JUS MUNDI

Arbitration 2022 Year in Review

Jus Mundi & VYAPs

Foreword

International arbitration continues to play an increasingly important role in resolving cross-border disputes. The past few years have seen significant developments in this field across jurisdictions around the world, both in commercial and investment arbitration.

Against this backdrop, Jus Mundi is thrilled to present this collection of articles covering the latest developments in international arbitration in 2022, in collaboration with 13 Very Young Arbitration Practitioners initiatives (VYAPs).

This collection of articles provides a comprehensive overview of the latest trends, case law, legal developments and insights into the future of international arbitration in 13 jurisdictions, covering Latin America, Europe, North Africa, and Singapore. Each article provides a deep dive into the local context, examining the unique challenges and opportunities facing arbitration practitioners in that jurisdiction.

This collection is a must-read for anyone interested in international arbitration.

We would like to express our gratitude to the young practitioners and VYAPs who contributed to this collection. We would also like to thank Zuhair Farouki for coordinating this project with us for London VYAP, as well as Helene Maio, Jewel Archer-Lucas, and Klarissa Trasani.

We hope you will enjoy reading it as much as we enjoyed putting it together.

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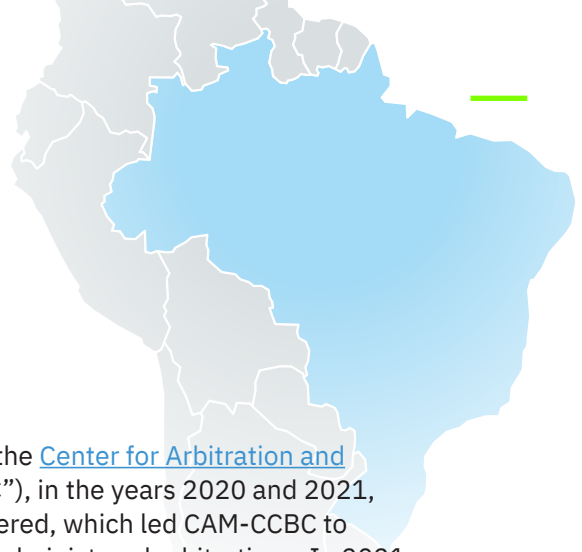
London Very Young Arbitration Practitioners (London VYAP)

London Very Young Arbitration Practitioners (London VYAP) provides a platform for professional networking and knowledge sharing among junior arbitration practitioners with up to 5 years of PQE and members of academia. London VYAP organises soft skills seminars, mentor programmes, and networking events, whilst also providing publishing opportunities through its valued partnership with Jus Mundi. With a fast-growing presence in London and a collaboration with many sister VYAPs across the world, London VYAP presents a unique opportunity at the junior end of the London arbitration market to proactively connect, learn from and network with one another.

TABLE OF CONTENTS

Brazil



This article provides an overview of the arbitration highlights in Brazil in 2022, a particularly relevant year for arbitration in the country. More specifically, this article 1) considers statistics disclosed in 2022 by some of the main arbitration institutions in the country, 2) covers the recent "anti-arbitration" bill proposed in the Brazilian Congress, 3) analyzes the first conflict of jurisdiction between arbitral tribunals decided by the Brazilian Superior Court of Justice, and 5) takes note of a relevant change in the regulatory framework requiring disclosure of arbitral proceedings' information, despite any confidentiality undertakings.

Arbitration in Brazil in Numbers

Arbitration has become one of the most discussed topics in the Brazilian legal community. After only 26 years since the enactment of the Brazilian Arbitration Act ("BAA"), Brazil is now regarded as one of the leading countries in the arbitration field, and commercial arbitration is the most commonly used method of alternative dispute resolution in the country.

The latest statistics on arbitration proceedings commenced in the country, published in 2022, reveal that Brazil experiences a steady growth in the number of cases administered by the main national institutions.

According to information released by the Center for Arbitration and Mediation Brazil-Canada ("CAM-CCBC"), in the years 2020 and 2021, more than 230 new cases were registered, which led CAM-CCBC to achieve the landmark figure of 1,311 administered arbitrations. In 2021, the total of the sums disputed in these cases amounted to BRL 5.6 billion, while the average amount in dispute reached BRL 43.7 million.

In the same sense, preliminary statistics released by the International Chamber of Commerce ("ICC") in 2022 for the year 2021 rank Brazilian parties as the second most common in arbitration proceedings registered that year.

The "Anti-Arbitration" Bill

This thriving environment for arbitration may be put in check if Bill No. 3,923/21 is approved by the Brazilian Congress. This bill amends the BAA with the declared purpose of *"disciplining the arbitrator's role, improving the duty of disclosure, establishing the disclosure of information after the conclusion of the arbitration procedure and the publicity of annulment proceedings"*. The bill is currently being discussed in the Chamber of Deputies and has already mobilized more than 40 entities against the parliamentary initiative.

According to the Brazilian Arbitration Committee ("CBAr"), the main arbitration entity in Brazil, the changes proposed in the bill increase legal uncertainty and weaken the entire arbitration system in the country.

> TABLE OF CONTENTS

Its approval would represent a real step backwards, contrary to most modern legislation in the world, as it promotes undue interference by the State in private proceedings.

The main changes proposed by the bill would:

- limit the choice to arbitrators who have no more than 10 cases;
- limit the choice to arbitrators who do not compose other arbitration tribunals with the same arbitrators of the case;
- limit the choice to arbitrators who are not on the board of directors of the arbitral institution that administers the proceeding;
- impose on arbitrators the duty to disclose any fact that gives rise to *"the slightest doubt"* as to their impartiality and independence;
- require the arbitral institution to publish the composition of the tribunals and the amount of the dispute;
- require the arbitral institution to publish the award (with the possibility to redact sensitive information); and
- determine that the proceedings for annulment of arbitral awards shall not be confidential before the Judiciary.

Following strong criticism from the civil society, the discussion and voting of the bill were postponed by the Chamber of Deputies. In an interview in November 2022, the president of the Chamber of Deputies, Arthur Lira, stated that the bill would not be processed hastily.

The arbitration community in the country fear that the bill is overreaching and portrays a dangerous interference in the autonomy of the parties who elected arbitration as an extrajudicial means of resolving their disputes. If approved, it will certainly harm Brazil's reputation as an arbitration-friendly country.

Lis Pendens Between Related Arbitration Proceedings Settled by the Superior Court of Justice

In June 2022, the Brazilian Superior Court of Justice ("STJ") adjudicated for the first time a conflict of jurisdiction between arbitral tribunals. The arbitration proceedings involved a major Brazilian multinational meat processing company, JBS S.A. ("JBS"), whose controlling shareholders confessed to committing illicit acts.

At the time of the judgment, three arbitration proceedings had been initiated against JBS's controllers before the Brazilian Stock Exchange's arbitration chamber (*Câmara de Arbitragem do Mercado*, "CAM"), seeking compensation for damages they would have caused to the company. The first two proceedings – which were later joined – were brought forth by JBS's minority shareholders, while the third one was filed by JBS itself, with the approval of the shareholders pursuant to the Brazilian Corporations Act ("BCA"). Each tribunal held that it had prevailing jurisdiction over the claims and refused to discontinue its respective proceedings. Following these conflicting decisions, JBS requested the STJ to settle the divergence.

In its decision, the STJ found that the irreconcilable decisions rendered in the arbitrations created a conflict of jurisdiction. Noting that CAM arbitration rules did not provide for how to resolve the impasse, the STJ held that it could not presume that the arbitration chamber, whose function is merely administrative, would have jurisdiction to settle the conflict. Considering the jurisdictional nature of arbitration in Brazil and the STJ's constitutional authority to rule on conflict of jurisdiction *"between any tribunals"*, the STJ declared its authority to resolve jurisdictional conflicts between arbitral tribunals.

To decide which proceeding should continue, the STJ did not apply the civil procedure rules to settle conflicts of jurisdiction but rather assessed the legal standing of the parties to bring forth their claims under the BCA. On a controversial legal interpretation, the STJ held that minority shareholders could initiate arbitration proceedings against controllers upon (a) the approval by the shareholders' general assembly and the inaction of the company to bring forth said claim, or (b) the refusal of the general assembly to authorize the filing of the arbitration. As a result, the STJ held that JBS's minority shareholders lacked legal standing to claim for damages, as JBS was simultaneously seeking reparation for those damages, and, therefore, that the arbitration it had requested should be discontinued in favor of the company-initiated proceeding.

A more detailed commentary can be found on JusMundi.

New Regulatory Rule: Companies to Disclose Details of Arbitration Proceedings to the Market

In June 2022, the Brazilian Securities and Exchange Commission ("CVM") passed Resolution No. 80/2022 settling the market's questions concerning the extent of the disclosure of arbitral proceedings required of reference forms.

As the regulatory authority overseeing publicly-listed companies' disclosure of information and observance of the regulations, CVM dictates the requirements of periodical disclosure documents. Among those documents are the reference forms, commonly known as the document drafted for the request for public listing, whereby companies are to inform potential investors of the company's activities, financial health and the risks involved in its business. Within this extensive report, one of the mandatory disclosures regards the involvement of the company or *its shareholders* in material disputes – that is, disputes which the company or its advisors consider to have the potential to affect the company's reputation or regular course of business.

When it came to the disclosure of confidential disputes, despite the CVM's guidance to the effect that confidentiality of legal proceedings should not overrule the need to disclose material disputes, in practice companies often only disclosed a few details, such as a high-level description of the object matter in dispute, the amount involved and the company's or shareholders' chances of success. While unquestionably material, shareholders' disputes are, more often than not, referred to *confidential* arbitration, thus raising controversy over their disclosure. This prompted much discussion in the backstages of the drafting of reference forms and other disclosure documents alike, with gatekeepers, the company and other stakeholders fighting for the inclusion of more or less information on such sensitive disputes.

Through the recent resolution, however, CVM brought an end to the controversy and determined that, regardless of any parties' undertakings to preserve the confidentiality of any matter pertaining to a dispute, arbitration agreements included, companies must describe the following details of a shareholder's dispute: (a) the parties' names, (b) the company/shareholder's assets or amounts involved in the dispute, (c) the main facts of the case, and (d) the claims or requests for relief.

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Ecuador

Whilst 2021 saw several milestones in the arbitration field in Ecuador, such as rejoining the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention" or "ICSID") after the State's withdrawal in 2008, or enacting the Regulation to the Arbitration and Mediation Law, which clarified its practical application in a pro-arbitration manner (Decree No. 165), 2022 has also proved to be an eventful year for arbitration in Ecuador. This note will address such events by explaining recent developments in case law, treaties, and regulations and summarizing the current stage of the investor-state dispute settlement ("ISDS") cases initiated against the Republic of Ecuador.

Case Law

After upholding the constitutionality of Ecuador's ratification to the ICSID Convention in 2021, the Constitutional Court of Ecuador dismissed a request for interpretation filed in 2018 challenging the current interpretation of Article 422 of the Constitution, which prohibits the conclusion of investment treaties providing for investor-State international arbitration seated outside of the region. In decision No. 2-18-IC/22, the Constitutional Court declared the request's inadmissibility as it did not encompass a general interpretation of the provision (the main admissibility requirement for a request for the interpretation of a Constitutional rule) and was intended to consult the Court on the application of the norm to a specific scenario – the conclusion of a Bilateral Investment Treaty ("BIT"). The Court, however, left the discussion open. It could be dealt with during the internal process to ratify an eventual BIT providing for ISDS. Although there is no information on whether the parties included an ISDS provision in its text, Ecuador and Spain completed a draft BIT on 5 December 2022, pending internal ratification in both states. This may be the opportunity for the Constitutional Court to review the previous interpretation of Article 422 of the Constitution.

Treaties

In addition to the negotiations to conclude new BITs and to promote international arbitration, Ecuador concluded a Host Country Agreement with the Permanent Court of Arbitration ("PCA") on 25 October 2022, granting privileges and immunities to PCA officials and arbitrators, and participants in PCA-administered cases. This also paves the way to set a framework for the institution's use of facilities located in Ecuador.

> TABLE OF CONTENTS

LAWS, REGULATIONS, AND ARBITRAL RULES

First, in February 2022, the Executive sent a draft law to the National Assembly titled Organic Law for the Attraction of Investments, Strengthening of the Stock Market and Digital Transformation.[1] This draft includes a provision stating that delegated management contracts and public-private partnerships concluded with the State must include a multi-tier dispute resolution clause– negotiation between the parties, mediation, and arbitration. The draft law also provides for the conclusion of arbitration agreements in investment contracts exceeding US $15,000,000, ensuring the benefit of recourse to arbitration for investors investing in Ecuador.

