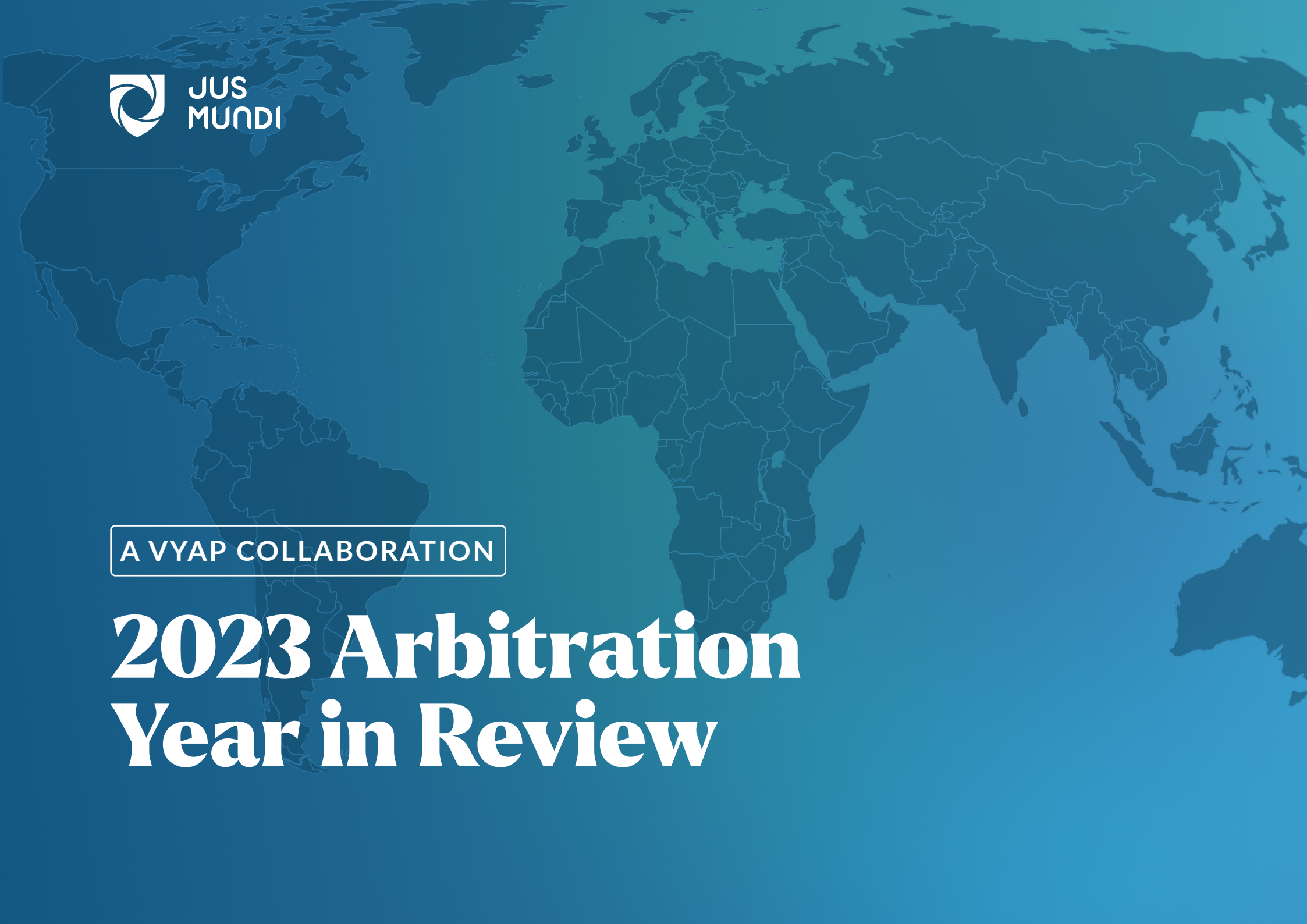


A VYAP COLLABORATION

# 2023 Arbitration Year in Review

# Foreword

In today's ever-evolving landscape of international dispute resolution, staying updated on the latest updates is crucial. With great enthousiasm, Jus Mundi presents this selection of articles, spotlighting the latest trends in international arbitration in 14 major jurisdictions, in collaboration with 14 Very Young Arbitration Practitioners initiatives (VYAPs) around the world.

Over the past year, we have witnessed remarkable advancements in this field across diverse jurisdictions worldwide, encompassing both commercial and investment arbitration. From the reformation of the Arbitration Act 1996 in the UK to the impact of AMA 2023 on Nigeria's arbitration landscape, and from the evolving duty of disclosure in Brazil to the latest regulatory frameworks in the UAE – each development has reshaped the fabric of international arbitration.

Within this collection, readers will find a comprehensive overview of these pivotal trends, alongside case law analyses, legal updates, and insights into the future of arbitration across 14 jurisdictions spanning Latin America, Europe, Africa, Asia Pacific, the Middle East and Turkey. Each article is a deep dive into the local context, illuminating the distinct challenges and opportunities confronting arbitration practitioners in their respective regions.

A must-read for anyone interested in international arbitration.

We extend our heartfelt appreciation to the young practitioners and VYAPs who contributed to this collection. We would also like to thank Katherine Ratcliffe and Georg Stigelbauer for coordinating this project with us for London VYAP, as well as Helene Maio, Thioro Sylla, Fernanda Mello, and Ryan Stephan at Jus Mundi.

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.*

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AFRICA

# Nigeria

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*The year 2023 was an eventful year for arbitration in Nigeria. From legislative reforms to important decisions and activity in investor-state arbitration, the Nigerian arbitration landscape continues to evolve to meet the users' needs and thrive as a dispute resolution mechanism. This report highlights the most significant developments of the past year – notably, the enactment of the Arbitration and Mediation Act 2023 ("**AMA**") dominated the scene in the past year.*

## Legislative Developments

### Nigeria Welcomes New Arbitration Law

In May 2023, Nigeria enacted a new arbitration law, welcoming a new regime that repealed the 35-year-old law. The new law consolidates Nigeria's pro-arbitration approach and aims to enhance and strengthen Nigeria's arbitration system and foster Nigeria's status as a leading arbitration venue. The salient features of the AMA are highlighted below:

#### Enforcement of Arbitration Agreements

Section 5 of the AMA mandates courts to stay proceedings commenced in contravention of the arbitration agreement unless found void, inoperative, or incapable of being performed. This important change removes the discretion granted to courts and the controversial requirement for an applicant to prove their readiness to proceed with the arbitration applicable under the previous legislation. Crucially, this provision brings Nigeria's legislative framework into full compliance with its New York Convention (1958) obligations.

### Judicial Intervention - Challenge and Enforcement of Awards

The AMA resolves the question as to whether, and if so, to what extent, Nigerian courts, when called upon to set aside an award or to refuse its recognition/enforcement, can undertake a review of the award on its merit. Although not contained as a ground for challenging an award or refusing its enforcement under the old law, Nigerian courts have previously set aside or refused to enforce arbitral awards on grounds of "error on the face of the award" finding such error as arbitrator misconduct. (*See Taylor Woodrow (Nig) Ltd v. Suddeutsche Etna-Werk GmbH (1993) 4 NWLR 127*.

Under the current legal framework, the question of error of law on the face of the award cannot be a ground to set aside an award or forestall its enforcement, as Section 55 (2) of the AMA clearly states that an application for setting aside an arbitral award shall not be made on such ground. The grounds for challenging or refusing the enforcement of an award are now entirely aligned with the New York Convention (1958) and laws of leading arbitration hubs.

### Interim Measures

Sections 19 and 20 of the AMA empower the tribunal and courts, respectively, to grant interim measures in aid of arbitration. Previously, only arbitral tribunals could grant protective measures which, without a framework for emergency arbitration, led to the failure of an interim remedy where the tribunal was not yet constituted.

However, judicial attitude in this regard has evolved, and courts have increasingly been minded assisting parties where there is a good faith application for interim relief. These provisions, therefore, codify the intervention already implemented by Nigerian courts and will greatly assist parties in arbitration to preserve the *res* pending the determination of the substantive dispute.

### Third Party Funding

The AMA clarifies the applicability of Third-Party Funding ("**TPF**") in Nigerian-seated arbitrations and arbitration-related court proceedings. The new law explicitly permits TPF arrangements and disapplies the common law doctrines of maintenance and champerty.

The AMA also requires disclosure of the existence of funding and details of the funder to the other party or parties to the arbitration, the arbitral institution, and the tribunal. A benefit afforded to a party in receipt of third-party funding is that the Act expressly brings the costs of obtaining third-party funding within the costs of the arbitration. Such costs are, therefore, in principle, capable of recovery as part of any award of costs in an arbitration.

### Award Review Tribunal

Perhaps the most innovative provision of the AMA is section 56, which introduces an Award Review Tribunal ("**ART**"). The ART is designed to perform a review function akin to a court of the seat considering an application to set aside an arbitral award. The process is an opt-in option where parties may provide in their arbitration agreement or otherwise agree after the issuance of the award.

A dissatisfied party may challenge an award before an ART within three months of the award date on the same grounds that a party may seek to challenge an arbitral award by recourse to the Nigerian court. This novel provision displaces the court's review in this sense, except in cases of public policy concerns. Although the exact mechanics of the procedure and its practical implementation remain to be seen, if successful, the ART mechanism would set Nigeria apart as a first-class venue.

## Significant Cases

### Nigeria Prevails in the P&ID Saga

In October 2023, the English High Court upheld Nigeria's challenge to a US$11 Billion award and set aside one of the most controversial international arbitration awards in P&ID v. Ministry of Petroleum of Nigeria. The Court found that the award was obtained by fraud and procured through false evidence, corrupt payments, and improper retention of leaked documents. The decision also calls for 'the facts and circumstances of this case to provoke debate and reflection among the arbitration community, and also among state users of arbitration, and among other courts with responsibility to supervise or oversee arbitration'.

The dispute arose from an unsuccessful gas processing project between P & ID and the government of Nigeria, resulting in a favorable liability award for P & ID and a subsequent damages award of US$6.6 Billion with pre and post-award interest at 7% per annum in 2017. Following the English court's 2019 decision granting leave to P & ID to enforce the award, Nigeria sought to challenge the award under Sections 67 and 68 of the English Arbitration Act (1996).

Following an eight-week trial in London that commenced in January 2023, the court found that P&ID, and certain individuals associated with it, had committed bribery throughout the arbitration, knowingly presented false evidence, and had corruptly and improperly obtained and utilised Nigeria's internal legal documents to benefit its own position in the arbitration. The court therefore set aside the awards as contrary to English public policy.

