INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

ISSN 2520-6052

ICC DISPUTE RESOLUTION BULLETIN

2017 | ISSUE 3

ICC INTERNATIONAL CHAMBER OF COMMERCE

ICC Dispute Resolution Bulletin | Issue 3

Quarterly e-journal of the International Chamber of Commerce (ICC)
Périodique numérique trimestriel de la Chambre de commerce internationale

Editors-in-Chief | Rédacteurs en chef

Julien Fouret

Dyalá Jiménez

Editorial Board | Comité de rédaction

Cecilia Azar

Frédéric Bachand

Domitille Baizeau

Chiann Bao

Utku Cosar

Valeria Galindez

Rémy Gerbay

Samaa Haridi

Daniel Kalderimis

Tejas Karia

Swee Yen Koh

Yasmine Lahlou

Reza Mohtashami

Ziad Obeid

Ucheora Onwuamaegbu

Dámaso Riaño

Galina Zukova

Alberto Zuleta

Dispute Resolution Services Publications

Stéphanie Torkomyan, Publications Manager

Claire Héraud, Publications Senior Assistant

Articles for publication should be sent to the Editors-in-Chief, members of the Editorial Board, or to the Publications Manager (stn@iccwbo.org). Suggestions for book reviews are also welcome.

ICC Publication No. @17BUL3
ISBN: 978-92-842-0458-8
ISSN: 2520-6052

Price | Prix

Subscription | abonnement : 180 euros (excl. VAT | hors TVA)

Per issue | par numéro : 49 euros (excl. VAT | hors TVA)

Publication date | Date de parution

November 2017 | novembre 2017

Published by | Édité par

ICC Services
Wholly-owned affiliate of the International Chamber of Commerce

Filiale à 100 % de la Chambre de commerce internationale (ICC)

SAS au capital de 305 562 euros
SIREN 313 975 237
RCS Paris B 313 975 237
Président, directeur de la publication : Philip Kucharski

Directeur général, directeur adjoint de la publication : Emmanuel Jolivet

Copyright © 2017
International Chamber of Commerce (ICC)

All rights reserved. No part of this work may be reproduced, distributed, transmitted, translated or adapted in any form or by any means except as permitted by law without the written permission of the ICC. Authors should request the permission of ICC prior to any reproduction or subsequent publication of an article (electronic or print). Permission can be requested from ICC through copyright.drs@iccwbo.org.

Tous droits réservés. Il est interdit de reproduire, de distribuer, de transmettre, de traduire ou d'adapter tout ou partie de cet ouvrage, sous quelque forme ou par quelque procédé que ce soit, en dehors des exceptions prévues par la loi, sans l'autorisation écrite de la Chambre de commerce internationale. Toute demande d'autorisation est à adresser à copyright.drs@iccwbo.org.

Disclaimer

Except where otherwise indicated, the views expressed and statements made herein are those of their authors and should not be construed as creating any duty, liability or obligation on the part of the ICC and its constituent bodies, including the International Court of Arbitration, the International Centre for ADR and their respective Secretariats.

Sauf indication contraire, les points de vue et les commentaires exprimés dans la présente publication sont ceux de leur(s) auteur(s) et ne sauraient créer aucun devoir, ni aucune responsabilité ou obligation à la charge de la Chambre de commerce internationale ou de ses organes, y compris la Cour internationale d'arbitrage, le Centre international d'ADR et leurs secrétariats respectifs.

Trademarks

ICC, the ICC logo, CCI, International Chamber of Commerce (including Spanish, French, Portuguese and Chinese translations), World Business Organization, International Court of Arbitration and ICC International Court of Arbitration (including Spanish, French, German, Arabic and Portuguese translations) are all trademarks of the ICC, registered in several countries.

ICC, le logo ICC, CCI, International Chamber of Commerce (y compris des traductions en espagnol, français, portugais et chinois) World Business Organization, International Court of Arbitration et ICC International Court of Arbitration (y compris des traductions en espagnol, français, allemand, arabe et portugais) sont des marques de la Chambre de commerce internationale et ont été enregistrées dans plusieurs pays.

publications@iccwbo.org
www.storeiccwbo.org

> Alexis Mourre
Message from the President 5

> **Welcome from the Editors-in-Chief** 8

> Alexis Mourre and Cecilia Azar
In Memoriam Guillermo Aguilar Alvarez 9

GLOBAL DEVELOPMENTS

> Sara Nadeau-Séguin
Canada
Ontario Adopts a New International Commercial Arbitration Act 14

> Giulia Previti
United States
The Court of Appeals for the Second Circuit Puts To Rest Enforcement Efforts in Thai-Lao Case 18

> Luis Alfredo Barragán and Irma Rivera
Colombia
Iura Novit Arbiter in Colombia: Supreme Court Considerations on the Principle of Congruence in International Arbitration 22

> Elina Mereminskaya
Chile
Recent Dismissal of a 'Recourse of Complaint' against an Arbitrator Acting in an ICC Arbitration 24

> Ryan Lim
Singapore
Service on Foreign States of Orders Granting Leave to Enforce Arbitral Awards 26

> Maria Athanasiou
Cyprus
Supreme Court Applies the Requirement of a 'Duly Authenticated Original Award' in line with Text and Purpose of the New York Convention 28

> Alexandre Mazuranic
Switzerland
Can an Interim Award Deciding on Part of the Jurisdictional Objections Be Challenged? 30

> Elsa Ortega
France
The Recent Decision by the Paris Court of Appeal in the Dresser Rand Case: an Endorsement of the Use of Adverse Inferences in International Arbitration . 32

COMMENTARY

> Victoria R. Orlowski
Using Experts as Adjudicators
Meeting the Demand for Dynamic Dispute Resolution with
the ICC Expert Rules 36

> The Hon. Michael Kirby AC CMG
International Arbitrators and Existential Problems 44

ICC PRACTICE AND PROCEDURE

> Mirèze Philippe
How Has Female Participation at ICC Evolved?
ICC Arbitrators, Court Members and Court's Secretariat 53

ICC ACTIVITIES

> ICC Young Arbitrators Forum
6th ICC YAF Global Conference, New York, 9 June 2017 69

> ICC Court
ICC Court President Meets Chinese Judiciary and Government in the Ambit of the 'Belt and Road Initiative' 79

> ICC Events
ICC Mexican Arbitration Day, in memory of Guillermo Aguilar Alvarez 80

BOOK REVIEWS

> Alfredo Bullard and José María de la Jara
Beyond Consent: Towards Default Arbitration
Rethinking International Commercial Arbitration:
Towards Default Arbitration 84

Message from the President

Alexis Mourre
President of the ICC International Court of Arbitration

One of the reasons for excessive time and costs in arbitration has been identified in the reluctance of many arbitral tribunals to address substantive issues at an early stage of the proceedings. Among the recommended practices that are included into Appendix IV of the Rules and the related ICC Commission Report on 'Controlling time and costs', the ICC International Court of Arbitration encourages arbitral tribunals to consider several techniques, including addressing the issues in dispute in stages. The case management conference, which is mandatory at the outset of the procedure under the ICC Rules, should be used more frequently throughout the arbitration and more effectively as an opportunity, not only to consult the parties on procedural issues – such as the sequence of submissions and the manner in which facts and oral evidence may be submitted – but also, whenever possible and appropriate, to engage with the parties on the substantive issues that will have to be discussed in the arbitration. Other good practices may be considered, such as the 'Reed Retreat' and the scheduling of case management conferences in advance of a hearing.

