts

Articles 59 and 60 of the Law address the jurisdiction of state courts in all matters where their intervention may be required in accordance with the Arbitration Law.

Contrary to the previous legislation, the competence for ruling on important arbitration related matters has been centred in the appellate courts (second instance courts). The aim is to have, in the near future, specialised appellate courts devoted to arbitration, as currently happens in France. The competence of the courts of appeal covers:

- the appointment and challenges of arbitrators;
- challenges against arbitrators' fees; and
- any appeals (where admissible) or requests to set aside.

Confirming the favor arbitratis, some of these procedures were classified as expedited proceedings.

For all other matters, from interim measures to assistance in the production of evidence, the competence remains within first instance courts, as they are more suited for these types of proceedings.

Portugal as an international venue for Portuguese-speaking countries

Portugal has an arbitration legislation consistent with international best practices and standards. As noted above, the law clearly favours arbitration, and the tradition of Portuguese courts has been to uphold the great majority of arbitral awards brought before them. The country has a vast legal community and a number of lawyers actively involved in arbitration, both as counsel and arbitrators.

Located at the western side of Europe, it maintains a strong relationship with all Portuguese-speaking countries in Africa (Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe), as well as with Brazil, Macau and Timor. As for the mentioned African countries, most of them still have their legal system based on the Portuguese matrix. Together with a common language, the same legal approach places Portuguese practitioners in a privileged position to contribute to the development of international arbitration in those countries.

Those factors, together with its location and easy access, facilities and available resources (including a large and experienced arbitral community) not to mention its good weather, moderate prices and general attractiveness, place Portugal – with Lisbon in the pole position – in an ideal position to function as a venue for international arbitration.

For historical and cultural reasons, Lusophone countries are the obvious candidates. However, Portugal's next challenge is to widen the scope of users to other countries.

In sum, now that you have taken the time to read this article to the end, the next step is to try Portugal as a seat of arbitration.

Notes

1 Liz Alderman, 'Portugal Dared to Cast Aside Austerity. It's Having a Major Revival'. *The New York Times*, 22 July 2018.

2 English, French and Spanish translations of the law are available at http://arbitragem.pt/legislacao/.

3 The previous law was Law 31/86 of 29 August 1986. Although not specifically based on any other law, it was inspired by French law and it contained solutions not substantially different from the ones adopted in other countries, despite some particularities of the law that were a consequence of our civil procedural tradition. In fact, the main evidence of the success of that law was that it remained in force for 25 years, with only a minor amendment, and allowed arbitration to flourish.

4 The Board of Directors of the Portuguese Arbitration Association, working pro bono. The author of this text was among the seven drafters.

5 When discussing the revision of Law 31/86 of 29 August 1986, there were many opinions on the path to follow including simply amending the law or approving a completely new document. Eventually, the latter option prevailed and the decision was taken to base the new text on the UNCITRAL Model Law. One of the purposes of changing the law was to make Portugal a more interesting seat for international arbitration, and that would be more easily achieved with a law following an internationally accepted standard.

6 See article 476 of the Code of Public Contracts, as amended by Decree-Law 111-B/2017, of 31 August.

7 See Decree-Law 10/2011 of 20 January, as amended by Laws 64-B/2011 of 30 December, 20/2012 of 14 May and 66-B/2012 of 31 December.

8 Law 62/2011 of 12 December.

9 An English version is available at www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Regulamento_de_Arbitragem/Rules_of_Arbitration_2014.pdf.

10 An English version is available at www.centrodearbitragem.pt/images/pdfs/Legislacao_e_Regulamentos/Fast%20Track%20Arbitration%20Rules%20english.pdf.

11 Decision of the Lisbon Court of Appeal of 24 March 2015, Case No. 1361/14.0YRLSB.L1-1; Decision of the Oporto Court of Appeal of 03 June 2014, Case No. 583/12.2TVPRT.P1; all available at www.dgsi.pt.

12 Decisions of the Supreme Court of Justice of 20 March 2018, Case No. 1149/14.8T8LRS.L1.S1, of 8 February 2018, Case No. 461/14.0TJLSB.L1.S1; Decisions of the Lisbon Court of Appeal of 20 June 2017, Case No. 5365/15.7T8LSB-D.L1-7, of 06 April 2017, Case No. 461/14.0TJLSB.L1-2, of 12 October 2016, Case No. 2130/14.2T8CSC.L1-4, of 29 September 2015, Case No. 827/15.9YRLSB-1 and of 24 March 2015, Case No. 1361/14.0YRLSB.L1-1; Decision of the Oporto Court of Appeal of 3 June 2014, Case No. 583/12.2TVPRT.P1; Decision of the Évora Court of Appeal of 8 September 2016, Case No. 204/14.9T2GDL.E1; all available at www.dgsi.pt.

13 Decisions of the Supreme Court of Justice of 21 June 2016, Case No. 301/14.0TVLSB.L1.S1, of 12 May 2016, Case No. 710/14.5TVLSB-A.L1.S1 and of 9 July 2015, Case No. 1770/13.1TVLSB.L1.S1; of the Appeal Court of Lisbon of 13 September 2016, Case No. 581/16.7YRLSB.-1, 7 July 2016, Case No. 508/14.0TBLNH-A.L1-2; all available at www.dgsi.pt.

14 Decisions of the Supreme Court of 26 September 2017, Case No. 1008/14.4YRLSB.L1.S1, of 27 April 2017, Case No. 93/16.9YRCBR.S1, of 14 March 2017, Case No. 103/13.1YRLSB.S1 Decisions of the Lisbon Court of Appeal of 14 April 2016, Case No. 2455/13.4YYLSB-A.L1-2 and of 15 March 2016, Case No. 871/15.6YRLSB-7; all available at www.dgsi.pt.

15 As examples, see Decision of 30 May 2017, Case No. 39/16.4YRLSB-1, of 14 July 2016, Case No. 660/16.0YRLSB-2; Decision of 12 February 2015, Case No. 1551/14.5YRLSB-8; Decision of 15 January 2015, Case No. 1362/14.8YRLSB.L1-8; Decision of 4 December 2014, Case No. 1181_14.1YRLSB.L1-6; Decision of 1 July 2014, Case No. 200/14.6YRLSB-7; Decision of 29 April 2014, Case No. 1337/13.4YRLSB-7; Decision of 13 February 2014, Case No. 1053/13.7YRLSB-2; Decision of 13 February 2014, Case No. 1068/13.5YRLSB-6; Decision of 06 February 2014, Case No. 866/13.4YRLSB-2; Decision of 3 October 2013, Case No. 747/13.1YRLSB.L1-8; Decision of 10 September 2013, Case No. 297/13.6YRLSB-7; Decision of 11 June 2013, Case No. 955/12.2YRLSB-7; Decision of 2 May 2013, Case No. 157/13OYRLSB; Decision of 11 July 2013, Case No. 537/13.1YRLSB; all of the Lisbon Court of Appeal and all except the last two available at www.dgsi.pt.

16 See, for example, Decision of the Lisbon Court of Appeal of 22 September 2015, Case No. 1212/14.5T8LSB.L1-7, available at www.dgsi.pt.

17 See, for example, Decision of 19 March 2017, Case No. 1052/14.1TBBCL.P1.S1, and of 22 September 2016, Case No. 660/15.8YRLSB.L1.S1, both from the Supreme Court and available at www.dgsi.pt.

18 Decision of 28 May 2015, Case No. 2040/13.0TVLSB.L1.S1; Decision of 2 June 2015, Case No. 1279/14.6TVLSB.S1; both of the Supreme Court. Decision of the Lisbon Court of Appeal of 4 November 2014, Case No. 194466/12.2YIPRT.L1-7; all available at www.dgsi.pt.

19 Decision of the Lisbon Court of Appeal of 24 March 2015, Case No. 7666/13.0TBOER.L1-1; Decision of the Oporto Court of Appeal of 10 February 2015, Case No. 3795/13.8TBMTS.P1.; all available at www.dgsi.pt.

20 The LAV accepts, with almost absolute flexibility, the rules of national and international centres, and therefore many of the articles of the LAV have only subsidiary application in the case of institutional arbitration.

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PLMJ is Portugal's largest law firm. It has one of the leading arbitration practices in the country and is the market leader for international arbitration. Twenty-five lawyers (including eight partners), of six different nationalities, based in offices in Europe and Africa, work as lawyers or arbitrators.

The team is equipped to represent clients in arbitrations in five languages (Portuguese, English, Spanish, French and German) and it has worked not only in Portugal, but in a number of other countries.

PLMJ is the only Portuguese law firm that has litigation and arbitration as distinct units and is therefore much more specialised. Many members of the team have postgraduate studies in arbitration and five of them have PhD (arbitration, public law, economy valuation, procedural law, evidence and causation).

Slovenia

Maja Menard and Matjaž Ulčar
Menard Ltd and Ulčar & Partners Ltd

With its geostrategic position and modern and comprehensive legal framework for commercial arbitration, Slovenia endeavours to develop its potential as an attractive and neutral seat of arbitration in international commercial transactions. The 2008 Arbitration Act (the Arbitration Act)[1] largely incorporates the 1985/2006 UNCITRAL Model Law on International Commercial Arbitration (the UNICTRAL Model Law) and provides a modern framework for arbitration proceedings in Slovenia. Slovenia is also party to all principal multilateral conventions in the field of international arbitration, including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the European Convention on International Commercial Arbitration and the Convention on the Settlement of Investment Disputes between States and Nationals of other States.

International commercial arbitration traditionally has strong institutional support in Slovenia. The Ljubljana Arbitration Centre at the Chamber of Commerce and Industry of Slovenia (LAC) and its predecessor, the Tribunal of the Ljubljana Chamber of Trade, Craft and Industry, have been administrating arbitration and mediation proceedings since 1928. The currently applicable LAC Rules entered into force on 1 January 2014 and follow the modern international trends in institutional arbitration ensuring speedy and efficient arbitration proceedings.

This article presents the currently applicable legal framework of international arbitration in Slovenia with special focus on the most recent developments, namely with regard to the border arbitration between Croatia and Slovenia, to third-party funding and the establishment of the Patent Mediation and Arbitration Centre.

Slovenian Arbitration Act

The Arbitration Act, which governs arbitration proceedings conducted in Slovenia, is largely modelled on the UNCITRAL Model Law and expressly provides that its provisions are to be interpreted in accordance with the UNCITRAL Model Law.

The most notable deviation of the Arbitration Act from the UNCITRAL Model Law is its express provision on arbitrability. According to article 4(2) of the Arbitration Act, any natural or legal person, including the Republic of Slovenia and other public entities, may conclude an arbitration agreement. Any pecuniary claim can form the object of an arbitration agreement, while with regard to non-pecuniary claims, only disputes concerning a legal relationship in respect of which the parties may reach a settlement, are arbitrable. Consequently, most of the disputes concerning family and public law may not be submitted to arbitration.[2] On the other hand, competition law disputes are, in principle, deemed as arbitrable, in accordance with the case law of the European Court of Justice, in particular in the *Eco Swiss* case,[3] following the US Supreme Court in the landmark *Mitsubishi* case.[4]

Consumer and labour disputes may also be referred to arbitration, subject to certain provisions ensuring the protection of the weaker party. Consumer and labour disputes are arbitrable solely if the arbitration agreement is entered into after the dispute has arisen. In addition, the arbitration agreement must be concluded in a special document (separate from the base contract), hand-signed by the consumer or the employee, respectively, and must define the seat of the arbitration. The arbitration tribunal may hold hearings outside the place of its seat only with the prior consent of the consumer or the employee, respectively, or if examining the evidence at the seat of the arbitration would give rise to disproportionate difficulties. Moreover, arbitration proceedings related to consumer and labour disputes must be conducted in Slovenian, unless expressly agreed otherwise. Finally, grounds for challenging the arbitral awards are wider in consumer and labour disputes than in other disputes.

Arbitration agreement

The Arbitration Act defines the arbitration agreement as:

> *an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined contractual or non-contractual legal relationship.*

An agreement to refer all future disputes between the parties to arbitration, without reference to an underlying legal relationship, is hence not allowed.[5] Moreover, an arbitration agreement can be concluded in the form of an arbitration clause in a contract or in the form of a separate agreement.

Article 10 of the Arbitration Act follows the general principles of the New York Convention[6] with regard to the form requirements of the arbitration agreement, requiring that it be concluded in writing. Promoting the arbitral resolution of maritime and corporate disputes, Slovenian law allows an arbitration agreement to be contained in an express reference to an arbitration clause in a shipping contract or in the articles of association of a company, referring all future disputes to arbitration.[7]

Finally, with regard to the validity of an arbitration clause contained in a null or void agreement, Slovenian law applies the severability principle.[8]

Appointment of arbitrators

There are no special conditions under Slovenian law for a person to be appointed as an arbitrator and there is no general requirement for arbitrators to have any specific experience or qualifications under the applicable law.[9] As the UNCITRAL Model Law, the Arbitration Act expressly provides that no one is precluded by reason of their nationality from acting as an arbitrator, unless otherwise agreed by the parties.