Deviating from the English courts' usual minimalistic approach to reviewing arbitral awards, the court considered evidence of perjury and collusion, including evidence obtained through a multi-jurisdiction investigation. Knowles J. further found that P&ID practiced "the most severe abuses of the arbitral process" to procure the awards from the London-seated arbitral tribunal. In December 2023, Knowles J. refused leave to appeal his ruling setting aside the award against Nigeria bringing an end to one of the most high-profile disputes in the field of arbitration and a decade-long legal proceeding.

### Supreme Court Reaffirms Pro-arbitration Stance

In November 2023, Nigeria's Supreme Court handed down a landmark judgment in *Nigeria National Petroleum Corporation (NNPC) v. Fung Tai Eng. Co. Ltd*. (2023) 15 NWLR (Pt. 1906) 117. The decision relates to a dispute arising from the failure to implement an arbitral award and the subsequent challenge of the award by the NNPC.

The significance of this decision is twofold. *First*, it brings to the fore the precincts of judicial intervention in arbitration in Nigeria, and *second*, it affirms the autonomy of Nigerian seated arbitrations. Importantly, the court reiterated the limited scope of judicial review of arbitral awards under Nigerian law and warned parties from using the challenge process as a recourse to challenge the merits of an award.

The minimalistic approach reaffirmed in this case is consistent with the long-standing jurisprudence of Nigerian courts, as well as international best practices.

### Eni Suspends ICSID Arbitration with Nigeria

On the international front, Italian energy multinational Eni has suspended its International Centre for Settlement of Investment Disputes ("ICSID") arbitration against Nigeria following the country's announcement that it would withdraw civil claims worth US$1.1 billion in which it accused Eni of corruptly acquiring an oilfield license. Eni commenced ICSID arbitration against Nigeria in October 2020 over a dispute relating to the acquisition of OPL 245, an oil-rich offshore field awarded to the two oil companies in 2011.

The parties agreed to suspend the proceedings on November 23, 2023, until February 23, 2024, presumably to reach settlement terms. While it remains to be seen if discussions will be successful, the recent development signals Nigeria's new government's approach to investment disputes. (See *Eni and others v. Nigeria*).

### Court of Appeal Overturns Decision on Arbitrator Bias

Nigeria's Court of Appeal has overturned a 2020 decision of the High Court of Lagos State setting aside an award on the ground of arbitrator non-disclosure in Global Gas v. Shell Petroleum. The court of first instance had curiously found that the arbitrator's non-disclosure amounted to misconduct, which led to the set aside of the arbitral award, notwithstanding that a challenge on the same grounds had been dismissed by the International Court of Arbitration of the International Chamber of Commerce ("ICC").

This decision, which was heavily criticised by the Nigerian arbitration community for its pronouncements such as 'a challenged arbitrator should resign', was set aside on grounds of procedural fair hearing. The Court of Appeal held that the High Court's failure to make any pronouncements on the application to enforce the award, after consolidating the hearing of the challenge and enforcement proceedings, amounted to a denial of fair hearing. On this basis, it set aside the High Court's decision and remitted the challenge and enforcement applications to the High Court for reconsideration.

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ASIA PACIFIC

# Australia

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*This article provides an overview of arbitration developments in Australia in 2023. Specifically, the article discusses recent Australian court judgments from 2023 relating to sovereign State immunity and the enforcement of arbitral awards, challenges to the jurisdiction of an arbitral tribunal, and the rights of third parties. Notably, these decisions confirm that among other things:*

- *A State's agreement to Arts 53–55 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ("ICSID Convention") amounts to a waiver of foreign State immunity when seeking to recognise and enforce an ICSID award;*
- *If a State agrees to the terms of the New York Convention (1958), this carries a necessary implication that it has waived its foreign State immunity from recognition and enforcement of an arbitral award; and*
- *In certain circumstances, a third party can exercise the rights conferred on a party to an arbitration agreement.*

## Sovereign State Immunity

### Waiver of Sovereign Immunity by Agreement

**Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11**

A foreign State's ability to waive its sovereign State immunity by agreeing to arbitrate under the ICSID Convention has become a topical issue fol-

lowing the recent Australian High Court judgment in Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11 in April 2023. In its judgment, the High Court held that under section 10 of the Foreign States Immunities Act 1985 (Cth) (the **FSI Act**), Spain's accession to the ICSID Convention, and concomitant agreement to Arts 53-55 of the ICSID Convention constituted a waiver of Spain's immunity from the jurisdiction of Australian courts concerning the recognition and enforcement of a binding ICSID award.

Notably, however, this conclusion had no bearing on Spain's foreign State immunity from the jurisdiction of Australian courts regarding the award's execution.

Overall, this decision illustrates the pro-arbitration stance of Australian courts, particularly in relation to the recognition and enforcement of ICSID awards. The decision also indicates that, while a sovereign State may be taken to have waived its immunity from the jurisdiction of Australian courts to recognize and enforce an arbitral award by agreeing to arbitrate, any sovereign State immunity from execution will remain left to be determined under the domestic law of the arbitral debtor's Contracting State.

### CCDM Holdings, LLC v Republic of India (No 3) [2023] FCA 1266

In CCDM Holdings, LLC v Republic of India (No 3) [2023] FCA 1266, the Federal Court of Australia held that India had waived its sovereign immunity in relation to the recognition and enforcement of the arbitral award by Australian courts. This was because India had acceded to the New York Convention; and the relevant arbitral creditors had tendered a copy of an arbitral award against India alongside a prima facie arbitration agreement. This signified that India had submitted to the jurisdiction of Australian courts "by agreement" pursuant to the FSI Act. Given that India was a party to the arbitral award, the Court reasoned that this gave rise to an "obvious and necessary implication that India (was) requiring Australia to recognise and enforce that award".

Notably, this decision is a testament to Australia's reputation as an enforcement-friendly, pro-arbitration jurisdiction. The decision also affirms that if a State agrees to the terms of the New York Convention, this carries a necessary implication that it has waived its foreign State immunity from recognition and enforcement of an arbitral award.

## Separate Entities of foreign States

### Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd [2023] NSWCA 134

Another topical legal issue that has recently arisen in Australia is whether a 'separate entity' of a foreign State can claim sovereign immunity under the FSI Act. This issue was considered by the NSW Court of Appeal in Greylag Goose Leasing 1410 Designated Activity Company v P.T. Garuda Indonesia Ltd [2023] NSWCA 134. In that case, the Respondent was Indonesia's national airline. The Appellant challenged the Respondent's immunity from winding up proceedings in Australia by relying on section 14(3)(a) of the FSI Act, which provides that: "[a] foreign State is not immune in a proceeding in so far as the proceeding concerns:(a) bankruptcy, insolvency or the winding up of a body corporate."

The Court ultimately found that section 14(3)(a) of the FSI Act does not suscept a foreign State (or a separate entity of a foreign State) to winding up proceedings in Australia. The Court reasoned that "the body corporate being referred to in s 14(3)(a).... should be understood and interpreted as referring to a body corporate 'in and of the Commonwealth'". The Court found that there was nothing to suggest that the legislature intended, by the FSI Act, to render a foreign State and its separate entities susceptible to winding up or bankruptcy proceedings against them in Australian courts.

This decision is useful as it clarifies the intended scope of the exception to sovereign immunity contained within section 14(3)(a) of the FSI Act. Notably, on 19 October 2023, the High Court of Australia approved the

Applicant's special leave application to appeal this decision. As such, the High Court will consider this case in 2024.

# Bifurcation and the Jurisdiction of an Arbitral Tribunal

## CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2023] WASCA 1

In the case of CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2023] WASCA 1, the Western Australian Court of Appeal considered the circumstances in which an award can be set aside on the basis that the tribunal was rendered functus officio concerning the issues it purported to decide. In that case, the Respondent applied to set aside the award under section 34(2)(a)(iii) of the Commercial Arbitration Act 2012 (WA).

In an earlier arbitration, the tribunal had ordered the bifurcation of proceedings between liability and quantum issues. Following the publication of the first interim award (rendered in favour of the Respondent), the tribunal ordered (among other things) the Claimant to re-plead some of its cases. The Respondent objected to the amended pleading on the grounds that it effectively amounted to the Claimant pleading a new case on liability. Given that the tribunal had already made findings in the first interim award, which were inconsistent with the Claimant's amended case, the Respondent argued that the tribunal was effectively acting functus officio.

The Western Australian Court of Appeal upheld the lower court decision in Chevron Australia Pty Ltd v CBI Constructors Pty Ltd [2021] WASC 323 to set aside the second interim award on the basis that its contents went beyond the scope of the tribunal's jurisdiction. The Court found that issuing the first interim award rendered the tribunal functus officio on all liability issues. Nothing in the first interim award indicated that the tribunal reserved additional liability issues for subsequent consideration.

This case illustrates how the bifurcation of issues can, in some instances, enliven the operation of the functus officio doctrine. The decision also promotes the finality of arbitration. On 17 November 2023, the High Court of Australia approved the Applicant's special leave application to appeal this decision. As such, this case will be considered by the High Court in 2024.

# Rights of Third Parties

## King River Digital Assets Opportunities SPC v Salerno [2023] NSWSC 510

In the decision of King River Digital Assets Opportunities SPC v Salerno [2023] NSWSC 510, the Supreme Court of New South Wales considered the circumstances in which a third party could exercise the rights of a party to an arbitration agreement, specifically the ability to seek a stay of court proceedings under section 8 of the Commercial Arbitration Act 2010 (QLD) (**CAA**).

The relevant third party (**Mr. Salerno**) had sought a stay of court proceedings in favour of arbitration pursuant to the arbitration clause contained in a pre-existing arbitration agreement to which it was not a party.

The Court was satisfied that Mr. Salerno was a "person claiming through or under a party to the arbitration agreement". This was because the defences raised by Mr. Salerno turned on claims and defences ordinarily only exercisable by a party to the arbitration agreement. In that respect, the Court observed that "although Mr Salerno is not a party to the arbitration agreement in the Master Purchase Agreement, he will be defending these proceedings "through or under" a party to the arbitration agreement". On that basis, the Court held that Mr. Salerno was a "party" within the extended definition of "party" in section 2 of the CAA. The Court was also satisfied that the relevant matter was "a matter which is the subject of an arbitration agreement" and that the arbitration agreement was not

"inoperative". As such, the Court determined that Mr. Salerno could seek a mandatory stay of the proceedings under section 8 of the CAA.