One of the techniques that may be used by arbitral tribunals in order to streamline the proceedings is the immediate disposal of manifestly unmeritorious claims. Such decisions may be taken when a party, at the appropriate stage of the proceedings, has entirely failed to substantiate a claim or a defense, and when disposing of it immediately would enhance the efficiency of the arbitration. It is entirely possible, under the ICC Rules, for an arbitral tribunal to dispose of a manifestly unmeritorious claim on an expeditious basis. Due to the existing misconception that such dispositive motions would not be permitted in ICC arbitrations, it was necessary to add additional guidance in the ICC Note to Parties and Arbitral Tribunals.

The revised version of the ICC Note to Parties and Arbitral Tribunals will accordingly clarify that, under the Rules, any party may, as promptly as possible after they are made, apply to the arbitral tribunal for the expeditious determination of one or more claims or defenses on grounds that they are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction. The arbitral tribunal has discretion to decide whether to allow the application to proceed by taking into consideration the stage of the proceedings, the need to ensure time and cost efficiency, and other relevant circumstances. If it decides to proceed, the arbitral tribunal may adopt any appropriate procedural measures to allow the expeditious determination of the claim or defense, provided that all parties are given a fair opportunity to state their views. Further presentation of evidence should be allowed only in exceptional circumstances and, when a hearing is to be held, the arbitral tribunal may conduct it by videoconference, telephone or similar means of communication. The arbitral tribunal shall decide as promptly as possible and may state the reasons for its decision in a concise form. If the decision is rendered in the form of an award, it will be scrutinized by the Court as soon as practicable, in principle within one week of receipt by the Secretariat.

These guidelines complement the other measures recently adopted by the Court to increase the time and cost efficiency of ICC arbitrations, including the adoption of expedited rules for claims in which the amount in dispute is lower than 2 million US$, the introduction of a time-limit for the submission of draft awards by arbitral tribunals to the Court, to which financial sanctions are applied in case of an unjustified delay, and the shortening of the time limit for the establishment of the Terms of Reference from two to one month. Most importantly, the Secretariat will continue to monitor closely the conduct of cases and ensure that proceedings are efficiently managed, while maintaining the highest level of quality in the administration of ICC cases.

In January 2018, our new Rules on ICC as Appointing Authority in ad hoc arbitrations will enter into force. This new set of rules will offer users a wide range of new administrative services, allowing them to opt between a full administration of the case, identified interventions of the ICC for the appointment or challenges of the tribunal, and assistance or other services in support of ad hoc proceedings.

The Court, while constantly aiming at improving the quality and efficiency of ICC arbitrations, is also pursuing its efforts to increase its global reach. Several recent developments deserve being reported on in this message.

First, our new Brazilian case management team is now up and running under the leadership of Gustavo Scheffer da Silveira, newly appointed counsel for the team and former deputy counsel in the Latin American team based in Paris. San Paulo is the third team of the Secretariat located outside of Paris, after the opening of the Hong-Kong office in 2008 and New York office in 2012. The new team 'Ica10' in the country of one of the main users of ICC arbitration and one of the world's major economies will be a game changer for the Court. In spite of the huge challenges that Brazil is facing, not the least of which the fight against corruption and the establishment of a business-friendly and flexible regulatory environment for business, I have no doubt that this dynamic country will soon overcome its current difficulties and fully take the lead in today's economy.

With this new management team, the ICC will become even closer to Brazilian parties, thus allowing us to increase our responsiveness and the quality of our services. For the first time ever, we will introduce a scale of fees in a currency other than US dollars, thereby allowing parties to pay advances on costs in Reals to a local bank account.

The Court is also actively preparing for the opening of its Singapore case management team in the first quarter of 2018. Singapore has become one of the main international arbitration hubs thanks to the dynamism of the local arbitration community and to the vision of its Government; it was high time for us, by becoming a Singaporean arbitral institution, to provide local arbitration services to our users, in the closest and most responsive possible way.

Our team in Singapore will with our existing presence in Hong Kong, double the presence of the Secretariat in the world's fastest growing economy. This Asian outreach already increased last year with the opening of a regional office in Shanghai, where the ICC was the first non-Asian institution to open an office in China. Our most recent conference in Beijing, on 16 September 2017, was a great success, with more than 400 delegates. On the occasion of our visit during the China Arbitration Summit on 20 September, our regional director Prof. Mingchao Fan and I had extremely constructive meetings with high ranking judges and officials of the People's Supreme Court and the Ministry of Commerce.

The Belt and Road initiative will bolster growth in the entire region and provide great benefits to the global economy. The contracts arising from this major investment program will need a reliable, neutral and high-quality dispute resolution forum acceptable to all parties. As the only truly global arbitral institution, renowned for its neutrality, its longstanding experience, the high quality of its services and its unique system of scrutiny of awards, the ICC provides the best possible forum for the resolution of these disputes. The Chinese People's Supreme Court has in this regard already confirmed, on two occasions in 2013 – in the Ningbo Bei Lun Case and the BP Agnati S.R.L Case – that a clause providing for ICC arbitration with a seat in mainland China was valid. Henceforth, parties may safely arbitrate their disputes under the ICC Rules with a seat in China.

On 13 September of this year, we also celebrated the opening of our new representative office in Abu Dhabi, which will be up and running in January 2018. Abu Dhabi will be a regional representative office and will essentially undertake marketing and training functions. It will contribute to developing the presence of the Court in the region, and will also serve to promote the Abu Dhabi Global Market (ADGM) free zone as a global arbitration hub and a friendly seat for international arbitrations. Our ADGM office will also allow parties in the Emirates and the region to file their ICC requests for arbitration locally, in the quickest and most convenient manner.

The ADGM move comes at a time of increased presence of the Court in the region, with the creation of the ICC Arab Arbitration Group– the second of this kind after our Latin American Arbitration Group—, for which the first meeting took place last January and the second being planned for next May in Beirut.

In Africa, our 2nd regional conference took place in Lagos on 14-16 May 2017, with 500 delegates from the entire continent.

In Europe a regional director for Europe, Laetitia de Montalivet, was recently appointed. The first and successful ICC European Regional Conference took place last year, as well as the launch of the Paris Arbitration Week at the initiative of the ICC. Its 2nd edition will take place from 9 to 13 April 2018.

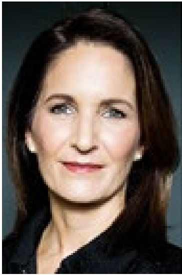
The Court is also an organization which has deeply rooted values, amongst which our belief in diplomacy, in the rule of law and in the importance of multilateralism to solve international disputes. I am in this respect very proud that the Court organized its

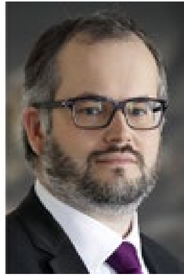
annual meeting of the ICC Latin American Group in Cuba on 25 August 2017, as well as an important event on 1 February 2017 in Teheran.