Second, the Ministry of Economy and Finance issued a Regulation for recognizing and paying arbitral awards rendered against Ecuador and its entities,[2] creating a program to include a financial provision in the State's yearly budget for the payment of awards and decisions which are foreseen to be due during the year in which the budget is operational. This provision will apply to all the awards due against the State with an amount equal or superior to US $ 1,000,000. The National Treasurer of Ecuador will assign the funds using the information of the awards that the General Attorney's office will provide for such effect.

Third, the Arbitration Centers of the Ecuadorian-American Chamber of Commerce ("AMCHAM") and the Chamber of Commerce of Guayaquil ("CCG") updated their arbitration rules, the validity of which started in 2022, to meet international standards while instrumenting Decree No. 165. The update includes rules on emergency arbitration, electronic notification of a claim, and a calendar for payment of arbitral costs.

[1] The translation is ours. The project's original name is: "Ley Orgánica para la Atracción de Inversiones, Fortalecimiento del Mercado de Valores y Transformación Digital".

[2] See pages 20-22.

ISDS Cases

2022 has had newly instituted investor-State arbitration proceedings against Ecuador, updates on ongoing proceedings, and concluded arbitrations.

Regarding arbitrations initiated in 2022:

- CODELCO, a Chilean state-owned company, started two arbitral proceedings against Ecuador, alleging the breach of a partnership agreement concluded between the investor and the Ecuadorian State-owned mining company, ENAMI, in 2019. The agreement was supposed to inaugurate the exploitation phase of a mining operation initiated with the exploration phase in 2008. The first arbitral proceeding was commenced in January 2022 pursuant to the ICSID arbitration rules (being the first ICSID proceeding against Ecuador since its re-accession to the Convention), and the second proceeding commenced in April 2022 pursuant to the International Chamber of Commerce ("ICC") arbitration rules with the seat in Paris. To date, the ICSID arbitration is suspended and the parties are negotiating.

- The Chinese mining company Junefield filed an *ad hoc* arbitration in October 2022, claiming Ecuador is liable for the lack of guarantees to operate the Rio Blanco Project as indigenous and anti-mining groups allegedly conducted numerous disturbances that prevented the company from carrying out activities in the area.

Regarding ongoing and concluded arbitrations:

- Poma SAS and Sofratesa Inc initiated an ICC arbitration alleging a breach of the contract signed with the Municipality of Guayaquil and the Municipal Public Transit Company of Guayaquil in September 2021. However, at least the state-owned company has not appointed its member of the arbitral tribunal yet.

- In May 2022, an arbitral tribunal of a PCA-administrated case issued an award condemning Ecuador to pay US $10,700,000 in favor of Gente Oil. Ecuador challenged the validity of the award before the Court of Appeals of Santiago, the decision of which is pending.

- In June 2022, the Court of Appeals of The Hague rejected Ecuador's appeal and upheld the 2018 partial award in favor of Chevron and Texaco, which found fraud and corruption in the judgment on environmental damages issued against Texaco in Ecuadorian courts. Later, in September 2022, the Attorney General's Office filed a cassation appeal within the process of annulment of the second partial award before the Supreme Court of the Netherlands.

- In August 2022, international press signaled that Luxemburgish financial institutions were ordered to freeze Ecuadorian assets under their guard for the payment of the ICSID award rendered in favor of Perenco in 2019, although the Ministry of Economy and Finance issued a communication asserting that the State did not receive an official notification from the judicial authorities of Luxembourg on the issue. In any case, in December 2022, the government agreed on a payment schedule with Perenco that extends throughout 2023.

- On 16 December 2022, an ICC arbitral tribunal constituted under the UNCITRAL Arbitration Rules issued a final award in the arbitration initiated by MAESSA and SEMI in 2015. The tribunal found the State's unilateral termination of the construction contract concluded with the claimants to be in breach of its obligations and awarded US $17,367,897.31 in favor of MAESSA and SEMI. The Attorney's General Office issued a press release saying the Republic of Ecuador is reviewing its options, which include challenging the award in the courts of Paris.

Looking ahead, 2023 may bring a new ISDS claim against Ecuador. Petrolia, a Canadian company, has declared that it will seek recourse to international arbitration for Ecuador's decision not to extend the period of its contracts to operate blocks 16 and 67, due by the end of 2022. The investor has anticipated that its claim will be on the scale of US $260,000,000.

Conclusion

The Constitutional interpretation prohibiting the Ecuadorian government from concluding investment treaties providing for investor-state arbitration proceedings seated outside of the region is still in force in 2022. However, the issue is likely to be revised during the ratification process of newly concluded BITs providing for an investor-State dispute resolution mechanism. In any case, Ecuador continues to develop its approach to ISDS proceedings; there have been efforts to equate Ecuador's arbitral practice to international standards; the government has decided to allocate funds from the State's budget to pay its obligations arising from arbitral awards; Ecuadorian law recognizes the right of investors and private parties concluding contracts with the State to seek recourse to arbitration; and the country has become one of the Host Countries of the PCA. Overall, 2022 was a favourable year for international arbitration in Ecuador.

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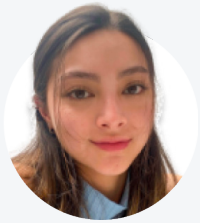

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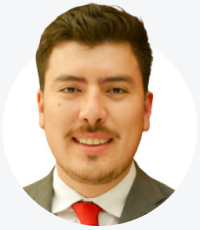

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Bolivia

The arbitration landscape in Bolivia in 2022 is quite particular. Arbitration, as a general concept, has been slowly evolving in domestic law, making increasingly influential appearances within the national legal order.

In 2009, the New Political Constitution of the Plurinational State of Bolivia (the "Constitution") was enacted. These new provisions allowed the creation of new laws in the investment and arbitration regimes, among others. The Constitution establishes, in matters of investment, that all foreign investment shall be subject to Bolivian jurisdiction, laws, and authorities, and no one may invoke a situation of exception, nor appeal to diplomatic claims to obtain more favorable treatment.

This disposition does not prohibit arbitration on investment matters and it does not even mention arbitration. Although at first glance it could refer only to procedural matters, in its essence, it stipulates much more than that as it subjects foreign investments to the Bolivian system. It also refers to substantive matters when it refers to the submission to Bolivian laws.

The Constitution further stipulates that foreign participation in the Bolivian hydrocarbons production chain, foreign participations will be, once again, subject to Bolivian jurisdiction, laws, and authorities. This obliges foreign investors to be subject to Bolivian rules, and its courts, thus taking full control of the situation.

The Continued Impact of Bolivia's Withdrawal from ICSID

The result of the new dispositions related to investment in Bolivia was the denunciation of the International Centre for Settlement of Investment Disputes Convention ("ICSID Convention") and its subsequent withdrawal from the same. On 2 May 2007, Bolivia sent a notification to ICSID of its denunciation of the ICSID Convention pursuant to Article 71. This made Bolivia the first country to withdraw from ICSID Convention in history.

Bolivia based its exit from ICSID on the following:

1. To tilt the balance as there was a view that *"ICSID is an absolutely unbalanced Tribunal that always takes sides with the transnationals"*.

2. To leave an undemocratic system as there was a view that *"ICSID is undemocratic because it deliberates behind closed doors and its decisions are unappealable"*.

3. To not be subject to high costs as there was a view that *"ICSID is extremely expensive for countries like Bolivia"*.

4. To not adhere to a system of millionaire compensations as there was a view that *"transnational corporations take advantage of the Tribunal to extort millionaire compensations from the States"*.

5. To not accept a system of judge and party as there was a view that *"the World Bank acts as judge and party in ICSID proceedings"*.

6. To renounce an openly unconstitutional system as there was a view that *"the ratification of this Tribunal openly violates the Political Constitution of Bolivia"*.

The next step for Bolivia was obvious: the denunciation of the Bilateral Investment Treaties ("BITs"). In consideration of the dispositions established in the Constitution, and due to its transitory provision, the government decided to take measures with respect to the BITs in force at the time. Accordingly, Bolivia denounced a total of 21 BITs, including those it had signed with China, the United States, Spain, France, and the United Kingdom.

Within the Constitutional Transitory Provision, Bolivia could renounce the international treaties or not renew them. Under the latter option, BITs signed with the United States, Spain, Netherlands, and Sweden were denounced on their expiration date. The Partial Scope Economic Complementation Agreement with Mexico, which included a section on investment, and indicated arbitration as a method of dispute resolution, was also denounced.

For Bolivia, maintaining domestic dispute resolution mechanisms involving the State is a clear priority. The denunciation of ISDS mechanisms has also been accompanied by more restrictive reforms to the mechanisms that remain in force.

Investment Dispute Resolution

Based on this legal framework, the Congress of Bolivia enacted Law No. 708 of Conciliation and Arbitration ("Law 708") on 25 June 2015, which is the arbitration law currently in force. Law No. 708 regulates investment disputes with the State, thus applying to any contractual or extra-contractual dispute where the State is a party and arises from or is related to an investment made under Law No. 516 for the Promotion of Investments ("Law 516").

The main purpose of Law 708 was to provide new rules for the application of conciliation and arbitration as alternative methods for dispute resolution within Bolivian territory. This legislation incorporated modifications and introduced specific rules concerning investment dispute resolution involving the Bolivian state. For example, the investment arbitration chapter of Law 708 establishes several mandatory provisions that will be applied to investment cases, thus limiting the right of the parties to freely determine the characteristics of the procedure in their arbitration agreement.

The most relevant restriction in the investment arbitration chapter is that related to the lex arbitri, whereby any investment arbitration shall have its seat in Bolivia. Further, Bolivia reserves the competence to resolve the appeal for annulment of the award to the Bolivian Judiciary. The result of this is that it submits to Bolivian jurisdiction the trial of the validity of the arbitral decisions. This is far from ideal for a foreign investor.

Investment Arbitration in 2022

Law 516 and Law 708 have domesticated investment arbitration, giving it a purely national character. The goal clearly is to keep arbitration proceedings, even investment arbitrations involving foreign investors, inside the country and subject to Bolivian law and its authorities.

Although the law is broad in terms of the appointment of arbitrators, the applicable rules, nationality of the arbitrators, and the place of hearings, the law is very rigid in establishing that the seat of investment arbitration will always be the territory of Bolivia. By establishing this obligation, the Bolivian courts will always have the last word in matters of nullity of the award, permanently tipping the scales towards the state itself.

As a result, Bolivia has effectively dismantled the mechanisms of international investment arbitration.

Through the new investment regulations and the massive denunciation of international agreements, many in the arbitration community believe that Bolivia is making a mistake. There are no real benefits of establishing Bolivia as the only possible venue for investment arbitration, and this would only discourage foreign investment. More importantly, the current Bolivian investment arbitration regime is detrimental and unnecessary for a correct, efficient, and impartial treatment of foreign investments.

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AVYAP
Argentina Very Young Arbitration Practitioners

Argentina

There were important developments in 2022 that continue to position Argentina as an attractive arbitral seat. Among the various updates, we have chosen to analyze three important court decisions that have been favorable to both local and international arbitration. We will analyze i) a case related to the request before the judicial courts for setting aside a domestic award based on the violation of public policy (Tinogasta Solar c/ cía. administradora del mercado mayorista eléctrico hereafter "Tinogasta"), ii) a second case related to the appealability of an arbitral award under the UNCITRAL Rules (Fiambala Solar S.A. c/ Compañía Administradora del Mercado Mayorista Electrico S.A. s/ recurso de queja (OEX) hereafter "Fiambalá"), and iii) a third one related to the validity of the arbitration clause in adhesion contracts (Soluciones Integrales S.R.L c/ Ternium Argentina S.A s/ordinario hereafter "Soluciones Integrales").

Tinogasta

In May 2017, Tinogasta, a company specialized in the production of electric energy, entered into a renewable electricity supply contract with Compañía Administradora del Mercado Mayorista Eléctrico S.A. (CAMMESA), a company in charge of operating the wholesale electricity market, pursuant to which:

i. Tinogasta had to build and operate a solar farm and sell exclusively to CAMMESA all the energy generated therein; and

ii. CAMMESA committed to purchase all the energy generated by the solar farm for a term of 20 years.

The contract provided for penalties if Tinogasta failed to timely obtain a commercial authorization for the solar farm and included an arbitration clause pursuant to which the parties submitted any dispute that could arise to arbitration *"under the terms of the Arbitration Rules of the United Nations Commission on International Trade Law"*.