This decision affirms that a third party can exercise the rights corresponding to a party to an arbitration agreement, such as the ability to seek a stay of court proceedings, upon satisfaction of the requirements contained within section 8 of the CAA.

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## Investment Arbitration

### Investment Arbitration Cases Involving China and Chinese Entities

In recent years, there has been a notable increase in Chinese investors initiating investment arbitration to safeguard their rights when investing overseas. In 2023, PowerChina and China Railway filed their second case against Vietnam based on the China-Vietnam BIT (1992) (PowerChina and China Railway 18th Bureau v. Vietnam). China Machinery Engineering Corporation commenced investment arbitration proceedings against the Republic of Trinidad and Tobago (CMEC v. Trinidad and Tobago). These cases signify growing familiarity with investment arbitration among Chinese entities, especially among Chinese SOEs.

The award of Beijing Everyway Traffic & Lighting Tech. Co., Ltd v. The Republic of Ghana was issued on 30 January 2023. The Tribunal found that the MFN provision in Article 3(2) of the China-Ghana BIT (1989) cannot be used to extend its jurisdiction to the Claimant's claims. The Tribunal reasoned that the MFN clause in Article 3(2) is limited to "the treatment and protection referred to paragraph 1." Noting that Article 3(1) sets out substantive standards of equitable treatment and protection, the Tribunal considered that there is nothing to suggest that the scope of the MFN clause should be broad.

In 2023, there were no new investment arbitration cases initiated against China, with the total number of cases against China remaining nine. In the noteworthy case of AsiaPhos Limited and Norwest Chemicals Pte Ltd v. PRChina, the Tribunal issued a final award in favor of China on 16 February 2023. The majority of the Tribunal has found that the Respondent's arbitral consent provided in Article 13(3) of the China-Singapore BIT (1985) does not cover the Claimant's expropriation and non-expropriation claims; rather, the scope of the arbitration clause is limited to disputes regarding the amount of compensation.

### New Legislations Relating to Investment Arbitration

The National People's Congress Standing Committee (NPCSC) adopted the Law on Foreign Relations of the PRC on 28 June 2023. Key provisions include: Article 26 provides for China's commitment to advance high-standard opening up, develop foreign trade, promote and protect foreign investment, encourage outbound foreign investment, and promote the joint construction of the Belt and Road Initiative. Article 33 provides that China has the right to employ countermeasures or re-

strictive measures against acts that violate fundamental principles of international law and international relations and harm its sovereignty, security, and developmental interests. Notably, Article 37 has an extraterritorial effect, which may mean that China is authorized to take necessary measures in accordance with its law to protect the security and legitimate rights and interests of Chinese citizens and organizations overseas, and to ensure that the nation's overseas interests are not threatened or encroached upon. The language used in the provisions is broad, because the Law on Foreign Relations serves as a broad framework that empowers relevant administrative departments to establish specific measures.

The NPCSC adopted the Foreign State Immunity Law of the PRC on 1 September 2023. The Law marks a historic change in China's approach to state immunity, transitioning from absolute immunity to restrictive immunity. This brings China's stance in line with prevailing international norms. The Law affirms the fundamental principle that a foreign state and its property enjoy immunity in China, subject to a few exceptions under which Chinese courts can exercise jurisdiction. These exceptions include disputes relating to commercial activities, contracts concluded to obtain labor or services in PRC, intellectual property, death, personal injury, etc. The Law also states that Chinese courts can take compulsory measures against a foreign state's commercial property under a few narrowly defined conditions.

# Developments in Arbitral Institutions

## Institutional Reform

Traditionally, most Chinese arbitration institutions were government-affiliated institutions, with their personnel, financial, and salary systems under government management. This mechanism has constrain the development of arbitration in China, especially its internationalization. As a result, since 2019, the Ministry of Justice has guided the reform of arbitration institutions to promote their internationalization.

The Dalian International Arbitration Court ("DIAC") is a good example. DIAC completed its institutional reform in March 2021. That year, the aggregate amount in dispute across all of the DIAC's cases exceeded 10 billion Yuan for the first time. As of 16 November 2023, only two years from the reform, the cumulative disputed amount of the DIAC's cases has exceeded 41 billion yuan.

Beijing Arbitration Commission ("BAC"), also known as Beijing International Arbitration Center, is another good example. BAC essentially completed its institutional reform in 2023 after years of preparation.

Most notably, BAC has revised its Schedule of Arbitration Fees, clearly separating "arbitrator's fees" and "administration fees" and increasing the proportion of arbitrator's fees relative to administrative fees, aiming to advance the remuneration level of arbitrators and clarify arbitrators' dominant role in arbitration proceedings. The revised fee schedule resembles the fee schedules of many international arbitration institutions.

## New Arbitration Rules

In 2023, several Chinese arbitral institutions revised their arbitration rules to stay better in line with international arbitration practices.

On 5 September 2023, the China International Economic and Trade Arbitration Commission ("CIETAC") released its new rules to offer more internationalized and professional dispute resolution services.

Particularly, the rules allow arbitral tribunals to apply CIETAC Guidelines on Evidence, in which rules regarding disclosure of documents and examination of witnesses can be found. Disclosure of documents and examining witnesses are not regular procedures in Chinese arbitrations. That is to say, the new CIETAC Rules may help align Chinese

arbitration practices with international arbitration practices.

Some other arbitral institutions, including the Shanghai International Arbitration Center (SHIAC), Xi'an Arbitration Commission (XAAC), and Wuhan Arbitration Commission (WIAC), also released their new arbitration rules in 2023, in lock step with the updated CIETAC Rules.

It is also worth mentioning that, in 2023, a series of documents significantly enhanced the prospects for ad hoc arbitration in China.

### Highlights of Regional Developments

2023 is the 10th anniversary of the Belt and Road Initiative. Over the past decade, Chinese arbitral institutions have witnessed a growing number of cases involving countries and regions along the Belt and Road. They are playing an increasingly important role in resolving these disputes.

On 29 October 2023, the Shenzhen Court of International Arbitration launched its Kashi Center. It is currently used as a platform for international arbitration cooperation between China and Central, South, and West Asia.

On 1 November 2023, CIETAC launched its Central Asia Trial Center in Urumqi. Only 45 days following its establishment, the Center conducted its first oral hearing.

In the east of China, in response to the directive from the Ministry of Justice in 2022, Shanghai has actively implemented initiatives to establish itself as an arbitration center in the Asia-Pacific Region. On 1 December 2023, Regulations of the Shanghai Municipality on Promoting the Initiative for Building an International Commercial Arbitration Center came into force, according to which, overseas arbitration institutions can set up operational branches in Shanghai and conduct arbitration cases. On the same date, the Korean Commercial Arbitration Board (KCAB) launched its operational agency in Shanghai.

## Judicial Support to International Commercial Arbitration

Chinese courts generally support arbitration, as evidenced by courts' interpretation of the arbitration agreements and enforcement of arbitral awards. Several cases from the past year are notable examples of this longstanding approach.

### Interpretation of Arbitration Agreements

The Beijing Financial Court has recently upheld the validity of an "asymmetric arbitration clause", determining that it did not constitute an impermissible "either arbitration or litigation clause" under the PRC laws. (China Development Bank v. Fiber Optic Communication Network Co., Ltd. (2022) Jing 74 Min Te No.4). The Court distinguished between an "either arbitration or litigation clause" and an "asymmetric arbitration clause" and stated that when only one party has the right to choose between arbitration and litigation, and it chooses to resort the dispute to arbitration, the arbitration agreement constitutes a definite consent to submit the dispute to arbitration exclusively, thus solving any indeterminacy that may render the arbitration agreement invalid. This case provides a helpful indication to parties of the willingness of some Chinese courts to employ sophisticated legal reasoning to uphold "asymmetric arbitration clauses".

### Recognition and Enforcement of Foreign Awards

Guiding case No. 200 released by the Supreme People's Court ("SPC") (SvenskHonungsfora–dlingAB v. Nanjing Changli Bees Product Co. Ltd,

(2018) Su 01 Wai Xie Ren No.8) reflects Chinese courts' pro-enforcement stance towards foreign arbitration awards adjudicated in the way of ad hoc arbitrations. The applicable arbitration agreement provided that "in case of disputes governed by Swedish Law and that disputes should be settled by Expedited Arbitration in Sweden". The issue before the Nanjing Intermediate People's Court was whether a foreign ad hoc arbitration initiated by the parties was in conformity with the above-mentioned arbitration agreement. The court found that ad hoc arbitration and expedited arbitration share the features of efficiency, convenience, and economy. Therefore, the term "Expedited Arbitration" in the arbitration agreement does not exclude resolving the dispute in an ad hoc arbitration.

It is worth mentioning that ad hoc arbitration is not clearly recognized by PRC Arbitration Law, which requires an arbitration agreement to designate an arbitration institution. In 2016, the SPC opened the door for companies registered in the free trade zones to submit their dispute to ad hoc arbitrations, but it was not until 2023 that the first ad hoc arbitration award was rendered.

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ASIA PACIFIC

# Singapore

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*This article highlights the key developments in international arbitration in Singapore in 2023, and in particular analyses four recent arbitration-related decisions from the Singapore courts.*

## Determining the Arbitrability of a Dispute

In Anupam Mittal v Westbridge Ventures II Investment Holdings, the Singapore Court of Appeal ("**CA**") adopted a "composite" approach to determining the arbitrability of a dispute at the pre-award stage.

A dispute arose out of a shareholders' agreement (the "**SHA**") between the appellant's company (the "**Company**") and its investor, the respondent. As a result, the respondent commenced proceedings in the National Company Law Tribunal in Mumbai, India, for corporate oppression (the "**NCLT Proceedings**"). The SHA was governed by Indian law and contained an arbitration clause stipulating a Singapore-seated arbitration under the ICC Arbitration Rules. The parties had not explicitly specified the governing law for the arbitration clause.

Justice Judith Prakash, delivering the judgment of the CA, dismissed the appeal and thereby upheld the permanent anti-suit injunction against the appellant granted by the Singapore High Court (the "**HC**"). In particular, she held that the arbitrability of a dispute is, in the first instance, determined by the law governing the arbitration agreement. She further elucidated that if the governing law is foreign and provides that the subject matter of the dispute cannot be arbitrated, the Singapore court will not allow the arbitration to proceed because it would be contrary to public policy, albeit foreign public policy, to enforce such an arbitration agreement. She noted that it is common ground that claims of corporate oppression can be arbitrated under Singapore law but not under Indian law, under which they can only be resolved by the NCLT. She added that because of the operation of s 11 of Singapore's International Arbitration Act ("**IAA**") (which states that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so"), where a dispute may be arbitrable under the law of the arbitration agreement but Singapore law as the law of the seat considers that dispute to be non-arbitrable, the arbitration would not be able to proceed.