I cannot close this message without a word of praise and appreciation for the fantastic work that Chris Newmark has done during his four-year term of presidency at the ICC Commission on Arbitration and ADR. Chris has raised the Commission to a new level, by shepherding projects of such importance as the ICC Report on Decisions on Costs, the Task Force on the Emergency Arbitrator Proceedings, the Task Force on Maximizing the Probative Value of Witness Evidence and finally the ICC Report on Financial Institutions and International Arbitration, a breakthrough in the industry. Chris was also instrumental in supporting the Court's efforts to introduce more transparency and efficiency in ICC arbitrations. For all this, we are indebted to him. I also take this opportunity to welcome and wish good luck to his successor, Carita Wallgren, who will take the helm as from January 2018. Carita is a leading figure in international arbitration. She was also one of the most active Vice-President of the Commission under Chris' term. No better choice could have been made to take the Commission's leadership.

Welcome from the Editors-in-Chief

Dyalá Jiménez Figueres and Julien Fouret





We start this third issue of 2017 with a section devoted to a dear member of our community, Guillermo Aguilar Alvarez, who passed a few months ago. We celebrate his life and his contribution to international arbitration in the words of President Alexis Mourre and Cecilia Azar (ICC Mexico). He will always remain an important part of the ICC family.

As highlighted in our first issue of this year, we aim at covering international arbitration developments in every corner of the globe in our Global Developments section. This time, we bring news regarding the enactment of a new arbitration law in Ontario, Canada and a court decision on the enforcement of an award in the United States, as well as two recent cases from Chile and Colombia dealing with arbitrator performance. As regards Europe, an author reports on the Dresser Rand case in France; another reporter shares opinions regarding a Swiss decision related to an interim award in the so-called 'Yukos saga', while a third commentator offers views on the requirements for the enforcement of awards against foreign States in Cyprus. This subject is also reviewed through a note regarding a Singaporean court decision.

In the Commentary section, we include an analysis of the role that experts can play as adjudicators and what should be taken into account in this regard. Secondly, we are including the inspiring speech of the Hon Michael Kirby AC CMG at the ICC Commission on Arbitration and ADR meeting in Sydney last October. We are grateful for his authorization to do so.

This section is then followed by an in-depth study of the evolution of female participation in the institution in our ICC Practice and Procedure section.

In the following ICC Activities section, the ICC's Young Arbitrators Forum (YAF) contributed with six regional reports of the 'Around the World in 80-ish Minutes' series held in June of this year at the Global YAF Conference. We wish to thank Soeun Nikole Lee's invaluable help for the reports to be an important part of this issue. As she has mentioned, 'the Global YAF conference was a success with approximately 200 participants from 44 countries and reaffirmed the increasing enthusiasm of the young international arbitration practitioner community'. Indeed, we should highlight that ICC's YAF has grown to include 61 regional representatives who help design dynamic discussions of hot topics in international arbitration in their corresponding regions.[1] These events are increasingly a 'must' for young and younger practitioners, and the Bulletin will regularly report on their most important events worldwide.

As mentioned in his welcome message, Alexis Mourre met with Chinese government and judicial authorities as part of the Belt and Road Initiative in September, which meetings are also reported in this issue. Another activity that is covered in this section is the first Mexican ICC Arbitration Day, dedicated to Guillermo Aguilar Alvarez.

Our last section on Book Reviews includes a review of Gilles Cuniberti's book 'International Commercial Arbitration: Towards Default Arbitration'. Will consent soon be a requirement of the past in international arbitration cases? Read on...

We also want to share with you a bit of news from 'behind the scenes': this third issue has been possible thanks to the invaluable work of our new Publications manager for ICC Dispute Resolution Services, Stéphanie Torkomyan, who nimbly stepped into Virginia Hamilton's shoes last September, as well as Claire Héraud's consistent work for 18 years at ICC. We give a warm welcome to Stéphanie on behalf of the entire Editorial Board, whose members also devote precious time to our Bulletin. Authors who wish to contribute to the ICC Dispute Resolution Bulletin are welcome to send their article to members of the Editorial Board, or to stephanie.torkomyan@iccwbo.org.

As always, of course, we are grateful to our contributors for the efforts displayed in the preparation of their submissions as well as for the relentless work of our Editorial Board members.

Finally, a word of thanks to Virginia Hamilton, a devoted perfectionist whose imprint is found in the millions of words published in ICC documents throughout the last 17 years.

1 https://iccwbo.org/media-wall/news-speeches/icc-announces-new-young-arbitrators-forum-regional-representatives/

ICC Young Arbitrators Forum

6th ICC YAF Global Conference, New York, 9 June 2017

During the 6th ICC YAF Global Conference, a morning session entitled 'Around the World in 80-ish Minutes' featured a roundtable discussion of recent landmark cases, decisions and legislative developments from around the world, and their impact on arbitration. ICC YAF regional representatives report on this session and summarize the new features and trends in different regions.

Europe and Russia

Mélanie Riofrio Piché, Associate at Armesto & Asociados Árbitros in Madrid and Clément Fouchard, Managing Associate at Linklaters LLP in Paris report on major changes in Europe and Russia, with the adoption of new arbitration laws, national court decisions relating to arbitrators' liability and third-party funding, controversies surrounding investment arbitration as well as developments on the enforcement and setting aside of awards.

Revision of arbitration laws in Russia, Sweden, and Switzerland

In September 2016, the newly-enacted Russian arbitration regulation[1] took effect introducing a number of amendments to the regulation of arbitrations in Russia, including (i) mandatory licensing of arbitral institutions; (ii) clarification of the scope of non-arbitrable disputes; (iii) regulation of arbitrators and co-operation between State courts and arbitral institutions.

The Swedish Arbitration Act is currently under review by a committee which proposed the main following improvements: (i) the repeal of the distinction between the grounds for setting aside an arbitral award and the grounds for declaring an award invalid; (ii) improvements related to the determination of the applicable law and the challenge of arbitrators' fees; and (iii) the option to plead in the English language before the Svea Court of Appeal in setting aside applications (the court's decisions, however, would still be rendered in Swedish, with a simultaneous English translation if requested).

In Switzerland, the proposed amendments to Chapter 12 of the Swiss Federal Private International Law Act 1987 relating to International arbitration were published in January 2017. These amendments inter alia (i) simplify the formal requirements for arbitration agreements which would now be valid even if the form is fulfilled by one party only (i.e. an arbitration clause may be valid if contained in a written offer submitted to the counterparty, who accepts it only orally or tacitly); (ii) entitle parties to request the assistance of State courts in case a counterparty does not voluntarily comply with provisional measures ordered by the tribunal (under the current law, only the tribunal is entitled to do so); and (iii) allow submissions to the Federal Supreme Court such as requests for revision or setting aside applications to be filed in English, although the Court's decision will still be issued in one of the official languages.

Spanish Supreme Court confirms arbitrators' liability to parties

In a dispute between sportswear brand Puma and its former Spanish distributors, the Spanish Supreme Court[2] upheld a first instance judgment and a decision of the Madrid Court of Appeal holding that two of the three members of the arbitral tribunal violated the applicable arbitration rules by excluding the third arbitrator from deliberations, leading to the setting aside of the award for violation of the principle of collegiality of the tribunal. The Court declared the two arbitrators professionally liable for the setting aside of the award, and ordered each of the arbitrators to reimburse their fees to Puma in the amount of €750,000 plus interest and costs.