After a 205-day delay in obtaining the commercial authorization, CAMMESA imposed a fine on Tinogasta for a total of USD 4,268,100, and Tinogasta filed a request for arbitration to claim:

i. The annulment of the fine or, alternatively, its reduction; and

ii. An economic restructuring of the contract.

Once the arbitral tribunal was constituted, the parties agreed that *"any award would be final, binding, and unappealable, with no possibility of judicial review of the merits"*, except for the appeal for the set aside in accordance with the applicable procedural law. The arbitral tribunal

rejected the claim filed by Tinogasta, except for the request to reduce the fine, which was set in USD 3,747,600.

Tinogasta filed an application to partially set aside the award before the Buenos Aires Commercial Court of Appeals claiming that the arbitral tribunal had validated *"a situation of abuse of law that is contrary to public policy"* when analyzing the fine reduction. The Court of Appeals considered that whether the award violates public policy or not is not a ground to set aside as contemplated in the applicable procedural rules. However, the Court of Appels acknowledged that such ground has been accepted by the Argentine Supreme Court of Justice.

Hence, the Court of Appeals established that the power to reduce fines was closely connected to public order and, therefore, the application to set aside the award was admissible.

The Court later considered that the admissibility of an application to set aside based on the fact that an arbitral award contravenes public policy *"must be understood as a kind of marked exception, which can only be found in extreme cases; and a minimalist criterion must prevail, according to which invalidity appears only in the face of a serious and apparent error of the award in the application of the public policy rule [...], and cannot be declared invalid for a simple formal or abstract violation, nor for a misapplication of the public policy rule"*. This being said, the Court of Appeals decided that the requirements had not been met, and therefore dismissed the application to set aside filed by Tinogasta.

Fiambalá

In October 2021, Fiambalá, a company in the energy sector, filed a motion for direct appeal before the Buenos Aires Commercial Court of Appeals against a decision of an arbitral tribunal that had denied its motion for appeal against the award that it had rendered. This award had established the termination of the arbitral proceedings due to its abandonment by the claimant Fiambalá, imposing the costs on the company and ordered it to pay them to the respondent.

In its motion for direct appeal, Fiambalá argued that:

i. The parties had not expressly waived the right to appeal, and

ii. The fact that the parties chose to have the arbitration governed by the UNCITRAL Rules could not be presumed as waiver of the right to appeal. In fact, Fiambalá stated that the UNCITRAL Rules reform in 2010 was aimed to allow appeals unless expressly waived, so that its references to the award as binding and final did not imply waiver of remedies.

The Court of Appeals rejected the motion for direct appeal on the grounds that choosing the UNCITRAL Rules did indeed imply a waiver of the available judicial remedies. The Court of Appeals noted that the fact that the award *"shall be final"* in the light of Article 34(2) of the UNCITRAL Rules has two connotations. On the one hand, it means that the award is irrevocable, i.e., the arbitral tribunal cannot reconsider it. On the other hand, according to the analysis of the *travaux préparatoires*, it reaffirms the principle that the arbitral award is final. Moreover, the Court of Appeals stated that the waiver of appeal *"may arise not only from an arbitration clause, but also from the rules to which the parties have submitted"*.

Soluciones Integrales

In February 2021, the cargo handling company Soluciones Integrales filed a lawsuit against Ternium, dedicated to steel manufacturing, before the Buenos Aires Commercial Court of Appeals. Soluciones Integrales claimed for the collection of unpaid invoices, as well as damages arising from the service contract they had executed. Ternium challenged the jurisdiction of the court since the parties had agreed to an arbitration

clause in the contract that granted jurisdiction to the Arbitral Tribunal of the Buenos Aires Stock Exchange to resolve any dispute arising from the agreement.

In October 2021, Soluciones Integrales appealed the first instance decision that had upheld the exception of lack of jurisdiction filed by Ternium on the grounds that the arbitration clause was included in an adhesion contract. Soluciones Integrales based its appeal on Article 1651(d) of the Argentine Civil and Commercial Code ("ACCC"), which stipulates that adhesion contracts are not arbitrable.

In February 2022, the Buenos Aires Commercial Court of Appeals confirmed the first instance judgment. The Court of Appeals reasoned that the purpose of Article 1651(d) of the ACCC is to guarantee the intervention of state courts when there is an imbalance on the negotiation power, legal assistance, and economic power between the parties in an adhesion contract. However, when the adhesion contract is concluded between companies, the provision cannot *"circumvent an admitted [arbitration] agreement since the contracting party could not consider itself surprised by its incorporation within the scheme intended to govern it, as is the case with companies"*.

Conclusions

These three decisions issued in 2022 reinforce Argentina's position as seat of arbitration. In *Tinogasta*, the Court of Appeals' decision strengthened the exceptional nature of the public policy exception as a ground for the setting aside of an award. In *Fiambalá*, the Court of Appeals decided that choosing arbitration rules which do not provide for the right to appeal the award amount to a tacit waiver of the right to appeal included in Argentine procedural law. Finally, in *Soluciones Integrales*, the Court of Appeals held the validity of an arbitration clause within an adhesion contract by defining the scope of the ACCC's exclusion of adhesion contract as arbitrable.

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Guatemala

Laws and Regulatory Framework

Guatemala adopted the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") in 1995. However, it adopted the first version of the Model Law and never incorporated the subsequent revised version of 2006 into its domestic legislation. It has been 38 years since Guatemala signed and ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 and 42 years since it signed and ratified the Inter-American Convention on International Commercial Arbitration of 1975 ("Panama Convention").

In the first half of the year, students José Dougherty, Julián Flores and Luis Aballi, filed a constitutional action ("Acción de inconstitucionalidad") to annul and change the interpretation of the provisions regarding arbitrability of the Guatemalan Arbitration Act. The current limitation states that all the proceedings for which Guatemalan law already provides a specific procedure cannot be resolved by arbitration. However, if the Constitutional Court of Guatemala decides to adopt the interpretation and the arguments of this constitutional action, Guatemalan parties and arbitrations seated in Guatemala would have a broader scope of subject matters that could be resolved by arbitral tribunals, like lease agreements or shareholder disputes.

During the third quarter of the year, the Guatemalan Congress discussed the *"iniciativa 6141"* bill, which eliminated the possibility of opting for arbitration in public procurement contracts. Finally, the Guatemalan Congress approved Decree 46-2022, a law for the promotion of foreign investment, which provides for relevant guidance on what constitutes a foreign investment under Guatemalan law, tax benefits for foreign investors and so on. However, this law does not provide an exhaustive list of benefits for investors. It is unclear to what extent this protection to foreign investors is supposed to be granted. Other authors have analyzed how similar laws in other Latin American jurisdictions have been interpreted in international investment arbitrations, mainly focusing on whether laws for attracting and protecting foreign direct investment actually include protection against regulatory changes.

Despite best efforts by some stakeholders, Guatemala has a long way to go before it can be considered an arbitration-friendly jurisdiction.

Relevant Case Law for Guatemalan Arbitration in 2022

One of the most relevant commercial arbitration cases for 2022 in Guatemala is DHK Finance v. Banco de los Trabajadores, which illustrates how arbitration law deals with issues of corruption. This case involved a criminal investigation by the *Comisión Internacional contra la Impunidad en Guatemala* ("CICIG") and how a stock purchase agreement was allegedly procured through corruption and bribery. However, a US Court recently confirmed the arbitral award issued by the sole arbitrator, issued under the Inter-American convention.

> TABLE OF CONTENTS

In the same line, the case Sigma Constructores, S.A. v. Republic of Guatemala (III), CENAC Case No. 11-2019 illustrates how the principle of comity is applied in international commercial arbitration, particularly in arbitrations with a sovereign State, under contracts governed by administrative law for the construction of infrastructure projects.

This year brought several decisions regarding investment arbitrations with the Republic of Guatemala, particularly in the electricity and infrastructure sectors. For example, *IC Power Asia Development Ltd. v. the Republic of Guatemala*, PCA Case No. 2019-43 – in relation to which Guatemala has recently reaffirmed its application for a default judgment before a New York federal court, where it seeks to enforce a USD$ 1.8 million award against IC Power – or the long-standing saga of cases of *Grupo Energía Bogotá ("GEB") vs. the Republic of Guatemala* -where the proceedings for consolidation have concluded in accordance with an agreement of the involved parties-. Speaking of old sagas, *Teco v. the Republic of Guatemala* – which was initiated in 2010 – was finally settled for USD$ 46 million, after a narrative that included three annulment attempts and a previous payment of around USD$ 37 million in favor of the investor after Guatemala risked default upon Teco's successful application for a restraining notice before New York courts back in November 2020. On its part, *Energía y Renovación v. the Republic of Guatemala* started moving forward, for the arbitral tribunal decided to join the objections to jurisdiction to the merits of the dispute. Interestingly, Guatemala changed the course of its legal team for the dispute against Energía y Renovación, where it appointed Greenberg Traurig's partner Daniel Pulecio-Boek among other of its members to represent it in these proceedings.

On an equally relevant note, Guatemala's Territorial, Insular and Maritime Claim (Guatemala/Belize) before the International Court of Justice saw a new development as on 16 November 2022, Belize initiated proceedings before the same court to claim Sovereignty over Sapodilla Cayes (Belize v. Honduras), a territory over which – as put by the Government of Guatemala in an official press statement – Guatemala asserts sovereignty within its dispute with Belize. Moreover, Guatemala also criticized the new claim, for it was filed shortly before Guatemala's deadline to submit its written reply to Belize's counter-memorial on 8 December 2022.

Institutional Developments

On 8 December 2022, the Republic of Guatemala and the Permanent Court of Arbitration signed a Cooperation Agreement with the purpose of strengthen their relationship and work together for the promotion of arbitration and other dispute settlement mechanisms for international disputes. The agreement is meant to allow for an open communication channel between both parties and reinforce the rol of Guatemala as a signatory of the 1899 and 1907 Convention for the Pacific Settlement of International Disputes.

Although based in Panama, the recently launched Institución de Resolución de Conflictos de Blockchain y Tecnología set its sights on providing its services as an arbitral institution in the Guatemalan market as part of its short-term business plan, which foresees the specialized administration of blockchain and technology related disputes across Latin America.

Finally, this year Guatemala Very Young Arbitration Practitioners joined forces with over 100 arbitration practitioners in Guatemala for a first of its kind piece of literature that will be published during 2023, aiming to bridge the gap between very young arbitration enthusiasts and seasoned professionals while capturing the otherwise diffuse knowledge in the field and creating a sense of community in the market.

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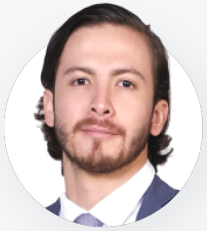

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Spain

There have been interesting developments in the field of arbitration in the Kingdom of Spain ("Spain") in 2022. From a commercial arbitration perspective, we detail herewith recent court decisions addressing arbitral matters of the utmost importance, as well as the latest developments in the Prestige dispute affecting Spain.

This year has also been highly significant in terms of investment arbitration: new developments affecting treaty cases against Spain are on the table, along with Spain's announcement to withdraw from the Energy Charter Treaty ("ECT").

Court Decisions in Spain Concerning Arbitration in 2022

The Spanish Constitutional Court ("SCC") issued a major judgment regarding the effects of criminal proceedings and investigations parallel to arbitration proceedings. In the judgment of 4 April 2022, the SCC upheld a constitutional appeal, filed against the judgment of the High Court of Madrid of 4 October 2019. The key points of this decision were the following:

- In the underlying arbitral dispute, one of the parties argued that there were ongoing criminal proceedings regarding the financing of several contracts, including the contract disputed within the arbitration. It was argued that these circumstances implied the existence of criminal *lis pendens (prejudicialidad penal)*, which should have led to an immediate stay of the proceedings by the arbitral tribunal. The tribunal concluded that there was no such criminal *lis pendens* and thus did not stay the proceedings, and instead decided on the merits.

- The High Court of Justice of Madrid (*Tribunal Superior de Justicia de Madrid*, "HCJM") annulled the above-mentioned award on the grounds that the arbitral tribunal should have observed the criminal lis pendens and stayed the proceedings, and, by not doing so, the award violated public policy and due process.

- The SCC's judgment concluded, however, that the HCJM relied on an extensive notion of public policy, upon which the HCJM intended to supersede the award's conclusions about the existence of such criminal lis pendens and the decision not to stay the proceedings.