Party autonomy is at the forefront of the appointment procedure, with the Arbitration Act providing default provisions for appointment in the absence of the parties' agreement. According to article 13 of the Arbitration Act, the arbitration tribunal consists

of three arbitrators, with each party appointing one arbitrator, and the two arbitrators thus appointed appointing the chairperson of the tribunal. If a party fails to appoint the arbitrator within 30 days of receipt of a request from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days from their appointment, the appointment is made, upon request of a party, by the District Court of Ljubljana. If parties agreed to have their dispute resolved by a sole arbitrator, but cannot agree on the selection, the arbitrator is to be appointed, upon request of either party, by the District Court of Ljubljana.

The LAC Rules provide for a similar appointment procedure as the Arbitration Act, save in the absence of parties' agreement on the appointment of arbitrators, the appointment is made by the LAC Board. The LAC Rules additionally provide for Emergency Arbitrator Proceedings (EAP), not foreseen by the Arbitration Act, appropriate when a party needs an urgent interim measure that cannot await the constitution of an arbitral tribunal. The application for the EAP is sent to the LAC via email, the LAC Board appoints an emergency arbitrator within 48 hours from the receipt of the application and a binding decision on interim measures is made within 15 days from the date of transmission of the application to the emergency arbitrator. Upon conclusion of the (underlying) arbitral proceedings, the interim measure ceases to be binding, unless the arbitral tribunal decides otherwise.

Arbitral proceedings

In line with the modern approach of the Arbitration Act and the UNCITRAL Model Law, the conduct of arbitral proceedings is primarily characterised by party autonomy and subordinately by the discretionary power of the arbitral tribunal, subject to the mandatory provisions of the Arbitration Act.[10] The mandatory provisions include the parties' right to equal treatment, the right to be heard, the capacity to become a party, arbitrator challenges, award challenges and interim measures.[11]

The arbitral proceedings in principle commence with the receipt of the request for arbitration by the respondent. The tribunal may hold an oral hearing or rule based on written pleadings, in accordance with the parties', or in the absence thereof, the tribunal's own decision.

The Arbitration Act and the LAC Rules provide certain limited requirements for written pleadings. The statement of claim must set forth the claimant's claim, including the relief or remedy sought, the facts supporting the claim and the (legal) points at issue. The statement of defence must set out the respondent's position with regard to the claimant, in particular whether and to what extent the respondent admits or denies the relief or remedy sought by the claimant, and the statement of facts and the legal grounds supporting the defence.

The arbitral tribunal has full authority to determine the admissibility, relevance, materiality and weight of any evidence. The LAC Rules expressly provide for the hearing and examination of witnesses and expert witnesses, in the manner set by the arbitral tribunal. Furthermore, the arbitral tribunal may appoint experts and impose information and document production requirements upon the parties for purposes of the expert determination. Finally, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request the assistance of a court of competent jurisdiction in the taking of evidence.

In the absence of any specific statutory provisions, the arbitral tribunal may conduct the discovery at its discretion, including by drawing adverse inferences from a party's failure to disclose or produce documents.

If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal terminates the proceedings and the settlement may be recorded in the form of an arbitral award at the request of the parties, subject to conformity with the public policy of the Republic of Slovenia.

Under the LAC Rules, the final award must be rendered within nine months from the submission of the case to the arbitral tribunal and the time limit may be extended only for justified reasons.

The arbitral award must be in writing, must state the reasons for the decision and contain a reference to the date and the seat of the arbitration. All arbitrators must sign the award as a general rule, but the signatures of the majority of the arbitrators may suffice if the reason for the failure of an arbitrator to sign the award is set forth therein. As regards the parties, the arbitral award has the effect of a final and binding court judgment.

Interim measures

The Arbitration Act allows the arbitral tribunal to grant interim measures, unless the parties agreed otherwise. Contrary to the UNCITRAL Model Law, the Arbitration Act does not define any specific grounds for interim measures, leaving this matter to the discretion of the parties and the tribunal.

In contrast with interim measures granted by the courts, the arbitral tribunal will usually grant interim measures after the respondent party has had an opportunity to present its case with respect to the request for the measure, save when the arbitral tribunal deems an interim measure exceptionally urgent, in which case it may rule on the measure without an adversarial exchange.

Interim measures granted in arbitration are subject to the recognition and enforcement in judicial proceedings,[12] but are not binding on third parties.[13] Recognition and enforcement will not be granted with respect to interim measures granted in the absence of an adversarial exchange, although such an interim measure is legally binding on the parties. The Arbitration Act expressly provides that parties are not limited to the interim measures granted by the arbitral tribunal and may at any time apply for interim measures in the courts.

Challenge of the arbitral award

The Arbitration Act allows the parties to challenge the arbitral award before the regular courts, by way of an application for setting aside the arbitral award, within three months from the date on which the party making the application has received the award. This period may be extended for an additional 30 days maximum if either party requests the correction or the interpretation of the arbitral award. The parties may not waive their right to challenge the award in advance.

Article 40 of the Arbitration Act, closely following article 34 of the UNCITRAL Model Law, specifies the grounds on which the parties may base an application for the setting aside of the arbitral award. The Arbitration Act expressly sets forth additional grounds for challenges of awards by consumers and employees, in case of violations of mandatory provisions from which the parties cannot derogate (even in cases with international elements) and in case of grounds for the setting aside of a judgment and remanding the case for a retrial.

In contrast to the UNCITRAL Model Law, article 40 of the Arbitration Act expressly excludes the lack of jurisdiction of the arbitral tribunal as grounds for the setting aside of an award if the court has already decided on this issue upon an application earlier in the proceedings.

The setting aside of an award does not affect the validity of the arbitration agreement on which the arbitration was based, allowing the parties to commence new arbitral proceedings following the setting aside of the award.

Recognition and enforcement of the arbitral award

Pursuant to the Arbitration Act, an arbitral award has the effect of a final and binding court judgment between the parties, and can be enforced only after the court has declared it enforceable. Arbitral awards rendered by domestic arbitral tribunals may be refused such a declaration only if the subject-matter of the dispute may not be settled by arbitration or the award is in conflict with the public policy of the Republic of Slovenia.

With regard to foreign arbitral awards, the Arbitration Act specifically refers to the New York Convention.[14] Parties seeking the recognition of a foreign arbitral award have to provide an original or copy of the arbitral award and, upon request of the court, an original or a certified copy of the arbitration agreement, and certified translations in case the agreement or the award are not in Slovenian.

With respect to the enforceability of interim measures granted by arbitral tribunals, the Arbitration Act specifically provides that the court may refuse to declare an interim measure enforceable if it finds ex officio that it is impossible to enforce the interim measure, and, at the request of a party, appropriately reformulates the interim measure to the extent necessary to ensure enforceability, provided that it does not substantially modify the measure.

Current developments

Final award in the border arbitration between Croatia and Slovenia

On 29 June 2017, the arbitral tribunal composed of Judge Gilbert Guillaume as president and Ambassador Rolf Einar Fife, Professor Vaughan Lowe, Professor Nicolas Michel and Judge Bruno Simma as arbitrators, rendered the long-awaited final award in the arbitration proceedings between Croatia and Slovenia in which it determined the disputed land and maritime border between Slovenia and Croatia.[15]

After a series of unsuccessful attempts to resolve the dispute amicably, an arbitration agreement was signed by the prime ministers of both countries with the facilitation of the European Commission, on 4 November 2009, endowing upon the arbitral tribunal the task to determine the course of the maritime and land boundary between the Republic of Slovenia and the Republic of Croatia, Slovenia's junction to the high sea and the regime for the use of the relevant maritime areas.

With respect to the Bay of Piran, the tribunal applied the principle of uti possidetis and, in the absence of any formal division between the former republics prior to the dissolution of Yugoslavia, delimited the bay based on effectivités, fixing the boundary along a line situated between the lines advanced by the parties and leaving the larger part of the bay to Slovenia.[16]

In its delimitation of the territorial sea, the tribunal sought to apply the equidistance principle to accommodate the particular configuration of Cape Savudrija.[17]

With regard to Slovenia's junction to the high seas, the tribunal observed that Slovenia's territorial sea boundary does not directly abut upon an area of high sea and found that the junction is to be an area in Croatia's territorial sea, immediately adjacent to the boundary laid down by the Treaty of Osimo, between the Slovenian territorial sea and the high seas, in the approximate width of 2.5 nautical miles. In this area, Slovenia is guaranteed uninterrupted and uninterruptible access from and to the high seas, including:

- the customary freedoms of communication applicable to all ships and aircraft for the purposes of access to and from Slovenia's territorial sea and airspace;
- freedom of navigation and overflight and of the laying of submarine cables and pipelines; and
- other internationally recognised freedoms, including the operation of ships, aircraft and submarine cables and pipelines.

However, such freedoms do not include the freedom to explore, exploit, conserve or manage the natural resources.[18]

With respect to the land boundary, the tribunal determined the boundary in accordance with international law and the principle of uti possidetis, acknowledging that over 90 per cent of the boundary had already been agreed upon by the parties, while for the remainder the tribunal sought to determine the boundary either based on legal title or effectivités.

Pursuant to the arbitration agreement, the award is binding on the parties and constitutes a definitive settlement of the dispute, and the parties must take all necessary steps to implement it, including by revising national legislation, within six months after the award is rendered.

Croatia's refusal to accept and implement the award, has given rise to various infringements of European Union law, both generally, with regard to the rule of law and duty of loyal cooperation and specifically, in the field of, inter alia, fisheries and border controls. Accordingly, Slovenia initiated proceedings against Croatia pursuant to article 259 of the Treaty on the Functioning of the European Union, by a letter to the European Commission of 16 March 2018, followed by an application to the Court of Justice of the European Union of 13 July 2018.[19]

Third-party funding

Despite the surrounding controversy, third-party funding (TPF) has come to be accepted as a lawful way of financing of arbitration proceedings.[20] As in numerous other jurisdictions, TPF is not expressly governed in Slovenian law.

Generally, TPF, as external financing of a party's arbitration expenses,[21] is based on a funding agreement between a party to the arbitration and an unrelated funder (eg, hedge funds, banks, insurance companies).[22] The funder is entitled to a share in the awarded proceeds in the case of the party's success in the arbitration, but remains bound to reimburse the costs of the proceedings in the adverse scenario.[23]

TPF can thus provide access to justice for claimants with scarce resources who would otherwise be deprived of their opportunity to have their case heard by an impartial tribunal. In addition, a funder's involvement (due diligence with regard to the claim) can provide a valuable pre-arbitration assessment of the probability of the outcome of the proceedings. However, TPF is not free of pitfalls: through their involvement, funders often obtain privileged and confidential information on the parties and their businesses, which they can potentially misuse in other proceedings involving at least one of the parties.

Even in the absence of applicable express provisions in Slovenian law, TPF is generally permitted and practised in Slovenia, without being subject to any special conditions or prerequisites, including in particular any obligations of disclosure of the involvement of funders in the proceedings.[24]

Filling the current regulatory void with regard to TPF, specifically by ensuring predictability of TPF-related issues,[25] would

allow the Slovenian legislator to contribute to the further development of Slovenia as an arbitration-friendly environment, as has been the case with Hong Kong and Singapore. Finally, in the absence of experience of Slovenian financial institutions in this field, foreign funders from abroad have a good chance to establish themselves as major players in the evolving Slovenian market with regard to TPF.

Arbitration in patent disputes

On 22 September 2016, Slovenia ratified the Agreement on a Unified Patent Court (AUPC), which had been signed by 25 EU member states three years earlier.[26] The AUPC will enter into force after 13 EU member states, including France, Germany and the United Kingdom, have ratified it, which is expected in 2018.[27]

In addition to the creation of the Unified Patent Court, the AUPC also establishes the Patent Mediation and Arbitration Centre (PMAC), which will be located in Ljubljana and Lisbon and is intended to contribute to the promotion of the use of alternative dispute resolution for intellectual property disputes. The PMAC will provide facilities for the arbitration and mediation of patent disputes, and any settlement reached through the PMAC will be enforced in the same way as a decision or order of the Unified Patent Court (UPC). However, the reach of these alternative dispute solution proceedings is somewhat limited, as a patent cannot be revoked or limited in mediation or arbitration proceedings.

The European patent arbitration and mediation rules provide further details on the mediation process and the arbitration proceedings, but parties remain free to attempt to resolve their dispute independently of the UPC system through separate mediation or arbitration.