While the SHA was governed by Indian law, the CA found that Singapore

law was the proper law of the arbitration agreement, besides being the law of the seat. The CA found that virtually all the complaints made by the appellant in the NCLT Proceedings were related to the management of the Company or the SHA in some way and were thus encompassed by the arbitration agreement. It further elaborated that the fact that all these allegations might eventually support a finding of oppression cannot take them out of the categories of disputes that the SHA specifically stipulated should be submitted to arbitration. The CA, therefore, found that in commencing the NCLT Proceedings, the appellant had breached the arbitration agreement and that there was no ground to discharge the anti-suit injunction, thereby dismissing the appeal.

## Availability of Sealing Orders in Arbitration-Related Court Proceedings

In the Republic of India v Deutsche Telekom AG, the CA was faced with determining whether to grant a sealing order for enforcement proceedings by Deutsche Telekom ("**DT**") against the Republic of India relating to a US$132 million arbitral award.

Sundaresh Menon CJ stated that the purpose of a sealing order under ss 22 and 23 of the IAA is to protect the confidentiality of the arbitration and that imposing a cloak of privacy on court proceedings is an exceptional measure that departs from the general rule that such proceedings are subject to the principle of open justice. He then held that where the confidentiality of the arbitration has been lost, the principle of open justice would weigh strongly in favour of lifting the cloak of privacy.

Menon CJ concluded that, in this case, confidentiality had been lost, and there was no basis for maintaining the confidentiality of the enforcement proceedings. In particular, he noted that, among others, the Interim and Final Awards issued in the Arbitration were accessible on third-party websites.

## Confidentiality of Arbitral Deliberations

In CZT v CZU, the Singapore International Commercial Court (the "**SICC**") dismissed three summons applications for orders that a three-member arbitral tribunal produce records of their deliberations. The SICC held that while there is no statutory provision in Singapore that expressly protects the confidentiality of arbitrators' deliberations, various authorities and commentaries confirm the protection of the confidentiality of deliberation, thereby finding that the confidentiality of deliberations is an implied obligation in law.

The SICC noted the established public policy reasons for this implied obligation, in particular:

- Ensuring open and genuine discussions among arbitrators;
- He facilitation of untrammelled conclusions (and changes in conclusions) arising from the tribunal's unrestricted review of the evidence;
- Shielding the tribunal from external influence; and
- Minimising unfounded annulment or enforcement challenges.

The SICC found that the protection of the confidentiality of deliberations is subject to exceptions, which would apply if "the facts and circumstances are such that the interests of justice in ordering the production of records of deliberations outweigh the policy reasons for protecting the confidentiality of deliberations" – but stated that such exceptions are extremely rare and require a compelling case.

The SICC formulated a two-part test to determine if an exception exists: first, the allegations must be very serious in nature and, second,

they must have real prospects of succeeding. The SICC found that none of the plaintiff's claims had real prospects of succeeding, so there was no need to conclude whether these constituted exceptions.
The SICC also clarified the extent of such protection – in particular, process issues, such as claims that an arbitrator has been excluded from deliberations or questions as to what matters have been submitted to an arbitrator for decision, fall outside the purview of such protection. Process issues do not involve arbitrators' thought processes or reasons for their decisions. Hence, the policy reasons for protecting the confidentiality of arbitrators' deliberations are not engaged.

# Pre-Conditions to an Arbitration

In CZQ and CZR v CZS, the Singapore International Commercial Court dismissed a jurisdictional challenge concerning the fulfilment of pre-conditions to an arbitration.

The contract between the parties incorporated an amended version of the FIDIC Conditions of Contract for Plant and Design Build (First Edition, 1999), the relevant provisions of which are as follows:

> *"20.5 – Amicable Settlement*
> *(a) If any dispute arises out of or in connection with the Contract, or the execution of Works... then either Party shall notify the other Party that a formal dispute exists. Representatives of the Parties shall, in good faith, meet within 7 days of the date of the notice to attempt to amicably resolve the dispute,*
> *(b) If the representatives of the Parties cannot resolve a dispute within 7 days from the first meeting, 1 or more senior officer(s) from each Party shall meet in person within 14 days from the first meeting of the representatives in an effort to resolve the dispute. If the senior officers of the Parties are unable to resolve the dispute within 7 days from their first meeting, then either Party shall notify the other Party that the dispute will be submitted to arbitration in accordance with Sub-Clause 20.6.*
> *20.6 – Arbitration*
> *Unless settled amicably, any dispute shall be finally settled by international arbitration..."*

When a dispute arose between the parties, neither party pursued negotiations or settlement discussions in accordance with Sub-Clause 20.5. The claimant commenced arbitration proceedings against the respondents, who claimed that the tribunal lacked jurisdiction as Sub-Clause 20.5 amounted to mandatory pre-conditions to arbitration, which had not been fulfilled. The tribunal dismissed the jurisdictional challenge, and the respondents applied to the court under s 10 of Singapore's International Arbitration Act 1994 to determine that the arbitral tribunal had no jurisdiction.

In finding that the tribunal had jurisdiction, the SICC found that Sub-Clause 20.5, unlike the pre-conditions to arbitration considered in Emirates Trading Agency LLC v Prime Mineral Exports and Ohpen Operations UK Ltd v Invesco Fund Managers Ltd [2019] EWHC 2246 (TCC), neither contained language which stipulated that the parties should "first" seek to resolve disputes in accordance with a stated procedure before commencing arbitration proceedings nor addressed the right to commence arbitration or litigation.

Further, the SICC held that the reference to "[u]nless settled amicably" in Sub-Clause 20.6 was not an express reference to the procedure in Sub-Clause 20.5, as the dispute could be settled in a variety of other ways too. Moreover, the SICC agreed with the Tribunal that the last sentence of Sub-Clause 20.5 did not make compliance with Sub-Clause 20.5 a condition precedent to arbitration under Sub-Clause 20.6, but rather that the notification contemplated therein was the logical conclusion of the Sub-Clause 20.5 process if chosen by the parties.

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EUROPE

# England & Wales

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*2023 saw the usual array of leading cases on a wide range of arbitration matters and various aspects of the Arbitration Act 1996. We will focus on those specific cases which we consider will have the greatest and most far-reaching impact on the field.*

## Casework Statistics

The Commercial Court Report 2021-2022 (published on 6 April 2023) notes "a very significant increase in the number of arbitration-related applications" and that a quarter of the Court's claims arose from arbitration. The Report indicates a slight increase in applications under section 69 of the Arbitration Act and much larger increases under sections 67 and 68 (54 and 59% respectively).

The London Court of International Arbitration ("LCIA") Casework Report 2022 shows 293 referrals for arbitration in 2022. Of that number, 88% were seated in London, and 85% applied English law. Close to 90% of parties to LCIA arbitrations came from 90 countries other than the United Kingdom.

The LCIA Report also notes that English arbitrators remain popular party appointees. Likewise, the ICSID Annual Report 2023 reflects that one in ten arbitrator appointments made in FY2023 was of a UK national.

## Third-Party Funding Agreements

The Supreme Court in PACCAR Inc and others v. Competition Appeal Tribunal and others [2023] UKSC 28 ("PACCAR") held that certain kinds of common litigation funding agreements were unenforceable. However, the ramifications of this decision in arbitration may never be felt, as the current government has now announced that the "damaging effects" of PACCAR will be reversed "at the first legislative opportunity".

## Reform of the Arbitration Act 1996

2023 also saw the Law Commission issue a Final Report on its review of the Arbitration Act 1996. A bill is now before Parliament and is expected to become law in the early months of 2024, bringing with it significant changes, including:

- A new default rule, where the arbitration agreement has no choice

of law provision, that English law will apply to an arbitration agreement where this jurisdiction is the seat. This is regardless of the governing law chosen for the main contract. The Law Commission had proposed that this change impact only contracts executed after the entry into force of the new act. The revised bill currently before parliament, however, has the change impacting pre-existing contracts where arbitral proceedings post-date the new act;

- Codification of arbitrators' duty to disclose any circumstances which might reasonably give rise to justifiable doubts as to their impartiality;
- Various immunities in relation to arbitrator challenges – albeit with some exceptions;
- The ability to issue arbitral awards on a summary basis;
- Removing some of the existing barriers to asking the court to make a preliminary ruling on the tribunal's jurisdiction; and
- Changes to the policy behind court challenges to jurisdiction awards under section 67, which will restrict the ability of a party to raise a wholly new objection or to have the court re-hear evidence already heard by the tribunal.

# UK Consumer Protections and the Enforcement of Arbitral Awards

In *Payward Inc and Others v Chechetkin* [2023] EWHC 1780 (Comm), the court refused to enforce a New York Convention (1958) award issued by a California-seated tribunal because UK consumer rights legislation rendered enforcement of the award contrary to public policy. The Consumer Rights Act states that where a consumer contract is closely connected to the UK, the Consumer Rights Act applies regardless of the governing law chosen by the parties. The Court found that Mr Chechetkin was a UK-based consumer and that the case had a sufficiently close connection to the UK such that the Consumer Rights Act applied. The court further determined that the Consumer Rights Act was an expression of UK public policy for enforcement, which was therefore refused based on the facts.

In *Eternity Sky Investments Ltd v Xiaomin Zhang* [2023] EWHC 1964 (Comm), the Court rejected a similar application to challenge the enforcement of an arbitral award based on the Consumer Rights Act. Bright J accepted that Mrs Zhang was a consumer of the Consumer Rights Act but found that the law with the closest connection was Hong Kong law.

# Loss of Right to Object (Section 73 Arbitration Act)

Section 73 of the Arbitration Act deals with the timeliness, or otherwise, of objections relating to jurisdiction and procedural irregularity. In National Iranian Oil company v Crescent Petroleum [2023] EWCA Civ 826, the Court of Appeal confirmed that in a situation where a party sought to appeal a finding about the loss of the right to object re jurisdiction, the ability to appeal on section 73 would be the same as the right of appeal under section 67 – *i.e.*, leave to appeal could only be given by the High Court and not the Court of Appeal.

The decision develops the case law in relation to section 73 and confirms the English courts' pro-arbitration stance and their pursuit of speedy finality.