Third-party funding developments in England and Ireland

Along with a growing international consensus on its acceptance, third-party funding of arbitral claims continues to raise new concerns; including whether third-party funding costs are recoverable in arbitration. In *Essar Oilfields Services Ltd v. Norscot Management Pvt Ltd*,[3] the English High Court held that the arbitral

1 See Federal Law No. 382-FZ of 29 December 2015 on Arbitration in the Russian Federation; Federal Law No. 409-FZ of 29 December 2015 on 'Incorporation of Amendments of Certain Legislative Acts of the Russian Federation' in connection with enactment of the law on arbitration.

2 Tribunal Supremo, Sentencia nº102/2017, 15 February 2017, available at http://res.cloudinary.com/lbresearch/image/upload/v1487683376/2017_02_15_sentencia_tribunal_supremo_puma_211117_1322.pdf.

3 [2016] EWHC 2361 (Comm), available at http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2016/2361.html&query=(2016)+AND+(ewhc)+AND+(2361).

tribunal has the discretion to award costs relating to third-party funding to a successful claimant. The Court concluded that costs for obtaining litigation funding could be included in 'other costs', and that identifying the scope of recoverable costs narrowed down to a functional criteria reflected through the following question: 'Do the costs relate to the arbitration and were they incurred for its purpose?'[4]

This finding raises the question of whether a tribunal may include other sums in its decision on costs (i.e. success fees under damages-based agreements and after-the-event insurance premiums). The arbitrator, in this specific case, concluded that 'Norscot's impecuniosity was deliberately caused, or substantially contributed to by Essar'[5], and left Norscot with no alternative other than to resort to this sort of funding.

The arbitrator was noticeably influenced by the fact that Norscot's impecuniousness had a strong causal connection with Essar's conduct. As the decision seems strongly based on the case's particular facts, arbitral tribunals may well decide to exercise their discretion differently in future cases.

Detractors of third-party funding still remain. For instance, in its first case relating specifically to the practice of third-party funding, the Irish Supreme Court held that third-party funding amounted to unlawful maintenance and champerty, which continue to be torts and offences in Ireland.[6]

Investor-state arbitration in Europe

In response to the vociferous criticism of the existing investor-state dispute settlement (ISDS) system from certain quarters, the European Commission expressed its determination to replace the current arrangements with a dispute settlement mechanism centred on a permanent investment court. The European Court of Justice rendered an opinion 2/15 on 16 May 2017 regarding the EU-Singapore free trade agreement (FTA) relating to foreign investments other than direct. Many observers wondered whether the ECJ has put the last nail in the coffin of Investor-state Arbitration in its current guise. In this opinion the ECJ declared that the EU has the exclusive competence to sign and ratify FTAs alone, however if FTAs contain provisions on either ISDS, or non-direct foreign investment, then each Member State would need to sign off on those specific provisions.[7]

Poland has recently appointed a Working Group to prepare recommendations on a new Polish investment policy, including the revision of the ISDS system. The European Commission requested Austria, the Netherlands, Romania, Slovakia and Sweden, by way of reasoned opinion, to terminate their intra-EU bilateral investment treaties. According to the European Commission, intra-EU bilateral investment treaties affect the single market by conferring rights to some EU investors on a bilateral basis, which are in conflict with EU Law and the principles of a single economic market.[8]

In the Netherlands, the Hague District Court set aside on 20 April 2016 the $50 billion Yukos award against the Russian Federation[9]. The Court reached its decision on the grounds that the arbitral tribunal that had rendered the awards lacked jurisdiction as the arbitration clause of Article 26 of the Energy Charter Treaty did not have a legal basis in Russian law, and was incompatible with the principles therein, specifically as Russian law limits arbitration to civil law disputes and does not provide a basis for the arbitration of disputes of a predominantly public law nature arising from legal relations between foreign investors and the Russian Federation. An appeal is pending.

Enforcement and setting aside proceedings in France, the Netherlands, Belgium, and Germany

French, Dutch and Belgian laws have increased the protection of States regarding seizures of their assets (so-called 'Yukos laws/decisions'). Pursuant to an Act of 9 December 2016, French law now provides that interim measures on State assets can only be granted by a national judge and requires an additional consent of the State to these measures. The attached assets must not be used in the context of public services.[10] In Belgium, the Act of 23 August 2015 provides that

4 Ibid. at para. 58.

5 Ibid. at para. 27.

6 Persona Digital Telephony Ltd., and Sigma Wireless Networks Ltd. and The Minister for Public Enterprise, Ireland, and the Attorney General [2017] IESC 27, available at http://www.bailii.org/ie/cases/IESC/2017/S27.html.

7 European Court of Justice, Opinion 2/15, 16 May 2017, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1073070

8 European Commission, 2 September 2016 at point 6 '*Financial Stability, Financial Services and Capital Markets Union*', available at http://europa.eu/rapid/press-release_MEMO-16-3125_EN.htm.

9 The Hague District Court, 20 April 2016, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230

10 'LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique', at Art. 60, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&categorieLien=id

assets belonging to sovereign States are, by their very nature, not attachable and protected by immunity from enforcement. By exception to this principle, a creditor may seek the authorisation to attach assets of a sovereign State by fulfilling strict conditions.[11] In the Netherlands, the Dutch Supreme Court ruled in 2016 that assets of foreign States located in the Netherlands cannot be subject to attachment and enforcement, unless they are used for non-governmental purposes. The same court also made clear that a possible waiver of State immunity cannot be implied from the general provisions contained in bilateral or multilateral arbitration agreements between State parties.[12]

In Germany, the Supreme Court rendered a decision of 7 June 2016 in the *Claudia Pechstein* saga confirming that the Court of Arbitration for Sport (CAS) seated in Switzerland is a properly constituted arbitral tribunal, and that an arbitration clause included in agreements between an athlete and a monopolistic international sports association referring all disputes to the CAS is generally valid.[13]

11 'Loi du 23 août 2015 insérant dans le Code judiciaire un article 1412 quinquies régissant la saisie de biens appartenant à une puissance étrangère ou à une organisation supranationale ou internationale de droit public', available at http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&caller=summary&pub_date=15-09-03&numac=2015009459.

12 Dutch Supreme Court, 14 October 2016: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2016:2371.

13 GFT (BGH) *SchiedsVZ* 2016.

North America

Eric Morgan, Senior Litigation Associate at Osler, Hoskin & Harcourt LLP in Toronto and Floriane Lavaud, Senior Associate at Debevoise & Plimpton LLP in New York report on new international commercial arbitration legislation in Canada and on a recent decision from the United States Court of Appeals for the Second Circuit on the enforcement of a foreign award against third parties.

The new International Commercial Arbitration Act in Ontario, Canada

A major development in the Canadian arbitration landscape is that Ontario earlier this year passed a new international commercial arbitration act. Canada has a federal legal system and arbitration is primarily a provincial matter. Ontario is Canada's most populous province which includes Toronto, the largest city and commercial centre.

The *International Commercial Arbitration Act 2017* (SO 2017, c 2) (the 'new Act') received royal assent on March 22, 2017 with immediate effect. The new Act replaces the *International Commercial Arbitration Act* (RSO 1990, c I.9) and incorporates the updated version of the UNCITRAL Model Law, including the 2006 amendments.