In Slovenia, the cooperation with the UPC preparatory committee and the implementation of the relevant provisions of the AUPC, including the creation of the PMAC, is carried out by the interdepartmental working group on the unified patent system established by the Slovenian government in 2013. Pursuant to the publicly available reports, the preparation of the legal framework for the operation of the UPC and the PMAC is in its final stages.[28]

Notes

1 Official Gazette of the Republic of Slovenia No. 45/2008 et seq.

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3 Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR, I-3055, 1 June 1999.

4 *Mitsubishi Motors Corporation v Soler Chrysler Pymouth Inc*, 473 US 614 (105 SCt 3346, 87 Led 2d 444), 2 July 1985.

5 See, eg, Decision of the Higher Court in Ljubljana, ref. No. II Cp 2060/99 of 5 January 2000.

6 See, eg, article 2(2) of the New York Convention.

7 Podgorelec P and Primec A, Arbitražna klavzula v ustanovitvenih aktih gospodarskih družb, Podjetje in delo 8(2013), p 1261.

8 Ude L, Arbitražno pravo, GV Založba, Ljubljana 2004, p 82–83.

9 Ibid, p 101. See also Dika M and Sajko K, Arbitražno rješavanje medjunarodnih trgovačih sporova, Ljubljana 1989, p 25.

10 Ibid, n 8, p 129–130.

11 Ibid, p 139-143.

12 The decision of the Constitutional Court Up-20/99, the decision of the High Court of Ljubljana No. I Cpg 215/2007.

13 Primec A, Začasne odredbe (začasni ukrepi) arbitraže, Podjetje in delo, 2008, GV Založba 3–4, p 542-556; ibid, n 8 above.

14 Official Gazette of the Socialist Federal Republic of Yugoslavia, International Agreements No. 11/81, and Official Gazette of the Republic of Slovenia, International Agreements Nos. 9/92 et seq.

15 Permanent Court of Arbitration, case No. 2012-04, Final Award of 29 June 2017.

16 Final Award, paragraphs 886–914.

17 Ibid, paragraphs 1008–1011.

18 Ibid, paragraphs 1123–1128.

19 Case No. C-457/18. See also, eg, https://english.sta.si/2534705/govt-takes-croatia-to-eu-court-of-justice-over-border-arbitration.

20 See, eg, Nieuwveld B L, 'Third Party Funding – Maintenance and Champerty – Where is it Thriving?', Kluwer Arbitration Blog, available at http://kluwerarbitrationblog.com/2011/11/07/third-party-funding-maintenance-and-champerty-where-is-it-thriving/ (8 October 2016); Clanchy J, 'Third Party Funding in Arbitration: Breaking down Barriers and Building Bridges', *Croatian Arbitration Yearbook*, 2016, p 15; Živković P, 'The Recoverability of Outcome-Based Fees Related to Dispute Financing in International Arbitration', *Slovenian Arbitration Review*, 2017, GZS 1, p 39.

21 Shaw JG, 'Third-party funding in investment arbitration: how non-disclosure can cause harm for the sake of profit', *Arbitration International*, 2017, Oxford Journals 33, p 110.

22 Ibid, p 111.

23 Frignati V, 'Ethical implications of third-party funding in international arbitration', *Arbitration International*, 2016, Oxford Journals 32, p 505–522.

24 Fabiani L, et al, 'Country Chapter: Slovenia', *Survey of International Litigation Procedures: A Reference Guide*, The Foundation of the International Association of Defense Counsel, 2014, p 12.

25 Eg, the recoverability of outcome-based fees (ie, uplift fees), an issue recently addressed by the English High Court in the case of *Essar Oilfields Services v Norscot Rig Management PVT Limited* EXHC 2361 (Comm) (2016).

26 Act ratifying the Agreement on a Unified Patent Court (Official Gazette of the Republic of Slovenia No. 13/16).

27 See 'A Message from the Chairman, Alexander Ramsay' – June 2017, available at www.unified-patent-court.org/news/message-chairman-alexander-ramsay-june-2017.

28 Reports of the interdepartmental working group on the unified patent system are available at http://vrs-3.vlada.si/MANDAT14/VLADNAGRADIVA.NSF/GLA_PRE_KAT?OpenView&ExpandView&RestrictToCategory=02402%20-%202014%20/%20000009.

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Maja founded the Menard Ltd in 2017, after seven years with Ulčar & Partners Ltd and five years in the Paris office of Cleary Gottlieb Steen & Hamilton LLP. She has extensive experience in resolving international and domestic disputes and in international business and financial transactions. Maja is admitted to the Paris and Slovenian Bar.

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Matjaž is founding and managing partner of Ulčar & Partners Ltd, specialised in corporate and commercial law and recognised as a leading expert in M&A and financial transactions.

Matjaž has, for over 10 years, advised major Slovenian companies and international investors with respect to their domestic and regional commercial and financial transactions. Matjaž handles large-scale privatisation projects, private M&A transactions, including takeovers, financing projects, restructurings and is frequently included in legal teams dealing with most complex dispute resolution proceedings.

Matjaž is praised by the firm's clients as an excellent negotiator, and his in-depth knowledge and experience with commercial transactions is a valuable asset when dispute resolution teams are developing tools and strategies for complex litigations and arbitrations. Matjaž is also active as an arbitrator.

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Ulčar & Partners is a leading Slovenian corporate practice, specialising in corporate (including M&A and corporate restructuring), commercial law and dispute resolution. Combining youthful enthusiasm, sustained learning and improvement, experience and determination, we have extensive experience in advising major Slovenian companies as well as public entities and international investors and offer comprehensive services to our clients, including also labour, competition, energy and environmental law advice. The firm has established excellent business relations with several global law firms as well as local law firms in Southeast Europe.

Spain

Mercedes Romero and Javier Tarjuelo
Pérez-Llorca

Under article 11.1 of the Spanish Arbitration Act,[1] an arbitration agreement binds the parties to its terms and prevents courts from hearing disputes which are submitted to arbitration, provided that the concerned party invokes said arbitration agreement and raises an objection to jurisdiction within 10 days of the service of process. This is the 'negative effect' of the arbitration agreement.

In 2018, Spanish courts have rendered a large number of interesting decisions that clarify some of the conditions for bringing an objection to jurisdiction. The aim of this article is to provide an overview and analysis of the conclusions reached in these rulings.

The submission of a dispute to arbitration cannot be assessed ex officio, as it can only be assessed following a motion from a party by means of an objection to jurisdiction which is filed in due time and form

Under Spanish law, the existence of an arbitration agreement cannot, under any circumstance, be assessed ex officio. A recent decision from the Court of Appeal of Bilbao, dated 18 May 2018,[2] has confirmed that it is the party that wishes to invoke the arbitration agreement who carries the procedural burden to file the objection to jurisdiction in due time (ie, within 10 days of the service of process) and form (the brief containing the objection must be accompanied by the piece of evidence on which it is based).[3] Thus, the judge before which a claim is filed cannot dismiss it ex officio and nor do so based on belated allegations made by a party in its statement of defence.

In view of the above, the Court of Appeal of Bilbao dismissed the objection to jurisdiction that was alleged by the defendant in its statement of defence, in which the defendant argued the existence of a framework agreement of sanitary assistance which established that the parties must submit any controversy regarding the said agreement to arbitration.

In the same vein, the Court of Appeal of Málaga decision dated 8 January 2018[4] found that if the defendant appears in the court proceedings without duly filing an objection to jurisdiction, the defendant is tacitly renouncing the arbitration agreement, thus preventing a solution by means of arbitration in relation to that specific dispute.

Only those actions aimed at challenging corporate resolutions which are contrary to public order shall be excluded from the possibility of being submitted to arbitration proceedings

With regard to corporate arbitration, a decision from the Court of Appeal of Valladolid, dated 5 March 2018,[5] addressed the question of whether a claim against corporate resolutions should be considered as a public order issue for the parties, and therefore cannot be decided in arbitration proceedings, or if the claim is actually subject to the parties' decision according to the principle of autonomy of the will. In the case at hand, the Court of Appeal of Valladolid accepted the objection to jurisdiction filed by the defendant and decided to refrain from hearing the dispute as it considered that, according to the relevant clause of the company bylaws, the matter was subject to arbitration.

In particular, the Court of Appeal of Valladolid found that only actions aimed at challenging corporate resolutions that are contrary to public order are excluded from the possibility of being submitted to arbitration proceedings, as they are issues outside the scope of decision of the parties. Actions aimed at challenging corporate resolutions which are merely contrary to the law, the company bylaws or corporate interests are not excluded. In this regard, an infringement of a legal rule is not enough on its own to be considered as an infringement of public order, and requires a higher degree of unlawfulness or severity, such as if it is contrary to constitutional principles, a criminal offence or a contradiction of the essential principles for society that could be considered under the scope of public order.

Dismissal of an objection to jurisdiction due to the inclusion of the arbitration clause in a letter of intent

A decision from the Court of Appeal of Madrid, dated 19 February 2018,[6] revoked a first instance ruling that upheld an objection to jurisdiction based on an arbitral agreement included in a letter of intent. Letters of intent are contractual entities in common law, whose incorporation into the Spanish legal system has arisen as a result of its wide use by economic operators. Consequently, they are a strange element for the Spanish legal system, and lack any legal regulation, but have been accepted by means of the principle of autonomy of the will,[7] meaning that its content is decided by the parties, and could contain a binding offer, or not. Therefore, general rules on its effects, characteristics or concept cannot be extracted solely from its denomination. It will depend on the degree of determination of the key elements, the content of the document and the behaviour of the parties.

Under these circumstances, the Court of Appeal found that the letter of intent entered into by PKG Holdings LLC and GEA Group AG and the named declaration of non-binding intentions for the acquisition of the Bossar business was a simple offer without any binding force (as clearly follows from its name, but also from its clauses), and therefore its arbitration clause (which submits all disputes arising out of or in connection with the letter of intent to the German Arbitration Institute) is inoperative.

Acceptance of an objection to jurisdiction for the clarity of the arbitration clause and the effective possibility of its knowledge by the parties

Unlike article 8.1 of the UNCITRAL Model Law on International Commercial Arbitration,[8] article 11.1 of the Spanish Arbitration Act does not expressly stipulate that the success of the objection to jurisdiction is dependent on having an arbitration agreement which is not null and void, inoperative or incapable of being performed. However, there is well-established case law[9] supporting

the prevention of an arbitration clause that is null and void from having effect. In this regard, to be considered effective, the arbitration clause must state the unequivocal will of the parties to submit all, or some, of the issues that arise or that may arise from the relevant contract to the decision of one or more arbitrators.[10] Therefore, the waiver of the exercise of actions before the courts through submission to arbitration must be explicit, clear, conclusive and unequivocal.[11]

The above doctrine was applied by the Court of Appeal of Barcelona in its decision dated 29 June 2018.[12] In the case at hand, the claimant opposed the objection to jurisdiction, which had been filed in due time and form by the defendant, alleging that the arbitration agreement was ineffective due to a lack of express acceptance and ignorance of its real scope. The Court of Appeal of Barcelona has confirmed a first instance ruling that upheld the objection to jurisdiction. The Court of Appeal considered that the arbitration clause was grammatically comprehensible because of its simple wording. The Court of Appeal also felt it was clear that the claimant had the effective possibility of understanding the clause, as it appears to be in a specific titled section, with capital letters and emphasised. This section came at the end of the document, above the parties' representatives' signatures. But, moreover, the claimant's allegation that they had not noticed the arbitration clause cannot be accepted given that, before the agreement was signed, the claimant made some amendments to it, without expressing any concerns about the arbitration clause. Finally, the fact that the contract contained a submission to the courts of Madrid is irrelevant. Such a compromise does not contradict the main arbitration clause, as it specifies that it will only be applicable if the parties waive the arbitration agreement in writing.

The loss of economic resources suffered by one party after signing the arbitration agreement does not make the arbitration agreement ineffective

The Court of Appeal of Toledo decision dated 9 April 2018[13] decided on the appeal filed by the claimant against the first instance ruling, which upheld an objection to jurisdiction filed by the defendant. In particular, the claimant alleged the rebus sic stantibus clause on the basis that, as a consequence of his current lack of financial resources, he was granted legal aid to afford legal representation and access to the court system, and therefore, if he was forced to go to arbitration, he would be deprived of his right to access justice as he was unable to afford the costs and expenses of arbitration proceedings.

The application of the rebus sic stantibus clause is exceptional as it clashes with the general principle pacta sunt servanta. In the case at hand, the Court of Appeal did not deem the imbalance due to a change in circumstances to have been proven, given that the unpredictability – the key element for the application of the rebus sic stantibus clause – has not been proven in this case, as at the time the arbitration agreement was signed, the consequences of a change in financial circumstances were easily foreseeable.