Additionally, there have been a substantial number of new court resolutions regarding domestic and international proceedings within the regional High Courts of Justice in Spain, such as the judgment of the High Court of Catalonia of 31 January 2022. This decision clarified that the scope of an award-annulment court's judgment can be partial, in the sense that courts are able to partially annul awards in cases where the claimant has addressed several fully separable claims.

Moreover, the judgment of the High Court of the Basque Country of 21 February 2022 confirmed that annulment claims are not a sort of appeal in law, and thus courts are not tasked with verifying that the decisions taken by arbitrators are in accordance with the law, rather only that they respect the essence of the Spanish constitutional system.

The judgments of the HCJM dated 2 November and 13 July 2022 are also notable, as they reinforce the role of Spain as a safe arbitral venue. In both cases the HCJM concludes that annulment actions cannot serve to review the application of substantive law, and thus, as indicated by the HCJM in the second case cited, annulment actions against awards are not a *"second instance in which facts and law can be reviewed, nor a mechanism to control the proper application of the case law".*

Commercial Arbitration Cases Involving Spain

In June 2022, the Court of Justice of the European Union ("CJEU") issued an arbitration-relevant decision in case C-700/20 within the *Prestige* saga. This decision arises from the request for a preliminary ruling from the High Court of Justice of England and Wales ("HCJEW"), which was dealing with the recognition of a decision issued by the Spanish Supreme Court ("SSC") in proceedings involving the insurer of the *Prestige* ("Insurer") and Spain.

In 2003, Spain brought civil claims in its territory against the Insurer. In 2012, while waiting for a decision, the Insurer commenced arbitration proceedings in the UK seeking declarations that (i) Spain, in accordance with the arbitration clause included in the insurance contract, would pursue its claims through arbitration; and (ii) given the existence of a *pay to be paid* clause, the Insurer could not be liable. In 2013, the arbitral tribunal concluded that the claims for damages brought by Spain before the Spanish courts should have been referred to arbitration in London.

Subsequently, a judgment by the HCJEW was entered in the terms of the arbitration award ("HCJEW Judgment").

In 2018, after numerous provisional decisions and appeals, the SSC issued a final judgment against the Insurer (the "Spanish Decision"). Consequently, Spain requested its recognition before the HCJEW. The HCJEW's corresponding order was appealed by the Insurer on the grounds that (i) the Spanish Decision was irreconcilable (in the sense of Article 34(3) of Regulation 44/2001) with the HCJEW Judgment; and (ii) in any event, following Article 34(1) of Regulation 44/2001, the recognition would be contrary to public policy in accordance with the principle of *res judicata*.

In this context, the HCJEW raised the issue before the CJEU, asking whether: (i) a judgment entered in the terms of an arbitration award qualifies as a *judgment* within the meaning of Article 34(3) of Regulation 44/2001; (ii) a judgment not qualifying as such may be relied on to prevent recognition; and (iii) if it is permissible to rely on Article 34(1) of Regulation 44/2001 regarding *res judicata* effects to refuse recognition.

In its decision, the CJEU reasoned that a judgment dictated in the terms of an arbitration award can be regarded as a *judgment* within the meaning of Article 34(3) of Regulation 44/2001. However, it also stated that *"the position is different where the award in the terms of which that judgment was entered was made in circumstances which would not have permitted the adoption, in compliance with the provisions and fundamental objectives of* [the Regulation 44/2001], *of a judicial decision falling within the scope of that regulation"* (para. 54).

In the case at hand, the CJEU notes that the content of the arbitration award *"could not have been the subject of a judicial decision falling within the scope of Regulation No 44/2001 without infringing two fundamental rules of that regulation concerning, first, the relative effect of an arbitration clause included in an insurance contract and, secondly, lis pendens"* (para. 59). Therefore, it concluded that the HCJEW judgment cannot prevent recognition of the Spanish Decision.

Finally, the CJEU stated that the force of *res judicata* is already covered by Articles 34(3) and (4) of Regulation 44/2001, thereby excluding recourse to the public-policy exception (Article 34(1)).

Recent Developments in Spain Regarding Investment Treaty Arbitration

For yet another year, the Spanish overview on investment arbitration is marked by the conflict between intra-EU investment arbitration and the doctrine established by the CJEU in the *Achmea* and *Komstroy cases*.

In *Achmea*, the CJEU declared that arbitration clauses contained in intra-EU Bilateral Investment Treaties ("BITs") are not compatible with EU law, since an arbitral tribunal cannot be considered equal to a court of a Member State. Furthermore, the *Komstroy* ruling extended this reasoning to intra-EU arbitrations under the ECT.

Following *Achmea* and *Komstroy*, a new chapter of the intra-EU investment arbitration dispute took place in 2022, as the Spanish Government announced its intention to withdraw from the ECT. The reasoning behind this decision is that the ECT is not in line with the Spanish Government's climate objectives. The proposed reform of the ECT would be insufficient, according to the Spanish Government, an opinion shared by other countries and international organisations.

Exiting the ECT may have important consequences for the investor-state dispute settlement system. In this regard, Spain has already faced more than 60 investor claims through the procedure established by the ECT. Nonetheless, it should be noted that the ECT contains a so-called *sunset clause*, according to which States would be subject to arbitration for 20 years from the date of withdrawal. It is not yet clear how this clause will operate.

On another note, the *Achmea* doctrine continues to spark debate in Spain. On 16 June 2022, an arbitral tribunal – constituted under the Stockholm Chamber of Commerce – ruled in favour of Spain and decided that it did not have competence to hear the case of an investor claiming €74 million (the *"Green Power"* case). The *Green Power* case marks the first time that an investment arbitral tribunal has upheld a State's intra-EU objection to deny its own jurisdiction.

In order to support its decision, the arbitral tribunal described EU law as a lex superior that overrides EU Member States' obligations under treaties, including the ECT. Although it is too early to understand how far-reaching this award will be in subsequent cases, for the time being, it seems that no other tribunal has followed this rationale.

It is in fact noteworthy that Spain has brought up this precedent in annulment proceedings filed against the award rendered in the 9REN case, where Spain was ordered to pay €42 million to a foreign investor. However, ICSID's ad hoc committee dismissed Spain's action for annulment, on the grounds that the procedural law of the arbitration in the Green Power dispute was Swedish law, which *"recognises the primacy of EU law"*. On the contrary, the ICSID tribunal that heard *9REN*'s case was not subject to the laws of an EU member state, but to the ECT alone.

> TABLE OF CONTENTS

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London VYAP
London Very Young Arbitration Practitioners

England & Wales

England and Wales continued last year to be a key jurisdiction for international arbitration matters. London remains a preferred seat for many arbitrating parties and the courts continue to support this consensual process.

The Arbitration Act 1996 – The Law Commission's Review

The Law Commission ("Commission") published its consultation paper on the proposed reform of the Arbitration Act 1996 (the "Act") in September 2022. The consultation period closed in December 2022, and the Commission is now digesting those responses before reporting its formal recommendations. Needless to say, the arbitration community eagerly awaits the Commission's final report of recommendations.

Recognising the value of arbitration practice to the United Kingdom's (UK) economy, the Commission resolved to conduct its review in a manner that seeks to enhance the competitiveness of the UK as a global centre for dispute resolution and strengthen the attractiveness of English law as the law of choice for international commerce. This resolution grounded the Commission's approach: it aimed to determine whether any amendments could and should be made to the current legal framework of the Act to ensure it is fit for purpose and continues to promote the UK as a leading destination for commercial arbitrations.

The eight specific areas identified by the Commission are:

1. Confidentiality.

2. Independence of arbitrators and disclosure.

3. Discrimination.

4. Immunity of arbitrators.

5. Summary disposal of issues that lack merit.

6. Interim measures ordered by the court in support of arbitral proceedings (section 44 of the Act).

7. Jurisdictional challenges against arbitral awards (section 67).

8. Appeals on a point of law (section 69).

The Commission's provisional proposals for change so far appear to be conservative. Where changes are suggested, they are mostly limited to amending existing statutory provisions.

But do all of the Commission's proposed changes, or lack thereof, ensure the Act remains fit for purpose? Take confidentiality: the Commission proposes that the Act should not codify the law of confidentiality, and the development of that law should be left to the English courts.

This might disappoint practitioners. The Commission recognises that the duty of confidentiality can arise from a number of sources in English law, yet those sources (and their application) can be tricky to navigate in the context of arbitration practice.

Some administering institutions make explicit provisions for confidentiality (for example, the London Court of International Arbitration (LCIA) Rules 2020, Article 30), but others do not. Scotland has an explicit confidentiality regime for arbitration (*see* Rule 26 of the Arbitration (Scotland) Act 2010), so there is nothing in principle that should prevent its neighbouring jurisdiction from adopting an express regime.

Arguably, a statutory expression of what confidentiality is and is not in an arbitration context could be helpful to parties and their global advisors. It would give them certainty and clarity and might mitigate the possibility or frequency of confidentiality disputes arising during arbitration proceedings. Instead, the Commission has so far ruled out such a change.

But in a world where data volumes in all their formats are expanding and corporates are increasingly concerned that their confidential information remains so, is this approach the better one? Will parties continue to choose to arbitrate under the auspices of the Act if an alternative jurisdiction exists that protects their documents and data as confidential in a simpler and codified manner?

Arbitration in the UK and the English Courts

It appears that arbitration volumes might be reverting to pre-Covid levels in the UK, with the LCIA receiving 377 referrals in 2021 (down from 440 in 2020).

The LCIA's Annual Casework Report confirms that the UK continues to be an enticing global centre for arbitration: a large majority of parties in LCIA arbitrations last year were from foreign jurisdictions (85.2%). London remained the most popular seat choice for LCIA arbitrations (85%) and 76% of those parties chose English law as the governing law for their disputes.

Perhaps in reflection of these figures, the amount of arbitration-related litigation appears to be relatively significant: up to a quarter of the Commercial Court's cases are arbitration-related. Precise statistics for 2022 are not yet available, but the Commercial Court Report 2020-2021 indicates that claims under the Act (specifically, sections 67 (challenges to jurisdiction), 68 (challenges due to serious irregularity), and 69 (appeals on a point of law) and arbitration-related injunctive proceedings remain relatively popular.

Despite that popularity, the courts remain supportive of arbitration: most recent statistics show a success rate of only 11% for claims made under sections 67, 68 and 69. Parties should therefore continue to be careful when asking the English courts to set aside or disrupt the decision-making process of arbitral tribunals. More likely than not, those claims will (continue to) not succeed, reflecting the jurisdiction's more-than-two-decade respect for and commitment to arbitration as a consensual dispute resolution process.

If such claims are being considered, practitioners must now bear in mind the relatively new strictures of the CPR's Practice Direction 57AC

> TABLE OF CONTENTS

("PD 57AC"). The courts have confirmed that many arbitration claims are caught by the framework for the purposes of PD 57AC, and therefore any factual witness statements must comply with it. This can be a challenge for the types of statements often adduced in arbitration claims before the courts, such as a solicitor's statement setting out the vital background of the arbitral proceedings underpinning the claim before the court itself, and exhibiting documents in respect of those arbitral proceedings as part of that context.

Statements must now refer to matters of fact in the witness's personal knowledge, listing in full all documents referred to. They should not quote at length from any of those listed documents, nor should they set out any kind of narrative derived from them, avoiding any argumentation. This is a significant departure from practitioners' previous approach to statements supporting arbitration claims, and represents the new world in which arbitration-related litigation exists in the English jurisdiction. Practitioners (English-qualified or otherwise) should proceed with caution.

Covid-19: Remember This?

Earlier in the year, with the implementation of the Commercial Rent (Coronavirus) Act 2022, the general moratorium on forfeiture of commercial premises due to non-payment of rent ended, just over two years since it was implemented at the start of the Covid-19 pandemic. This legislation introduced an arbitration scheme whereby parties would have six months to apply for arbitration (with landlords prevented from exercising their usual remedies in respect of so-called 'Protected Arrears' during those six months).

Seven 'Approved Bodies' are allowed to administer arbitrations under this scheme, which is intended to be a flexible and cost-effective dispute resolution process. Given the continued political sensitivities of the handling of Covid-19 in the jurisdiction, practitioners can expect scrutiny of scheme-related awards as they begin to be published.

Third-Party Funding: In or Out?

THE ENGLISH COURTS

In 2022, the jurisdiction remained broadly supportive of third-party funding ("TPF") in arbitration, and this approach is reflected by the English courts.

Take, for example, the decision *of Tenke Fungurume Mining S.A v Katanga Contracting Services S.A.S.* The Commercial Court rejected the challenge to an arbitral award made by Tenke Fungurume Mining S.A. ("Tenke") and found that under section 68 of the Act, it did not constitute a "serious irregularity" to award the costs of TPF to the successful arbitrating party.

