JUS MUNDI | International Law Connected

Arbitration 2021 Year in Review

VYAPs x Jus Mundi

TABLE OF CONTENTS

French Perspective

This article provides an overview of French case law relating to arbitration highlights over 2021, in particular cases relating to enforcement and annulment proceedings, as well as peri arbitral matters.

Enforcement and annulment proceedings

French law [Article 1520 of the French Code of Civil Procedure] only provides five limited grounds for setting aside an international arbitral award, namely where:

- The arbitral tribunal wrongly upheld or declined jurisdiction; or
- The arbitral tribunal was not properly constituted; or
- The arbitral tribunal ruled without complying with the mandate conferred upon it; or
- Due process was violated; or
- Recognition or enforcement of the award is contrary to international public policy.

JURISDICTION OF THE ARBITRAL TRIBUNAL

The (excessive?) power of jurisdiction review by French courts

In two investment arbitration-related decisions, namely the *Nurol* and *Aboukhalil* cases, the International Commercial Chamber of the Paris Court of Appeal ("**ICCP-CA**"), in line with the *Schooner* case, confirmed that new arguments that have not been previously raised during the arbitration proceedings, pertaining to the arbitral tribunal's jurisdiction, can be heard by the Court as long as the party raised objections to jurisdiction during the arbitral proceedings.

Such decisions have been heavily criticized on the grounds that setting-aside proceedings cannot equate to an appeal. One thing is sure: this new development should be monitored by arbitration practitioners.

CONSTITUTION OF THE ARBITRAL TRIBUNAL

Irregularity in the constitution of the arbitral tribunal

In the *DS Contruction FZCO v. Libya* case, the Paris Court of Appeal annulled a partial award on jurisdiction for irregularity in the constitution of the tribunal. On the basis of the most-favoured-nation clause contained in the OIC Agreement, the investor relied on another treaty to ask the Secretary-General of the PCA to designate an appointing

authority which then appointed an arbitrator on behalf of Libya. The Arbitral tribunal then rendered a partial award whereby it recognised its jurisdiction. Libya filed an application to set aside this partial award.

The Paris Court of Appeal ruled that the most-favoured-nation clause did not extend to the procedural provisions and benefits provided in other investment treaties. The Court also rejected claimant's alternative request to appoint arbitrators. In this latter respect, the Court stated, "[t]*he Court, having been presented with an application to set aside an award rendered in international arbitration, did not* [have] *the power to proceed itself with the appointment of an arbitrator after having set aside the said award*."

In such cases, it is recommended for the parties to require assistance from the French judge as a support to arbitration ("*juge d'appui*").

The principle of arbitrator's independence and impartiality

Over the last few months, several decisions of the Paris Court of Appeal have addressed the issue of arbitrators' independence and impartiality. Three decisions, namely the *Vitadel*, *Pharaon* and the *Lerco* cases will be succinctly addressed here.

In the *Vidatel* case, the arbitration clause, inserted in a shareholder agreement, referred to the ICC Rules of Arbitration and provided for the appointment of one arbitrator per party plus a chairman. Unitel initiated an arbitration against its three partners and asked the ICC Court to constitute the arbitral tribunal. The ICC appointed five arbitrators who subsequently rendered an award. Vidatel sought to set aside the award, invoking a violation of the principle of equality and lack of independence of two arbitrators, including the chairman. On 26 January 2021, the ICCP-CA dismissed Vidatel's request for annulment, finding no breach of the principle of equality between the parties. In particular, the Court ruled that the judge shall separately and subsequently analyse the regularity of the constitution of the arbitral tribunal (i) on the day the arbitration clause was concluded and (ii) on the day the dispute arose. While the clause may comply with the principle of equality at first, it may be conflicting at a later stage.

In the *Lerco* case, on 23 February 2021, the Paris Court of Appeal recalled that: "*the arbitrator is obliged to disclose any circumstance which might be of such a nature as to call into question its independence or impartiality in parties' minds or which might likely affect its independence, both before and after accepting its appointment*". The Court, however, rejected the application for annulment of the award, stating that there was not enough evidence to establish a business relationship between a law firm and a co-arbitrator such as to give rise to reasonable doubt as to his independence (the award was annulled due to a jurisdiction issue).

In the *Pharaon* case, the Paris Court of Appeal first clarified that if the arbitration involved several parties, a claim for annulment of the award filed by one of the parties did not automatically extend and benefit to the others. It then indicated that it was not sufficient to challenge an arbitrator before the ICC Court during an arbitration procedure to be entitled to challenge the award once issued: it is also necessary to "*expressly object or at least make reservations before the arbitral tribunal*".

Peri arbitral matters

FRENCH COURTS' JURISDICTION TO HEAR A LIABILITY CLAIM AGAINST AN ARBITRATOR

The Paris Court of Appeal rendered an interesting decision regarding the jurisdiction to hear a liability claim against an arbitrator in the *Saad Buzwair* case. In this thought-provoking decision, the Court held that:

- The Brussels 1 bis Regulation was not applicable as Article 1.2 (d) excluded arbitration from its scope; and
- That "*in matters of international arbitration, unless otherwise agreed*

by the parties, the State court of the place where the service was provided - for the purpose of deciding a liability claim against the arbitrator in the performance of the arbitrator's contract - is the domestic court of the seat of the arbitration"

CONTROL OF TRANSCRIPT DISTORTION BY FRENCH JUDGES

In the *Alstom* case of 2019, the Paris Court of Appeal overruled the decision granting exequatur to an ICC arbitration award because of corruption. It considered, in particular, that one of the parties' manager refused to answer the questions asked at the evidentiary hearing. In 2021, the Court of Cassation quashed this decision on the basis that the judges had distorted the content and the meaning of the arbitration hearing transcript on which they relied upon for establishing the facts of corruption.

However, the transcript showed various answers from the manager at stake. It is worth noting that the Court of Cassation considered transcripts as elements of facts that can be subject to its control, even though they were subsequent to the facts of corruption and did not have to comply with any formal requirement.

THIRD-PARTY CHALLENGE ("*TIERCE OPPOSITION*" IN FRENCH)

In the *Central Bank of Lybia* case, the Court of Cassation allowed a third-party challenge against an enforcement order issued by French judges of an international arbitral award rendered abroad. The Court ruled, based on Articles 1525(1) and 585 of the Code of Civil Procedure, that: "*the third-party challenge against the decision of the Court of Appeal granting the enforcement order constituted a common legal remedy not against the arbitral award itself, but the decision to enforce the award made abroad*".

CLOSING REMARKS

For 40 years, French courts have been fostering a pro-arbitration approach. The ICCP-CA, created in 2018, constitutes a major innovation in the French judicial landscape. This year, the ICCP-CA published a bilingual guide of procedure, enabling arbitration practitioners from France or abroad to follow a transparent and practical procedure. Moreover, the ICCP-CA's decisions are now accessible in English directly on its website.

It is also worth noting that the Paris Court of Appeal has often referred to soft law over the past year. In the *Lerco* case, for instance, the Court expressly referred to the IBA rules to address the issue of the scope of disclosure for arbitrators. In the *Vidatel* case, we also note the explicit reference to the recent Guidance Note for disclosure of conflicts by arbitrators in the ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration.

Zélie Héran *is an associate at Medici. She is a French qualified lawyer and member of the Paris Bar. She works in international arbitration and commercial litigation in a wide range of sectors. You can contact Zélie at* zelie.heran@medici.law

German Perspective

2021 is drawing to a close, and this offers us time for reflection. Despite the pandemic, it has been a busy year for arbitration in Germany. In this post, we will discuss some of the highlights of 2021. We will cover the key decisions in commercial and investment arbitration that were handed down by the German courts, as well as some of the highlights of the arbitration calendar. We also peer into the future by providing a short outlook for 2022.