In another decision, an applicant had lost its right to object pursuant to section 73 because it continued to participate in arbitral proceedings after learning of the grounds of the objection it later sought to assert. The span of time between knowledge of the grounds of the objection and the applicant's next step taken in proceedings, sufficient to waive its right to object, was one day (*Radisson Hotels APS Danmark v Hayat Otel Isletmeciligi Turizm Yatirim Ve Ticaret Anonim Sirketi* [2023] EWHC 892 (Comm)).

# Allegations of Fraud

## P&ID v Nigeria

On 23 October 2023, the English Commercial Court handed down judgment in *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm), the latest in a series of English court judgments in this long-running dispute. In this landmark judgment, Knowles J held that awards obtained by P&ID against Nigeria were procured through fraud and were contrary to public policy, so that they should be set aside pursuant to section 68 of the Arbitration Act.

P&ID had concluded a contract with Nigeria under which P&ID was to construct and operate facilities to process wet gas provided by Nigeria into lean gas for power generation. The contract contained an arbitration agreement for London-seated arbitration. After the project faltered, P&ID requested arbitration seeking damages for breach of contract and lost profits. The tribunal found that Nigeria had repudiated the contract and awarded USD 6.6 billion to P&ID, which, with interest, had grown to around USD 11 billion by the time of judgment.

The application to set aside the awards had been made years out of time, but an earlier judgment had exercised the court's discretion to permit the application to proceed. Nigeria advanced considerable evidence of suspected bribes paid to government officials concerning the contract and the arbitration itself. Knowles J stopped short of finding that a civil claim for bribery was made out noting that such a claim would itself be subject to arbitration. However, he did find that P&ID had bribed one of the contract's drafters, the legal director of the Nigerian Ministry of Petroleum. Witness evidence in the arbitration had concealed that fact while P&ID made ongoing payments to the individual.

In a further judgment in December 2023, P&ID was refused leave to appeal in *Federal Republic of Nigeria v Process & Industrial Development Ltd (Re Ruling on Leave to Appeal)* [2023] EWHC 3320 (Comm) while the court also held that the awards should be set aside rather than have the case remitted to the original tribunal. The judgments and the underlying facts of the case have led to a renewed focus on the need for institutional reforms to the arbitral process worldwide, and broader reflections on the best approaches to the problem of fraud on the arbitral tribunal.

## Tuna Bonds Scandal

On 20 September 2023, the UK Supreme Court handed down its judgment in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors* [2023] UKSC 32, focusing on the scope and application of the mechanism for staying court proceedings in favour of arbitral proceedings found in section 9 of the Arbitration Act.

Each of the contracts at issue, which Mozambique alleged were obtained by fraud, contained an arbitration clause conferring exclusive jurisdiction on tribunals seated in Switzerland. Mozambique instituted proceedings in England, bringing claims in tort for bribery and unlawful means conspiracy. The defendants made jurisdictional applications contending that all of Mozambique's claims were "matters" falling within the scope of the arbitration agreements, such that the Court must stay the English proceedings.

The Supreme Court held that none of the claims at issue in the English proceedings were "matters" within the scope of the arbitration agreements for section 9 whereas the Swiss tribunals had jurisdiction over questions regarding the underlying contracts, the English courts were seized of a discrete dispute concerning alleged fraudulent conduct.

The Supreme Court called for a two-stage process in applying section 9 in reaching its decision. First, identify the "matters" which are the subject of the section 9 application. Second, determine whether those "matters" fall within the scope of the agreement to arbitrate.

## Intra-EU Arbitrations

On 24 May 2023, judgment was handed down in *Infrastructure Services Luxembourg S.A.R.L and Energia Termosolar B.V. v Kingdom of Spain* [2023] EWHC 1226 (Comm). The case concerned an International Centre for Settlement of Investment Disputes ("ICSID") award under the Energy Charter Treaty (1994) ("ECT") in favour of the claimants, which had applied to register the award pursuant to the Arbitration (International Investment Disputes) Act 1966.
Spain argued that the claimants were prohibited from relying on two exemptions to immunity contained in the State Immunity Act 1978 ("SIA"), namely:

- Pursuant to section 2(2), where there was a written prior agreement to submit to the jurisdiction of the English courts ("the First Exemption"); and
- Pursuant to section 9(1), where a state has agreed in writing to submit a dispute to arbitration ("the Second Exemption").

In relation to the First Exemption, the claimants argued that Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ("ICSID Convention") constituted a sufficient prior written agreement such that Spain had no immunity. Spain took the opposite position but, in any event, argued that Article 54 was never understood as containing a waiver of a State's adjudicative immunity.

As for the Second Exemption, the claimants relied on Article 26 of the ECT as an arbitration agreement. Spain's core argument was that, as the CJEU had determined in each of *Achmea v. Slovakia (I)* and *Energoalians v. Moldova*, *"...there can be no valid arbitration provision adopted by Member States which grants jurisdiction to any arbitral tribunal that may touch upon matters of EU law"* because of the primacy of the CJEU to determine all EU law matters. On Spain's case, the agreement to arbitrate contained in Article 26 of the ECT was thus invalid.

The judgment held:

- First, the 1966 Act was clear. If Spain were correct, the only awards that could be registered would be those in which the UK was a party. In any event, Article 54 fell within the definition of a "prior written agreement" for section 2(2) SIA.
- The decisions of the CJEU cannot trump the UK's treaty obligations under the ICSID Convention. Were Spain's position correct, the decisions of the CJEU would have the effect of unilaterally changing the existing treaty obligations for all contracting parties to the ICSID Convention. The court did not accept this argument.

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EUROPE

# Poland

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*2023 proved to be an interesting year for arbitration developments in Poland. Poland continues strengthening its position in the CEE region as a key jurisdiction for international arbitration matters.*

*This report provides an overview of developments in commercial and investment arbitration, and highlights various arbitration events in 2023.*

## Developments in Commercial Arbitration

### Conversion of Court Proceedings into Arbitration Proceedings – Amendment to Polish Arbitration Law

An amendment to Polish arbitration law (Chapter V of the Polish Code of Civil Procedure), effective as of July 1, 2023, introduced a provision enabling the conversion of civil proceedings pending before common courts into arbitration proceedings. The primary objective of this legislative change is to streamline existing procedures, ultimately alleviating the burden on common courts, and expediting the dispute resolution process. By providing the option for parties to convert proceedings, the legislature emphasises the importance of allowing disputing parties to choose the method of dispute resolution until a court conclusively decides the case.

The new law outlines specific time limits for parties involved in proceedings to opt for conversion. First, the law permits the conversion of ongoing proceedings, i.e., cases where a statement of claim has been successfully filed and a copy has been served on the opposing party. Second, parties retain the right to decide on conversion until the court reaches a final decision. This flexibility allows converting court proceedings into arbitration at any stage.

To convert proceedings, the parties must first enter into an arbitration agreement. Only a legally valid arbitration clause can trigger the conversion of proceedings. In cases where an arbitration agreement is reached between parties before a common court, the court conducts a thorough review to ensure compliance with all legal requirements governing the validity and effectiveness of the arbitration agreement. Upon confirming the agreement's validity, the court discontinues the proceedings, transferring the case to arbitration. It should be noted that,

upon successfully converting of court proceedings into arbitration, the plaintiff receives a refund of 3/4 of the paid court fee.

The successful conversion of court proceedings to arbitration can potentially expedite dispute resolution. In traditional court proceedings, the timing and duration of hearings are largely contingent on the judge's workload and the technical capabilities of the court. Indeed, according to the official statistics prepared by the Ministry of Justice for 2021, the average duration of commercial proceedings in the court of first instance is approximately twenty months.

### SAKIG and Jus Mundi Forge Exclusive Partnership to Share Non-Confidential Arbitration Awards

In October 2023, the Court of Arbitration at the Polish Chamber of Commerce in Warsaw (SAKIG) and Jus Mundi announced an exclusive partnership aimed at globally disseminating non-confidential SAKIG arbitration awards and related materials for the greater public good.

Under this collaboration, selected SAKIG arbitration awards and associated materials will be included in Jus Mundi's expansive international law and arbitration database. Jus Mundi will publish non-confidential SAKIG arbitration awards and pertinent information on its open public database. Therefore, people anywhere in the world will be able to access and search these materials using Jus Mundi's research tools.

The partnership underscores SAKIG's commitment to fostering cross-border trade and investment. Through Jus Mundi, SAKIG aims to contribute to the global promotion of these values while upholding the highest standards of independence, impartiality, and transparency in all arbitration proceedings. This collaboration signifies a pivotal step towards making valuable arbitration insights accessible to a broader audience, enhancing understanding and trust in international dispute resolution.

## Developments in Investment Arbitration

### ECT Award Against Poland

In a recently published award in Mercuria v. Poland (II), the arbitral tribunal chaired by Klaus Sachs awarded the investor USD 33 million in damages plus interest on tax in arrears.

In 2008, Mercuria initiated proceedings against the Republic of Poland under the Energy Charter Treaty 1994 ("ECT") for the first time. Mercuria alleged that the Republic of Poland breached Article 10(1) of the ECT (fair and equitable treatment ("FET") obligation) arising out of the imposition of a fine for failure to maintain mandatory stocks of fuel oil for use in a state of emergency, as required by Polish law. In 2011, the arbitral tribunal found that Poland had not breached its FET obligation under the ECT.

In 2019, Mercuria commenced new arbitration and alleged that Poland had breached the ECT's FET obligation due to the Polish Material Reserves Agency's failure to pay interest applicable under Polish law when it repaid the fine. Mercuria also argued that the Republic of Poland failed to ensure that its domestic law provided an effective means of redress for investors.

The arbitral tribunal confirmed its jurisdiction despite the Republic of Poland's arguments that the tribunal had no jurisdiction to adjudicate an intra-EU dispute under the ECT (from the moment Poland became an EU Member State).

On November 30, 2023, Mercuria filed a petition in the US District Court for the District of Columbia to enforce the award. The Republic of Poland filed a motion in Swedish court to annul the ECT award.

## Dutch Court Refuses to Cease Intra-Eu Bit Claim Against Poland

On March 8, 2023, an Amsterdam court refused to order LC Corp (a Dutch investment company) to cease arbitration against the Republic of Poland under the Netherlands-Poland BIT (1992) (LC Corp v. Poland).

The Netherlands-Poland BIT (1992) was terminated in 2019. In 2021, the Republic of Poland and the Netherlands signed the EU's termination treaty for intra-EU BITs, extending sunset clauses.