An ICC tribunal ordered Tenke to pay the TPF costs incurred by Katanga Contracting Services S.A.S ("Katanga") for a total amount of US$1.7m. Tenke claimed to the Commercial Court that by awarding Katanga's funding costs, the tribunal exceeded its powers, which constituted a "serious irregularity" under section 68 of the Act. Tenke argued that "[w]hen the [Act] was passed, no one could reasonably have thought that Parliament intended that either 'costs of the arbitration' or the 'legal or other costs of the parties' could possibly have encompassed" fees paid to a litigation funder.

The court was not convinced by Tenke's arguments, finding that "only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process, will the Court allow an application under section 68 [of the Act]", and that the decision of the ICC tribunal did not reach this threshold.

THE EUROPEAN UNION

On 13 September 2022, the European Parliament adopted a "Report with recommendations to the Commission on Responsible private funding of

litigation" (the "Proposed Directive"), which primarily aims to provide a regulatory framework in relation to TPF. This is not yet a binding directive for member states of the European Union ("EU"), but it is the first step of the process.

Following Brexit, the Proposed Directive (if implemented) would not take effect in the UK. That said, UK-based funders will be carefully monitoring the progress of the Proposed Directive - particularly as they will likely have ongoing mandates in the EU. Such funders are unlikely to be willing to accept recovery limits and upfront liability for adverse costs (one element of the Proposed Directive). Equally, some might consider the authorisation, monitoring and supervision system suggested by the Proposed Directive will impose excessive burden and costs on them.

If this proposal is adopted, TPF in the UK market (particularly in arbitration cases) could be positively or negatively affected by this new regulation. On the one hand, this regulation could push some parties to choose London as a preferred arbitration seat, to avoid its ambit. On the other, if recovery is capped in the EU to a certain percentage, then UK-based funders might have to adjust their funding schemes to remain competitive in a crowded market.

State Immunity in the UK: The Libya Case

Finally, an update on a key state immunity case heard by the Commercial Court in February 2022: *General Dynamics United Kingdom Ltd v The State of Libya*, in which the court discussed the relevance of adjudicative and enforcement state immunity as part of arbitration enforcement proceedings.

On 20 July 2018, Mr Justice Teare made an Order that granted General Dynamics permission to enforce an arbitral award against Libya and dispense with service. He gave Libya two months to apply to set aside the Order. Following an application by Libya in May 2021 to set aside part of the Order, diplomatic service of the Order was effected upon Libya. On 16 August 2021, Libya applied to set aside the remainder of the Order.

Libya's application primarily relied on the ground that General Dynamics failed to inform the court that Libya had adjudicative and enforcement immunity under the State Immunity Act 1978 ("SIA"). Under section 1(1) of SIA, a state is immune from the jurisdiction of the UK courts (subject to the exceptions described under sections 2-11). Libya argued that even if it was found there was no immunity in respect of adjudicative jurisdiction under the relevant exceptions, there was still immunity in respect of enforcement by execution under section 13.

General Dynamics' submitted that the orders the court was being asked to make fell under section 101 of the Arbitration Act 1996: "[a] New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland". General Dynamics further argued that there was no defence on the basis of state immunity and that under section 9 of the SIA, "[w]here a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the UK which relate to the arbitration". Additionally, General Dynamics submitted that Libya could not enjoy state immunity in respect of the Award because it had already participated in arbitration.

Mr Justice Butcher found for General Dynamics and refused Libya's application: Libya had no adjudicative immunity. Further, he agreed that Libya had participated in the arbitration and had done nothing in those proceedings to suggest that it would seek to assert sovereign immunity in the event of an award being made against it.

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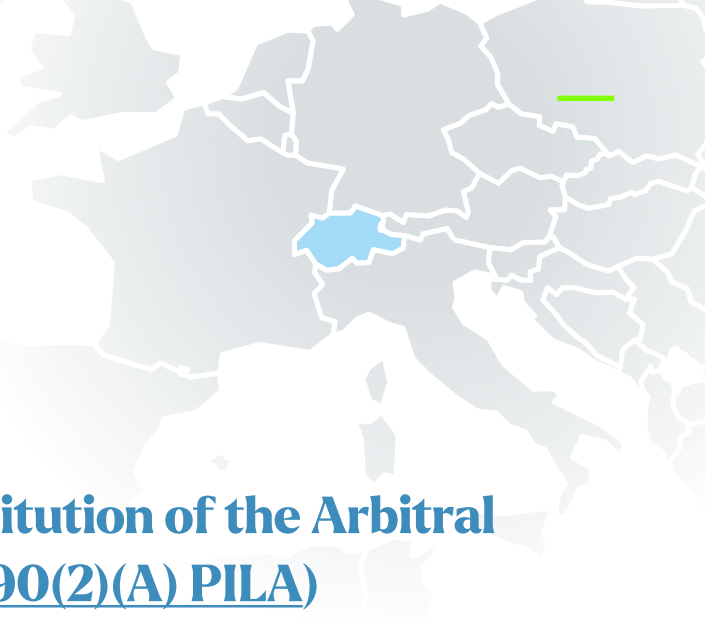

Switzerland

The Swiss Federal Tribunal ("SFT") has the exclusive jurisdiction to hear applications to set aside international awards rendered by arbitral tribunals seated in Switzerland. In 2022, the SFT handled – once again – a high volume of arbitration-related cases, particularly sports-related matters, issuing no less than 51 decisions on applications to set aside or revise international arbitration awards. Despite this large number of cases, the SFT remained true to its practice of a low success rate with this year's zero application being successful.

This report provides an overview of a selection of significant decisions issued by the SFT over the past year sorted by the grounds a party can raise in accordance with Article 190(2) Swiss Private International Law Act ("PILA").

Improper Constitution of the Arbitral Tribunal (Art. 190(2)(A) PILA)

In a landmark decision 4A_520/2021 of 4 March 2022 related to the "FIFA-Gate" case, the SFT addressed the issue of the independence and impartiality of the Court of Arbitration for Sport ("CAS") arbitrators. The SFT first considered the IBA Guidelines on Conflict of Interest ("IBA Guidelines") as a key tool of soft law to harmonize the standards in international arbitration. According to Article 3.1.3 of the IBA Guidelines, the fact that an arbitrator has been appointed twice or more by the same party in the last three years falls within the waivable "Orange list". In this case, the Claimant argued that the Chairman did not disclose that he was involved in more than 26 cases involving FIFA in the last three years. The SFT clarified that only cases where the arbitrator was directly appointed by FIFA should be counted as multiple appointments, and that consolidated procedures should only be counted as one appointment. The SFT acknowledged that in the end the Chairman's three direct appointments made by FIFA in the last three years could potentially be seen as problematic under the IBA Guidelines. However, the SFT argued that multiple appointments are common in CAS proceedings, especially for FIFA, which has to appoint many arbitrators every year. In this context, the SFT concluded that the Chairman's failure to disclose any appointments in his initial declaration of independence or to regularly update it during the proceedings is not sufficient to challenge him, unless there are other incriminating elements.

> TABLE OF CONTENTS

In a previous decision 4A_462/2021 of 7 February 2022, the SFT examined whether the Chairwoman of an arbitral tribunal complied with the new Article 179(6) PILA, which requires arbitrators to disclose, throughout the entire proceedings, circumstances that could give rise to justified doubts as to their independence or impartiality. The Chairwoman informed the parties on 1 September 2021 that she became partner in a new law firm. Claimant however claimed that Respondent is a key client of the litigation and arbitration practice of that law firm. In its consideration, the SFT first noted that an impression of bias is sufficient to establish a lack of impartiality. However, the SFT found that in this matter there was no appearance of a lack of independence because the deliberations on the case ended on 5 February 2021 i.e., before the Chairwoman began negotiations with her new law firm. The SFT also stated that while the process of drafting an award could potentially affect the outcome of the award, this was not the case here. The SFT considered that even if there is a temporal gap between the end of the deliberations and the notification of the final award with reasons, the only decisive factor is whether an influence on the outcome of the award was still possible.

Incorrect Decision on Jurisdiction (Art. 190(2)(B) PILA)

In two connected decisions 4A_344/2021 and 4A_346/2021, both of 13 January 2022, the SFT dealt with two applications in which the Claimant – a football association – did not directly challenge the jurisdiction of the CAS under Article 190(2)(b) PILA, but rather the jurisdiction of the FIFA Tribunal. The SFT first clarified that internal decision-making bodies within associations are not arbitral tribunals, their decisions are therefore only mere expressions of the will of the association. Such decisions can then be challenged based on Article 75 of the Swiss Civil Code ("SCC") before an arbitral tribunal if a valid arbitration agreement exists. However, the SFT held that the only challenge that can be raised under Article 190(2)(b) PILA is the claim that the arbitral tribunal – in this case, the CAS – wrongly declared itself competent, rather than challenging the competence of the previous instance. The CAS' decision, including its reasoning on FIFA's jurisdiction, could be challenged, but only under the limited control of violation of public policy (Article 190(2)(e) PILA).

One of the key issues addressed by the SFT in the decision 4A_398/2021 of 20 May 2022 related to the *Clorox v. Venezuela case*, was the question of when treaty shopping should be considered abusive. The SFT first acknowledged that it is always difficult to distinguish between legitimate nationality planning and abusive treaty shopping. The SFT then stated that simply (re)structuring investments to benefit from the protection of an investment treaty is not in itself abusive. However, the SFT also indicated that the temporal aspect is decisive in determining whether treaty shopping is abusive. If an investor restructures its investments to benefit from the protection of an investment treaty at a time when a dispute is foreseeable, the protection of the treaty should be denied. However, the SFT added that the criterion of foreseeability must be interpreted restrictively since abuse of rights can only be presumed in exceptional cases. Therefore, the SFT held that the question to be asked is whether a reasonable investor who was in the same situation as the concerned investor at the time of the investment could have reasonably foreseen a particular legal dispute. In the present case, the SFT considered that the restructuring was not abusive because the dispute was not foreseeable at that time.

Violation of Swiss Public Policy (Art. 190(2)(E) PILA)

In decision 4A_542/2021 of 28 February 2022, the SFT upheld a lifetime ban for all-football activities imposed on Ricardo Teixeira, former president of the Brazilian Football Confederation. Teixeira argued that the disciplinary sanction would be incompatible with public policy as

the sanction would be disproportionate and would violate his personal rights. The SFT noted that in matters of disciplinary sanctions in the field of sport, it will only interfere if the sanction leads to a manifestly unjust result or a shocking inequity. In this case, the SFT held that Teixeira has not sufficiently established that this sanction would jeopardise his economic existence.

In a decision 4A_242/2022 of 8 September 2022, the SFT held that the principle of "social justice" is not part of public policy under Article 190(2)(e) PILA. Moreover, the SFT noted that the fact that a norm is part of Swiss mandatory law does not necessarily imply that its violation by the arbitral tribunal would contravene public policy.

Request for a Revision Against an Arbitral Award (Art. 190a PILA)

In a decision 4A_100/2022 of 24 August 2022, the SFT addressed a request for revision of an award under the newly adopted Art. 190a PILA. The Claimant argued that one of the arbitrators had a conflict of interest because he previously represented Respondent in proceedings in England. As in its recent decision 4A_318/2020 in the *Sun Yang v. WADA* case, the SFT confirmed that, despite the existence of a declaration of independence, parties must investigate an arbitrator's independence, but not to an excessive extent. However, in this instance, the SFT stated that public databases on English court decisions should be consulted when dealing with an English arbitrator. Based on this, the SFT concluded that the previous representation relationship would have been apparent during the proceedings if due attention had been paid. Accordingly, the SFT ruled that it is not acceptable to raise these claims only after several years in the context of revision proceedings.

Outlook for 2023

Despite the increasing number of set aside applications in international arbitration cases brought before the SFT, the chances of success remain low. This year the SFT has consistently confirmed awards rendered by arbitral tribunals and demonstrated a commitment to upholding the principles of international arbitration. SFT's efficiency and consistency are surely a factor making Switzerland a leading venue for international arbitration.

As from 1 January 2023, a new amendment to the Swiss Code of Obligations ("SCO") will allow Swiss companies to include arbitration clauses in their articles of associations (Article 697n SCO). This will apply not only to the company itself, but also to its governing bodies, members and shareholders, unless the articles of association specify otherwise. This will surely lead to an increase in the number of arbitration-related cases brought before the SFT.