Developments in commercial arbitration

March 2021 saw a memorable decision rendered by the Higher Regional Court Frankfurt am Main (*Oberlandesgericht Frankfurt am Main*) concerning the enforceability of a multi-million Euro arbitral award in an ICC arbitration seated in Germany (25 March 2021, 26 Sch 18/20). The court had to decide whether or not the arbitral tribunal violated the respondent's (who was also respondent in the arbitration proceedings) right to be heard. The applicant (who was the claimant in the arbitration proceedings) had applied a particular pricing method for the calculation of its damages in its last submission. The tribunal had subsequently applied this pricing method to calculate the amount of damages and had, for the justification of the adoption of this pricing method, relied on the content of a website that it had consulted after the close of the proceedings. The respondent argued that the tribunal had not granted the defendant the opportunity to comment on the applicability of this pricing method or on the tribunal's adoption of it. First, the court held that a tribunal might consult online sources and conduct online research as it pleases. Second, and with respect to the adoption of the pricing method as such, the court held that the tribunal had not rendered a "surprise decision" and had therefore not violated the defendant's right to be heard. The court concluded that since the application of the adopted pricing method was in line with established German case law, the respondent could have anticipated and included it in its submissions without prior notice from the tribunal.

In May 2021, the Higher Regional Court Frankfurt am Main decided on the activities of another tribunal (17 May 2021, 26 Sch 1/21). In this case, the court was asked to set the award aside because the tribunal had rendered the award a year after the oral hearing took place. The applicant (who was the respondent in the arbitration proceedings) argued that this violated the general rule that a decision shall be rendered within three weeks of the oral hearing pursuant to section 310 (1) of the German Code of Civil Procedure ("**CCP**"), and hence the principle of procedural public policy. The court declared the award enforceable and held that first, Section 310 (1) CCP is neither directly nor by analogy applicable to arbitration proceedings. Second, even if section 310 (1)

CCP were deemed applicable in arbitration proceedings, an infringement of the stipulated deadline therein would not violate procedural public policy. The court held that in contrast to procedural rules protecting the individual rights of the parties, Section 310 (1) CCP typically affects both parties, and thus the principle of equality of arms is not in jeopardy if the deadline was missed.

But it was not only the Higher Regional Court Frankfurt am Main that covered arbitration-related issues in this year's decisions: For instance, the Federal Court of Justice (*Bundesgerichtshof*), Germany's highest court, was tasked with evaluating whether a party to an arbitration agreement violates the principle of good faith (under section 242 of the German Civil Code) when, despite the existence of an arbitration clause, it pursues a claim before state courts, but later objects to the jurisdiction of a state court against a counterclaim (20 April 2021, II ZR 29/19). The Higher Regional Court Munich had concluded that in accordance with earlier decisions of the German Federal Court of Justice (e.g., 30 April 2009, III ZB, 91/07), the claimant is precluded from asserting the arbitration clause due to contradictory behaviour. The German Federal Court of Justice, however, overturned this ruling. In essence, the court held that the claimant was not violating the principle of good faith when asserting the arbitration clause against the counterclaim, although it had brought the claim before the state courts. According to the court, the salient difference to the rulings of the past was the arbitration clause itself. The arbitration clause in question only covered claims up to a certain amount, and while the amount of the counterclaim fell within the arbitration clause, the amount of the claim had exceeded the amount set out in the arbitration clause. Therefore, it concluded, the claim had not been subject to the arbitration clause. Subsequently, the court argued that the mere factual connection of the two claims was not enough to preclude the claimant from asserting the arbitration clause.

Developments in investment arbitration

The fall-out of the landmark *Achmea* decision by the European Court of Justice ("**CJEU**") on 6 March 2018 (C-284/16) occupied the German arbitration landscape also in 2021.

With the *Achmea* decision, the CJEU had heralded the end of intra-EU investor-state arbitration, ruling that the arbitration clause in the Netherlands-Slovakia bilateral investment treaty ("**BIT**") was incompatible with EU law as it impaired the CJEU's exclusive jurisdiction to interpret EU law and, thus, the autonomy of the EU.

Based on this decision, the Republic of Croatia is now on the way to successfully avert arbitration proceedings initiated by an Austrian bank and its Croatian subsidiary (*Raiffeisen Bank v. Croatia (II)*, PCA Case No. 2020-15). After an application by the Republic of Croatia, the Higher Regional Court Frankfurt am Main declared the arbitration inadmissible. Considering the *Achmea* decision to be of general significance for all intra-EU BITs, it held that the arbitration agreement was contrary to EU law and did not continue to constitute a valid basis for the arbitration (11 February 2021, 26 SchH 2/20). The German Federal Court of Justice has reportedly confirmed the decision of the Higher Regional Court only recently (I ZB 16/21; not yet published).

The decision of the Higher Regional Court Frankfurt am Main has inspired the Netherlands (*cf.* Kamerbrief by the Ministerie van Economische Zaken en Klimaat dated 17 March 2021) to pursue a similar approach to try and ward off two ICSID arbitrations by the German companies RWE AG (*RWE v. Netherlands*, ICSID Case No. ARB/21/4) and Uniper SE (*Uniper v. Netherlands*, ICSID Case No. ARB/21/22). The Netherlands has initiated "*anti-arbitration*" proceedings before the German courts against the arbitration proceedings, which – unlike the *Raiffeisen Bank v. Croatia (II)*

case – are not based on BITs, but on the Energy Charter Treaty ("**ECT**"). More importantly, these arbitrations are ICSID rather than *ad hoc* arbitrations which raises the question of whether the application by the Netherlands is compatible with the self-contained and exclusive nature of the ICSID Convention.

Also, in 2021, the CJEU held that the reasoning of its *Achmea* decision also applies to intra-EU *ad hoc* arbitrations based on the ECT (*Komstroy v Moldova,* Case C-741/19 on 2 September 2021) as well as based on newly formed *ad hoc* arbitration agreements replacing arbitration agreements that have been affected by the *Achmea* decision (*PL Holdings v Poland*, Case C-109/20, on 26 October 2021).

As yet another consequence of the *Achmea* decision, in May 2020, the Federal Republic of Germany – as many other EU member states – signed the EU Agreement for the Termination of all Intra-EU Bilateral Investment Treaties. In March 2021, Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) dismissed a request for provisional measures by *Achmea* to prevent Germany from ratifying the agreement (3 February 2021, 2BvQ 97/20). On 9 June 2021, the Termination Agreement thus entered into force for Germany.

In this context, the settlement of the investor-state arbitration *Vattenfall et al. v.* Germany (ICISD case No. 12/12) relating to the phase-out of a nuclear power plant in Germany is also notable. The arbitration was settled after Germany agreed to compensate the energy providers Vattenfall, RWE and E.ON/PreussenElektra in the amount of approx. 2.4 billion euros.