The Court of Appeal also dismissed the claimant's allegation regarding the breach of article 24 of the Spanish Constitution,[14] which refers to the legal protection of citizens' rights. As the Court of Appeal indicates, arbitration is precisely an alternative means of resolving disputes without having to go to court. Therefore, the Court of Appeal did not accept the grounds for the appeal, as the acceptance of the objection to jurisdiction by the court of first instance is lawful, due to the existence of the parties' submission to arbitration. Those parties who agree on the submission of disputes to arbitration should be aware of its implications, and it cannot be alleged that its fulfilment is impossible because of the loss of economic resources suffered by one party after signing the arbitration agreement, as this is a possibility that should be anticipated and assessed.

Final considerations

The 'negative effect' of the arbitration agreement gives rise to interesting questions and controversial situations to be addressed by courts and arbitral tribunals. One of the most common practical issues derived from objections to jurisdictions is the potential coexistence of two types of proceedings – court and arbitration – in relation to the same dispute. Indeed, article 11.2 of the Spanish Arbitration Act, as well as article 8.2 of the UNCITRAL Model Law on International Commercial Arbitration,[15] states that the objection to jurisdiction shall not prevent the initiation or continuance of arbitration proceedings. As a consequence, an objection to jurisdiction filed in the court proceedings may not cause a stay of the concurrent arbitral proceedings, leading to an undesirable overlap between both the proceedings and the decision makers: the court and arbitral tribunal.

This article has also addressed other more specific and less common practical issues which arise from objections to jurisdiction that will help to gain a broader insight into the negative effect of the arbitration agreement under Spanish law, in relation to matters as diverse as corporate arbitration, letters of intent, rebus sic stantibus clause or the principle of autonomy of the will.

Notes

1 'Ley 60/2003, de 23 de diciembre, de Arbitraje'.
2 See Court of Appeal of Bilbao decision dated 18 May 2018 [LA LEY 94981, 2018].
3 Article 65.1 of the Spanish Civil Procedural Act ('Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil').
4 See Court of Appeal of Málaga decision dated 8 January 2018 [JUR 2018, 185924].
5 See Court of Appeal of Valladolid decision dated 5 March 2018 [JUR 2018, 190040].
6 See Court of Appeal of Madrid decision dated 19 February 2018 [JUR 2018, 139580].
7 Article 1255 of the Spanish Civil Code (Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil).
8 A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests no later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
9 See Spanish Supreme Court judgment dated 27 June 2017 [RJ 2017, 3021].
10 See Spanish Supreme Court judgments dated 27 June 2017 [RJ 2017, 3021] and 11 February 2010 [RJ 2010, 3771].
11 See Spanish Constitutional Court judgment dated 2 December 2010 [RTC 2010, 136].
12 See Court of Appeal of Barcelona decision dated 29 June 2018 [JUR 2018, 206788].
13 See Court of Appeal of Toledo decision dated 9 April 2018 [JUR 2018, 207569].
14 All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence.
15 Where an action referred to in paragraph 1 of this article has been

brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

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Pérez-Llorca is a preeminent law firm in Spain. We provide high-end advice to international and domestic clients in connection with the largest and most complex transactions and disputes in Spain or matters with a Spanish component. We pride ourselves on offering unrivalled quality, service and long-term commitment to clients. The majority of our work is cross-border and often involves several jurisdictions. As an independent law firm, we approach multi-jurisdictional work by providing turnkey solutions together with other leading independent firms from Europe, the Americas or Asia. We offer full-service advice on Spanish law and operate from our offices in Madrid, Barcelona, London and New York.

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Sweden

Fredrik Lundblom and David Henningsson
Vinge

Sweden has a long-standing tradition of resolving civil disputes through arbitration. In 1734, Sweden passed a law that allowed parties to resolve certain forms of disputes by means of arbitration, and in the late 1800s Sweden adopted its first comprehensive arbitration act. Moreover, over the course of the 20th century, Sweden positioned itself as a popular venue for international arbitration. During the Cold War, parties from the United States (and other Western countries), the Soviet Union and China regarded Sweden as a neutral venue and the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Institute) as a neutral administrator of disputes. Therefore, they frequently included arbitration clauses in their agreements that stipulated that the seat of arbitration should be Stockholm, Sweden, and that the arbitration should be administrated by the SCC Institute. Since then, the SCC Institute's popularity has anything but declined.

During the past 10 years, the SCC has had 170–216 new cases every year, of which around half have been international arbitrations. In 2017, a year during which the SCC celebrated its 100th anniversary, the SCC had its third-highest caseload since it was founded. Of the 200 cases on its docket last year, around half were international and the parties came from 40 different countries.[1] As regards the administration of investment treaty disputes, the SCC Institute ranks as the second largest institution in the world.[2] In short, Sweden continues to be one of the world-leading forums for international arbitration.

Several factors may explain why Sweden has established itself as one of the most popular venues for international arbitration. Sweden's reputation as a relatively independent state as far as world affairs is concerned continues to be cited as one main reason. In addition, it is often recognised that the Swedish justice system demonstrates a high degree of efficiency and respect for the rule of law. Further, Sweden has promoted itself internationally by being an active participant when rules and standards pertaining to international arbitration have been adopted.

Notably, the Swedish government has recently taken steps to maintain and develop Sweden's position as a hub for international arbitration. On 30 August 2018, the government introduced a new bill titled 'A modernisation of the Arbitration Act'. The bill contains several proposals intended to make the law even more easily accessible to Swedish and foreign parties and lawyers alike, and to ensure that Sweden remains a popular venue for international arbitration. The government has proposed that the amended law shall enter into force on 1 March 2019.

Below, we will provide a brief overview of some of the key provisions set out in the current Arbitration Act. Thereafter, we will describe some of the amendments of this law proposed by the Swedish government in the new bill. In the following section we will provide a brief introduction to the SCC Rules and to SCC arbitrations. In the final section, we will touch on a couple of recent court decisions related to arbitration in Sweden.

Brief overview of the Swedish Arbitration Act

Arbitrability

It follows from the Swedish Arbitration Act that any dispute that concerns matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an arbitration agreement may concern future disputes concerning a legal relationship specified in the agreement (however, the legal relationship as such must exist at the time when the arbitration agreement is concluded). The dispute may concern the existence of a particular legal fact. The parties may also ask the arbitrators to fill out gaps in agreements in a manner that goes beyond what follows from mere interpretation of the relevant agreements.

Arbitrators may also rule on the civil law effects of competition law as between the parties.

Arbitrators

Any person in possession of full legal capacity regarding his or her actions and his or her property may serve as an arbitrator. However, the parties may of course agree that the arbitrators shall have certain other qualifications than those stipulated in the Arbitration Act. Notably, the Arbitration Act does not require that the arbitrators are Swedish citizens or have residence in Sweden.

The parties are free to determine the number of arbitrators and how they shall be appointed. If the parties have not agreed on the number of arbitrators, the arbitral tribunal shall consist of three arbitrators, where each party appoints one arbitrator and the two party-appointed arbitrators appoint the chairperson. In accordance with the provisions set out in the Arbitration Act, the district court may, in some situations, get involved in the appointment of arbitrators (eg, if one of the parties fails to appoint an arbitrator).

The arbitration procedure

Unless otherwise agreed by the parties, the arbitral proceedings commence when a party receives a request for arbitration that fulfils certain requirements set out in the Arbitration Act.

The Arbitration Act states, inter alia, that the arbitrators shall handle the dispute impartially, appropriately and in a speedy fashion. They shall thereupon act in accordance with what the parties have determined, insofar as there is no impediment to doing so.

According to the Arbitration Act, it is the parties that shall supply the evidence. The parties to arbitral proceedings may rely on written witness statements, which in practice is common. If a party so requests, a final hearing shall be held before the arbitral tribunal renders a final award.

If a party wishes to have a witness or expert testify under oath, or a party examined under an affirmation of truth, the party may, after obtaining permission from the arbitrators, file a request for such hearings with the district court. This also applies if a party wishes to obtain an order for production of documents.

Costs of arbitration

As a main rule, the parties shall be jointly and severally liable to pay reasonable compensation to the arbitrators for work and expenses. However, the Arbitration Act also includes, inter alia, a provision that prescribes that the parties may jointly decide otherwise in a manner that is binding upon the arbitrators.

International matters

The Arbitration Act applies to arbitral proceedings that take place in Sweden even if the dispute has an international connection. Arbitral proceedings under the Arbitration Act may be initiated in Sweden:

- if the agreement stipulates that the proceedings shall take place in Sweden;
- if the arbitrators or an arbitration institute in accordance with the agreement has decided that the proceedings shall take place in Sweden; or
- if the opposing party otherwise consents thereto.

Moreover, arbitral proceedings under the Arbitration Act may also be initiated in Sweden against a party that is domiciled in Sweden or is otherwise subject to the jurisdiction of the Swedish courts in respect of the matter in dispute, unless the arbitration agreement stipulates that the proceedings shall take place in another country.

Invalidity and annulment of awards

An award or a part of the award is invalid:

- if it includes determination of an issue which, under Swedish law, may not be decided by arbitrators;
- if the award, or the way in which the award was rendered, is clearly incompatible with the basic principles of the Swedish legal system (ie, ordre public); or
- if the award does not fulfil certain requirements with regard to written form and signature.

Furthermore, a party may bring a challenge action before a court of appeal and request that the award be wholly or partly set aside. The court of appeal shall set aside the award:

- if it is not covered by a valid arbitration agreement between the parties;
- if the arbitrators have rendered the award after the expiration of the period determined by the parties, or if the arbitrators have otherwise exceeded their mandate;
- if the arbitral proceedings should not have taken place in Sweden (according to a provision set out in the Arbitration Act);
- if an arbitrator has been appointed in violation of the parties' agreement or in violation of the Arbitration Act;
- if an arbitrator was unauthorised in the sense that he or she lacked legal capacity regarding his or her actions and his or her property, or failed to fulfil the requirement of impartiality; or
- if, for reasons not pertaining to the party, there otherwise occurred an irregularity during the proceedings and it is probable that the irregularity influenced the outcome of the case.

An award may not be set aside if the party challenging the award relies on a circumstance that the party is deemed to have waived, for instance, by participating in the proceedings without raising an objection. Moreover, an action to set aside an award must be initiated within three months from the date on which the party received the award or, where correction, supplementation, or interpretation has taken place pursuant to the Arbitration Act, within a period of three months from the date on which the party received the award in its final wording.

An action to have an award set aside shall be filed with the court of appeal. The decision laid down by the court of appeal may not be appealed. However, the court of appeal may grant permission for its decision to be appealed to the Swedish Supreme Court if it is considered that the adjudication process in Sweden at large is well served by a precedent from the Supreme Court.

Recognition and enforcement of foreign awards

Sweden is a party to the 1958 New York Convention. Thus, as a main rule, foreign arbitral awards based on an arbitration agreement shall be recognised and enforced in Sweden. However, some exceptions apply. For example, a foreign award shall not be recognised and enforced in Sweden if the award includes an assessment of an issue that, according to Swedish law, cannot be resolved by arbitrators, or if recognition and enforcement is deemed incompatible with the basic principles of the Swedish legal system.

The proposed amendments to the Swedish Arbitration Act

In 2014, the Swedish government appointed a government committee mandated to consider how the Arbitration Act may be amended to ensure that it continues to be a modern and efficient law that is attractive to Swedish and foreign parties and lawyers. On 30 August 2018, the government introduced a bill that comprises several, albeit not all, of the government committee's proposals. In the new bill, the government proposes that the new law will enter into force on 1 March 2019.

Below, we summarise some of the key proposals in the bill.

- Under the current Arbitration Act, the arbitrators may rule on their own jurisdiction. However, a party may also request that a general court rules on the arbitrator's jurisdiction in a declaratory judgment. According to the current Arbitration Act, the arbitrators may in that case continue the arbitral proceedings pending a decision by the court. In other words, the issue of whether the arbitrators have jurisdiction may be the subject of parallel proceedings (ie, the arbitral proceedings and the court proceedings).

  Moreover, a party may challenge an award on the basis that the arbitrators lacked jurisdiction over the dispute. If a party prior to such challenge proceedings has requested that a district court rules on the issue of jurisdiction (as described in the paragraph above), and if that case is still ongoing when the challenge proceedings is initiated, the same issue may be the subject of two court proceedings at the same time.