The new Act applies to all international commercial arbitration agreements and awards rendered in Ontario, whether made before or after the coming into force of the new Act, and brings several key changes that are important both for transactional and dispute resolution lawyers:

1. The new Act modernizes and liberalizes the form in which an arbitration agreement can be made. While an arbitration agreement must still be in writing to be enforceable, unlike the previous Act, the new Act only requires that the content of the agreement be *recorded* in written form. Thus, an arbitration agreement can be *concluded* orally, by conduct, or by other means, so long as its content is *recorded* through the use of electronic communications, including electronic mail.

2. The new Act makes significant amendments to the *Limitations Act of 2002* by imposing a limitation period on the enforcement of arbitral awards of generally 10 years from the signature of the award.

3. The new Act includes the 2006 UNCITRAL provisions governing interim measures and preliminary orders and provides greater clarity to the parties about the jurisdiction of the arbitral tribunal.

4. The new Act expressly adopts the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Convention').

United States: CBF Indústría de Gusa S.A. v. AMCI Holdings, Inc.

In January 2017, the United States Court of Appeals for the Second Circuit rendered a controversial decision concerning the enforcement of a New York Convention award.[14] The case arose out of sales contracts entered into between Gusa and Steel Base. After Gusa commenced arbitration for breach of contract, Steel Base transferred all of its assets to a shell company owned by Steel Base's shareholders and eventually filed for bankruptcy. An ICC tribunal sitting in Paris issued an award, finding that Steel Base had repudiated the contracts, but refused to reach the assets of the shell entity for lack of sufficient evidence of fraud.

Gusa subsequently sought to enforce the award in the United States District Court for the Southern District of New York against the shell company and other related third parties on the ground that such entities were the alter egos of Steel Base. The District Court denied enforcement. While other issues were involved, the two main questions on appeal were: *first*, whether a foreign award must be confirmed before it can be enforced; *second*, whether a foreign award can be enforced against entities that were not parties to the arbitration agreement or the arbitration proceedings.

With regard to the *first* question, the Second Circuit held that the New York Convention does *not* require prior confirmation of a foreign award at the seat before such award can be enforced elsewhere. The confusion arose in part from Chapter 2 of the Federal Arbitration Act, which uses the term 'confirm' instead of 'enforce' to describe the process by which a court recognizes and enforces a foreign award.[15] However, as the Second Circuit recognized, eliminating the *double exequatur* was 'the entire purpose of the New York Convention'.[16]

With regard to the *second* question, the Second Circuit initially held that whether a New York Convention award may be enforced against an entity that was not a party to the arbitration or named in the award turned on the *scope* of the arbitration agreement. In doing so, the Court applied the logic of previous cases, in which an arbitrator had made a non-signatory to the arbitration agreement a party to the arbitration and issued an award that included the non-signatory.[17] As the New York City Bar Association and Debevoise & Plimpton emphasized in their amicus brief, however, the Court's analysis is 'inapt' where the award does not by its terms purport to bind non-signatories to the arbitration agreement.[18]

If an award creditor seeks to enforce an award against third parties, 'whether it may do so should be determined by legal principles concerning enforcement of awards under the applicable state law, not by New York Convention and Federal Arbitration Act principles concerning the ambit of the arbitration agreement'.[19] Furthermore, imposing a rule that turns on the intent of the parties at the time of the arbitration agreement may encourage award debtors to transfer all of their assets to shell entities for the sole purpose of avoiding enforcement.

Following the submission of the amicus brief, in March 2017, the Second Circuit issued an Amended Opinion, implicitly recognizing that the intent of the parties at the time of the agreement is irrelevant under the circumstances. The Court's revised approach will avoid confusion and facilitate the enforcement of foreign awards, reinforcing New York's role as a leading arbitration centre.

14 *CBF Indústría de Gusa S.A. v. AMCI Holdings, Inc.* (846 F.3d 35, 2d Cir. [2017]), *vacated and superseded on reh'g sub nom. CBF Indústría de Gusa S.A. v. AMCI Holdings, Inc.*(850 F.3d 58, 2d Cir. [2017]).

15 9 U.S.C. § 207.

16 *CBF*, 846 F.3d at 50.

17 Id. at 53, citing *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, (717 F.3d 322, 325 2d Cir. [2013]).

18 *CBF Indústría de Gusa S.A. v. AMCI Holdings, Inc.*, Amicus Curiae Memorandum Brief, February 17, 2017 at *2.

19 Id. at *3.

Latin America

Daniel García-Barragán L., senior associate at Garcia Barragan Abogados S.C. in Mexico City reports on current trends and developments in Latin America.

Without a doubt, Latin America has proven to be fertile land for the development of international arbitration. According to the ICC statistics for 2016,[1] there was a 22% increase of Latin American parties in ICC arbitrations. Furthermore, Brazil ranked 5th and Mexico 7th in the number of parties' nationality for the worldwide statistics involving all of the arbitrations administered by the ICC, being of the main users of ICC arbitration with respectively 123 and 105 parties.

The acceptance reflected in the ICC's statistics has had a direct impact on the legislative developments across Latin America, especially in those countries where arbitration has played a more significant role in the local dispute resolution system.

In the case of Brazil, the Congress approved in 2015 a comprehensive set of amendments to its arbitration law[2], which was initially adopted in 1996. The amendments, which settled certain controversial issues of the original text of the law, broadened the scope of arbitral proceedings inter alia by expressly allowing (i) arbitral clauses in corporate by-laws, (ii) arbitration for public entities in disputes involving its disposable economic rights ('direitos patrimoniais disponiveis'), and (iii) precautionary measures from state courts pending the constitution of the arbitral tribunal, by establishing arbitral communications ('carta arbitral'), which allow arbitral tribunals to request the adoption of enforcement measures by state courts.

The recent modifications to the Brazilian Arbitration Act do not only reflect the integration and enhancement of arbitral proceedings (both foreign and domestic) in the Brazilian dispute resolution system, but also a sophistication of the arbitration process. In this vein, Argentina has also decided to take a significant step towards the enhancement of its arbitral proceedings through the creation of a joint Civil and Commercial Code,[3] which supersedes certain arbitration related dispositions of the Argentinian Code of Civil and Commercial Procedure, considered as 'antiquated'.[4] Furthermore, in 2015 the Argentinian Ministry of Justice submitted a proposal to Congress in order to pass a new Commercial Arbitration Law based on the UNCITRAL Model Law.[5] It should be noted that the regional developments on alternative dispute resolution are not limited to arbitration, but also include other dispute resolution methods. For instance, Brazil has recently adopted a Mediation Act[6] and Mexico is currently in the process of enacting a General Statute on Alternative Dispute Resolution Mechanisms, which will regulate mediation and conciliation.

In Brazil, the Superior Court of Justice rendered two decisions on the enforcement of foreign awards in Brazil. The *EDF v. Endesa* case[7] raised, for the first time before the Brazilian judiciary, the question of enforcement of an award annulled at the seat of the arbitration. The Brazilian judiciary deferred to the annulment decision of the seat (in Argentina), and considered that the annulment decision extended its efficacy into Brazilian territory, therefore preventing an enforcement of an award which had already been annulled in the seat of the arbitration.