Events throughout the year

Despite the ongoing pandemic, 2021 was a busy year in the German arbitration calendar. Some highlights include:

- From 22-24 March 2021, the Center for International Dispute Resolution at Bucerius Law School hosted the 5th Hamburg International Arbitration Days.
- In March 2021, the Munich Center for Dispute Resolution hosted the All Munich Rounds, an annual pre-moot for the Willem C. Vis International Commercial Arbitration Moot.
- On 17 June 2021, the German Arbitration Institute ("**DIS**") and the German Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*, BMJV) hosted a virtual event on "Strengthening Germany as a Location for Dispute Resolution – Status Quo and Quo Vadis".
- On 13 October 2021, the DIS40, the young practitioner's group of the DIS, held its autumn conference in person in Frankfurt am Main on "How Reliable are Witnesses?". The new DIS40 co-chairs were also announced at the event. The DIS40 co-chairs and regional committees regularly host events, and this year was no exception, with a series of online and in-person events held throughout the year.
- On 26 October 2021, Germany Very Young Arbitration Practitioners (Germany VYAP) hosted its inaugural event "How to Succeed as a Junior Arbitration Practitioner" online.
- On 24 November 2021, the DIS hosted its autumn conference "Virtuality and Arbitration: Literacy for the Digital World" online. Professor Richard Susskind gave the keynote speech.
- On 30 November 2021, the Munich Center for Dispute Resolution hosted its annual Moot Court Lecture online. Professor Dr. Maxi Scherer gave the keynote speech on "The Law Applicable to the Arbitration Agreement".

Outlook for 2022

The trajectory of 2021 is set to continue in 2022 and practitioners can look forward to another busy year.

Practitioners should keep an eye on the work of the "2018 Arbitration Rule Clinic", launched by the DIS in March 2021. The current DIS Arbitration Rules came into force in 2018, and are currently getting a reality check for their third birthday. Devised as an exchange platform and think tank, the 2018 DIS Arbitration Rules Clinic consists of six working groups in which arbitration practitioners share their knowledge and experience on various aspects of the 2018 DIS Arbitration Rules in practice and exchange ideas for the future of arbitration in Germany.

Eileen Loebig *is an Associate at Allen & Overy LLP in Frankfurt, Germany. She advises and represents clients in national and international arbitration proceedings, in disputes before state courts and alternative dispute resolution processes for cross-border disputes. She further acts as secretary to arbitral tribunals. Her focus lies on construction and post-M&A disputes and other complex commercial matters, in particular in the energy, technology and retail sector.*

Duncan Gorst *is a Senior Associate at Osborne Clarke in Munich, Germany. He advises businesses, states and international organisations on a wide range of international law and dispute resolution issues and acts as counsel in international commercial and investment arbitration proceedings.*

Viktoria Schneider *is an Associate at the international dispute resolution boutique HANEFELD, based in Hamburg, Germany. She acts as counsel in arbitration and state court proceedings as well as secretary to arbitral tribunals in complex and high-value cases (pertaining, in particular, to corporate law, post-M&A, international trade and distribution law, international commercial and sales law, energy and infrastructure) and has a sound knowledge of public international and EU law.*

London VYAP
London Very Young Arbitration Practitioners

UK Perspective

2021 proved to be another busy year for English arbitration. With the pro-arbitration stance of the English courts, London has retained its position as a prominent seat for international arbitration. The 2021 QMUL International Arbitration Survey identified London as the preferred arbitral seat (tied with Singapore), and identified the LCIA as one of the most preferred arbitral institutions. In the LCIA's 2020 Annual Casework Report, England remained the most popular seat for arbitrations administered under the LCIA Rules, while in the 2020 ICC Case Statistics, England was the fourth most selected place for arbitrations administered under the ICC Rules. This report discusses noteworthy procedural developments and provides a round-up of decisions related to English arbitration over the past year.

Arbitration-related applications in the English courts

According to the Commercial Court Report 2019-2020, arbitration matters made up around 25% of the claims issued in the English courts, including applications relating to injunctions in support of arbitration proceedings under s.44 of the Arbitration Act 1996 ("**AA**"), challenges to arbitral awards on the ground of a serious irregularity under s.68 AA, and appeals on a point of law under s.69 AA. The minutes of the November 2021 Commercial Court User Group Meeting provide insight into arbitration matters from 2020-2021 (though the statistics are incomplete due to the number of pending cases awaiting a hearing), as well as final statistics for 2019. This year:

- There were 27 applications brought under s.44 AA (as compared to 24 in the previous year).
- There were 25 applications brought under s.68 AA (as compared to 28 in the previous year) — with 5 dismissed, 4 without a hearing. A review of the 2019 figures concluded that s.68 AA applications had an 11% final success rate, with 28 applications brought, 1 successful, and 2 partially successful.
- There were 34 applications brought under s.69 AA (the same as the previous year) — with 5 granted permission and 16 refused. A review of the 2019 figures found that there were 37 s.69 AA applications

brought — with 18 refused and 10 granted (of which 4 succeeded), also amounting to an 11% success rate. The figures for 2018-2019 reflected a 5% success rate.

Osborne Clarke published a survey of all arbitration cases before the English courts from 2010 to 2020. Based on the statistics of the major London arbitral institutions, the survey found that at least 30,000 arbitrations have been commenced in London over that period. The survey also found that only 2-3% of the total number of arbitrations commenced in London come before the English courts, with the total number of *successful* challenges to an arbitral award being less than 1% (compared with the total number of arbitral awards).

Law governing the arbitration agreement

In the highly-anticipated decision of *Kabab-Ji v Kout Food Group* [2021] UKSC 48, the UK Supreme Court ("**UKSC**") addressed how to determine the governing law of an arbitration agreement where it is not expressly stated and where the governing law of the main contract (English law) differs from the law of the seat (Paris). The UKSC unanimously upheld the decision of the English Court of Appeal to refuse the recognition and enforcement of an arbitral award issued by a Paris-seated tribunal. This was on the basis that Kout Food Group ("**KFG**"), the parent of a company that had entered into various franchising agreements, was not bound by arbitration agreements to which it was not a signatory.

Applying an approach consistent with *Enka v Chubb* [2020] UKSC 38, which articulated the key principles to be considered when determining the law of the arbitration agreement, the UKSC held that the parties to the franchising agreements had chosen English law to govern the arbitration agreements. The UKSC affirmed that: (i) in the absence of an express choice of law governing the arbitration agreement, the law of the main contract will presumptively also govern the arbitration agreement by implication (subject to certain exceptions, including if a provision under the law of the seat indicates that the law of the seat should govern the arbitration agreement, or if applying the governing law of the main contract would create a serious risk that the arbitration agreement would be invalid); and (ii) in the absence of an express or implied choice, the arbitration agreement will be governed by the law with which it is most closely connected. Consequently, under English law, the UKSC found that KFG was not a party to the franchising agreements, nor the arbitration agreements. Interestingly, the Paris Court of Appeal reached an opposite outcome in parallel annulment proceedings relating to the award — holding that the law of the seat governed the arbitration agreements, and under French law, KFG was bound by the arbitration agreements. *Kabab-Ji* highlights the potential risk of conflicting outcomes across jurisdictions if the governing law of an arbitration agreement is not expressly stated.

Conflicting dispute resolution clauses

The English courts considered several cases of seemingly conflicting dispute resolution provisions, demonstrating the courts' desire to avoid inconsistencies and give effect to arbitration agreements.

In *AdActive Media Inc v Ingrouille* [2021] EWCA Civ 313, the Court of Appeal held that a jurisdiction clause (providing that any "case, controversy, suit, action or proceeding" be decided in the Californian courts) and an arbitration clause (applying to "all claims, disputes, controversies, differences or misunderstandings" stemming from a consultancy agreement, save those arising under two specified clauses) were not inconsistent. The Court found that disputes arising from the consultancy agreement, to the extent that they did not arise from the two specified clauses, should be referred to arbitration.