  Hence, it is noted in the bill that the current legislation may lead to parallel proceedings regarding the same issue. It is also noted that this regulation deviates from rules applicable in several other countries. Against this background, new rules are proposed in the bill according to which a decision from the arbitrators that they have jurisdiction to resolve the dispute may be appealed to the court of appeal within 30 days. Furthermore, the bill introduces a procedural impediment that would bar a party from filing a separate request for a declaratory judgment with a general court after the arbitral proceedings have been initiated, unless the parties agree that the issue of jurisdiction shall be subject to such court proceedings.
- As mentioned above, the Arbitration Act provides that the arbitrators must be impartial. The preparatory works provide

that this requirement includes an assessment of whether an arbitrator is independent. However, since the Model Law sets out both an impartiality and an independence requirement, and since foreign parties may be confused as to whether independence is included in the assessment notwithstanding the absence of an explicit requirement to such effect, the bill includes a proposal that the term 'independent' shall be added to the relevant legal provision.

- The current Arbitration Act lacks provisions that govern the possibility to consolidate two or more arbitrations. However, since the Act entered into force in 1999, provisions regarding consolidation of arbitrations have been introduced in the SCC Rules, as well as the set of rules provided by several other arbitration institutes. The government is now proposing consolidation rules in the bill according to which several arbitrations may be consolidated if the parties consent thereto, the arbitrators deem that the handling of the proceedings will benefit from a consolidation and the same arbitrators have been appointed in the arbitrations.
- Contrary to several other arbitration frameworks, such as the Model Law and the SCC Rules, the Arbitration Act does not include any provisions concerning applicable substantive law. The following is now proposed in the bill:
  - It is proposed that it shall be clarified through an explicit provision that the dispute shall be resolved in accordance with the substantive laws or the set of rules agreed upon by the parties. According to statements in the bill, the parties shall also be able to choose to have their dispute resolved under a non-governmental framework such as the Principles of European Contract Law.
  - For the purposes of further clarification, the government also proposes a provision that provides that an agreement that designates a country's law shall be understood as a reference to that country's substantive law and not to its rules governing conflicts of law, unless otherwise prescribed pursuant to the parties' agreement.
  - At present, the Arbitration Act does not contain any explicit rule governing the situation where the parties have not agreed on the applicable substantive law. It is proposed in the bill that if the parties have not entered into such an agreement, the arbitrators shall decide which substantive law shall be applied. It is proposed in the bill that the law shall not direct the arbitrators as to how to reach such a decision.
- As mentioned above, an award may be set aside if the arbitrators have exceeded their mandate. In the current Act, there is no requirement that the excess of mandate must have affected the outcome of the arbitration. It is now proposed that this rule shall be complemented with a requirement that it must also be probable that the excess of mandate has affected the outcome.
- Furthermore, it is proposed that the time limit for filing a request for the setting aside of an award shall be shortened from three to two months. The aim is to ensure that arbitration is indeed a speedy and efficient form of dispute resolution and to put the legislation closer in line with the law in, for example, France and England.
- The proposed law would increase the opportunity to use the English language during the taking of evidence in the context of the challenge proceedings in court. Obviously, this is another concrete example of how the Swedish government is now striving to further facilitate litigation in Sweden for foreign parties. It is proposed that the court shall be able to take oral evidence in English (ie, that parties and witnesses shall be allowed to testify in English without interpretation to Swedish). However, it may be noted that currently parties may already submit written evidence in English to Swedish courts and that the Supreme Court has stated that such evidence often ought to be accepted.
- The bill introduces a requirement that parties seeking to appeal a court of appeal's judgment in a challenge proceeding must obtain permission to appeal from the Swedish Supreme Court. As mentioned, the court of appeal may in challenge proceedings grant permission for its judgment in a challenge proceeding to be appealed to the Supreme Court, if it is considered that the adjudication process in Sweden at large is well served by a precedent from the Supreme Court. Currently, no permission to appeal is required from the Supreme Court in these cases and the government notes that this means the Supreme Court is unable to limit its assessment to the very issue that is deemed necessary to clarify through a precedent from the highest court. Hence, the government now proposes that a requirement for permission to appeal is introduced into the law.

Brief introduction to the SCC Rules

Many of the provisions set out in the Arbitration Act are optional. Thus, to a large extent, the parties may decide whether their procedure shall be governed by the Arbitration Act or other rules. For example, the parties may agree that an arbitration shall be governed by a set of rules provided by an institution. As mentioned, institutional arbitration is very common in Sweden and most of these proceedings are administered by the SCC Institute and governed by the SCC Rules.

The latest version of the SCC Rules entered into force on 1 January 2017. The SCC Rules govern all fundamental aspects of the arbitral proceedings including, for example, confidentiality, the initiation of proceedings, the composition of the arbitral tribunal, challenge to arbitrators, the proceedings before the arbitral tribunal, evidence, interim measures, awards and decisions, time limits for the final award, costs of the arbitration and so on. Of course, the SCC Rules also provide the parties and the arbitral tribunal with a great deal of freedom to agree on a procedure as they see fit. It is also worth noting that the SCC Institute serves as an administrative body and that it is not a court of arbitration. Consequently, when the SCC Institute has referred the case to the arbitral tribunal, it has little involvement in the proceedings as such and it does not perform scrutiny of awards.

Where the parties have not agreed on the number of arbitrators, the SCC Institute shall decide whether the Arbitral Tribunal shall consist of one or three arbitrators, having regard to the complexity of the case, the amount in dispute and any other relevant circumstances. If the Arbitral Tribunal shall consist of three arbitrators (and if the parties have not agreed otherwise), each party shall appoint one arbitrator and the Board of the SCC Institute appoints the chairperson. If the parties are of different nationalities, the chairperson (or the sole arbitrator) shall be of a different nationality than the parties (unless the parties have agreed otherwise, or the SCC Institute otherwise deems it appropriate). In practice, arbitrators from many different countries act as arbitrators in SCC arbitrations. It may also be noted that the Board of the SCC Institute includes nationals from several different countries.

The SCC Rules have been adopted with the aim of ensuring a speedy and efficient proceeding. At the outset, a general rule

prescribes that the arbitral tribunal and the parties shall act in an efficient and expeditious manner. Furthermore, under the SCC Rules, the arbitral tribunal shall promptly arrange a management conference with the parties to organise, schedule and establish procedures for the conduct of the arbitration. Immediately after the case management conference, the tribunal shall establish a timetable, including the date for rendering the award. The aim of ensuring speedy and efficient proceedings also underpins several other provisions set out in the SCC Rules, such as article 43, which provides that the final award shall be rendered no later than six months from the date on which the case was referred to the arbitral tribunal, unless the SCC Board decides to extend this time limit upon a reasonable request from the arbitral tribunal or if otherwise deemed necessary. Statistics for 2017 confirm that arbitration under the SCC Rules tends to result in expeditious proceedings: the majority of awards were rendered within six to 12 months from the time of registration.[3]

As mentioned, the latest version of the SCC Rules entered into force on 1 January 2017. Key changes made in the latest version of the SCC Rules included, for example, the following:

- introduction of a summary procedure, under which the tribunal may decide one or several issues of fact or law without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration;
- provisions regarding joinder of additional parties under which a party to an arbitration may request that the Board of the SCC Institute join one or several additional parties to the arbitration;
- provisions that allow parties to make claims arising out of or in connection with more than one contract in a single arbitration;
- provisions regarding consolidation of arbitrations under which a newly commenced arbitration may be consolidated with a pending arbitration;
- provisions regarding the use of administrative secretaries, which regulate the relationship between the secretaries, parties and tribunal;
- provisions which allow arbitrators to order a claimant (or counterclaimant) to pay security for costs and to stay or dismiss the party's claims in whole or part if the party fails to provide security; and
- provisions emphasising the standard of efficiency and expeditiousness.

The SCC Rules for Expedited Arbitration

The SCC framework also allows parties to choose a particular form of expedited arbitral proceedings by agreeing before or after the dispute has arisen that the dispute shall be resolved in accordance with the SCC Rules for Expedited Arbitration. Under the Rules for Expedited Arbitration, the parties are only allowed to make a limited number of written submissions. In addition, written submissions shall be brief and the time limits for the filing of submissions may not (as a main rule) exceed 15 working days. Furthermore, under the Rules for Expedited Arbitration, the arbitration shall be decided by a sole arbitrator and the time limit for a final award is three months from the date on which the case was referred to the arbitrator. Further, a hearing shall be held only at the request of a party and if the arbitrator considers the reasons for the request to be compelling. In 2017, a majority of the awards rendered under this framework were rendered within three months and only 3 per cent of the awards were rendered after more than six months.[4]

Emergency arbitrators

In 2010, the SCC Institute became one of the first arbitration institutes in the world to offer the appointment of so-called emergency arbitrators. A party that wishes to seek a decision on interim measures may file a request with the ICC Institute to have an emergency arbitrator appointed in accordance with the rules set out in an appendix to the SCC Rules and the SCC Rules for Expedited Arbitration. In such a case, the SCC Board shall seek to appoint an emergency arbitrator within 24 hours of receipt of the application (in all three cases coming before the SCC Institute in 2017, an emergency arbitrator was indeed appointed within 24 hours) and a decision on interim measures shall be made no later than five days from the date on which the application was referred to the emergency arbitrator under the relevant SCC rule. The emergency decision is binding on the parties when rendered, and by agreeing to arbitration under the SCC Rules the parties thereby undertake to comply with any emergency decision without delay. However, the arbitral tribunal is not bound by the decisions and reasoning of the emergency arbitrator, and the emergency arbitrator's decision ceases to be binding, for example, if the arbitral tribunal so decides.

Investor treaty disputes

The SCC Rules also include an appendix that sets out provisions that apply specifically to investor treaty disputes (ie, disputes based on a treaty providing for arbitration of disputes between an investor and a state). The SCC Rules are the third most commonly used arbitration rules in investment disputes and this makes the SCC Institute the second largest arbitration institute in the world (after ICSID) for the administration of investment disputes.[5]

Recent case law

The Swedish Supreme Court, Case Ö 5384-17

A May 2018 judgment by the Supreme Court has provided further guidance on how provisions imposing impediments to recognition and enforcement of foreign awards shall be interpreted and applied in the realm of competition law. As mentioned above, the main rule set out in the Arbitration Act is that foreign awards shall be recognised and enforced in Sweden. However, there are a few exceptions whereby an award shall not be recognised or enforced if: the award includes an assessment of an issue that, according to Swedish law, cannot be resolved by arbitrators; or if recognition or enforcement is deemed incompatible with the basic principles of the Swedish legal system (ie, ordre public).

The case concerned whether any of these two exceptions were applicable on grounds related to competition law. The foreign arbitral award, rendered in Norway, contained an injunction hindering competition between two parties and an obligation for one of the parties to pay damages based on a violation of an agreed restriction of competition.

The Supreme Court found that it did not have to rule on the enforcement of the injunction since the term of the injunction had expired by the time the Supreme Court was to make its decision.

However, the Supreme Court did consider the obligation to pay damages, and in a 3:2 decision it found that no impediment to the enforcement of the arbitral award was at hand.

The Supreme Court stressed that at the time the arbitral award was rendered, the parties could have entered into a binding agreement corresponding to the arbitral tribunal's decision on damages.

Accordingly, there was no impediment to enforcement on the basis that the arbitrators could not resolve the issue.

With respect to the ordre public exception, the Supreme Court stated that the purpose behind the ordre public provisions is to ensure that courts and authorities do not assist in the enforcement of awards when such assistance would be 'deeply offensive' (in Swedish, *höggradigt stötande*). The Court then added that although it is generally required that the offensiveness is obvious, such an 'obvious prerequisite' is not applicable if the assessment pertains to peremptory competition law. Further, the Supreme Court clarified that the assessment of whether an agreement is prohibited under competition law, and therefore incompatible with the basic principles of the Swedish legal system, shall be based on the circumstances that existed when the objection based on competition law was first raised. In this context, the Supreme Court noted that a party may continuously, and with binding effect, admit liability to indemnify the damage that is gradually caused through a violation of a condition hindering competition.

Further, the Supreme Court clarified that the interest of upholding the mandatory competition rules through the ordre public exceptions only requires that a party shall be required to invoke mandatory competition law to successfully contest continuous liability to indemnify. In the case at hand, the party invoking the ordre public provisions had not raised its objection related to competition law prior to the challenge proceeding in the Swedish court of appeal. Therefore, the ordre public exemption did not constitute an impediment to the enforcement of the award at issue.

Svea Court of Appeal, Cases No. T 765-16 and T 4427-16

On 21 October 2017, the Svea Court of Appeal rejected a protest action that was based, inter alia, on the claim that the arbitrators had exceeded their mandate by basing parts of the award on circumstances which, according to the challenging party, had not been referenced by the parties. The Svea Court of Appeal dismissed the challenge.