The Republic of Poland requested the court to order LC Corp to file a joint application with the Republic of Poland for termination of the arbitral proceedings within two weeks, to declare that no valid arbitration agreement existed between the parties, and to impose a daily fine of EUR 1 million if the investor did not comply. LC Corp, in turn, argued that the Dutch court lacked authority to rule on the arbitral tribunal's jurisdiction and that the proper court for annulment or enforcement proceedings would be at the arbitral seat in the UK.

## Arbitration Community Events

**March 3**: 14th Warsaw Pre-Moot and "Discretion or Randomness: Arbitrators' Decision-Making Framework" Conference addressing challenging procedural issues and arbitrators' discretion in applying material law organized by the University of Warsaw. The conference was accompanied by a Moot Alumni Association presentation addressed to students and young practitioners on the MAA Mentor-Mentee Program and a satellite event organized by Poland VYAP titled "Career Pathways in Arbitration – Everything You Wanted to Know But Were Afraid to Ask." September: Arbitration Lunch Match – the Polish chapter of a worldwide initiative intended to bring together female arbitration practitioners through a blind date coordinated by the law firms Gessel and Baker McKenzie.

**September 7**: 3rd edition of "Women in Arbitration: SpeedNet" aimed at integrating the arbitration community organised by SKS Law firm.

**October 5**: Workshop on the IBA Rules on the Taking of Evidence in International Arbitration (2020), curated by the Eastern Europe Arbitration Group of the IBA Arbitration Committee in cooperation with the Faculty of Law of the University of Warsaw and the Warsaw Bar Association. The panel discussions involved key features and lessons to be learned from applying the IBA Rules of Evidence 2020 to increase the efficiency of arbitration and litigation. The workshop was later followed by a discussion organised by CMS on the counsel perspective on the IBA Rules.

**October 19**: "Financing disputes as a type of investment project" meeting aimed at presenting the perspective of arbitrators, counsel, scholars, and experts organized by the Court of Arbitration at the Polish Chamber of Commerce in Warsaw.

**October 20-22**: SWPS University in Warsaw, together with the United States Agency for International Development (USAID), and the Commercial Law Development Program Office of the U.S. Department of Commerce for a second time organized a three-day intensive training gathering students from 11 universities in Lithuania, Moldova, Poland, and Ukraine.

**October 22**: ICC YAAF "Arbitration Insights: How to Navigate Your Career in International Arbitration" to shed more light on different pathways and opportunities, and the do's and don't's of building a career in international arbitration.

**December 6-7**: Solidarity Arbitration and Mediation Days – to express the continuing solidarity of the international arbitration and mediation community with Ukraine. The topics discussed included novel kinds of disputes resulting from energy transition, ESG, modern dispute prevention, and mediation in complex infrastructure disputes. Numerous satellite events also addressed the calculation of damages in IT disputes, arbitration in a tech-driven world, CEE countries as seats for arbitration, and the practical implications of insolvency in arbitration.

**December 14**: International Chamber of Commerce ("ICC") Poland held a conference titled "Disability Inclusion in International Arbitration: Make Arbitration a Better Place", focused on spreading awareness on how arbitration can benefit from including people with disabilities, providing practical recommendations for arbitral tribunals, institutions, and counsel.

The conference was followed by the 4th ICC Charity Christmas Dinner in Warsaw, where funds were raised for Fundacja Centrum Edukacji Niewidzialna, supporting blind and visually impaired people.

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EUROPE

# Spain

*Arbitration has experienced significant developments in 2023 in the Kingdom of Spain ("Spain"):*

- *From an investment arbitration perspective, there have been significant advancements regarding the annulment and enforcement of investment arbitration awards against Spain; and*
- *In commercial arbitration, Madrid has enhanced its position as an international arbitration venue, and there have been updates on one of the most interesting yet complex cases involving Spain in the last 20 years.*

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## Investment Treaty Arbitration in Spain: Enforcement and Annulment Proceedings

2023, as in previous years, has been defined by investment arbitrations initiated by foreign investors against Spain. Notably, Spain has been actively seeking to set aside and impede the enforcement of the awards. Further decisions on the enforceability of intra-EU investor-State awards were issued, as the doctrine established by the Court of Justice of the European Union ("**CJEU**") in Achmea v. Slovakia (I) ("**Achmea**") and Energoalians v. Moldova ("**Komstroy**"), that arbitration clauses contained in intra-EU bilateral investment treaties and the Energy Charter Treaty ("**ECT**") are incompatible with EU law continue to spark discussion:

- On 13 December 2022, the Svea Court of Appeal granted an application by Spain to set aside an intra-EU award for €56 million secured by Novenergia. The Court found that the arbitral tribunal lacked jurisdiction in light of the Achmea and Komstroy cases. On 10 July 2023, the Swedish Supreme Court upheld the award's annulment when it refused to grant Novenergia leave to appeal the

award.

- On 15 February 2023, the United States District Court for the District of Columbia granted two anti-suit injunctions in favour of the investors 9Ren and NextEra. The purpose of these injunctions was to stop Spain from preventing the enforcement of two Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) ("**ICSID Convention**") intra-EU awards with a combined value of €333 million. On 29 March 2023, a different judge of the same District Court found that the Court lacked subject-matter jurisdiction to enforce an intra-EU award obtained by AES Solar against Spain. The Court held that Spain lacked the capacity to extend an offer to arbitrate under EU law, and therefore, no valid agreement ever existed.

- On 2 March 2023, an ICSID ad hoc committee upheld a €31 million award in favour of a group of European investors against Spain under the ECT, disregarding the Achmea doctrine. On 8 May 2023, the same result was adopted by another ICSID committee, which refused Spain's application to annul a €22 million ECT intra-EU award. In the latter case, the committee expressly departed from the decision of the arbitral tribunal in the Green Power and SCE v. Spain case, which, on 16 June 2022, ruled in favour of Spain and held that it did not have the competence to hear the case of an investor seeking €74 million.

- On 27 March 2023, the High Court of Justice of England and Wales ("**HCJEW**") issued three interim payment orders against Spain for the enforcement of an award. The High Court ordered the precautionary seizure of certain assets and rights of the Spanish Instituto Cervantes and Agencia per a la Competitivitat de L'Empresa in London.

- On 12 April 2023, the High Court of Australia concluded that Spain could not invoke sovereign immunity to avoid the recognition and enforcement of an ICSID award obtained by Antin, a foreign investor. The High Court held that Spain waived its immunity by ratifying the ICSID Convention. Also, on 24 May 2023, the HCJEW established that Spain cannot invoke sovereign immunity to prevent the recognition and enforcement of a €120 million ICSID award under the ECT.

Apart from the above, Spain has experienced setbacks in investment arbitration cases brought by foreign investors. For instance, on 6 October and 30 October 2023, two ICSID tribunals ordered Spain to pay damages over reforms to the renewable energy subsidy regime.

# New Developments in Commercial Arbitration Practice in Spain

Spain's hot topics on commercial arbitration have also been of great interest to both international and domestic arbitration players:

- On the institutional front, the leading international court of arbitration in Spain, – the Madrid International Arbitration Center ("**CIAM**") –, has released a new set of rules aimed at stepping up Madrid's game in the international arbitration arena; and
- From the commercial practice perspective, Spain has observed how the London Steamship v. Spain (I) ("**Prestige**") saga is far from being a closed case, as the HCJEW has rejected the enforcement of the Spanish judgment despite last year's CJEU judgment.

## Madrid Strengthens its Position as a Leading International Arbitration Hub

On 19 October 2023, the CIAM published its new Arbitration Rules ("**2024 Rules**" or the "**Rules**"), which will apply to any request for arbitration filed on or after 1 January 2024. The 2024 Rules respond to the demands for greater speed and efficiency in international arbitration

and offer tools to enhance the flexibility of arbitral proceedings, as well as a wider range of options for parties and arbitrators to determine the particularities needed to conduct their cases.

The main innovation introduced by the 2024 Rules is the creation of a highly expedited procedure by which the parties can resolve certain disputes, provided that there is express agreement to do so regardless of the amount in dispute. Highly expedited procedures administered by the CIAM aim to provide parties the option of conducting the whole arbitration within four months. The procedure's main characteristics are as follows:

- Disputes are resolved by a sole arbitrator;
- No first procedural order is issued;
- There is no hearing unless the sole arbitrator deems it necessary; and
- The deadline to render the award is three months from filing the statement of claim.

Arbitration practitioners are eagerly waiting to see whether the new features introduced by the CIAM (in particular, the new highly expedited procedure) will boost Madrid's position as a leading international hub for commercial arbitration.

## The Prestige Saga: an Unexpected Turn of Events After 20 Years

The Prestige saga was addressed in last year's "Arbitration 2022 Year in Review - Spain". As anticipated, in 2023 the HCJEW departed from the CJEU's judgment on this matter last year, rejecting the enforcement of the €855 million Spanish decision issued in this case.

In 2003, Spain filed a claim before the Spanish courts (the "Spanish Proceedings") against the insurer of the oil tanker, the Prestige (the "Insurer"), following the disaster that occurred on the Galician coast in 2002. In 2012, while the Spanish Proceedings were still ongoing, the Insurer commenced arbitration in the United Kingdom. A year later, the arbitral tribunal concluded that the claims brought in the Spanish Proceedings should have been referred to arbitration in London. The HCJEW rendered a judgment in the terms of the arbitration award (the "HCJEW Judgment").

In 2018, in the context of the Spanish Proceedings, the Spanish Supreme Court issued its final judgment against the Insurer (the "Spanish Judgment"). When Spain requested its recognition before the HCJEW, the Insurer argued that the Spanish Judgment was irreconcilable with the HCJEW Judgment under Article 34(3) of Regulation 44/2001. The HCJEW raised the issue before the CJEU, which, in its judgment dated 20 June 2022, concluded that the HCJEW Judgment could not prevent recognition of the Spanish Judgment (the "**CJEU Judgment**").

Even though it appeared that the CJEU Judgment had resolved the jurisdictional conflict arising from the Prestige saga, on 6 October 2023 the HCJEW issued a judgment refusing to enforce the Spanish Judgment. The HCJEW alleged that its enforcement would be irreconcilable with existing English arbitral decisions, and even contrary to the principles of English public policy relating to res judicata.