In line with *AdActive,* the High Court in *Melford Capital Holdings LLP and others v Digby* [2021] EWHC 872 (Ch) deemed a clause providing for the exclusive jurisdiction of the English courts — which again seemed to conflict with an arbitration agreement — to mean that the English courts would retain merely a "supervisory jurisdiction over any arbitration".

Similarly, in *Helice Leasing v PT Garuda Indonesia (Persero) TbK* [2021] EWHC 99 (Comm), the High Court considered a conflicting arbitration clause (providing for the resolution of "any dispute" by arbitration under the LCIA Rules) and an Event of Default clause (providing for "court action" for a breach of the lease). The Court granted a stay of proceedings under s.9 AA on the grounds that: (i) the parties objectively intended to refer any dispute to arbitration, since on a business common sense construction, "court action" must reasonably have been intended to mean action before the LCIA; (ii) the determination of whether an Event of Default occurred was a dispute to be resolved through arbitration; and (iii) if arbitrators were to decide whether there had been an Event of Default, it would be illogical for the lease to then provide for the lessor to switch the dispute to court proceedings.

Multi-tier dispute resolution clauses

Another key issue addressed by the English courts in 2021 was the important distinction between admissibility and jurisdiction when complying with pre-arbitral steps. In *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm) and *NWA v NVF* [2021] EWHC 2666 (Comm), the English courts clarified that non-compliance with pre-arbitral procedural requirements will be treated as an issue of admissibility — in other words, whether the claim is ready to be heard — rather than jurisdiction — which relates to the competency of the tribunal to hear a claim.

Service of enforcement proceedings against sovereign States

The decision in *General Dynamics v Libya* [2020] UKSC 22 came in stark contrast to an apparent trend towards the easing of service rules for the enforcement of awards against sovereign States. When General Dynamics attempted to enforce an arbitral award against Libya in England under s.101 AA, the enforcement order was granted without notice to Libya. Due to the contemporaneous state of civil unrest and political uncertainty in Libya, service of the claim form (among other documents) via the UK Foreign, Commonwealth and Development Office, was dispensed with, in contravention of the State Immunity Act 1978 ("**SIA**"). The UKSC decided, however, that the procedure for the service of enforcement proceedings on a foreign State through diplomatic channels was "mandatory and exclusive", regardless of any exceptional circumstances.

State immunity

In *London Steam-Ship v Spain (M/T Prestige (Nos. 3 and 4))* [2021] EWCA Civ 1589, the Court of Appeal clarified issues of state immunity, by confirming that Spain and France did not have state immunity for damages for breach of an arbitration agreement. The Court held that where a State has agreed in writing to submit a dispute to arbitration, the effect of s.9 SIA is that the State is not immune in respect of English court proceedings relating to that arbitration.

In Hulley Enterprises v The Russian Federation [2021] EWHC 894, the High Court dismissed an application by former Yukos shareholders to lift a stay of enforcement proceedings in respect of arbitration awards, where there was a pending challenge in the curial courts (the Dutch courts, in this case). The Court also affirmed that state immunity was a preliminary

issue, to be decided before the court could consider the exercise of its powers under s.103(5) AA.

Confidentiality and arbitrator bias

This year has also seen developments regarding the privacy and confidentiality of arbitration proceedings and the application of the fair-minded and informed observer test to determine arbitrator bias, articulated in *Halliburton v Chubb* [2020] UKSC 48 — with both cases arising in the context of football disputes.

In *Manchester City FC v Premier League* [2021] EWCA Civ 1110, the Court of Appeal rejected an appeal by Manchester City Football Club ("MCFC") against the publication of a High Court judgment that had rejected MCFC's s.67 AA and s.68 AA challenges to an arbitral award. The Court of Appeal determined that the publication of a judgment will be favoured where it will not lead to the disclosure of "significant confidential information". This applies particularly in a case such as this, where there was a high degree of pre-existing press coverage relating to the dispute and public interest in the dispute. Notably, MCFC's challenge to the jurisdiction of the arbitrators and the unsuccessful allegation of apparent bias were not deemed to constitute "significant confidential information".

The High Court in *Newcastle United FC v Premier League* [2021] EWHC 349 (Comm) decided that although the subject matter of the dispute was already public and there was substantial public interest, these were insufficient reasons to deviate from the default position under Rule 62.10 of the Civil Procedure Rules that arbitration claims be heard privately by the court. However, the High Court subsequently ordered publication of the judgment, finding that it did not contain "significant confidential information".

In the underlying s.68 AA challenge in *Manchester City*, MCFC alleged that there was apparent bias in the Premier League Rules' method for appointing arbitrators. The High Court (applying Halliburton) held that the fair-minded and informed observer would not conclude that there was a real possibility of bias. The Court also noted that MCFC had waived its right to object to the appointment process. Similarly, the High Court in *Newcastle United* rejected a s.24 AA application to remove an arbitrator — determining that although the arbitrator had failed to disclose past advice to the Premier League, the fair-minded and informed observer would again not conclude that there was a real possibility of bias.

Digital Dispute Resolution Rules

In April 2021, the UK Jurisdiction Taskforce published the Digital Dispute Resolution Rules, providing a procedural framework for the rapid resolution of disputes relating to emerging digital technologies (such as crypto-currencies and blockchain) through arbitration. As these rules are untested, it remains to be seen whether they will be adopted by digital technology users.

Reform of the Arbitration Act 1996

Following years of speculation that a review was on the horizon, we can expect to see proposed reforms to the Arbitration Act 1996. The Law Commission is launching a review of the Act in the first quarter of 2022 and aims to publish the consultation paper in late 2022. With the Act now 25 years old, the Law Commission's review has the objective of "maintain[ing] the attractiveness of England and Wales as a 'destination' for dispute resolution and the pre-eminence of English Law as a choice of law". The Law Commission's review seeks to ensure "that the Act is as effective as possible, particularly as other jurisdictions have enacted more recent reforms to their own respective arbitration legislation". We can look forward to proposals for potential reports in the new year, including in respect of the tribunal's power to summarily dismiss unmeritorious claims or defences (noting that the LCIA Arbitration Rules 2020 introduced early determination provisions in Articles 14.6(vi) and 22.1(viii)), confidentiality issues in arbitration, and the availability of appeals on points of law.

Daniel Jacobs *is an international arbitration senior associate and solicitor-advocate at Covington & Burling LLP (London). He is qualified in England & Wales.*

Patricia Snell *is an international arbitration associate and solicitor-advocate at Covington & Burling LLP (London). She is qualified in England & Wales, New York, and Ontario.*

Daniel Spivey *is a trainee solicitor at Covington & Burling LLP (London).*

Spanish Perspective

The year 2021 has been particularly relevant for the arbitration field in Spain due to different reasons.

*Among them, during the last 12 months, annulment of awards has been a matter constantly addressed as a hot topic. In this sense, the Spanish Constitutional Court ("**SCC**") has remarked that arbitral awards could only be annulled on an exceptional basis, stressing that arbitration is based on the parties' free will. Given the importance of this particular matter, it will be briefly developed hereunder.*

2021 has also been a busy year in investment arbitration proceedings against the Kingdom of Spain, as well as a more active period regarding social events and commemorations involving arbitration.

2021 year in review: a significant year in the field of arbitration

Around 2015, the Spanish High Courts, and specifically the Madrid High Court ("**MHC**"), started a trend of annulments of arbitral awards upon public policy infringements. This fashion generated some uncertainty among the Spanish arbitration community since High Courts seemed to use a broad interpretation of the notion of public policy as a pretext to, somehow, review the awards' findings or the application of the law.