In the arbitral proceeding, the arbitral tribunal had assessed whether the parties had entered into an agreement to the effect that the respondent – a tenant – would be released from an obligation to pay rent in accordance with a previous written agreement between the parties, in the event that the respondent's turnover from the relevant business would be less than a certain amount. The arbitral tribunal answered that question in the affirmative, basing its assessment on, inter alia, a fact brought into the dispute through an oral witness statement (namely, the fact that the witness had informed a person representing the claimant about the existence of the oral agreement according to which the respondent would be released from the obligation to pay rent if the respondent's turnover would be less than a certain amount). However, this fact had not been invoked by the respondent during the arbitral proceedings.

In respect of the claim that the arbitrators had exceeded their mandate, the Court drew a distinction between ultimate facts (facts that have a legal consequence, ie, directly relevant circumstances) and evidentiary facts (facts that have evidentiary value when determining the existence of an ultimate fact, eg, indirectly relevant circumstances). The Court noted that an arbitral tribunal generally has exceeded its mandate if it bases its decision on an ultimate fact not invoked by the parties. On the other hand, an evidentiary fact does not have to be invoked by the parties; it is sufficient that the evidentiary fact has been introduced to the arbitral proceeding (eg, through witness testimony). In the case at hand, the Court found that the circumstances at issue constituted evidentiary facts and, consequently, that the arbitral tribunal had not taken an ultimate fact not invoked by the parties into account when determining the outcome of the case. Hence, the arbitrators had not exceeded their mandate on the basis contended by the challenging party.

Notes

1 See the SCC Institute's website, available at https://sccinstitute.com/statistics.
2 See the SCC Institute's website, available at https://sccinstitute.com/dispute-resolution/investment-disputes.
3 See the SCC Institute's website, available at https://sccinstitute.com/statistics.
4 See the SCC Institute's website, available at https://sccinstitute.com/statistics.
5 See the SCC Institute's website, available at https://sccinstitute.com/statistics.

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Vinge is a member of Lex Mundi, an international association of independent law firms. In addition, Vinge has an extensive global network of business contacts which it has established throughout the years and which is available to its clients.

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Switzerland

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Measuring the efficiency of post-award proceedings

The long-standing arbitration-friendliness of Switzerland is well known. This is reflected in its laws (the Swiss Private International Law Act, currently under revision, being the most relevant example), but also in the reports of arbitral institutions which demonstrate its ongoing popularity as a seat: Geneva and Zurich together are second only to Paris in the 2017 International Chamber of Commerce Court case statistics.[1] Swiss arbitrators are the third-most appointed (after the United Kingdom and France) when it comes to nationality (and first on a per capita basis),[2] and Swiss law among the top four chosen laws on the merits.[3]

In assessing the desirability of an arbitral seat, however, other highly salient factors are too often overlooked. These factors directly affect parties' interests, not only to a fair, efficient and cost-effective arbitral process. Once a (hopefully favourable) arbitral award is obtained, the hurdles that can stand in the way of its enforcement become the primary concern. The time taken for appeals to run their course – to a true final result – can at times erode the value of the award itself. Moreover, the uncertainty associated with the likelihood that the award will be set aside also stands in the way of finality. A high degree of certainty in an arbitral award's ultimate enforcement, and the expectation that it can be enforced without undue delay thereby increase the value of the end-to-end dispute resolution process.

In order to assess how well a given jurisdiction fares not only with respect to the support of a nascent or ongoing arbitral process (such as the availability and willingness of judges to assist with document production orders, and the like), it is necessary to take a close look at what happens after the award is rendered.

Felix Dasser and his research assistants have been doing this for some time. The most recent update by Dasser and Piotr Wójtowicz analyses data on challenges of Swiss arbitral awards as of 2017.[4] Their approach analyses three different data samples of decisions rendered by the Swiss Federal Court, the sole and final appeal instance for awards subject to Swiss lex arbitri. The first (and largest) sample concerns challenges of international arbitral awards pursuant to article 190(2) of the Swiss Private International Law Act (PILA). The second looks at request for revision of international arbitral awards, and the third focuses on challenges to domestic arbitral awards pursuant to article 389 et seqq of the Swiss Code of Civil Procedure (CCP) (which entered into force on 1 January 2011). A summary of Dasser and Wójtowicz's analysis is outlined below.[5]

Challenges of international arbitral awards

The figures

Since 1989, 576 decisions on challenges have been rendered, with the past two years setting new records: 31 and 43 decisions in 2016 and 2017, respectively. These numbers mean that 2017 represents almost double the amount of 2008 or 2009, though the average has been on the rise over the past decade.

The high volume measured in recent years is due to a large number of decisions on challenges of sports arbitration awards rendered in 2017 (a peak of 21 sports cases). High numbers in sports cases have been known for some years, since the outset of that trend in 2010 (20 requests for the setting aside of sports awards were filed in 2010, compared to just 11 in 2009).

The aggregate record for the last decade (2008 through 2017) tallies 145 sports decisions (45 per cent) out of a total of 323 decisions rendered (178 non-sports). The sports awards have been almost exclusively rendered by the Court of Arbitration for Sport in Lausanne, Switzerland (the CAS).

The number of non-sports cases[6] also increased over the past 10 years, yet less impressively. Consequently, the overall yearly number of decisions and by implication challenges has remained high since 2010.

The total of 576 decisions entails 438 cases that were decided on the merits (76 per cent) (1989 through 2017); 78 challenges were dismissed due to lack of admissibility (14 per cent); 60 challenges were dismissed due to withdrawal (10 per cent).

Extent of success

Despite the increase in the number of challenges in 2016 and 2017, there was no notable increase in their success rate. Only three awards were set aside (one in 2016, and two in 2017). It is noteworthy that (for the first time in almost a decade) not a single challenge to a sports arbitration award succeeded over a two-year period. Accordingly, the yearly numbers of successful challenges appear, for the time being, to have plateaued on a low level.

In absolute terms (as one would expect), successful challenges grew more numerous since 1989 (the moment from which Dasser started tracking challenges), basically for two reasons:

- the number of challenges filed per year has inexorably risen over time, meaning that even a consistently low percentage of reversals leads to increased absolute numbers; and
- for several years, sports arbitration used to record a slightly higher frequency of successful challenges.

In recent years, the percentages of successful sports and non-sports challenges have converged. The success rate for non-sports arbitration cases has risen slightly from previous years but remains at a low 7.37 per cent (23 out of 312 cases), while 14 sports awards have been set aside at a rate of 7.94 per cent (10 out of 126 cases), a noteworthy drop from the 9.71 per cent just two years ago (10 out of 103 cases).

Dasser's very first study in 2007 referred to the 'magic seven' per cent of overall (partial) setting aside. This rule of thumb still appears to be valid as of 2017 (with 7.53 per cent of awards at least partially set aside).[7]

Grounds of challenge

The most successful avenue for challenging an award remains jurisdictional grounds (article 190(2)(b) PILA), with an 11.3 per cent success rate. Next comes a violation of equal treatment (or 'right to be heard', 190(2)(c)) at 5.5 per cent, followed by constitution of the arbitral tribunal (190(2)(a)) at 3.8 per cent, ultra or infra petita (190(2)(c)) at 2.9 per cent, and finally a decision against public policy (ordre public) at a mere 1 per cent (though the latter ground remains a popular means of challenge).

Duration of proceedings

Dasser and Wójtowicz calculate the duration of proceedings from the date on which the Federal Court receives a challenge. Not counting cases where the challenge was found procedurally inadmissible, they found that since 2009, the median duration until issuance of the decision increased from four to six months and appears to be settling below six months. Given the one-month period for filing a challenge,[8] parties can reasonably expect to know where they stand – from a final standpoint – within seven months of receiving the arbitral award.

Participation of foreign parties

The research shows that Switzerland remains a prime neutral ground for dispute resolution between foreign parties by means of arbitration; ie, non-Swiss parties that at the time of the conclusion of the arbitration agreement had neither their domicile nor their habitual residence in Switzerland. The percentage of cases in which only foreign parties were involved has risen in the past decade, reaching 71 per cent as of 2015. As of 2017, it remains at a still high 69 per cent. In 327 out of the 472 cases with identifiable nationalities, all parties were foreign (in keeping with the percentage found in the first study in 2007.

Conclusion

While the numbers of challenges brought before the Federal Court per year has constantly been increasing and has peaked at 43 decisions in 2017, Dasser and Wójtowicz's data testifies to the very arbitration-friendly and efficient approach by the Swiss judiciary. The percentage of successful challenges in non-sports arbitration remains stable at around 7 per cent. As of 2017, the data for sports arbitration, too, suggest a chance of about 7 per cent of an award being set aside. With regard to individual grounds for successful challenges, there is a certain, maybe random, shift towards ground (b) (jurisdiction) of article 190(2) PILA.

The median duration of the procedure before the Federal Court is roughly six months. The median duration from the issuance of an award to the final determination of a challenge by the Federal Court is slightly longer than it was a decade ago. Yet, it is still short: seven months.

With a 7 per cent chance of a successful challenge, and a seven-month time span from issuance of the award until a final decision on the challenge, Dasser and Wójtowicz appropriately conclude that the Federal Court gives a high degree of deference to arbitral tribunals, with impressive efficiency, while remaining vigilant to violations of bedrock principles of international arbitration.

Revision of international arbitral awards

The figures

The PILA is silent with regard to requests for revisions, however the Federal Court filled this gap in 1992, holding that a request for revision of an arbitral award is admissible and had to be addressed to the Federal Court.[9] A revision may be requested on two grounds:

- the award was affected by criminal offence; or
- preexisting material facts or decisive evidence have been discovered since the award.[10]

Since 1992, only 27 decisions have been rendered (including two each in 2016 and 2017). The percentage of admissible requests (ie, requests decided on the merits) remains similar to the one for challenges, 74 per cent as compared to 76 per cent for challenges. All concern revisions to international arbitration awards.

Success of requests for revision

Only three out of the 20 requests for revision that were admitted have been successful as of 2017 (in 2006, 2009 and 2016). None of them were sports-related. The number of cases is so low that it is difficult to draw reliable conclusions. That said, the success rate based on this small sample stands at 15 per cent, suggesting (as is the case for challenges) a high degree of deference by the Federal Court to arbitral awards.

Grounds for revision

Excluding requests that were held to be inadmissible, the invocation of a criminal offence took place twice, both times successfully. On the other hand, when newly discovered facts or evidence were invoked (16 times), only one request was successful.

Duration of proceedings

The median duration of the 20 merits decisions on revision (approximately five months) is slightly shorter than the one for challenges. There is, however, considerable variation.

Conclusion

Dasser and Wójtowicz reasonably conclude that, given the rate of admissibility and the duration of the proceedings, similar trends to those for challenges of awards can be expected. However, given the paucity of revision cases, making any predictions is challenging. On the basis of the existing data, however, it does seem like the existence of criminal conduct is necessary to ensure success given the strong likelihood of failure on the only other available ground.

Challenges of domestic arbitral awards

General principles and figures

Parties can challenge domestic arbitral awards under article 389 of the Swiss Code of Civil Procedure (the CCP).[11]

By default, only the Federal Court is competent to hear such challenges (article 389 CCP). However, and contrary to international arbitration, the parties may designate the competent cantonal court of the canton where the arbitral tribunal has its seat to hear the case (article 390 CCP). Once designated, the cantonal court has exclusive powers to hear the case and its decision is final; there is no recourse to the Federal Court. The Dasser and Wójtowicz study does not record any such decisions of the cantonal courts.

The number of decisions in domestic arbitration has remained lower than in international arbitration. Since 2011, 79 decisions have been rendered in total (27 of them in 2016 and 2017), out of which 59 were on the merits.

The overall number of cases is low, however some nascent trends can be distinguished. The vast majority of cases concern commercial disputes. In addition, there are several employment-related cases (14 cases, or 18 per cent), while sports-related

challenges are rare (five cases, or 6 per cent). The employment cases evidence the importance of arbitration in Swiss (collective) employment law.[12]

Success of challenges

As of 2017, the data indicates a rate of success of 19 per cent on the merits, with 11 out of 59 challenges being successful. No additional challenges of sports or employment awards were successful in the past two years, while two commercial decisions were successful in 2016 and one was in 2017.

The data thus indicates a historic chance of success of a challenge of 17.8 per cent for commercial and a strikingly similar 18.2 per cent for employment matters. On their own, the number of employment cases is too low to allow for predictions. Yet in light of the similar rate of success in commercial cases, a similar trend might at least be assumed. No serious predictions appear possible for sports arbitration given the marginal number of such cases (one successful out of three admitted challenges).

To date, numbers seem to indicate that the success rate of challenges in domestic arbitration might double or even triple the rate in international arbitration.