In relation to the CJEU Judgment, the HCJEW held that it was not bound by answers to questions not raised to the CJEU:

> *"209. I have also reached the conclusion (as did Sir Peter Gross at paragraph [122(3)] of the Gross First Award) that, if the CJEU purported to answer a question not or falling outside those referred to it, the national court would not be bound to follow any such purported answer, though it would not lightly so hold. This appears to me to be the corollary of the limited jurisdiction established by Article 267 of the TFEU. [...]*
> *236. Further, while I am clearly entitled to have regard to the reasoning of the CJEU in those paragraphs, if I am not bound by them I would not follow them. In my judgment they fail to give effect to the*

*exclusion of arbitration from the Regulation, and they fail to have regard to the jurisprudence of the ECJ/CJEU which has recognised that the arbitration exception is effective to exclude arbitration in its entirety, including proceedings in national courts the subject matter of which is arbitration [...].*

On 19 December 2023, the HCJEW issued a new judgment allowing Spain to appeal the above-mentioned judgment. In the meantime, we shall keep an eye out for the next steps in the unfolding Prestige saga.

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EUROPE

# The Netherlands

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*This year's developments in the Dutch arbitration landscape further establish the Netherlands as a jurisdiction that gives primacy to (international) arbitration. The Dutch courts have proven to be a reliable ally to arbitration, while European scepticism towards (intra-EU) investment arbitration continues to stir the pot. 2023 was a fruitful year in the context of arbitration, and we look forward to what 2024 will bring to the table.*

## Case Law Highlights

### Review of Negative Jurisdiction Awards Not Possible Under The Dutch Arbitration Act

In its judgment of 21 April 2023 in Manuel García Armas v Venezuela, the Dutch Supreme Court reached an interesting decision about the jurisdiction of arbitral tribunals. The judgment was issued within the set aside proceedings of investor-state arbitration (with a seat in The Hague), where the arbitral tribunal issued a negative jurisdiction award (i.e., an award declining jurisdiction), finding that the claimants did not qualify as investors under the relevant BIT because they were dual nationals.

It is established Dutch case law that – given the fundamental nature of the right of access to state courts – the courts deciding upon a set aside application fully reassess a positive jurisdictional award (i.e., an award upholding the jurisdiction of the arbitral tribunal) if a party claims that a valid arbitration agreement was lacking.

In the present case, however,, the Supreme Court ruled that Dutch arbitration law does not allow the challenge of negative jurisdiction awards. The Supreme Court referred to the Dutch legislative history and to the UNCITRAL Model law to reach this conclusion.

This judgment creates a novel asymmetry in the Netherlands where, on the one hand, Dutch courts conduct a full de novo review; on the other hand, a review is not possible (depending on whether the award on jurisdiction rendered assumes or denies jurisdiction). Nevertheless, the judgment clarifies the Dutch approach, while it is observed that the (im)possibility to review negative jurisdiction awards differs from jurisdiction to jurisdiction.

### State Immunity Remains a Challenge to Overcome

The Netherlands has been known as a jurisdiction with an enforcement-friendly regime, especially regarding the request to (pre-)attach assets present in the Netherlands. The procedure to levy attachments in the Netherlands is, in fact, quite simple, and Dutch courts often grant attachment requests.

When it comes to enforcement against states or state-owned entities, however, enforcement gets more complicated due to the availability of state immunity defences and the test applied by Dutch courts in that regard.

State immunity was recently invoked with success by the Republic of Kazakhstan in the proceedings Stati v. Kazakhstan, in which Kazakhstan tried to lift the attachments levied by investors following a successful arbitral award. The courts in the first instance did not accept the state's submissions relying on state immunity. While in its previous decision in 2020, the Supreme Court had also ruled on the standard to be applied in relation to state immunity defences, in its judgment of 22 September 2023.the Supreme Court found that the investors had failed to sufficiently prove that the attached shares in a Kazakhstan state-owned wealth fund were meant for other than public purposes, even when assuming that the shares are exploited commercially.

In contrast, the Yukos investors' efforts to enforce their arbitral award against the Russian Federation seem to be more successful. Advocate General P. Vlas presented an Opinion on 22 September 2023 on the attachment by the Yukos investors of trademarks and copyrights held by Russian state-owned FKP. Shortly put, Vlas observed that since the attached rights are meant for purposes other than public (read: commercial), the Russian Federation cannot successfully rely on state immunity protection. It will be interesting to see whether the Dutch Supreme Court will align its judgment with Vlas' Opinion.

### Restraint Application of Setting Aside Grounds Reaffirmed

In its judgment of 17 March 2023, the Dutch Supreme Court once more reaffirmed that the five exhaustive setting aside grounds (which are listed in article 1065 of the Dutch Civil Code of Procedure) have to be applied with restraint by a court considering a set aside application.

This case, in particular, dealt with whether the state court could set aside four arbitral awards due to the tribunal acting in excess of its mandate. In the first instance, the court agreed with the contention that the tribunal had violated its mandate (by not adhering to the principle of res judicata) and, therefore, decided to set aside the arbitral awards. The defendant, in the set aside proceedings, however, complained in cassation that the court had not exercised sufficient restraint in its consideration of the set aside grounds.

The Supreme Court found these complaints to be well-founded. Despite the fact that, in her Opinion of 9 September 2022, Advocate General De Bock advocated for a broader interpretation of the test to be applied by courts considering set aside applications (i.e., applying a less restrictive test), the Supreme Court clearly rejected that plea and reiterated the long-settled framework that courts must exercise restraint when assessing annulment claims.

## Intra-EU Investment Arbitration Continues to Stir the Pot

### RWE Withdraws its Investment Arbitration against The Netherlands, but Court Litigation Remains

Until recently, the Netherlands was facing two (of its first-ever) adverse investment arbitration cases. These International Centre for Settlement of Investment Disputes ("ICSID") proceedings on the basis of the ECT were brought separately by Uniper and RWE following the Netherlands' decision to phase out coal-fired power plants.

Whilst Uniper withdrew its ICSID case in 2022, RWE decided to follow suit on 16 October 2023. Notably, RWE's withdrawal followed an anti-arbitration injunction that the Netherlands obtained from the German Federal Court of Justice. Despite acknowledging the autonomous (and therefore seatless) nature of ICSID proceedings, the German court ruled that it was not precluded from declaring RWE's ICSID case inadmissible because of a special provision in its national arbitration law combined with the primacy of EU law.

Thus, the water seemingly cleared for the Netherlands in relation to its adverse investment arbitration cases. However, RWE continues to pursue its court litigation against the Netherlands. It is observed that RWE seeks to rely on the protective provisions of the ECT in these national proceedings. How the Dutch courts will handle this unprecedented approach is yet to be seen.

### In Turn, the Dutch Courts Deny Anti-Arbitration Injunction Requests

As the number of anti-arbitration injunction requests globally seems to be rising, the Dutch courts have not escaped this trend. This year, the Dutch courts denied injunctions sought by Poland and Spain in relation to intra-EU investment arbitration cases.

On two separate occasions last year (8 March and 29 August 2023), the Amsterdam District Court and Amsterdam Court of Appeal denied granting an anti-arbitration injunction to thwart an investment arbitration seated in the UK against Poland on the basis of the Netherlands-Poland BIT. The Dutch courts considered that, although it would be barred from giving effect to an award resulting from this investment arbitration on the basis of EU law, it lacked the power to block the investor from pursuing its claim in the UK-based arbitration. In doing so, the court also observed that the English courts are not bound by EU law. Of course, it is to be seen how long English courts can maintain that approach given the recent Opinion of Advocate General Emiliou in the EU infringement proceedings against the UK.

On 6 March 2023, albeit for different reasons, the Amsterdam District Court denied Spain an anti-enforcement injunction in relation to enforcement efforts of an intra-EU ECT award in the US. Spain argued that such enforcement would compel Spain to violate EU state aid laws, but the District Court was not persuaded. Instead, it ruled that it could not entertain Spain's attempt to open a new (and non-existing) forum to re-argue the invalidity of the adverse ECT award. Importantly, the court reasoned that Spain's attempt to set aside the award had already been denied at the seat in Switzerland and based on the closed system of the New York Convention (1958), only the court where enforcement is sought has the power to rule on matters thereto.

In sum, the Dutch courts have not been persuaded by attempts to block investors' right to continue investment arbitration (related)-cases, which confirms the neutral and pragmatic approach adopted by the Dutch courts.

## Outlook for 2024

With developments outlined above and brand-new authoritative literature such as the handbook on Arbitrage en bindend advies in the Asser-series being published, 2023 is to be considered a fruitful year for the Dutch arbitration landscape.

Looking forward to 2024, further interesting developments are appearing on the horizon. For example, a judgment by the Supreme Court on the enforceability of mediation clauses (currently deemed unenforceable) is anticipated in the first half of 2024 (after the Advocate General opined in favour of enforceability on 26 January 2024), and the new Arbitration Rules of the Netherlands Arbitration Institute are expected to be published. To be continued!

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LATIN AMERICA

# Argentina

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*The recognition and enforcement of arbitral awards are issues that concern both individuals and States all over the world. In this article, we have chosen two judicial decisions rendered by the Argentine courts in 2023 regarding the enforcement of arbitration awards that we hope will help the reader better understand Argentine legal practice.*

*We will analyze:*

- *a case involving an alleged violation of public policy stemming from how the payment of the Award was established (Banco Seguros del Estado de la República del Uruguay c/ Instituto de Reaseguros s/ exequatur, hereafter "Banco de Seguros"), and*
- *a second case related to a request for enforcement of an Award against the Republic of Argentina (Consorcio de Aguas Bilbao Bizkaia Bilbao Bizkaia Ur Partzuergoa y otro c/ EN-M Hacienda s/ proceso de ejecución, hereafter "Consorcio de Aguas").*

## Banco de Seguros

In October 1975, the Insurance Bank of the State of the Republic of Uruguay ("BSEU"), an insurance company based in Uruguay, and the National Institute of Reassurance of Argentina ("INDER"), a former entity of the Ministry of Economy of Argentina, entered into a retrocession agreement. According to the agreement, BSEU, a reassurance agent, agreed to transfer to INDER part of the risks undertaken with foreign insurance companies, and INDER undertook to cover such risks by the disbursement on the condition that BSEU met certain conditions.

This agreement was subject to further interpretation in an arbitral award later in 1995, which helped to set the conditions for BSEU to obtain the agreed payments.

Nevertheless, since BSEU and INDER disagreed regarding the extent of their obligations, they decided to sign an arbitration agreement on July 3rd, 2006. Accordingly, the arbitral tribunal -seated in Montevideo, Uruguay, was to decide:

- Whether INDER was obligated to pay the outstanding amounts in BSEU's technical and financial accounts, and
- If INDER was responsible for the damages caused by the non-compliance of certain undertaken obligations.

On February 27, 2015, the arbitral tribunal rendered an Award in which INDER was ordered to pay USD 5,277,779.81 to BSEU for breaching the agreement, with an annual interest rate of 6% commencing on the date of service of the notice of the complaint ("Award").