In a landmark judgement dated 15 February 2021, No. 17/2021, the SCC has confirmed the limited power of Spanish Courts to perform a merits-review when it comes to annulments of arbitral awards on the grounds of public policy. This judgment continues the SCC's pro-arbitration view stated in the previous ruling of 15 June 2020, which limited the notion of public policy and remarked the principle of party autonomy as an intrinsic element of arbitration.

This judgement from the SCC decided a constitutional appeal against an annulment judgement issued by the MHC.

- In the underlying case, the MHC had annulled an award issued in an equity arbitration, on the basis that it was contrary to public policy.
- The breach of public policy was found upon lack of reasoning and incorrect evidence valuation on the award.
- On such basis, the MHC applied article 41(1)(f) of the Spanish Arbitration Act (Act No. 60/2003 of 23 December), which regulates the annulment of awards upon breach of public policy.

The SCC rejected the arguments of the MHC and concluded that the lack of reasoning could only be found as cause for annulment when there is a clear arbitrary decision or a gross error in the award, which was not to be considered in such a case. In fact, it was the MHC who acted arbitrarily applying such doctrine, materially affecting the constitutional rights of the party affected by nullity.

The doctrine established in the 15 February 2021 judgement has been replicated in two SCC judgments handed down on 15 March 2021. On the one hand, regarding an ICC arbitration case, the SCC No. 55/2021 judgement reverted the annulment ordered by the MHC on the basis of an "*extensive and unjustified interpretation*" (free translation) of the notion of public policy. On the other, the SCC No. 65/2021 judgement –also, from 15 March–, in the context of swap contracts and banking information duties, concluded that the MHC exceeded the notion of public policy.

In summary, the 2021 caselaw from SCC sets an important precedent in relation to court review in annulment proceedings. One relevant fact is that the rulings handed down this year do not have any dissenting opinions from the judges of the SCC. The pro-arbitration stance from the SCC reinforces the confidence of international investors when choosing Spain as a place of arbitration.

It is to be noted in any event that after the above SCC's judgements, the MHC issued the recent judgement No. 66/2021, dated 22 October 2021, where a new award was annulled upon public policy reasons. In short, the underlying dispute seemed to require the application of certain European Law, which apparently was not applied by the arbitral tribunal. According to the judgment, the award would have resolved the issue exclusively based on Spanish Law. The MHC considered there was a gross lack of motivation on the exclusion of the European Law of the matter, which in view of the court was made without the minimum basis of reasoning. This was to have an impact in terms of constitutional rights, upon the consideration that the lack of motivation on the exclusion of the relevant European law was to be considered a breach of public policy.

Scholars and practitioners have expressed divergent opinions on the above MHC judgement, but the meeting point is that Spain has got a strong arbitration system and does work as a safe place of arbitration.

In addition, a number of investment arbitration proceedings involving the Kingdom of Spain have been finished or have had material developments, being 2021 a busy year in this particular field.

Specifically, investment arbitration is marked by the arbitration proceedings started by foreign investors against Spain because of the regulatory changes experimented in the renewable energy sector between 2010 and 2014.

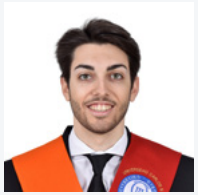
In essence, some investors brought arbitration claims under the Energy Charter Treaty against Spain, claiming reimbursement for the losses that resulted from the change of the remuneration system. In response, Spain claims that its actions were lawfully within its sovereign right to regulate. It also contends that no reasonable investor could expect a regulatory framework to remain unchanged for over two decades and investors only had the right to receive a "reasonable rate of return" for their investments in the renewable energy field.

In 2021 a total of five Awards have been rendered in this field: *BayWa v. Spain*; *FREIF v. Spain*; *Sun-Flower and others v. Spain*; *STEAG v. Spain* and CSP Equity Investment v. Spain.

Spanish arbitration commemorations and events in 2021

In parallel, a few different events have also contributed to making a relevant year for Spanish arbitration out of 2021. The Spanish Court of Arbitration (*Corte Española de Arbitraje-CEA*) commemorated its 40th anniversary since its foundation in 1981. It is also to be remarked that in only a few months the Madrid International Arbitration Center (*Centro Internacional de Arbitraje de Madrid-CIAM*) will celebrate its 2nd birthday. The work already performed by this last arbitration center has been highly regarded as one of the most relevant contributions to the field of Arbitration in Spain.

Lastly, it is also worthy of being noted that in 2021 the Spanish Arbitration Club (*Club Español del Arbitraje*) organised in September its 15th International Congress, "*Arbitration in the 21st Century: Challenges and Opportunities*", in a hybrid on-site-virtual format. In this same vein, the Asociación Europea de Arbitraje hosted in October its traditional "Open Arbitration" congress in a mainly in-person edition. The two events were truly well received and make a very promising 2022 in terms of arbitration events and know-how contribution in Spain.



Eduardo Amor Arroyo *is an LLM Candidate at Universidad Carlos III de Madrid. He participated in the 28th Willem C. Vis International Commercial Arbitration Moot and co-coordinates the Madrid VYAP.*

Víctor J. Lana *is a junior associate at Clifford Chance, Madrid. He practices both commercial arbitration and domestic litigation. He is Co-Coordinator of the Madrid VYAP and a mentee at the 8th cycle of the Young ICCA Mentoring Programme.*

Inés Puig-Samper Naranjo *is an associate at Gómez-Acebo & Pombo. She practices both international arbitration and domestic litigation, and co-coordinates the Madrid VYAP.*

Turkish Perspective

2021 was a remarkable year for arbitration practitioners, in which many landmark decisions were rendered and new arbitration proceedings with compelling aspects have been initiated. Turkey was also affected by this global trend and witnessed several significant new happenings throughout the year. While there is a general increasing appetite for arbitration among Turkish parties, it is fair to say that 2021 was the year of investment arbitration in Turkey. With one ICSID case initiated against the Republic of Turkey and four cases initiated by Turkey-based parties against other states, investment arbitration kept the arbitration agenda of Turkey quite busy. Commercial arbitration, on the other hand, also remained the parties' go-to choice, especially for those transactions involving foreign parties. Increased case numbers were also supported by more arbitration-friendly decisions by the Turkish courts. In this round-up, you will find the most significant developments of this year's arbitration practice in Turkey.

Investment Arbitration in Turkey

TWO NEW BILATERAL INVESTMENT TREATIES

Turkey is trying to attract foreign investors both by introducing necessary legal regulations and also taking the necessary steps to cooperate with other countries so that Turkey-based investors can operate all around the world. To that end, in 2021, Turkey signed two new Bilateral Investment Treaties ("**BITs**") with Angola and the Democratic Republic of the Congo, on 27 July 2021 and on 8 September 2020, respectively. Neither of these BITs has entered into force yet, and the date of entry into force has not been announced.

DISPUTES

According to the ICSID cases registered in 2021, a total of five cases had a Turkish dimension this year. Four of them have been filed by Turkey-based investors, and one case has been filed against Turkey.

Cases where Turkey-based investors took part as a claimant mostly involved disputes related to the construction sector. In fact, in 2021, there was only one case where a Turkey-based investor raised a claim in a sector other than the construction industry. The case in question was filed against the Republic of Uzbekistan and concerned the food products enterprise. Another point to note is that two of the construction disputes (here and here) filed by Turkey-based parties in 2021 were against Turkmenistan, while the other case was filed against Pakistan.