In the *Abengoa v. Ometto* decision,[8] the Brazilian Superior Court of Justice denied the recognition of an arbitral award rendered in the United States. The landmark decision involved a US $100 million award rendered by a tribunal whose chairman failed to disclose past work, amounting to US $6 million, provided by his law firm to the winning party of the arbitration.[9] Not only does this decision establish a high threshold for the enforcement of foreign awards

1 *ICC Dispute Resolution Bulletin 2017*:2 and 2016:1, available at http://library.iccwbo.org/dr-bulletins.htm .

2 Law No. 9.307/96, available at http://www.planalto.gov.br/ccivil_03/leis/l9307.htm.

3 Law No. 26.994, available at http://www.uba.ar/archivos_secyt/image/Ley%2026994.pdf.

4 International Comparative Legal Guides, 'Latin America Overview: A Long Road Travelled, a Long Road to the Journey's End', available at https://iclg.com/practice-areas/international-arbitration-/international-arbitration-2016/latin-america-overview-a-long-road-travelled-a-long-road-to-the-journeys-end.

5 The complete version of the International Commercial Arbitration Law draft is available at https://www.justicia2020.gob.ar/se-encuentra-disponible-anteproyecto-ley-arbitraje-comercial-internacional/.

6 Law No. 13.140, available at http://algimediacao.com.br/wp-content/uploads/2014/02/Brazilian-Mediation-Act-English-Version-APS-1-rev-PEM.pdf.

7 *EDF International S/A v. Endesa LatinoAmérica S/A & YPF S/A*, SEC No. 5.782/AR.

8 *Abengoa v. Adriano Ommeto Agricola et al.*, SEC 9.412/US.

9 Baker&Mckenzie Global Arbitration News, April 20, 2017, available at https://globalarbitrationnews.com/20170420-brazilian-superior-court-denies-recognition-award-due-conflict-relating-arbitrators-law-firm/.

in Brazil, but it also reinforces the independence and impartiality standards required for arbitrators, in particular within the current worldwide context of global law firms, which have multiple offices and hire hundreds or thousands of lawyers around the globe, some of whom may never have any contact with one another.

Case law has also played a fundamental role in the development of trends within the region primarily regarding enforcement actions, the definition of public policy, and the scope of review of state courts.

A recent decision rendered by the Mexican Supreme Court[10] created a wide array of decisions involving the delimitation of public policy, and a possible consideration of manifest disregard of the law as a ground for annulment. While part of the Mexican arbitral forum applauded the decision because it rightly narrowed the concept of public policy within setting aside procedures, certain practitioners shared their concern on a reasoning which, by means of an obiter dictum, stated that the principle of promotion of arbitration shall prevail 'unless it is outright unjust or incorrect'. The aforementioned reasoning started discussions on whether the Mexican Supreme Court opened the door to what could be considered a non-statutory manifest disregard of the law ground when seeking annulment of awards, or if the intent was merely to delimit the public policy concept and establish a minimum standard of motivation for Mexican arbitral awards, in order to prevent arbitrary decisions.

In Chile, in the context of an enforcement action where objections were raised on the grounds of public policy and due process, the Supreme Court held that enforcement proceedings should not lead to a de novo review of the merits of the case or the reassessment of evidence, thus limiting the scope of review and interpretation of state courts at this stage.[11]

This overview proves that arbitration is a live specimen, developing, growing and adapting. Latin America has provided a perfect example of an environment where a duly cared and exercised practice of the system has allowed it to flourish beyond more prominent economies of the world. Young arbitrators and practitioners shall play a decisive role in the consolidation of arbitration as a real efficient alternative to court systems in a region overwhelmed with judicial cases, and institutions such as ICC, are making sure the next generation is ready for such endeavor.

10 Suprema Corte de Justicia de la Nación, Primera Sala., May 18, 2017, Amparo Directo 71/2014, Min. Alfredo Gutiérrez Ortiz Mena.

11 *Qisheng Resources Limited v. Minera Santa Fe*, Case Identification Number 7854-2013.

Middle East and North Africa

Salma El Baz, Senior Associate at Rizkana & Partners in Cairo and Dr Jamsheed Peeroo, Barrister at Chambers of A.R.M.A. Peeroo SC GOSK in Port Louis report on discussions on recent developments in Qatar, the UAE and Egypt.

Qatar: New legislative framework and Court of Cassation decision to enforce ICC award

The new Qatari arbitration law, which came into force in April 2017, is largely inspired by the UNCITRAL Model Law. Speed and efficiency are at the heart of the legislation as changes included new time limits and a new appointment process. Arbitral tribunals will, for instance, have to issue their awards within three months even though this time limit may be extended by the courts. Additionally, applications to set aside an award must be filed within a month instead of three months as provided for in the UNCITRAL Model Law. Also of notable interest is the regulation of the good character of appointed arbitrators, who should preferably be selected from a registry maintained by the Ministry of Justice, even though arbitrators can still be selected from other lists or sources provided the good character requirement is met. The new law also interestingly enacted the parties' right to choose the supervisory jurisdiction between (1) the Qatar Court of Appeal, or (2) the Qatar Financial Centre Civil and Commercial Court of First Instance.

In Case no. 2216/2013, the Qatar Court of First Instance refused the enforcement of an ICC arbitral award as it was not rendered in the name of the Qatari 'Emir', which was considered as breach of Article 69 of the Qatari Civil and Commercial Procedural Code and consequently a breach of public order. However, in 2016, the Qatari Court of Cassation overturned the aforementioned ruling stating that: 'the New York Convention made no mention of an award being attested by authorities and that the conditions of Article IV had been met'.

New criminal provisions against the arbitrators in UAE

An amendment to Article 257 of the UAE Penal Code in 2016 provided for the imprisonment of arbitrators

found to have breached their 'duty of objectivity and integrity'. Whilst this amendment initially aimed at preventing partiality and bias in arbitration, it has raised much concern mostly because the exact scope and definition of these duties remain unclear and uncertain. The amendment has been heavily criticized by the legal community and its repeal may be expected.

Interpretation of an arbitration clause by a DIFC Court in favour of an implied seat of arbitration

The Dubai International Financial Centre Court's decision in *Gavin v Gaynor* ([2015] DIFC CFI 017) clarifies that even where there is no express agreement on the seat of arbitration, such an agreement may be implied, 'giving consideration to the Seat with the most connection with the Agreement, the parties, the transaction or any other relevant consideration'. This reinforces the idea that arbitrators and courts should not determine the seat of arbitration arbitrarily but should defer to party autonomy.

Conflict of jurisdiction: scope of the DIFC Court's *conduit jurisdiction*

The Dubai-DIFC Judicial Committee set up in June 2016 to resolve conflicts of jurisdiction between Dubai Courts and DIFC Courts. In its first decision in December 2016 in *Daman Real Capital Partners Company LLC v. Oger Dubai LLC* (Cassation No. 1 of 2016), the Judicial Committee appears to have narrowed down the scope of the DIFC's *conduit jurisdiction*, which allowed the parties to seek recognition of foreign or domestic arbitral awards before DIFC Courts for enforcement in Dubai. The Judicial Committee held that DIFC Courts should relinquish its recognition and enforcement jurisdiction entirely because setting aside proceedings were pending before the Dubai Courts. Dissenting opinions were expressed by the three DIFC Judges forming part of the Judicial Committee on the ground that DIFC Courts should have exclusive jurisdiction on enforcing awards within the DIFC.