Overall, it is expected that Swiss international and national arbitration will continue to grow and develop in 2023 and beyond.

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France

2022 proved to be another critical year for arbitration in France. Despite some concerning decisions, the pro-arbitration stance of the French courts remains undisputable, while the ICC – headquartered in Paris – still stands out as the most preferred arbitral institution. This report reviews noteworthy arbitration-related developments and provides a round-up of decisions related to French arbitration over the past year.

The Arbitration Agreement and its Implementation

THE PRINCIPLE OF *COMPÉTENCE-COMPÉTENCE*

One of the peculiarities of French international arbitration law is the recognition of and the scope granted to the negative effect of the *Compétence-Compétence* principle.

If proceedings are brought before a State court despite the existence of an arbitration clause that is not manifestly void or manifestly inapplicable, the negative effect of the *Compétence-Compétence* principle prohibits the State court from ruling on the jurisdiction of the arbitral tribunal before the latter has had the opportunity to do so, and requires the court to find that it lacks jurisdiction.

Despite the fact that the negative effect of *Compétence-Compétence* occupies a fundamental place in French arbitration law, the Court of Cassation ruled in *Marioff Corporation* that, while parties may not waive the negative effect of *Compétence-Compétence* in domestic arbitrations, they may do so in international arbitrations. Consequently, signatories of an international arbitration agreement may authorize the State court to rule on the validity and efficiency of the arbitration agreement before or while the arbitral tribunal does so. However, in its decision, the court emphasized on the need for such derogation to be expressed and unequivocal.

EXTENSION OF THE ARBITRATION AGREEMENT TO THIRD-PARTY FUNDERS

The Paris Court of Appeal, in a brief but informative excerpt, reflected upon the possibility for a third-party funder to be brought into – and elevated to the status of a party to – arbitration proceedings.

The leading decision on the extension of the arbitration agreement in French arbitration law is the so-called *"ABS" decision* of the Court of Cassation, according to which "the effect of the international arbitration clause extends to the parties directly involved in the performance of the contract and the disputes that may arise therefrom".

In *Privinvest*, far from categorically ruling out the prospect of an arbitration agreement extending to a third-party funder, the Paris Court of Appeal recognized this possibility, provided that the appellants not only establish the involvement of the third-party funder in the proceedings, but also prove that such involvement is not inherent to the operation of a third-party funder. The court emphasized that only exceptional circumstances could allow a similar extension to occur.

THE IMPECUNIOSITY OF A PARTY TO THE ARBITRATION AGREEMENT

Under French law, the negative effect of the *Compétence-Compétence* principle does not apply if the arbitration clause is manifestly void or manifestly inapplicable.

In *Carrefour Proximité France*, the Court of Cassation decided that, when it is not demonstrated that a prior attempt to initiate arbitration proceedings had failed due to the lack of financial resources of a party, the latter's impecuniosity cannot, in itself, characterize the manifest inapplicability of the arbitration clause.

In other words, impecunious parties bound by an arbitration agreement must attempt to resolve their disputes through arbitration first. It is only if such an attempt fails due to a party's lack of financial resources that French State courts may accept to hear the dispute, thus protecting the impecunious party from a denial of justice.

THE REFUSAL BY A PARTY TO PAY ITS SHARE OF THE ADVANCE ON COSTS

In *Tagli'Apau*, to further ensure that financial issues do not result in a denial of justice, the Court of Cassation decided, on the basis of the principle of procedural fairness, that a party that paralyzes the arbitral proceedings by refusing to pay its share of the advance on costs is not entitled, when summoned to appear before State courts, to invoke the jurisdiction of an arbitral tribunal and challenge that of the State court.

THE LAW APPLICABLE TO THE ARBITRATION AGREEMENT

The Court of Cassation has reiterated the well-established principle according to which arbitration agreements are subject to the so-called "substantive rules" *("règles matérielles")*, among which the rule specifying that the existence and efficiency of an arbitration agreement are to be assessed – subject to the mandatory rules of French law and international public policy – on the basis of the parties' common intention, without it being necessary to refer to any national law.

However, in *Kout Food*, the court innovates by adding an exception to the application of this substantive rule where the parties have expressly submitted the validity and effects of the arbitration agreement to a particular national law.

Absent an express choice by the parties as to the law applicable to the arbitration agreement *per se*, French courts will assess the validity and efficiency of the arbitration agreement without a reference to any national law, including that of the underlying contract.

Enforcement and Annulment Proceedings

JURISDICTION OF THE ARBITRAL TRIBUNAL

Under French law, an award can be set aside if the arbitral tribunal *"wrongly upheld or declined jurisdiction"*. The distinction between

jurisdiction and admissibility is therefore paramount. In two decisions, the Paris Court of Appeal favored admissibility over jurisdiction, therefore limiting its control.

In *Aktor*, the Court considered that whether an arbitral tribunal deciding on the alleged non-compliance of a party with a decision of a dispute adjudication board (DAB) may rule on other claims than those ruled upon by the DAB is a matter pertaining to admissibility, not jurisdiction.

Similarly, the Court ruled in *Rusoro* that the investor's compliance with time limitation and amicable settlement of the dispute provisions under the Canada-Venezuela BIT does not affect the arbitral tribunal's jurisdiction under this treaty.

Despite these remarkable restrictions to its power of review, the Court confirmed in *Schooner* that arguments pertaining to the arbitral tribunal's jurisdiction can be raised for the first time during setting-aside proceedings as long as the party raised objections to jurisdiction during the arbitration proceedings, in full line with the heavily criticized *decision* of the Court of Cassation of 2020 in the same matter.

In view of the current war in Ukraine, it is also worth mentioning that the Court of Cassation has *reinstated* a USD 1.1 billion investment treaty award against Russia in favor of Oschadbank (a Ukrainian State-owned bank), which had its Crimean assets expropriated. The French Supreme Court considered that the temporal condition set out in Article 12 of the Russia-Ukraine BIT pertained to the merits of the case and thus was not reviewable in an action to set aside.

ARBITRATOR'S INDEPENDENCE AND IMPARTIALITY

A number of decisions rendered by the Paris Court of Appeal make it clear that the court now considers arbitration rules as the primary source to assess an arbitrator's duty of disclosure. As such, the Paris Court of Appeal will refer primarily to the criteria set out in the arbitration rules rather than those set out in the Code of Civil Procedure to assess whether an arbitrator has violated their duty of disclosure.

For instance, the Paris Court of Appeal has referred several times to a criterion provided in the *ICC Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration*, according to which the arbitrator or prospective arbitrator may need to disclose a *"professional or close personal relationship with counsel to one of the parties or the counsel's law firm."* It concluded that:

- The common participation of an arbitrator and a counsel in scientific works or activities are not likely to characterize the existence of a *"close personal relationship"* and are therefore not likely to trigger the arbitrator's duty to disclose since the latter have taken place in a purely academic context *(Pizzarotti)*;
- The fact that an arbitrator and a counsel have co-chaired a conference does not imply the existence of a *"professional or close personal relationship"* as the relationship can at most be described as academic *(Billionaire)*.

INTERNATIONAL PUBLIC POLICY

On 23 March 2022, the Court of Cassation finally delivered its opinion on what should be the intensity of French courts' control of international public policy. Following years of heated debates, the French Supreme Court ruled in *Belokon* that an award must be set aside if the violation of international public policy that would result from its recognition or enforcement is *"blatant"*.

Beyond this change in semantics (the Paris Court of Appeal previously required a *"manifest, effective and concrete"* violation of international public policy), it is now clear that the Court of Cassation allows the annulment judge not only to re-examine the facts and the arbitral tribunal's legal analysis thereof but also to further extend the debate, if appropriate.

With this decision, the French Supreme Court seriously challenges – at least regarding international public policy – the prohibition of a substantial review of the award, a driving principle of French arbitration law that clearly made Paris one of the most popular seats for international arbitrations.

Is the protection of the French legal order's interests worth it, notably regarding the fight against corruption and money laundering? Yes, according to the Court of Cassation.

Remarkably, the Paris Court of Appeal immediately endorsed the *Belokon* ruling in *Groupement Santullo*, issued less than two weeks later.

Belokon was further confirmed in *Sorelec*, where the Court of Cassation enigmatically extended its ruling to all five grounds for setting aside an award under French law as listed in Article 1520 of the Code of Civil Procedure. A clerical error or another step forward? Time will tell.

Arbitration, European Union, and European Courts of Human Rights

The fall-out of the landmark *Achmea* decision by the Court of Justice of the European Union (CJEU) eventually reached France: in two decisions, the Paris Court of Appeal strictly complied with the case law of the CJEU, as set out in *Achmea* and confirmed in *Komstroy* and *PL Holding*.

In *Slot* and *Strabag*, the Paris Court of Appeal set aside two Paris-seated arbitral awards involving Poland, under respectively the Poland-Czech Republic BIT and the Poland-Austria BIT. Interestingly, the French judge meticulously applied the *Achmea* solution, while the applicable BITs did not expressly provide for the application of EU law, unlike the Netherlands-Czech and Slovak Federative Republic BIT in *Achmea*.

For better or for worse, investment arbitration based on intra-EU BITs is dead and buried for French Courts, in line with the ruling of the CJEU.

Finally, in a more down-to-earth matter, the European Court of Human Rights held in *Lucas v. France* that France had violated Article 6(1) of the Convention by ruling that annulment proceedings were inadmissible under French law because they had not been electronically initiated through the notoriously cumbersome – yet mandatory – "RPVA" platform.

Although this platform was recently upgraded, this is a welcome reminder that formal requirements shall not prevent litigants from being entitled to a fair trial.

> TABLE OF CONTENTS

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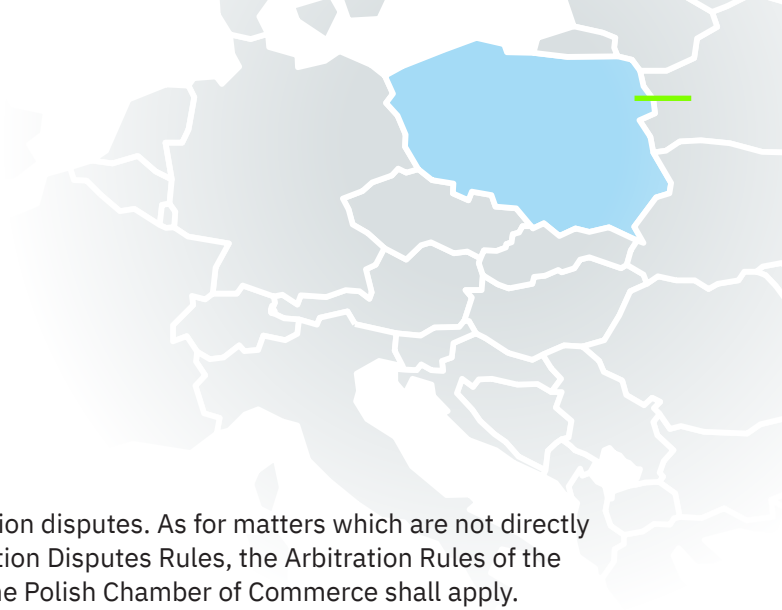


Poland

This article provides an overview of developments in the fields of commercial and investment arbitration in Poland. We have also provided highlights of arbitration events in 2022.

Developments in Commercial Arbitration

On 1 January 2022, the Rules of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw in Disputes Regarding Resolutions (the "Resolution Disputes Rules") came into force. They deal with disputes regarding the annulment or invalidation of a resolution adopted by the general meeting of a limited liability company or a joint-stock company, which lawfully should be heard by a court of arbitration.

The Resolution Disputes Rules specifically address:

i. the initiation of the resolution dispute and appointment of the arbitrators;

ii. accession of participants to the proceedings;

iii. the dispositive and adversarial nature of the resolution dispute; and

iv. multiplicity of resolution disputes. As for matters which are not directly regulated by the Resolution Disputes Rules, the Arbitration Rules of the Court of Arbitration at the Polish Chamber of Commerce shall apply.

The Resolution Disputes Rules were introduced as a response to the recent amendments to the Polish Code of Civil Procedure (which entered into force on 8 September 2019), which confirmed the arbitrability of resolution disputes. Up to this change, the question whether resolution disputes can be resolved by means of arbitration remained unanswered and there were differing approaches.

The Lewiatan Court of Arbitration has introduced a similar arrangement and included Supplementary Regulations for Proceedings in Corporate Disputes as Appendix VI to the Rules of the Court of Arbitration at the Confederation Lewiatan in July 2020.