In 2021, the Republic of Turkey was involved in only one case as a respondent. The case was filed by *Alamos Gold Holdings Coöperatief U.A.* and *Alamos Gold Holdings BV* following Turkey's refusal to grant required permits and licences to the investors due to alleged detriments of the planned gold mine to the environment.

Can Shareholders Agree to Arbitrate in the Articles of Association?

While the Turkish Court of Appeal's response to this question has been negative, there is an increasing trend in doctrine for a more arbitration-friendly approach, supporting the opposite view of the Court of Appeal. These conflicting views have prevented trade registries from approving articles of association clauses ("**AoA**") with arbitration agreements for many years. This issue, however, seems to have been resolved (for now) in a recent conference organised by the Istanbul Chamber of Commerce Arbitration and Mediation Centre where representatives from both the Ministry of Trade and the Istanbul Trade Registry were able to present their positions as to the arbitration agreements included in the AoAs. It was indicated that other than for the annulment of general assembly resolutions and dissolution of the company – which are considered as non-arbitrable issues by the Court of Appeal – companies are welcomed to include an arbitration agreement in their AoAs. Not long after this assuring statement by the officials, the first AoA including an arbitration agreement was registered by the Istanbul Trade Registry. The inclusion of an arbitration agreement in AoA is especially important to avoid parallel proceedings where the shareholders agreed to arbitrate under the shareholders' agreement. Though this issue is yet to be finally resolved once it is brought before the Court of Appeal, it is indeed a very positive step towards a more arbitration-friendly practice in Turkey.

Turkish Constitutional Court's Decision on Lack of Jurisdiction

The Turkish Constitutional Court ("**TCC**") handed down a remarkable decision (Turkish Constitutional Court's decision dated 08.06.2021, numbered 2018/5832) involving an arbitration clause with a foreign element. The dispute in question concerns an insurance claim where a Turkish insurance company that became a successor to the rights of a Turkish charterer, following the payment of the insurance compensation, initiated an execution proceeding against the German carrier of the damaged goods. The carrier objected to the execution proceeding based on the arbitration clause between the parties. During the seven-year litigation process, (a) the court of first instance rejected the objection of arbitration, (b) this decision was reversed by the Court of Appeal, (c) the court of first instance then accepted the objection of arbitration, and (d) the decision upholding the objection of arbitration was finalised by the confirmation of the Court of Appeal's decision. The insurance company then applied to the TCC (among others), alleging that its receivable is time-barred under English law due to the lengthy litigation procedures. The TCC, however, rejected the insurance company's arguments based on the facts that the insurance company (i) was aware of the arbitration agreement and in a position to envisage the outcome of the litigation proceeding, and (ii) failed to demonstrate that its receivable became time-barred as it did not initiate an arbitration proceeding before its application to the TCC.

Decision on the Validity of an Arbitration Agreement Under a Standard Sale Conditions and Terms Document Which is Referred to Through a Website on an Invoice

In the decision of the 12th Civil Chamber of the Istanbul Regional Court ("**the Regional Court**"), it was held that the prerequisite for deciding on the enforcement of foreign arbitral awards is that an arbitration agreement should be concluded between the parties or that any dispute that may arise in the articles of association should be resolved through an arbitrator (12th Civil Chamber of the Istanbul Regional Court's decision numbered E. 2021/1025, and K. 2021/1545).

In Article 2 of the New York Convention, which Turkey has also signed and ratified, it is stated that the arbitration agreement must be in written form. In this case, there is no mutually signed contract between the parties. In Article 13 of the Standard Terms and Conditions of Sale ("**the Conditions**"), which is referred to in the invoices issued by the plaintiff, accepted by the defendant, and is stated on the plaintiff's website, it has been decided that the disputes between the parties will be resolved by the Arbitration Tribunals of the Finnish Central Chamber of Commerce. However, the terms of the contract in question were given unilaterally by the plaintiff on its website.

On the other hand, the arbitration clause is not directly included in the invoices, and only references are made to the Conditions posted on the plaintiff's website. Therefore, it is not possible to mention the existence of a definitive arbitration agreement between the parties as specified in Article 2 of the New York Convention. Since there is no arbitration agreement between the parties, the defendant's participation in the arbitrator selection process and the absence of any objection to the arbitrator's authority, and the invalidity of the agreement will not make the arbitration proceeding valid. In this respect, taking into account the above-mentioned issues, the decision was made regarding the abolition of the original decision and the rejection of the case with the acceptance of the defendant's appeal application.

Turkish Court of Appeal's Latest Decision Concerning the Infamous Law No. 805

Law no. 805 on the Mandatory Use of Turkish Language in Economic Enterprises has long been criticised by both scholars and practitioners. In short, Law no. 805 requires all Turkish companies and enterprises to keep their company records and books, execute their agreements and conduct their business transactions in Turkish. The law also imposes the mandatory use of the Turkish language in transactions and correspondence between foreign companies and Turkish parties. It can be said that the law had its purposes back in 1926 when the Republic of Turkey was newly constituted. However, despite the fact that time has passed since, the law is still in force and continues to give rise to complex legal issues, and the arbitration practice, unfortunately, is not immune to this.

To this date, there has been no unified stance from Turkish courts concerning the validity of English-language arbitration agreements executed between a Turkish party and a foreign party. While English-language contracts and arbitration agreements therein can be considered as the standard market practice, some decisions of Turkish courts have rendered English-language arbitration agreements between a Turkish party and a foreign party invalid. Indeed, such decisions are highly criticised by all stakeholders as they damage Turkey's position

as an arbitration-friendly jurisdiction. It came, therefore, with a sigh of relief when the decision of the 15th Civil Chamber of the Turkish Court of Appeal handed down its decision numbered 2020/2652. The court reversed the decision of the lower court rendering an English-language agreement invalid. The 15th Civil Chamber of the Turkish Court of Appeal ruled that Law no. 805 cannot be applied to this case as one of the parties to the agreement is from Luxembourg. This decision of the Court of Appeal is expected to serve as an example for the other decisions of the Turkish courts, especially those related to arbitration agreements.

İpek İnce *graduated from Istanbul University Faculty of Law and is currently working as an associate at Gedik & Eraksoy Attorney Partnership. İpek›s practice covers representing clients in domestic and international arbitration as well as commercial litigation proceedings. İpek also advises clients on a wide range of compliance issues.*

Emel Özaltun *graduated from Bilkent University Faculty of Law and is currently working as an associate at Çetinel Law Firm in Istanbul. Her expertise covers complex international construction and investment arbitration cases along with the management of pre- and post-arbitral stages. She also advises both contractors and subcontractors in non-contentious construction law matters regarding international construction contracts.*

Latin American Perspective

2021 passed on a very positive note for arbitration in the Latin American region. As explained in detail in the following section regarding Argentina, Brazil, Chile, Ecuador, and Uruguay, Latin American jurisdictions continue to issue arbitration-friendly regulations and show their respect for the principles and rules applicable to international arbitration. In this sense, domestic courts have (i) upheld the principle of kompetenz-kompetenz, (ii) ruled on the importance of limiting judicial review of arbitral awards, and (iii) ensured adequate disclosure by arbitrators.

Specifically, in the case of Argentina, this has been much celebrated as a departure from the position previously held by the Supreme Court of Justice, which had allowed the appeal of an arbitral award before the judicial courts on the grounds of unconstitutionality, illegality, and unreasonableness. Moreover, Brazil has recently enacted a law encouraging disputes arising from public contracts with state entities to be solved through non-judicial methods. Similarly, Ecuador has issued a decree which broadens the application of arbitration in the country.