Extensive application of Anti-Suit Injunctions by Dubai Courts

In *Brookfield Multiplex Constructions LLC v. (1) DIFC Investments LLC (2) Dubai International Financial Centre Authority* ([2016] DIFC CFI 020), the DIFC Court of First Instance refused to grant an anti-suit injunction to restrain proceedings before the non-DIFC Dubai Courts. It however stated that it would have jurisdiction to issue such an injunction 'even if the seat of the arbitration is non-DIFC Dubai' but that it would be 'an unusual and exceptional case where the Court did so, particularly bearing in mind the appropriate respect that the courts of the two different systems in the Emirate of Dubai must have for each other'. The Court further opined that anti-suit injunctions available before the Dubai Courts could be used in support of arbitration seated in the DIFC.

Recent case law in Egypt: challenge of arbitrators in Egyptian administered proceedings, sufficient reasoning of awards, seat and venue

An arbitral tribunal was challenged in an important commercial arbitration taking place in Egypt. One of the parties objected to the arbitration centre's jurisdiction to decide on the challenge and referred the matter to the courts in accordance to Article 19 of the Egyptian Arbitration Act which states challenges to arbitrators should be referred to the *juge d'appui.* The challenging party also stated that the process of challenging a tribunal/arbitrator before arbitration centres in Egypt lacked transparency and impartiality as unreasoned decisions rendered by an anonymous committee defies all notions of transparency, right of defence and equality. Finally, the challenge included a claim that Article 19 is a matter of public order and should not be disregarded. This case has re-opened a debate in Egypt as to whether Article 19 of the Egyptian Arbitration Act is of public order. The Court of Appeal has rendered two contradictory decisions in this respect whereby one declared that Article 19 was a matter of public order in 2002 and the other declared the opposite in 2015.

The arbitral award issued in the arbitration between *Bassem Youssef and Q-Soft v. CBC* was very politicized and the tribunal did not provide any reasoning or justification for the damages awarded to CBC. Accordingly, the award was annulled for failing to provide any reasoning for the awarded damages. During the past year, this award has created a wide debate around a judge's authority when setting aside an arbitral award, specifically, the judge's right to review the entirety of the award in question. On 6 January 2016, the Cairo Court of Appeal set aside the arbitral award issued against *Bassem Youssef* and *Q-Soft* for lack of sufficient reasoning. Originally, Article 53 of the Egyptian Arbitration Act provided exclusive and limited grounds for setting aside arbitral awards and Egyptian courts have always strictly implemented such Article. It has been established that when setting aside arbitral awards, the court does not have the authority to review the merits of the dispute nor the arbitrator's discretionary power. Accordingly, Egyptian courts did not consider insufficient, contradictory, or invalid reasoning as valid grounds for setting aside an award. In 2016, the Cairo Court of Appeal however ruled that

the court had the authority to carefully review the reasoning indicated in the arbitral award. It added that the reasoning allows the court to ensure that the arbitral proceedings were in compliance with the due process principle. Although the Court of Appeal did stress on the fact that it does not have the authority to review the merits of the case, it concluded that the existence of a flagrant grievance in the reasoning which led to a discrepancy between the reasoning and the outcome of the award is a sufficient ground to set aside an arbitral award under Egyptian Law. The annulment has been appealed and a decision is yet to be made by the Court of Cassation.

On 7 December 2015, a Cairo Court of Appeal issued a decision regarding the annulment of an award issued on 17 December 2014 in the case *Golden Pyramids v OCI S.A.E/CCC.* In its decision, the Court confirmed the distinction between the seat and the venue of arbitration.

The seat of arbitration is the basis of establishing a number of legal relationships between the arbitration process in question and the procedural order/legal regime governing the seat. The arbitral award is always considered rendered at the seat of arbitration, not the geographic location where the arbitral hearings have been held; and

If the arbitral tribunal decided to render its award in a place other than the seat of arbitration, this is considered a change in location or venue only, and not of the seat of arbitration agreed upon by the parties. The courts of the seat remain solely competent to decide over matters related to the validity or annulment of the arbitral award.

North Asia

Yuichiro Omori, Associate, Baker & McKenzie (Gaikokuho Joint Enterprise) in Tokyo and Chloe Chun-Ju Tai, Assistant Manager atTransGlobe Life Insurance Inc. in Taiwan report on many positive developments in China, Hong Kong, Japan, the Philippines, Republic of Korea and Taiwan.

Developments in China

As from late 2015, major international arbitration institutions in Asia located outside of China – HKIAC (Hong Kong), ICC (with its office in Hong Kong) and SIAC (Singapore) – have opened representative offices in the Shanghai Free Trade Zone. None of these offices provide case management services in mainland China as they primarily focus their activities on promoting their respective arbitration rules and international arbitration in the region.

On 30 December 2016, China's Supreme Peoples' Court issued an *Opinion on the Provision of Judicial Support for the Development of Pilot Free Trade Zones* (see Fa Far 2016 No. 34). In this opinion, the Supreme Court seems to have broadened the scope of foreign-related disputes by permitting wholly foreign-owned enterprises (WFOEs) incorporated in the Free Trade Zone to refer commercial disputes to foreign-seated arbitration (i.e. arbitration seated outside China).

Third party funding bill in Hong Kong

On 14 June 2017, Hong Kong's Legislative Council passed an amendment to its Arbitration and Mediation legislation relating to third party funding ('Third Party Funding Bill') which abolishes the common law doctrines of champerty and maintenance in relation to third party funding of arbitration found in the previous Arbitration Ordinance (Cap. 609, L.N. 38 of 2011) and Mediation Ordinance (Cap. 620, L.N. 167 of 2012). With this amendment, third party funders are allowed to fund parties in arbitration proceedings in Hong Kong. The Third Party Funding Bill however requires a funded party to provide the tribunal and the other party/parties with certain information, including the existence of a funding agreement and the funder's identity. This requirement will enable arbitrators to check any potential conflicts of interest with the funder, and to enhance integrity when third party funding is used on the basis of the information provided. The amendments are expected to go into effect later this year, after granting sufficient time for the elaboration of a code of practice, which will apply to third party funders.

Pending appeal on disclosures in Japan

In a recent case, a Japan-seated arbitration award has been set aside on the grounds that the presiding arbitrator breached his disclosure obligation (see Osaka High Court, 28 June 2016, Hanrei Times No. 1431, p. 108). In this case, the presiding arbitrator failed to disclose during the proceedings that his colleague in a different office was representing an affiliate of the claimants in an ongoing matter unrelated to the

arbitration. The tribunal rendered an award in favor of the claimants. The respondent sought to set aside the award in the Osaka District Court.

The Osaka District Court dismissed the application (see Osaka District Court, 17 March 2015, Hanrei Jihou No. 2270, p. 74). The Court held that, even if the non-disclosed fact arguably ought to have been disclosed by the presiding arbitrator, such breach was *de minimis* and the application should be dismissed on discretionary grounds.

On appeal, however, the Osaka High Court overturned the Osaka District Court's decision and ruled that, from the perspective of the applicants, the non-disclosed fact was critical information in deciding whether or not to challenge the presiding arbitrator. Moreover, the presiding arbitrator was subject to a duty to investigate and retrieve information that was readily accessible, such as this non-disclosed fact, which could have been identified easily through a conflict check. According to the Osaka High Court, even if non-disclosure had no direct effect on the outcome of the arbitration, given that this was a grave procedural violation, the award should be set aside under Article 44(1)(vi) of Japan's Arbitration Act (Act No. 138 of 1 August 2003).