Developments in Investment Arbitration

On 14 November 2022, the President of Poland, signed an act terminating the Energy Charter Treaty ("ECT") and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects. The act entered into force 14 days after the date of its publication.

In the written motives to the draft law, Poland has considered the withdrawal from the ECT to be necessary due to the following reasons:

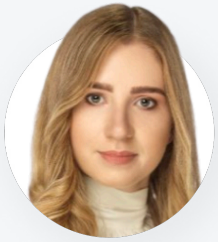
- incompatibility of the dispute settlement clause (Article 26 of the ECT) with EU law;
- high costs of settling disputes with investors under the ECT (withdrawal from the ECT would allow for reducing the financial burdens of the State);
- Poland has also underlined that the energy transformation (which has accelerated) would be impaired if Poland were to continue with *"the need to pay high compensation on the basis of vague treaty standards to fossil fuel investors"*;
- the ECT has no provisions confirming the State's right to regulate (contrary to e.g., CETA) which renders the Fair and Equitable Treatment clause and arbitral tribunals' approach unpredictable.
- The media has reported that the decision to withdraw from the ECT came as a surprise as it went largely unnoticed (despite green activists who have been campaigning for years against the treaty). Poland's withdrawal was part of the bigger exit from the ECT in the European Union. Spain, the Netherlands, France, and Germany followed in Poland's footsteps and announced their intention to exit from the ECT. Italy withdrew from the ECT in 2016.

Arbitration Events

After the downtime in-person gatherings, 2022 brought numerous arbitration events:

- 26-27 May – 6TH EDITION OF THE CONFERENCE DISPUTE RESOLUTION IN M&A TRANSACTIONS. The first edition of the conference since the 2020 outbreak of the COVID-19 pandemic gathered over 200 attendees. Special welcoming remarks were sent from the President of the Ukrainian Arbitration Association, Olena Perepelynska. This year's panels and keynote speeches included topics such as consolidation of proceedings, principles of equity, multiparty multi-contract arbitrations, and energy transition disputes.
- 27 May – ICC YAF: Champagne clauses and what comes next. The conference was followed by the ICC Young Arbitration Forum two-part event: an interview with Claudia Salomon, President of the ICC IAC and a panel discussion with speakers from different backgrounds exchanging thoughts on working with clients at different stages in the life-cycle of a dispute resolution clause.
- May & September 2022 – Arbitration Lunch Match – a Polish community counterpart of the worldwide initiative meant for bringing together female arbitration practitioners in the form of a blind date.
- June 2022 – The Polish equivalent of the Very Young Arbitration Practitioners network launched its initiative with the very first introductory meeting with the purpose to listen to the voices of the youngest generation entering the arbitration community in order to implement its mission to bridge the gap between the newbies and the more experienced colleagues.
- 6 December 2022 – ICC Charity Christmas Dinner: came back strongly as the very first edition organised after the outbreak of the COVID-19 pandemic and Russian invasion of Ukraine. A charity auction, heated as usually, was organised in order to raise funds for the Ocalenie Foundation, which offers tuition assistance and educational and cultural excursions for refugee children.
- 7 December 2022 – Delos-Y breakfast: an interactive breakfast gathering speakers – mentors and moderators dispersed across Central and Eastern Europe holding discussions revolving around challenges and new trends in working with witnesses and building a professional career in the CEE.

ABOUT THE AUTHORS



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Turkey

Although Türkiye has made great strides in the field of commercial arbitration with the adaptation of its national law and practice in recent years, it is also undeniably one of the first countries that come to mind when it comes to investment arbitration. However, this tradition has changed a little this year as 2022 has been a quiet year with respect to investment arbitration; Türkiye has signed only one Bilateral Investment Treaty ("BIT") and faced no investor claims, while only one Turkish investor brought an arbitration claim before the Convention on the Settlement of Investment Disputes (ICSID). As for the national courts, we happily see various decisions given that demonstrate that arbitration is getting more commonly used day by day and will continue its progress in that regard. Indeed, we are delighted to cover the most important developments of 2022 regarding arbitration in this review.

Investment Arbitration in Türkiye

A NEW BILATERAL INVESTMENT TREATY

The number of Turkish embassies in Latin American countries has nearly tripled in the last 20 years. In parallel with this significant growth, for the reciprocal promotion and protection of investments, Türkiye and Uruguay signed a BIT on 23 April 2022. It is worth noting that even before the signing of the BIT, the Türkiye-Uruguay bilateral trade volume increased by 30% despite the pandemic, and now these countries expect higher numbers with the signing of this treaty.

DISPUTES

Although no new investment arbitration claim was filed against Türkiye in 2022, an Italian energy company, Enel, S.p.A. had brought a treaty-based arbitration claim against Türkiye in very late 2021, *i.e.*, on 10 December 2021. The claimant argues that Türkiye expropriated its investment in violation of the Türkiye-Italy BIT when certain previously granted permits for a geothermal power project were revoked. The tribunal constituted on 17 October 2022 with the parties' appointment of August Reinisch as chair. The claimant appointed J. Williams Rowley, while Türkiye had appointed Brigitte Stern. The dispute is pending.

The only case which has been brought before ICSID by a Turkish investor is against the Islamic Republic of Pakistan concerning water, sanitation

and flood protection. Although the case was registered in the month of June 2022, and the case is still pending.

AWARDS

On 8 December 2022, and ICSID tribunal issued its award in Ipek Investment Limited v. Türkiye case, dismissing the USD 6 billion claim on jurisdictional grounds. The dispute arose out of Türkiye's decision to seize companies that were previously part of the Koza Group. Türkiye claims that the reason for this seizure was due to the owner of the Koza Group (allegedly) supporting those responsible for the 2016 failed political coup in the state. The claimant argued that it had become the ultimate parent of the Koza Group through a June 2015 Share Purchase Agreement (SPA), but Türkiye contested the authenticity of this SPA. This coup attempt has featured in three other ICSID cases. Whilst Türkiye prevailed on jurisdictional grounds in , the other two cases (Akfel v. Türkiye and Aljarallah v. Türkiye) are still pending.

Commercial Arbitration – Decisions by the Court of Cassation

THE LONG-STANDING DISCUSSION ON THE ARBITRABILITY OF INSOLVENCY DISPUTES – IS IT POSSIBLE?

There is little to no consensus in the Turkish doctrine as to the arbitrability of the bankruptcy disputes, especially with regards to its extent, when determining which stage is non-arbitrable. The Turkish Court of Cassation ("TCC") seems to have put an end to this debate with its decision in December 2021. In this case, while a party applied to national courts to obtain its receivable via bankruptcy proceedings, another party filed an objection to jurisdiction relying on their arbitration agreement and succeeded as the local court dismissed the case. During the appeal proceedings, after pointing out the fact that arbitration is an exception to the national courts' judicial authority and relying on the right to legal remedies along with the principle of procedural economy, the TCC concluded that the national courts have the authority to decide on the receivables in the bankruptcy proceedings even when there is an arbitration clause. However, two members dissented from the decision on the grounds that the acceptance of the possibility of eliminating the arbitration agreement by initiating a bankruptcy proceeding despite the existence of the arbitration clause would be contrary to the principle of good faith and pacta sunt servanda. Because the dissenting votes indicate that the question is far from being answered definitively, we may expect further discussions in this regard.

EXTENSION OF ARBITRATION AGREEMENTS IN CASE OF SUBROGATION

In 2022, the TCC once again confirmed that the arbitration agreements can be extended to the insurers by way of subrogation. The TCC confirmed that by paying insurance indemnity to a party, which concluded the arbitration agreement, the insurance company got into that party's shoes and thus became bound by the arbitration agreement. Hence, the TCC clarified that the question is not whether the respondent agrees to arbitrate with a particular person with respect to a transaction. Rather, the correct question is whether the respondent has consented to arbitration of claims arising from a certain transaction, irrespective of who brings it.

MULTI-TIER DISPUTE RESOLUTION CLAUSES

Another key issue addressed by the TCC in 2022 was the classification of the pre-arbitral steps as jurisdiction and admissibility. In this case, the parties' dispute resolution clause required the parties to mediation first and then conciliation. If these two pre-arbitral steps are unsuccessful,

either party has the right to commence arbitration. The TCC clarified that any failure to comply with these pre-arbitral steps 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. The TCC also clarified that failure to comply with the mediation and conciliation can be cured if the parties resort to these remedies after the commencement of the arbitration. Moreover, the TCC also confirmed that the fact that the parties sent each other a warning letter through notary publics confirms that they tried to settle the dispute but failed to do so. Therefore, an alleged failure to comply with pre-arbitral steps does not qualify as a ground for set-aside as a matter of Turkish law.

ARBITRABILITY OF THE MATTERS BELONGING TO THE EXCLUSIVE JURISDICTION OF THE TURKISH COURTS

The decision rendered in mid-2022 by the TCC came in stark contrast to the Turkish court's pro-arbitration approach. The TCC concluded that matters belonging to the exclusive jurisdiction of the Turkish courts are not arbitrable as a matter of Turkish law. The TCC argued that the Turkish Commercial Code provides that a party can commence litigation before Turkish courts against a foreign company's Turkish agency as the representative of that foreign company provided that the relevant relationship was established through that agency. Furthermore, the Turkish Commercial Code suggests that any agreement circumventing this rule is void. By referring to these provisions, the TCC argued that the parties do not have the right to lift the exclusive jurisdiction of the Turkish courts by way of a form selection clause. As an extension, the TCC further noted that arbitration agreements cannot be concluded for these matters. Otherwise, these matters would not be resolved by the Turkish courts, despite the fact that Turkish courts have exclusive jurisdiction. As a result, the TCC refused the enforcement of the award and stated that this matter should have been heard by Turkish courts.

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Morocco

The New Arbitration Law Applicable in Morocco

In Morocco, arbitration was introduced in 1913 in the Code of Obligations and Contracts. Later and after 1961, in 1974, it was added in the Code of Civil Procedure. In 2007, the law No. 08-05 repealing and replacing Chapter VIII of Title V of the Code of Civil Procedure was published and substantially improved the previous texts by introducing in particular international arbitration in articles 327-39 of the Code of Civil Procedure.

Recently, the *Dahir* No.1-22-34 of May 24, 2022 promulgated the law No. 95-17 relating to arbitration and conventional mediation in the Moroccan Official Gazette (the "Law").

NEW PROVISIONS OF THE LAW

The Law, composed of one hundred and five (105) articles, is divided into three titles, the first dealing with arbitration, the second with conventional mediation and the last with various and transitional provisions.

This Law which constituted a real code of arbitration brought many new provisions of which:

- the generalization of the use of electronic processes in terms of signature and notification;
- in the event of a difference in votes between the arbitrators, the chairman's vote shall prevail, subject to the recording of the opposing vote in separate minutes;
- the award shall have the same effect as if it had been signed by all the arbitrators, if one of the arbitrators is unable or unwilling to sign it, provided that this is stated;
- the decision to fix the fees may be appealed before the president of the competent court within fifteen (15) days from the date of receipt of the decision;
- the order issued by the president concerning the appeal against the decision to fix the fees is not subject to appeal;
- the mediation agreement may be entered into during the course of the proceedings by the authorized party and must be brought to the attention of the competent court within a period not exceeding seven (7) days of the conclusion of the agreement.

Regarding the choice not to submit the arbitrator to the control of a judicial party and to fix the list of arbitrators by a regulatory text as provided for in Article 12 of the Law, still leaves the possibility to the parties and to the President of the court, as the case may be, to designate one or more arbitrators outside the list.

> TABLE OF CONTENTS

Moreover, in the case of plurality of claimants or respondent, in particular in the case where the parties of the same clan do not agree on the appointment of a single arbitrator and where each party of the clan in question appoints a separate arbitrator, the third paragraph of Article 23 of Law provides a suitable solution by allowing the President of the competent court to appoint a single arbitrator at the request of one of the parties, if the members of the clan in question fail to reach agreement within 15 days of the request.

There is also a new possibility of holding meetings and hearings remotely which is provided by Article 33 of the Law which provides an option for arbitrators who are unable to attend in-person hearings to hold virtual meetings/hearings if the parties agree.

On the same subject, the new Law provides in Article 35 for the possibility allowed to the parties to the dispute to file their statement of claim and reply electronically. Additionally, Article 51 of the Law provides for the possibility of rendering arbitral awards electronically as well.

IMPORTANCE OF THE NEW PROVISIONS OF THE LAW

The Law aims to bring a certain flexibility as regards the internal or international arbitration, on the conditions of validity of the arbitration agreement or on the conditions of recourse to arbitration in administrative matter.