This pervasive favorable outlook on arbitration is in line with the modern arbitration legislation in place in each jurisdiction, which in most cases contain international arbitration laws following the UNCITRAL Model Law and the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Furthermore, arbitral institutions in the region are also making steady progress in their growing sophistication, as confirmed by the approval of state-of-the-art arbitration rules in Uruguay and the creation of a specialized arbitration center in Chile.

Argentina

During 2021, Argentina made a huge step towards becoming a more pro-arbitration jurisdiction. On August 5, the Argentine National Supreme Court of Justice (the "**SCJ**") issued a crucial judgement in the case *"Milantic Trans S.A. c/ Ministerio de la Producción (Ast. Río Santiago y ot.) s/ ejecución de sentencia – recurso extraordinario de inaplicabilidad de ley y nulidad"* ("**Milantic**"). This decision marks a turning point with respect to the 2004 precedent of the SCJ *"José Cartellone Construcciones Civiles S.A. c/ Hidroeléctrica Norpatagónica S.A. o Hidronor S.A. s/ proceso de conocimiento"* ("**Cartellone**"), in which it ruled that an arbitral award may be appealed before the judicial courts on the grounds of unconstitutionality, illegality and unreasonableness.

The decision rendered in Milantic, where the composition of the SCJ was different from Cartellone, follows a pro-arbitration approach regarding the limitation that local courts have in reviewing arbitral awards.

THE "MILANTIC" DECISION

The company Milantic Trans S.A. ("**Claimant**") initiated judicial proceedings before the Contentious Administrative Lower Courts of La Plata, Province of Buenos Aires, in order to obtain the recognition and enforcement of an arbitral award rendered on 15 November 2004, in London, United Kingdom.

Astillero Río Santiago, a company owned by the Province of Buenos Aires ("**Respondent**"), argued that the arbitration award could not be enforced due to the lack of legislative approval of the construction contract celebrated with Claimant, which contained the arbitration clause, and assured that the arbitral award violated the local public order because Claimant had already been compensated for the damages it sought.

The Contentious Administrative Lower Court No. 2 of La Plata conceded the enforcement of the arbitral award. Respondent appealed this decision.

Although the appeal was only limited to the decision concerning the costs of the judicial proceedings, the Contentious Administrative Chamber of Appeals of La Plata admitted the appeal and overruled the entire decision rendered by the Lower Court by arguing that the lack of legislative approval determined the invalidity of the arbitral clause and, consequently, the controversies linked to public authorities of the Province of Buenos Aires could not be removed from the jurisdiction of local courts. On those grounds, the tribunal denied the recognition and enforcement of the arbitral award.

Claimant submitted an appeal against this ruling before the Supreme Court of Justice of the Province of Buenos Aires, which was rejected on 30 March 2016. Accordingly, Claimant filed the extraordinary federal appeal before the SCJ.

SCJ'S RULING

Firstly, the SCJ analyses article V.2.b of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). According to the SCJ, the interpretation of this norm must observe public law principles of the Argentine National Constitution ("**CNA**") when recognizing and enforcing an arbitral award, such as due process.

Furthermore, the SCJ assures that the jurisdiction of appeals tribunals is limited to the terms in which the controversy has been settled and, pursuant to relevant precedents, the disregard of this limitation violates the congruency principle established in articles 17 and 18 of the CNA. Therefore, the SCJ considered that both the Contentious Administrative Chamber of Appeals and the Supreme Court of Justice of the Province of Buenos Aires should have limited their review only to the costs of the judicial proceedings.

Lastly, the SCJ points out that *res judicata* constitutes a fundamental pillar for the Argentine constitutional regime, and thus, it is not possible for local courts to modify this principle *ex officio* when the parties do not request the review of any aspect of a decision (congruency principle).

On these grounds, the tribunal decided to admit the appeal submitted by Claimant.

CONCLUSION

Even though it does not strictly modify the criteria established in Cartellone, by reassuring that due process and the congruency principle must prevail when revising the recognition and enforcement of an arbitral award in order to ensure legal certainty, Milantic has become a landmark in review of arbitral awards by the Argentine judicial courts. This follows-up on a series of previous events, such as the enactment of an international commercial arbitration law in line with the UNCITRAL Model Law in 2018 and the opening of the Permanent Court of Arbitration Latin American Office in Buenos Aires in October 2019, that confirms a trend towards turning Argentina into a *pro arbitrii* jurisdiction.

Brazil

In 2021, the Brazilian Arbitration Act ("**BAA**") celebrated its 25th anniversary. After some initial resistance by Brazilian courts, arbitration in Brazil has become the go-get dispute resolution method for many companies and investors in commercial and construction contracts. It goes without saying that Brazil is now regarded as an arbitration-friendly country, having evolved in both sophistication and success.

In the last year, Brazil solidified its arbitration-friendly framework with the enactment of the New Government Procurement Act ("**NGPA**") (Law No. 14,133/2021). The NGPA encourages disputes arising from public contracts to be solved through non-judicial methods, including arbitration. In 2015, the BAA underwent a reform whereby it explicitly provided for the lawfulness of arbitrating with governmental bodies. Now, the NGPA takes a step further by bringing greater legal certainty for investors, whether Brazilian or foreign, seeking to invest in large projects in Brazil led by state entities. The NGPA is especially relevant considering that Brazil has not ratified the ICSID Convention and is not a party to any bilateral investment treaties ("**BITs**").

Another development has been in relation to disclosures by arbitrators. The BAA establishes that the duty to disclose encompasses any facts that may bring into question the arbitrator's impartiality or independence to act in a case (Article 14, paragraph 1). In March 2021, a São Paulo state court preliminarily stayed the effects of a partial ICC award in an annulment proceeding on the basis that one of the arbitrators failed to disclose prior business relationships he allegedly had with one of the law firms involved in the case. The preliminary decision was then reversed on July 2021 and although the lawsuit is still pending, the allegation was widely reported in the media. This case, therefore, highlights the relevance Brazilian courts place on the duty to disclose facts that may put the independence and impartiality of the arbitrators into question.

In relation to confidentiality, while neither the BAA nor Brazilian law generally establishes the confidentiality of arbitral proceedings (except for arbitrations involving state entities), most arbitrations in Brazil are confidential. This is either by express agreement of the parties or by reference to institutional rules that provide for confidentiality. Accordingly, the 2015 Brazilian Code of Civil Procedure established a rule whereby lawsuits related to confidential arbitration proceedings be processed under seal, subject to judicial secrecy. However, a few recent decisions by the São Paulo state court in the first semester of 2021 considered this rule to be unconstitutional and lifted the seal of some annulment proceedings. It is important to note that the confidential arbitration proceedings themselves did not have their legality challenged; only the confidentiality of the judicial proceedings related to arbitrations.

Finally, it is noteworthy to mention that the Brazilian arbitration community in general has embraced Environmental, Social and Governance ("**ESG**") and Equity, Diversity and Inclusion ("**EDI**") goals and practices. Initiatives such as REAL (Racial Equality for Arbitration Lawyers) and Greener Arbitrations have reverberated in Brazil.

Chile

2021 was a good year for arbitration in Chile. Regarding domestic arbitration, the Santiago Court of Appeals reinforced Chile's recognition of the *kompetenz-kompetenz* principle. The Supreme Court, however, sent mixed signals: on the one hand, it prescribed a wide interpretation of an arbitration agreement by extending its scope to certain invoices that derived from the underlying contract; on the other hand, it restrictively interpreted an arbitration agreement by excluding from its scope the performance of the obligations of a contract, when the agreement only referred to the interpretation, execution, or validity of that contract.