Dasser and Wójtowicz explain that the main reason for the higher numbers of reversals in domestic arbitration compared to international arbitration lies primarily in article 393(e) CCP (arbitrariness of an award). The Federal Court can review the arbitral tribunal's decision on merits under the test of arbitrariness which is far broader than the very narrow test of public policy pursuant to article 190(2)(e) PILA for international cases. Consequently, challenges based on arbitrariness are successful in 20 per cent of the cases (compared to a mere 1 per cent for challenges based on public policy in international cases).

Grounds of challenge

Under article 393(a)–(f) CCP, a domestic arbitral award may be challenged only on the following grounds:

(a) the single arbitrator was appointed or the arbitral tribunal composed in an irregular manner;
(b) the arbitral tribunal wrongly declared itself to have or not to have jurisdiction;
(c) the arbitral tribunal decided issues that were not submitted to it or failed to decide on a prayer for relief;
(d) the principles of equal treatment of the parties or the right to be heard were violated;
(e) the award is arbitrary in its result because it is based on findings that are obviously contrary to the facts as stated in the case files or because it constitutes an obvious violation of law or equity; and
(f) the costs and compensation fixed by the arbitral tribunal are obviously excessive.[44]

As of 2017, not a single challenge on grounds (a) or (c) was successful, while ground (f) (excessive fees and costs) has not yet been invoked. Conversely, the chances of a challenge based on ground (b) (jurisdiction), and (e) (arbitrariness), remain high (as of 2017, two out of nine, and seven out of 35, respectively). For the first time, ground (d) (equal treatment or the right to be heard) has been invoked successfully, in 2016 and again in 2017 (two out of a total of 16).

Duration of proceedings

The median duration of challenge proceedings before the Federal Court in domestic arbitration has been rising steadily since 2011 and, as of 2017, amounts to 145 days (roughly 4.75 months, for 59 decisions on the merits). It remains shorter than in international arbitration. Thus, taking into account the 30-day period for the filing of a challenge, parties may expect a domestic award to be final less than six months after its issuance. However, the variance in duration is very high.

Conclusions

Dasser and Wójtowicz conclude that it is still early days for any empirical study on domestic arbitration under the CPC. The still rather low number of cases are much easier to challenge on the merits due to the relatively broad ground of arbitrariness, which is unavailable in international cases under the PILA. There have been no challenges based on allegedly excessive arbitration fees so far, in spite of the often-heard complaint about costs of arbitration.

Overall, apart from the challenges based on arbitrariness, challenges of domestic awards share most features with international cases, suggesting it may not matter that much whether a case turns out to be international or domestic under Swiss law. The current gentle reform of Swiss arbitration will align international and domestic arbitration even more, without compromising in any way the extremely liberal approach of the PILA.[13]

Taken together, the conclusions drawn from the study on challenges to international and domestic arbitral awards, as well as on the revision of international arbitration awards, jointly demonstrate an efficient system that is arbitration-friendly in all phases of the process, including in post-award challenges and revision requests that are dealt with within, on average, a seven-month time span from the issuance of the award.

Notes

1 ICC Dispute Resolution Bulletin 2018 (Issue 2), p 60.
2 Ibid, p 58.
3 Ibid, p 61.
4 Felix Dasser and Piotr Wójtowicz, Challenges of Swiss Arbitral Awards – Updated Statistical Data as of 2017, ASA Bulletin Volume 36, No. 2, 2018, pp 276–294.
5 Refer to ibid for the comprehensive analysis including illustrative charts.
6 Includes commercial and occasional investment arbitration awards.
7 For prior studies refer to Felix Dasser and Piotr Wójtowicz, Challenges of Swiss Arbitral Awards – Updated and Extended Statistical Data as of 2015, ASA Bulletin Volume 34, No. 2, 2016, pp 280–300; and Felix Dasser, International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis, ASA Bulletin Volume 25, No. 3, 2007, pp 444–472.
8 Article 100(1) Swiss Federal Act on the Federal Court of 17 June 2005 (Swiss Federal Court Act), SR 173.110.
9 Decision BGE 118 (1992) II 199.
10 Decision BGE 134 (2008) III 286.
11 The CCP came into force on 1 January 2011, replacing previous cantonal codes of civil procedure and, with its third part on arbitration (articles 353 et seqq), the former cantonal Concordat on Arbitration that governed domestic arbitration.
12 Cf Piotr Wójtowicz, Labour Law and ADR in Switzerland – Selected Topics. Mediation, Arbitration and Collective Employment Contracts, Arbitrability of Labour Law Claims, in: Themis Polska Nova 2015 / nr 1 (8), 209–222, 214–216.
13 See www.ejpd.admin.ch/ejpd/de/home/aktuell/news/2017/2017-01-11.html. The Federal Council's bill to Parliament is scheduled for late summer 2018.

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ASA – the Swiss Arbitration Association is a non-profit association with over 1200 members – of whom more than 450 are from outside Switzerland, all practitioners and academics engaged or interested in domestic and international arbitration. Membership is open to all nationalities, irrespective of the level of experience. Since its creation in 1974, it has become one of the leading arbitration associations, bringing together the world's most eminent arbitration practitioners. ASA is however not an arbitral institution and does not administer arbitral proceedings. ASA may be designated as an appointing authority or requested to provide other services in support of arbitration or conciliation or mediation proceedings.

Ukraine

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Protection of investments in international armed conflicts: a case for Donbas

The illegal annexation of Crimea by the Russian Federation in April 2014, which was followed by the armed conflict in Donbas that has been financed, supported (through military, economic and political assistance) and de facto controlled by the Russian Federation, resulted in the large-scale expropriation, destruction, impairment and losses of investments in the occupied territories of Crimea and Donbas. This includes investments owned by both private and state-owned companies. According to the State Property Fund of Ukraine, over 900 state-owned companies, including Ukrainian Railways, Ukrainian Seaport Authority and Ukrainian Post, lost their investments in Crimea and Donbas. According to the report of the Atlantic Council (in the article 'Kremlin Aggression in Ukraine: The Price Tag') the material losses of Ukraine in Crimea and Donbas may amount to almost US$100 billion.[1]

However, only a few private and state-owned companies pursued investor–state claims against the Russian Federation for expropriation of investments in Crimea. These include:

- *Everest Estate LLC and Others v Russia* (US$150 million in damages and interest were awarded on 2 May 2018);[2]
- *PJSC CB PrivatBank and Finance Company Finilon LLC v Russia* and *Aeroport Belbek LLC and Mr Igor Kolomoisky v Russia* (in the *PrivatBank* and *Belbek* cases, tribunals accepted jurisdiction in February 2017);[3]
- *PJSC Ukrnafta v Russia* and *Stabil LLC and Others v Russia* (in the *Ukrnafta* and *Stabil* cases, tribunals accepted jurisdiction in June 2017);[4] and
- *Oschadbank v Russia*, *Lugzor LLC and Others v Russia* and *PJSC DTEK Krymenergo v Russia*.

At the same time, no investor–state claims against Russia have so far been pursued in respect of occupied Donbas. Russia's involvement and its effective control over Donbas is supported by abundant evidence, and, similarly to Crimean cases, the Russian Federation shall be responsible under international investment law for expropriation, destruction and other damages to investments in Donbas.

In this article, I will explore, among other matters, the grounds to hold the Russian Federation responsible under its own bilateral investment treaties (BITs), including the Russia–Ukraine BIT, for expropriation, destruction and failure to protect foreign investments during the armed conflict in the occupied territories of Donbas. Russia's responsibility may be triggered by the effective control directly or indirectly exercised by Russia in Donbas.

Russia's occupation

The abundant evidence collected by the Ukrainian authorities and international organisations supports the view that the Russian Federation has been in effective control over Donbas since 2014 and, therefore, shall be treated as an occupying power.

Effective control

Article 42 of the 1907 Hague Regulations, the main legal authority for occupation, provides that 'territory is considered occupied when it is actually placed under the authority [effective control] of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.'[5]

As follows from article 42 and its application by the international tribunals and courts, such as International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY), in cases concerning armed conflicts 'occupation' requires the de facto placement of a state's territory or its part under the authority of a hostile army, which is exercised by the occupying power through effective control over the occupied territory. For example, in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, the ICJ examined whether Uganda occupied the Ituri district of Democratic Republic of the Congo over which the Uganda People's Defence Forces exercised effective control:

> *175. It is not disputed between the Parties that General Kazini, commander of the Ugandan forces in the DRC, created the new "province of Kibali-Ituri" in June 1999 and appointed Ms Adèle Lotsove as its Governor. Various sources of evidence attest to this fact, in particular a letter from General Kazini dated 18 June 1999, in which he appoints Ms Adèle Lotsove as "provisional Governor" and gives suggestions with regard to questions of administration of the new province. This is also supported by material from the Porter Commission. The Court further notes that the Sixth report of the Secretary-General on MONUC (S/2001/128 of 12 February 2001) states that, according to MONUC military observers, the UPDF was in effective control in Bunia (capital of Ituri district).*[6]

Overall control

A classical case of occupation involves the physical presence of a hostile army of one state exercising authority (effective control) over the territory of another state without consent. However, in today's armed conflicts, such as that in Donbas, it is usual for a foreign state to exercise its control over a given territory through the local military or paramilitary groups, which are trained, equipped, financed, generally supported and coordinated by the state. International tribunals and courts developed 'overall control' concept to attribute actions of local military groups to outside (foreign) state, which finances, supports and coordinates such groups.

For example, in the *Tadic* case, the ICTY applied the 'overall control' concept in order to establish that Serbia exercised sufficient control over the military forces operating in Bosnia and,

therefore, Serbia acting through its proxies was engaged in an international armed conflict in Bosnia.[7] In the *Blaškić* case, the ICTY also relied on the overall control concept to establish the existence of an indirect occupation:

> *In relation to areas within Bosnia, Croatia played the role of occupying Power through the overall control it exercised over the HVO* [the local militia, which destroyed the property of the Bosnian Muslims]*, the support it lent it and the close ties it maintained with it . . . . the overall control exercised by Croatia over the HVO means that at the time of its destruction, the property of the Bosnian Muslims was under the control of Croatia and was in occupied territory.*[8]

According to the jurisprudence of the ICTY, in order to establish overall control over military or paramilitary groups and international responsibility for their actions, financial and military support and general coordination of military activities are sufficient:

> *131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.*[9]

In the *Bosnia Genocide* case, the ICJ rejected the 'overall control' test, as applied by the ICTY in the *Tadic* case, stating that this test provides for a wider scope of state responsibility for acts committed by others as reflected in article 8 of the ARSIWA.[10] In *Bosnia Genocide*, the ICJ followed its earlier *Nicaragua* case and applied the 'effective control' test, which requires a greater degree of control by a state over military or paramilitary groups operating outside its borders in order to attribute their wrongful acts to the controlling state and trigger its responsibility.[11]

While the ICJ used its own strict control test, the ICTY and others derogated from the ICJ cases. They applied less demanding control tests to ensure that states do not avoid responsibility for internationally wrongful acts when they act through others. As the Appeal Chamber of the ICTY stated in the *Tadic* case, the degree of control required for attribution and state responsibility may vary in different circumstances:

> *The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individual. The degree of control may, however, vary according to the factual circumstances of each case. The Appeal Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.*[12]

European Court of Human Rights

The European Court of Human Rights (ECtHR) in its jurisprudence uses a similar and wider effective control tests to decide which state shall be responsible for violation of human rights on a given territory – the sovereign state deprived of effective control over its territory or the aggressor state which gained and exercises authority over such territory. Although the ECtHR does not employ territorial nexus, its jurisprudence sheds light on responsibility of states for activities of non-state actors outside their territories.

For example, in the *Loizidou v Turkey* case, the ECtHR attributed violations of human rights by the local authorities in northern Cyprus to Turkey because Turkey exercised its effective overall control over the whole area of northern Cyprus:

> *It is not necessary to determine whether . . . Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC"* [Turkish Republic of Northern Cyprus]*. It is obvious from the large number of* [Turkish] *troops engaged in active duties in northern Cyprus . . . that her army exercises effective overall control over that part of the island* [northern Cyprus]*. Such control . . . entails her responsibility for the policies and actions of the "TRNC."*[13]

Likewise, in the *Cyprus v Turkey* case, the ECtHR used an effective overall control test to establish jurisdiction and responsibility of Turkey not only for the action of its military forces, but also for actions of the local administration in northern Cyprus:

> *Having effective overall control over northern Cyprus, its* [Turkey's] *responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support.*[14]

In *Ilascu and Others v Moldova*, the ECtHR ruled that the Russian Federation was responsible for human rights violations committed by the local authorities of the Moldovan Republic of Transnistria (MRT), a sovereign territory of Moldova under the effective authority of the local secessionist movement, which could not 'survive' without 'the military, economic, financial and political support' from the Russian Federation:

> *All of the above proves that the "MRT", set up in 1991–1992 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.*[15]

Evidence

Considering the abundant evidence of Russia's heavy involvement in the armed conflict in Donbas, one may infer that Russia shall be treated as an occupying power by reason of Russia's effective control in Donbas, which is exercised directly (through Russian military personnel, de facto present in Donbas) or indirectly through overall control by Russia over the local anti-governmental forces. Evidence includes the following:

- Ukraine and its parliament regard the uncontrolled territories of Donbas as 'temporarily occupied' by the Russian Federation, as occupied by the 'military forces of the Russian Federation' and as under the 'occupation administration of the Russian Federation'.[16]
- Ukraine asserts that it is in possession of plentiful evidence to prove that self-proclaimed bodies that usurped the exercise of power on the occupied territories of Donbas are controlled by Russia, that irregular illegal armed groups in Donbas have been created, subordinated, managed and funded by the Russian Federation.
- The Russian rouble was introduced as the single currency in the territory of certain districts of the Donetsk and Luhansk Regions.