The case has been appealed to the Supreme Court.

Philippine Supreme Court confirms extension of the arbitration clause to subsequent contracts

The Philippine Supreme Court, in *Bases Conversion Development Authority v. DMCI Project Developers* (G.R. No. 173137, 11 January 2016) held that an arbitration clause in a contract may be extended to subsequent contracts executed for the same purpose. The Supreme Court found that the relevant contracts, i.e. the original contract and the subsequent amended contracts, had been executed in order to achieve a single purpose and should thus be treated as a single contract, part of the whole agreement. Under such circumstance, even if an arbitration clause is not included in the amended contract, parties to the amended contract are bound by the arbitration clause provided for in the original contract.

Changes in legislation and rules in the Republic of Korea

First, amendments to the Korean Arbitration Act entered into force on 30 November 2016 (Act No. 14176, 29 May 2016). The new Act revises the previous Act which had been in force since 1999 and adopts the 2006 UNCITRAL Model Law more extensively. Among other things, the revision includes (i) alleviating the 'writing' requirement for arbitration agreements, by allowing oral agreements as long as they are recorded, (ii) allowing enforcement of interim measures issued in Korea-seated arbitrations, and (iii) simplifying the recognition and enforcement proceedings of arbitral awards.

Second, the Korean Commercial Arbitration Board amended its international arbitration rules (see KCAB 2016 International Arbitration Rules), and introduced a Code of Ethics for Arbitrators on 1 June 2016.

New rules for arbitration institution in Taiwan

The Chinese Arbitration Association (CAA), a leading international arbitration institution in Taiwan established in 1955, promulgated the Chinese Arbitration Association, International (CAAI) Arbitration Rules 2017, which took effect on 1 July 2017 (available at http://www.arbitration.org.tw/rule.php). Some of the key features include, among others, Mandarin Chinese or English as default languages of arbitration, in the absence of parties' agreement (Art. 7 'Notice for Arbitration', and Art. 20 'Language of Arbitration'), Hong Kong as the default seat of CAAI administered arbitrations (Art. 19), and a continuation of the arbitration by the challenged arbitrators pending CAAI's decision on the challenge, unless CAAI orders a suspension of the arbitration (Art. 16(4)), hence minimizing the effect of dilatory or frivolous challenges.

South Asia

Jocelyn Lim Yean Tse, partner in SKRINE in Kuala Lumpur, and Shashank Garg, partner in Advani & Co. in Delhi, report on their respective jurisdictions, Malaysia and India, as examples of recent and shifting trends in South Asia.

South Asia has seen the opening of an increased number of arbitration centres over the years, as well as numerous developments as a result of a surge of international arbitration matters in the region.

In Malaysia, the Federal Court rendered two noticeable decisions. In *CTI Group Inc v International Bulk Carriers SPA* (Civil Appeal No. 02(f)-61-09/2015(S)) ('CTI Group Inc case'), the Federal Court expressly ruled that the grounds for refusing recognition or enforcement of foreign arbitral awards are exhaustively set out in section 39 of the Malaysian 2005 Arbitration Act (equivalent to Article 36 of the UNCITRAL Model Law).

In this case, the plaintiff filed an application before the court for an enforcement order recognising an ICC arbitral award rendered in favour of the plaintiff and another party. In reaching its decision, the Federal Court took an exhaustive interpretation of Section 39 of the 2005 Arbitration Act and held that a party applying to set aside an enforcement order should apply based on the grounds exclusively set out in Section 39.

In another case, *Thai-Lao Lignite Co. Ltd and Hongsa Lignite Co. Ltd v Government of the Lao People's Democratic Republic* (Civil Appeal No. 02(f)-91-12-2015) ('Thai Lao case'), the Federal Court upheld the decision of the lower courts allowing the respondent's application to set aside a foreign arbitral award on the grounds that the arbitral tribunal had failed to stick to the disputes that had arisen under the relevant project development agreement – thereby exceeded its jurisdiction – and allowed the arbitral award to be set aside under the provisions of the 2005 Arbitration Act.

The Federal Court in the Thai-Lao case also had the opportunity to deal with the following issue:

> [W]here the governing law of the contract is foreign law and the seat of arbitration is Malaysia, does the parties' stipulation of Malaysia as the seat constitute an express agreement that the law governing the arbitration agreement is Malaysian law?

The Federal Court adopted the conflict of laws rules whereby the law with the closest and most real connection to the arbitration agreement is the law applicable to the arbitration agreement. Whilst the Federal Court recognised that:

> [T]he stipulation of Malaysia as the seat is not an express agreement that the law applicable to the arbitration agreement is the law of Malaysia.

It nonetheless held that, unless it is shown to the contrary:

> [U]nder the conflict of laws rules, the stipulation of the seat is usually decisive in the determination of the law applicable to the arbitration agreement.

In summary, by adopting a restrictive approach to the interpretation of the 2005 Arbitration Act provisions in the CTI Group Inc. case, it appears that the Malaysian courts have taken a pro-arbitration stance in restraining the role of courts in international arbitration proceedings. However, this approach does not amount to an absolute blanket not to intervene in international arbitration proceedings as illustrated in the Thai Laos case whereby the Malaysian courts, as the supervisory court, will not merely rubber stamp arbitral awards but will continue to review arbitral awards thoroughly.

In India, the modifications introduced by the 2015 Amendment Act ('the Amendment Act') to the 1996 Arbitration and Conciliation Act ('the 1996 Act') have rightly addressed several inadequacies of the 1996 Act. The Amendment Act has included strict timelines for arbitral proceedings and the option to adopt a fast track mechanism. It also deals with the grounds for challenging the appointment of an arbitrator, and sets out in detail the circumstances affecting the independence and impartiality of arbitrators. The Amendment Act also gives arbitrators the power to grant interim relief in a foreign seated arbitration before the commencement of the arbitration, and removes the automatic stay of the enforcement and execution process pending a challenge against the award.

Further, the introduction of the 'cost follow the event' doctrine brings the Indian arbitration legislation in line with international standards and practices regarding the allocation of costs.

In recent years, the Supreme Court of India has also rendered decisions towards modernizing the arbitration regime, such as the possibility for Indian parties to choose a foreign seat of arbitration. Even though this issue had been addressed by a number of High Courts in the past, no clarification had been made on this issue. In *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd* (Arbitration Petition Judgment, no. 910/2013, 12 June 2015), the Bombay High Court expressed the view that two Indian parties agreeing to a foreign seat and a foreign law governing their arbitration agreement may be contrary to national public policy. In a more recent case, *Sasan Power Ltd v. North America Coal Corporation India Pvt. Ltd* (First Appeal Judgment, no. 10/2015, 11 September 2015), the Madhya Pradesh High Court opined that two Indian parties may agree to conduct arbitration in a foreign seat under English law. The Madhya Pradesh High Court primarily relied on the ruling in the case *Atlas Exports Industries v. Kotak & Company* ([1999] 7 SCC 61) wherein the Supreme Court had ruled that two Indian parties could contract to have a foreign-seated arbitration.

Although South Asia has its own set of challenges in becoming an international arbitration hub, the trends and developments within this region seems to show a positive outlook towards international arbitration becoming increasingly 'Asian'.