Regarding international arbitration, the Supreme Court recognized an international award issued in Germany applying German law. In doing so, the Supreme Court confirmed that recognition of foreign awards is governed by Law 19.971, which implements the 1985 UNCITRAL Model Law. Among other issues, the decision concluded that a sales order containing an arbitration clause that was not signed by a party, but which was confirmed through subsequent emails was a valid arbitration agreement; and that service of suit through courier services is a valid method of notification. Finally, the Supreme Court refused to entertain the merits of the dispute, despite respondent's claim that the award applied a substantive rule of German law that opposed Chilean public order.

Additionally, the Santiago Court of Appeals rejected a request to partially set aside an award issued in an arbitration seated in Santiago. The request argued that the sole arbitrator had not applied the rules of costs found in the applicable arbitral rules. The Court of Appeals verified that the arbitrator had indeed followed the arbitral rules and dismissed the claim. In doing so, the Court of Appeals also confirmed that set aside procedures are the only recourse against an international award seated in Chile.

On a related note, Chile received few notifications of intent to trigger investment arbitrations. Most of these notifications derive from the efforts of Congress to allow withdrawals from people's private pension funds, as well as advance payments on life annuity contracts.

Finally, mining arbitration in copper-intensive Chile will also benefit from the opening of a new arbitration center specifically tailored for this industry.

Ecuador

Presidential elections took place in Ecuador in early 2021. The newly elected government has approved two major changes concerning arbitration.

First, Ecuador executed -and returned to- the ICSID Convention. Then, following the domestic procedure to execute and ratify international treaties, the Constitutional Court determined that the Convention did not require the approval of the legislative power prior to its ratification (opinion 5-21-TI/21). The examination of the matter by said power could have implied difficulties in returning to the Convention. As a result, the ICSID Convention entered into force on 3 September 2021. However, the same Court is still pending to rule definitively on whether the ICSID Convention is compatible with article 422 of the Constitution**,** which was the ground to denounce this instrument back in 2008 as well as the bilateral investment treaties in force at the time.

The second relevant event is the issuance of Decree No. 165 on 31 August 2021. This instrument comprises the Regulations to the Arbitration and Mediation Law for the first time since the law entered into force in 1997. Amongst the main topics developed by the Regulations are: i) confirmation of arbitration and mediation in public procurement; ii) clarification of the requirement of prior approval by the Attorney General to execute arbitral agreements with state entities for domestic and international arbitration; iii) flexibility of the arbitral process and the power of tribunals to conduct an efficient process; iv) independence of arbitration and mediation centers from the judiciary: v) the annulment action and the applicable principles; and vi) the enforcement of foreign arbitral awards.

Decree No. 165 is likely to broaden the application of arbitration in Ecuador. For instance, the National Public Procurement Service has already issued Resolution 120-2021 in compliance with said Decree. This Resolution incorporates arbitration in the standards applicable to public contracts as the default method to solve controversies arising from contractual relationships with the State.

Uruguay

The Uruguayan arbitration community has had plenty to celebrate in 2021, with the official presentation on 30 November of the new Arbitration and Conciliation Rules of the Centre for Conciliation and Arbitration - MERCOSUR International Arbitration Court of the National Chamber of Commerce and Services ("**NCCS**"). Founded in 1995, the Centre is the longest-standing arbitral institution in Uruguay, boasting a long tradition of providing efficient alternative dispute resolution services. The much-awaited new rules introduce several amendments, in the spirit of bringing the Centre up to speed with the latest international trends.

Some of the innovations introduced by the new Arbitration Rules include the possibility of holding virtual hearings, provisions on multi-party and multi-contract arbitrations, enhanced transparency and disclosure obligations, and the possibility of expedited and emergency arbitration proceedings.

The amendment of the Arbitration Rules of the Centre also responds to the enduring impulse imparted by the passing in 2018 of an international commercial arbitration law in line with the UNCITRAL Model Law (Law No. 19.636, of 13 July 2018), a landmark development that had been long-awaited.

Regarding local case law, 2021 adds to the long and steady record of arbitration-friendly decisions issued by Uruguayan courts. In a recent ruling, a civil court of first instance rejected an attempt by a company to compel the respondent to a domestic arbitration at the Centre for Conciliation and Arbitration of the NCCS regarding a dispute that had been already resolved by arbitration in New York. The Uruguayan court of first instance upheld the principle of *kompetenz-kompetenz*, refusing to reanalyze the jurisdiction of the arbitral tribunal seated in New York. Although the court of first instance did not render a judgment regarding the recognition and enforceability of the New York award, which pertains to the Supreme Court of Justice, it emphasized the *res judicata* effect of the decision on the dispute at hand.

In the field of investment arbitration, no new cases have been filed against Uruguay in 2021. However, there have been some post-award developments regarding recently concluded arbitrations. In the case concerning the *Aratirí* mining project, the Claimants filed before the French courts a motion to set aside the arbitral award issued last year dismissing all claims on jurisdictional grounds (*Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Oriental Republic of Uruguay*, PCA Case No. 2018-04).

In addition, Uruguay has recently filed before the US Courts a petition to recognize and enforce the award rendered in Italba Corporation v. Oriental Republic of Uruguay (ICSID Case No. ARB/16/9), by means of which the tribunal found that it lacked jurisdiction and ordered the Claimant to reimburse Uruguay for costs and legal and expert fees in the amount of USD 5,885,344.17, plus pre-judgment interest.

Tomás Villaflor *is an Associate at Tavarone, Rovelli, Salim & Miani's Energy and Public Law Department, qualified in Argentina. He has experience representing private companies on regulatory and public law disputes before the judiciary and administrative bodies, regulatory and public law matters, energy contracts and investor-state arbitration. He graduated from the University of Buenos Aires.*

Joana Holzmeister e Castro *is an Associate at Lefosse Advogados in São Paulo. Her practice is focused on arbitration, having advised companies and state-owned entities in the oil and gas, energy, construction, and food industries in contractual and post-M&A disputes. She holds an LLM in International Commercial Law from University College London and an LLB from Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio).*

Francisco Rodríguez *is an associate in the dispute resolution team at Cuatrecasas (Santiago) and a member of SVYAP's Executive Committee.*

Michelle Vasco *is a senior associate in Almeida Guzmán & Asociados. She is a former attorney for Ecuador's Attorney General Office in cross-border litigation and international arbitration. She has an LLM in International Dispute Settlement from Leiden University. She is a Certified Mediator and Member of the ExCo of ECUVYAP.*

Lorena Barrazueta *has experience as secretary of arbitration tribunals in over forty local proceedings administered by the Arbitration and Conciliation Center of the Guayaquil Chamber of Commerce. She is a certified mediator and has solved football disciplinary matters as part of LigaPro's Football Disciplinary Committee. Currently, she is a law clerk in the National (Supreme) Court of Justice of Ecuador, after working as one in the Constitutional Court.*

Pilar Álvarez *is Counsel to the Deputy Secretary of the Uruguayan Presidency. Among other responsibilities, she coordinates Uruguay's defense in investment arbitration proceedings as well as in set aside and enforcement proceedings arising therefrom. Previous experience includes having worked as part of Shearman & Sterling's International Arbitration team in Paris, advising companies and state-owned entities in commercial and investment arbitrations. Pilar graduated with honors from the University of Montevideo.*

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