- In addressing the issue of terrorism financing in the ICJ, Ukraine referred to the DPR (Donetsk People's Republic) and the LPR (Luhansk People's Republic) as 'proxies of the Russian Federation':

  The DPR and the LPR emerged as two of the primary illegal armed groups operating in Ukraine. These organizations and other groups and individuals associated with them are proxies of the Russian Federation: they operate with critical Russian support and assistance, defying Ukrainian and international law, committing acts of terrorism, and inflicting violence and human rights abuses on the people of Ukraine [in DPR and LPR].[17]

- In addressing international crimes in the armed conflict in Donbas, the prosecutor of the International Criminal Court stated in its recent report:

  During the course of the conflict, periods of particularly intense battles were reported in Ilovaisk (Donetsk oblast) in August 2014 and in Debaltseve (Donetsk) from January to February 2015. The increased intensity of fighting during these periods has been attributed to alleged corresponding influxes of troops, vehicles and weaponry from the Russian Federation to reinforce the positions of the armed groups.[18]

- The Parliamentary Assembly of the Council of Europe recognised the uncontrolled territories of Donbas as 'temporarily under the effective control of the Russian authorities.'[19]
- In the appeal to the international community, the Ukrainian parliament asserted the 'active support of terrorists at the state level' by Russia.[20]
- Ukraine filled two applications to the ECtHR – on the situation in Eastern Ukraine and Donbas before and after September 2014. Ukraine places responsibility on the Russian Federation for numerous violations of the European Convention on Human Rights as a result of 'de facto control over the regions of Donetsk and Luhansk' by the Russian Federation.[21]
- The Organization for Security and Co-operation in Europe monitoring mission reported the presence of troops naming themselves as Russian servicemen in the DPR-controlled territory.[22]
- The Atlantic Council reported that by July 2017, 36,300 Russian proxies and 2,900 Russian regular military personnel (from Kostroma, Novorossiysk and Volgograd Regions of Russian) were present in occupied Donbas. Russia supplied weapons and military equipment to the DPR and LPR, including Russian tanks, heavy artillery and multiple launch rocket systems, armored fighting vehicles and anti-aircraft warfare systems.[23]

Such combination of direct and indirect evidence demonstrates that, from the very start of the armed conflict in Donbas (eastern Ukraine) the Russian Federation has been exercising effective control over and is an occupying power in Donbas.

Even though it may be more difficult for investors to prove classic occupation of Donbas by Russia, there is abundant convincing evidence of indirect occupation of Donbas by Russia through the overall control over the local anti-government forces, including financial support, supply of weapons and military equipment, political support and coordination of military operations in the occupied territories.

Application of Russia's BITs to occupied Donbas

BIT's territorial application: what is territory?

Assuming that Russia exercises effective control over Donbas directly (through its military personnel present in Donbas) or at least indirectly through the overall control exerted by Russia over the anti-government forces of the unrecognised DPR and LPR, I will now consider whether the territorial application of Russian BITs, including the Russia–Ukraine BIT, and whether the obligations of the Russian Federation to protect foreign investments in its territory shall be extended to occupied Donbas.

It will be instructive to review the Crimean cases in which arbitral tribunals have extended the territorial application of the Russia–Ukraine BIT to annexed Crimea.

For example, in *PJSC Ukrnafta v Russia* and *Stabil LLC and Others v Russia*, two identically constituted tribunals in jurisdictional rulings dated 26 June 2017, held that the Russia–Ukraine BIT applied to annexed Crimea and the Russian Federation was responsible for protection of the investments of the Ukrainian investors in Crimea after its annexation by Russia. Relying on Russia's own assertions that annexed Crimea was an integral part of Russia's territory and also relying on Ukraine's written submissions acknowledging that Crimea was under occupation and under effective control of the Russian Federation, the tribunals were satisfied that the Russian Federation established the effective control over Crimea through a combination of physical occupation of Crimea in February 2014 and legal incorporation of Crimea into the Russian Federation in March 2014. The arbitral tribunals did not consider the legality of Russia's occupation of Crimea.

In light of the object and purpose of the Russia–Ukraine BIT – to encourage and to protect foreign investments – the arbitral tribunals interpreted the term 'territory' in the Russia–Ukraine BIT broadly to cover the 'entire' territory over which the Russian Federation exercises its effective control (and its de facto jurisdiction), irrespective of whether such territory is lawfully or unlawfully occupied by the Russian Federation. The Russian Federation was able to exercise its de facto jurisdiction in Crimea and this alone was sufficient for Russia to be held responsible for protection of investments in Crimea under the Russia–Ukraine BIT.

The arbitral tribunals stated that the object and purpose of the Russia–Ukraine BIT do not permit a restrictive interpretation of the term 'territory' which 'would exclude investments that ended up being located on a contracting states territory as the result of that state's territorial expansion', irrespective of whether such expansion is lawful or unlawful. The arbitral tribunals reasoned in their rulings that it would be incompatible with the object and purpose of the Russia–Ukraine BIT:

> *to leave without protection foreign investments on a territory over which a State exercises exclusive control* [effective control] *. . . particularly in circumstances where that State is not only the main beneficiary-State of these investments but also the only state in a position to protect foreign investments.*[24]

Because the Russian Federation exercises 'effective control' over Donbas, either directly or indirectly through overall control over the local anti-governmental authorities in DPR and LPR, the same reasoning may be invoked by foreign investors, including Ukrainian investors, to extend the application of Russia's BITs, including the Russia–Ukraine BIT, to occupied Donbas and to hold Russia responsible for expropriation and impairment of foreign investments in Donbas.

Moving treaty-frontiers rule

Apart from broad application of the territorial scope of Russia's BITs to occupied Donbas based on broad interpretation of the term 'territory', investors may also consider an argument that the territorial application of Russia's BITs shall be extended to the newly acquired territories based on the moving treaty-frontiers rule.

The moving treaty-frontiers rule, which is a customary rule of public international law, is codified in article 29 of the Vienna Convention of the Law on Treaties (VCLT)[25] and in article 15 of the Vienna Convention on Succession of States in respect of Treaties (VCST).[26] Article 29 of the VCLT provides that treaties of a state shall apply to its 'entire territory' at any given time, while article 15 of the VCST extends the application of treaties of a state to newly acquired territories:

> *When part of the territory of a State* [Donbas, which is a part of Ukraine's territory] *becomes part of the territory of another State* [Russia as a result of its occupation of Donbas]*:*
> *(a) treaties of the predecessor State* [treaties of Ukraine] *cease to be in force in respect of the territory* [in respect of occupied Donbas] *. . . from the date of the succession of States; and*
> *(b) treaties of the successor State* [treaties of Russia] *are in force in respect of the territory to which the succession of States relates* [in respect of occupied Donbas] *from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.*

However, extension of the application of Russia's BITs to occupied Donbas and its territory under article 15 of the VCST would seem to be precluded by article 6 of the VCST providing that the VCST:

> *applies only to the effects of a succession of States occurring in conformity with international law and, in particular . . . the Charter of the United Nations* [the UN Charter prohibits an illegal use of force, including illegal occupation by states of foreign territories].

Richard Happ and Sebastian Wuschka in their recent article 'Horrow Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories' have discussed that the non-recognition principle and the moving treaty-frontier rule should be applied in a way to deny benefits to Russia for the illegal annexation of Crimea. However, they should not excuse Russia from its obligations to protect foreign investments in annexed Crimea under Russia's BITs.[27] We agree with the approach and reasoning advanced by Mr Happ and Mr Wuschka. We believe that the same approach is equally applicable to occupied Donbas.

Under the non-recognition principle, the main reason for denying the recognition of title to illegally acquired territories, and to exclude state succession in respect of treaties in such cases, was to deprive states engaged in unlawful conduct violating territorial sovereignty of other states from any benefits and rights arising from their unlawful actions. However, it would be contrary to the very purpose of the non-recognition principle if this principle were applied the other way around to permit an occupying state to avoid international obligations and responsibility under its own treaties, including its international obligations to protect foreign investments pursuant to its BITs, in respect of any illegally occupied territories.

Therefore, the effect of Russia's BITs in occupied Donbas shall not be recognised in respect of any benefits and rights, which Russia may potentially claim in such case. For example, Russia shall not be permitted to claim that under its applicable BITs Russia is entitled to nationalise or expropriate foreign investments in occupied Donbas if such nationalisation or expropriation are made for public purpose and subject to prompt, adequate and effective compensation. However, it shall not release Russia from its obligations to protect foreign investments in occupied Donbas under Russia's BITs because Russia is the only state exercising effective control in Donbas and the only state, which has capacity to protect investments in Donbas.

Such application of Russia's BIT to occupied Donbas is supported in international jurisprudence. For example, the ICJ in its 1971 Namibia Advisory Opinion stated that South Africa remained responsible for any violation of its own international obligations in the occupied territory of Namibia, notwithstanding that South Africa had no title to the territory pursuant to the non-recognition principle. According to the ICJ, physical control exercised by South Africa over the occupied territory, not sovereignty or legitimacy of title, was the basis for its responsibility:

> *118. South Africa, being responsible for having created and maintained a situation which the Court has found to have been validly declared illegal, has the obligation to put an end to it. It is therefore under obligation to withdraw its administration from the Territory of Namibia. By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It* [South Africa] *also remains accountable for any violations of its international obligations* [in occupied Territory of Namibia]*, or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.*[28]

Collective claims

Small- and mid-size private and state-owned companies that lost investments in Crimea and Donbas and otherwise would be precluded from pursuing investor–state claims against Russia because of significant financial costs involved may consider and follow the example of collective claims pursued in several Crimean cases:

- PrivatBank joined the efforts with Finance Company Finilon;[29]
- NJSC Naftogaz filed its claims together with PJSC Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukraiiny;[30]
- Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-Nafta LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC, and Stemv Group LLC jointly approached the Permanent Court of Arbitration on 15 June 2015 claiming an alleged expropriation of petrol stations by the Russian Federation in annexed Crimea;[31] and
- Everest Estate LLC was joined by 18 other legal entities.[32]

In *Everest Estate LLC and Others v Russia*, taking into consideration 'apparent lack of relationships' between the 19 claimants, the arbitral tribunal considered possible jurisdictional objections of the

Russian Federation against multiparty claims from allegedly unrelated claimants. The arbitral tribunal noted that the UNCITRAL Arbitration Rules did not expressly provided for collective claims. The arbitral tribunal stated that the Russia–Ukraine BIT used both 'investor' and 'investors' wording. The tribunal also relied on the *Abaclat* and *Ambiente Ufficio* cases to conclude that although the Russia–Ukraine BIT did not expressly provide for multiparty claims, it does not mean there was a lack of consent by Russia and the investors. The arbitral tribunal stated that 'the state [the Russian Federation] and each investor [each of the 19 investors in the case in question] have given their consent'. Finally, the arbitral tribunal found 'sufficient link' among the claimants due to the jointly submitted claim, the application of the same legal provisions, the existence of 'similar circumstances' related to expropriation of their assets in Crimea and 'substantially identical' relief sought by each claimant.[33]

Conclusion

Russia's heavy involvement and its control over local anti-governmental groups in Eastern Ukraine are supported by abundant evidence, including the reported influx of Russian troops at some critical points in the armed conflict, continuous presence of Russian military personnel in Donbas, financial support, supply of weapons, political support and general coordination of military operation in Donbas by Russia.This convincingly demonstrate that the Russian Federation exercises effective control in occupied Donbas and shall be regarded as an occupying power. Therefore, similarly to the Crimean cases, foreign and Ukrainian investors acting individually or collectively may consider invoking Russia's BITs to pursue investment claims against Russia and hold the Russia Federation responsible for expropriation of their investments in occupied Donbas.

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