This Law, as we have seen above, is aware of the technological advances, and the Covid-19 crisis is a factor in this. Indeed, certain stages of the procedure were sometimes carried out by electronic way.

However, the judicial court retains its power and competence for the exequatur, in matters of challenge of the arbitrators, or to rule on the heads of claim omitted by the arbitral tribunal. At the same time, the law establishes the jurisdiction of the administrative court when one of the parties is a person of public law. Indeed, on the arbitral award concerning a dispute to which a person of public law is party, falls to the president of the administrative court of first instance in whose jurisdiction the award will be executed, or to the president of the administrative court of first instance of Rabat, when the arbitral award concerns the whole national territory.

It is certain that this Law is fundamental for the development of arbitration in Morocco and for the choice of Morocco as a place of arbitration. The promotion of Moroccan law in arbitration at national, African and international level is a matter understood by Moroccan legislators. Taking into consideration that in Morocco arbitration, both ad-hoc and institutional, has experienced a remarkable growth.

MEDIATION

Concerning mediation, the advances are also important, making the mediation process more flexible. In particular, the mediators must meet a certain number of qualities, such as independence, impartiality, integrity and loyalty.

The mediation process becomes more flexible thanks to this new Law, in particular as regards the conditions for the establishment of the mediation agreement or the conditions for its conduct, which are more precise thanks to the Law.

Finally, at the end of the mediation process, the transaction remains, which can be the subject to the exequatur procedure, the court having from now on to rule within a maximum delay of 7 days.

We can conclude that Moroccan law has adapted to international practice through provisions that are compatible with international conventions on the subject and similar to existing provisions in foreign laws. This law thus makes it possible to attract parties to mediation and arbitration centers in Morocco.

Interim Measures in Arbitration under Moroccan Law

THE POSITION OF MOROCCAN LEGISLATION ON INTERIM MEASURES IN ARBITRATION

Pursuant to Article 19 of the Law, each party may request from judicial courts to grant interim relief. In fact, the provisions of the Law provides that *"[t]he arbitration agreement shall not prevent a party from having recourse to the 'juge des référés', either before the beginning of the arbitration proceedings or during its course, to request the granting of any provisional or conservatory measure in accordance with the provisions laid down in the Code of Civil Procedure, and their withdrawal shall be carried out in accordance with the same provisions"*.

Hence, each party can resort to Moroccan national courts requesting interim relief as long as the criteria for interim relief are met. However, Moroccan law does not give an exhaustive list of criteria on which a party should rely upon in order to have its interim relief granted.

However, a party could rely on the criteria set by the Chartered Institute of Arbitrators' Professional Practice Guideline on Applications for Interim Measures such as (i) demonstrating serious or irreparable harm, (ii) demonstrating a showing of urgency, (iii) demonstrating *prima facie* case on the merits and (iv) a *prima facie* establishment of the Arbitral Tribunal's jurisdiction and power to grant the requested relief.

Even though not explicitly provided by Moroccan law, these criteria and particularly criteria (i) and (ii) remain the general standard under Moroccan law. In fact, several case laws have shown that a party has to establish the existence of irreparable harm and the urgency of requesting interim relief.

THE POSITION OF MOROCCAN COURTS ON INTERIM MEASURES IN ARBITRATION

In a case, the Commercial Court of Appeal of Marrakech considered that even in the presence of an arbitration clause, the co-contractor may, during the term of the contract, have recourse to the *juge des référés* in order to put an end to the prejudice it suffers as a result of the refusal of its contractor to grant access to the premises subject to the contract containing the arbitration agreement. (*See, CAC Marrakech decision n°609*, dated 19/05/2009, file n°285/2/2009).

Similarly, the Commercial Court of Appeal of Casablanca was called to rule on the admissibility of an application for interim relief by which a contractor requested its co-contractor to leave the construction site in order to allow the contractor to hire another company to finalize the work. The contract binding these parties provided for an arbitration clause and the co-contractor refusing to withdraw from the construction site filed a claim for damages on the merits. The Court considered that the party filing a claim for damages on the merits was sufficient evidence to conclude that the contract had been terminated. Therefore, the recourse to the *juge des référés* in accordance with the provisions of Article 327-1 of the Moroccan Code of Civil Procedure (now Article 19 of the Law), was admissible and more particularly the party requesting to the *juge des référés* a protective measure tending to order the withdrawal of its co-contractor from the construction site was legitimate and satisfied the criterion of urgency insofar as this measure made possible the suspension of the damages suffered by the contractor. (*See, CAC Casablanca decision n°2013/5564*, dated 17/12/2013, File n° 4/2013/1442)

The Moroccan practice goes in line with the general practice in international arbitration since arbitrators must satisfy themselves that irreparable harm would be caused to the claimant and that the measures are urgent; arbitrators also have to be convinced of the likelihood of success of claimant's position on the merits.

It is worth mentioning that a party may not resort to the *juge des référés* to request the suspension of the arbitration proceedings. In fact, the Commercial Court of Appeal of Casablanca has considered that requests to suspend an arbitration procedure do not constitute a temporary and conservatory measure within the framework of Article 19. Hence, granting to arbitral tribunals broad powers over the conduct of the proceedings and rationale of suspending the proceedings which will be assessed on a case-by-case basis. (*See, CAC Casablanca decision n°2353*, dated 16/05/2022, file n°2021/8225/5126).

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Singapore

2022 marked a year of key developments in the Singapore arbitration scene. This report provides a round-up of some of the major developments, such as the introduction of conditional fee arrangements in Singapore as well as leading judgments issued by the Singapore courts relating to arbitration.

Conditional Fee Arrangements

On 4 May 2022, Singapore's framework for conditional fee arrangements ("CFAs") came into operation. This allows lawyers in Singapore to enter into CFAs with clients in selected proceedings under the new CFA framework. The CFA framework is set out in the Legal Profession Act and the Legal Profession (Conditional Fee) Arrangement Regulations 2022 (the "CFA Regulations").

While CFAs were previously illegal under Singapore law, this new development enhances Singapore's competitiveness as an arbitral hub and develops its litigation funding landscape, whilst also supporting the dispute resolution needs of businesses and individuals in Singapore. Damages-based agreements or contingency fee agreements continue to be illegal in Singapore.

Pursuant to Section 3 of the CFA Regulations, CFAs are only permitted in specific types of contentious proceedings, namely a) international and domestic arbitration proceedings, as well as related court proceedings (such as stay of proceedings applications, enforcement of awards and mediation proceedings), and b) proceedings in the Singapore International Commercial Court as well as related proceedings (such as mediation proceedings and appeal proceedings).

Pursuant to Section 4 of the CFA Regulations, prior to entering into a CFA, lawyers are required to provide certain information on the CFA to the client, including:

a) the nature and operation of the CFA and its terms;

b) the client's right to seek independent legal advice before entering into the CFA;

c) that the uplift fees (if any) are not recoverable; and

d) that the client continues to be liable for any costs orders that may be made against the client by a court of justice or an arbitral tribunal.

Pursuant to Section 5 of the CFA Regulations, every CFA must include terms relating to all of the following:

a) the particulars of the specified circumstances in which remuneration and costs or any part of them are payable to the lawyer under the CFA;

b) the particulars of any uplift fee, if applicable;

c) that lawyers and clients must comply with the cooling-off period of five days after a CFA is entered into, during which either party may terminate the agreement via a written notice;

d) any variation of the agreement must be in writing and expressly agreed to by all parties to the CFA;

e) that for variation related to costs issues, there is also a cooling-off period of three days after the CFA is varied, during which either party may terminate the variation agreement via a written notice; and

f) that on the termination of the CFA during the cooling-off period in c) or e) above, the client is not liable for any remuneration or costs incurred during the cooling-off period except those incurred for any service performed during the cooling-off period that was expressly instructed by or agreed to by the client.

Validity of Arbitration Agreement Which Misnames Arbitral Institution

In Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd [2022] SGHC 58, the Singapore High Court was faced with determining whether an arbitration clause was defective because it referred disputes to a non-existent institution, namely the "China International Arbitration Center", and consequently whether the arbitral award was enforceable in Singapore against a Singapore-incorporated company.

Justice Philip Jeyaretnam held that his task was to construe the arbitration agreements in the contracts to determine whether China International Economic and Trade Committee ("CIETAC") was right to conclude that it was indeed the selected arbitral institution. He found that the parties intended to resolve their disputes in China, and that they would not have deliberately chosen a non-existent institution, but intended to choose an existing arbitral institution which they misnamed.

Justice Jeyaretnam compared the name of the non-existent arbitral institution in the English primary text of the arbitration agreements to the full names of five of the major arbitral institutions in China, including CIETAC, to check for similarities in wording. He then concluded that in agreeing on "China International Arbitration Center", the parties had in fact agreed on CIETAC, and that inaccuracy in the name of the arbitral institution in the arbitration agreements does not nullify the parties' consent to arbitration or their choice of CIETAC. He therefore upheld the CIETAC award.

Enforceability of Interim Awards Made By An Emergency Arbitrator in a Non-Singapore-Seated Arbitration

In CVG v CVH [2022] SGHC 249, the Singapore High Court held that that an interim award made by an emergency arbitrator in a foreign seated arbitration was, in principle, enforceable in Singapore. In this case, the emergency interim award of the emergency arbitrator was made in Pennsylvania, United States, in International Centre for Dispute Resolution ("ICDR") arbitration proceedings. The defendant had been the claimant's franchisee in Singapore, Malaysia, Taiwan, and the Philippines. The dispute arose out of the termination of various agreements which governed the Singapore franchise business.

Justice Chua Lee Ming considered whether the term "foreign award" in section 29 of Singapore's International Arbitration Act 1994 (2020 Rev Ed) ("IAA") includes foreign interim awards made by an emergency arbitration. He concluded that it did, relying on a purposive interpretation

of section 27(1) of the IAA and holding that the term "arbitral award" in s27(1) of the IAA "includes awards by emergency arbitrators." He held that consequently, s29 of the IAA "applies to foreign awards by emergency arbitrators."

Justice Chua also held that the award was binding within the meaning of s29(2) of the IAA and stated that this was "unarguably clear" from Article 7(4) of the ICDR's International Arbitration Rules, which states:

"The emergency arbitrator shall have the power to order or award any interim or conservatory measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order. Any interim award or order shall have the same effect as an interim measure made pursuant to Article 27 and shall be binding on the parties when rendered. The parties shall undertake to comply with such an interim award or order without delay."

Allegations of Pre-Judgement in Related Arbitrations

In CNQ v CNR [2022] SGHC 267, the Singapore High Court dismissed a setting aside application for an ICC award in which the plaintiff had alleged that the arbitrator had prejudged the issues based on an earlier ICC award issued by the same arbitrator and involving the same parties.

Justice Maniam referred to the following test for establishing prejudgment in BOI v BOJ [2018] 2 SLR 1156:

"To establish prejudgment amounting to apparent bias, therefore, it must be established that the fair-minded, informed and reasonable observer would, after considering the facts and circumstances available before him, suspect or apprehend that the decision-maker had reached a final and conclusive decision before being made aware of all relevant evidence and arguments which the parties wish to put before him or her, such that he or she approaches the matter at hand with a closed mind."

Justice Maniam then held that the arbitrator had not approached the issues in the second ICC arbitration with a closed mind, and that there was "nothing inherently wrong in him deciding [the same issues between the same parties] the same way." He found that the arbitrator had considered the new evidence and contentions from the plaintiff in the second ICC award and had engaged with the plaintiff's counsel and expert during the hearing in the second arbitral proceedings. He held that this demonstrates that the arbitrator had attempted to understand the plaintiff's case in the second ICC arbitration, and consequently had not prejudged the issues in the second ICC arbitration.

Determining the Finality of an Arbitral Award

In York International Pte Ltd v Voltas Ltd [2022] SGHC 153, the Singapore High Court considered whether an arbitrator was *functus officio* once a conditional final award had been rendered by the arbitrator in the arbitral proceedings.

Justice S Mohan found that the conditional final award did deal with all the issues that formed the subject of the arbitration, such that the arbitrator was functus officio after its issuance. In coming to this decision, Justice Mohan found that the arbitrator chose to make a quantum award rather than adjourn the decision on quantum, the award did not contain an express reservation of jurisdiction to issue any further awards, and the award fully resolved the dispute between the parties. He added that although the award did not contain a specific sum to be paid by

the plaintiff, it did detail a method of calculation of the specific sum. He therefore held that the award had fully set out the extent of the plaintiff's liability and was "complete and final on its own terms".

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