INDER filed an application to set aside the Award before the Montevideo Civil Court of Appeals, which was rejected on December 22nd, 2015.

In 2017, BSEU sought the enforcement of the Award before the Argentine Federal Courts. The Ministry of Economy of Argentina objected to the enforcement of the Award, claiming that the arbitral tribunal had violated the defendant's right of defense. The Ministry of Economy further argued that the enforcement of the Award would violate Argentine public policy related to legislation regarding economic emergencies that applied to the agreement (Law No. 23.982 and Law No. 25.344).

In May 2022, the Ministry of Economy appealed the first instance decision that had ordered the enforcement of the Award. On April 5th, 2023, Chamber III of the Federal Court of Appeals in Civil and Commercial Matters overturned the enforcement decision.

To this extent, the Court of Appeals considered that it was not entitled to examine the Ministry of Economy's grievances regarding the alleged violation of its right of defense since it had already filed an application to set aside the Award before the Montevideo Civil Court of Appeals. Indeed, the Court of Appeals stressed that the competent court had already examined any violation that could have taken place in the arbitration proceedings. As the Award had become final, it was not subject to review in an enforcement proceeding.

Then, the Court of Appeals reviewed the compatibility of the Award with Argentine public policy. After examining the local emergency legislation invoked by the petitioner, the Court of Appeals rejected the enforcement of the Award based on the following conclusions:

- Argentine restructuring of the foreign debt was a measure adopted by the Argentine Government to help overcome the economic, administrative, financial, and foreign exchange emergency of 2001 declared by Law No. 25.561;

- Public policy provisions covered the sums claimed by BSEU and could not be enforced against the Republic of Argentina since they matured during the emergency period and the legal cause was prior to such period (i.e., the Award rendered in 1995). A contrary finding would establish a sort of privilege in favor of INDER that would prejudice domestic and international creditors;

- The conversion of the Award for BSEU's execution in compliance with the Argentine debt consolidation regime does not correspond in an exequatur.

It is important to note that the Court of Appeals determined that the treaties on which BSEU sought the enforcement of the Award, the Montevideo Treaty on International Procedural Law (1940) and the New York Convention on Recognition and Enforcement of Foreign Awards (1958) were not applicable. Instead, the Court of Appeals determined that the Las Leñas Protocol on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labor and Administrative Matters among Mercosur Member States should be applied. A different result could have been achieved if BSEU petitioned the application of Article 23 of the Las Leñas Protocol (which establishes that "if a judgment or arbi-

tration award cannot be fully effective, the competent jurisdictional authority in the requested State may admit its partial effectiveness upon request from an interested party").

## Consorcio de Aguas

In early 2000, Consortium Aguas Bilbao Bizkaia Bilbao Bizkaia Ur Partzuergoa from Spain ("Company") and the Province of Buenos Aires entered into a concession agreement to provide water and sewage services. Due to the termination of this agreement in the context of the 2001 Argentine economic crisis, in 2007, the Company submitted arbitration proceedings before the International Centre for Settlement of Investment Disputes ("ICSID"). On December 8th, 2016, the arbitral tribunal rendered its Award on the merits of the dispute, rejecting all monetary claims under the Agreement for the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Argentina. However, the arbitral tribunal decided to order the Republic of Argentina to pay the costs of the jurisdictional stage of the proceedings of USD 1,047,700, plus an annual interest rate of 3% that began to accrue 60 days after the Award was rendered ("Award on Costs").

The Company sought the enforcement of the Award on Costs before the Buenos Aires Federal Courts for Administrative Matters.

The Company argued for the direct enforceability of the Award pursuant to Section 517 of the National Civil and Commercial Procedural Code, which established that an Award rendered under an international treaty must be enforced in accordance with the terms of that treaty. In this sense, since Articles 53 and 54 of the ICSID Convention (1965) ("Convention") determine that an Award is, for its enforcement, comparable to a final judgment rendered by a national court without the need to submit it to exequatur, the only requirement for enforcement is the submission of a copy of the Award certified by the ICSID General Secretariat.

The Republic of Argentina objected to the enforcement sought by the Company on the grounds that there is no obligation to comply with the payment until the beneficiary files a petition for the recognition and enforcement of the Award before national courts. In this sense, since Argentina had not formally made an application seeking recognition and enforcement of the ICSID awards, the general provisions applicable to national judgments prevail.

On June 13th, 2023, the First Instance Court ruled, recognizing that ICSID arbitral Awards are equivalent to a final judgment issued by a local court. Therefore, it is not necessary to submit them to the exequatur. The Republic of Argentina did not appeal the judgment, which made it final.

It is worth noting that this is the first proceeding in which the enforcement of an ICSID Award against Argentina was sought –and obtained– before Argentine courts.

## Conclusion

These cases arise as a consequence of the economic policy adopted by Argentina more than two decades ago and may still influence awards rendered many years later. This does not undermine the efforts of the lawmakers to provide for a favorable investment environment in the country and compliance with international obligations.

This analysis invites practitioners to consider the historical and economic context of the country to create awareness of the strong utility of the public policy doctrine, which may include regulations of years past and may not be known by many.

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LATIN AMERICA

# Brazil


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*This article provides an overview of the arbitration highlights in Brazil in 2023, another extremely relevant eventful year for arbitration in the country. More specifically, this article:*

- *Considers statistics disclosed in 2023 by some of the leading arbitration institutions in the country;*
- *Covers recent legislative and judicial initiatives regarding the arbitrators' duty of disclosure;*
- *Examines a bill that may impact arbitration of corporate disputes; and*
- *Takes note of a decision handed down by the Brazilian Superior Court of Justice that changed the relationship between insurance companies and arbitration.*

## Arbitration in Brazil in Numbers

In last year's review, striking developments in the arbitration field in Brazil were featured. In 2023, the results of this analysis are even more impressive: according to the information released by the Center for Arbitration and Mediation Brazil-Canada ("**CAM-CCBC**"), in 2022, more than 115 new cases were registered, which led the CAM-CCBC to achieve the landmark figure of 1,427 administered arbitration (against the 1,311 registered between 2020 and 2021). The positive trend continues further. While, in 2021, the total amount in dispute was BRL 7.3 billion, in 2022 it reached BRL 7.9 billion. A similar increase was recorded with respect to the average amount in dispute: in 2021, BRL 57.1 million, while in 2022, BRL 68.8 million (i.e., an increase of over BRL 10 million per case on average).

The statistics released by the Market Chamber ("**CAMB3**") reflect a very similar scenario: in 2022, the number of requests for arbitration filed with the institution was almost 50% higher than the previous year. In addition, the average amount in dispute jumped from BRL 36 billion to BRL 44 billion in just one year.

Brazil's rise and consolidation in the arbitration field is not only due

to the well-known advantages of the dispute resolution mechanism but also to its harmonious relationship with Brazilian national court. In 2023, a survey carried out by the Brazilian Arbitration Committee ("**CBAr**") and the Brazilian Association of Jurimetry ("**ABJ**") identified that the probability of an arbitral award being set aside by the national courts in São Paulo, the Brazilian state with the most arbitrations in the country, is extremely low - about 1.5%.

These indicators clearly show prosperity of arbitration seated in Brazil and give a glimpse of future growth. It is no coincidence that the projection that Brazil will become one of the leading countries in the field of arbitration appears to be increasingly coming true.

## Arbitrators' Duty to Disclose on the Spotlight

As also reported in the 2022 review, Bill No. 3,923/21 is currently pending in the Brazilian Congress, which proposes amendments to the Brazilian Arbitration Act to modify the standard for the arbitrators' duty of disclosure. The so-called "anti-arbitration bill" aims to impose on arbitrators a duty to disclose any facts that could raise the "slightest doubt" on their impartiality and independence, thus departing from the "justifiable doubt" standard and international best practice.

While the arbitration community's advocacy against the bill have slowed down the pace of the legislative procedure, the duty to disclose has moved into the spotlight of the judicial arena in 2023.

In March 2023, a Brazilian political party brought a constitutional action before the Brazilian Supreme Court ("**STF**"), seeking a "constitutional interpretation" of the arbitrator's duty to disclose in commercial arbitrations (União Brasil v. Presidente da República and Congresso Nacional). The plaintiff requested the Supreme Court to declare that:

- The duty to disclose is an exclusive burden for the arbitrators, and parties bear no duty to investigate;
- "Justifiable doubt" must be assessed through the eyes of the parties rather than those of a third party;
- Failure to disclose is sufficient to disqualify an arbitrator, even if the undisclosed fact would not amount to a breach of impartiality;
- The IBA Guidelines on Conflict of Interest in International Arbitration (2014) cannot guide the duty to disclose unless expressly agreed upon by the parties; and
- The arbitrator's lack of independence or impartiality is a matter of public policy, not limited by the doctrine of estoppel or limitation periods.

Also this year, the Brazilian Superior Court of Justice ("**STJ**") decided on a special appeal against a decision held by the São Paulo Court of Appeals related to the violation of the duty to disclose (Raphael and Brandão & Valga v. Esho). The ruling dismissed an application to set aside an arbitral award due to undisclosed information that would entail the disqualification of an arbitrator. The majority decision established that parties have an ethical duty to investigate potential grounds for disqualification and raise them before the commencement of the arbitration. Upon receiving the special appeal, the rapporteur issued an interim measure to halt all enforcement proceedings related to the arbitral award, considering that there was a dissenting opinion advocating for the award's annulment.

As Brazil's higher courts have yet to rule on the issue, academics, practitioners, and prominent civil associations opposed judicial interference to define the contours of the duty to disclose. To assist in addressing issues related to the duty to disclose, the CBAr launched in September 2023 guidelines on this matter. These guidelines, developed with contributions from institutions, professionals, and the public society, are tailored to the Brazilian context and align with international standards. Its final version quickly garnered support from major arbitral institutions (see here), highlighting its practical applicability as a "best practice" reference that, while not mandatory, can be expressly adopted by

parties and arbitrators.

Yet, this chapter is far from over. Further developments are likely to take place in 2024, as this remains a developing area within the Brazilian arbitration community.

## Collective in Arbitration of Corporate Disputes in the Horizon

In June 2023, the Brazilian Ministry of Finance submitted Bill No. 2,925/2023 ("**PL 2925/23**") to the Brazilian Congress to modernize corporate governance standards in the capital markets. The bill sparked debates, especially regarding the arbitration of corporate disputes, introducing the possibility of "collective arbitration".

PL 2925/23 proposes allowing minority shareholders in Brazilian public limited companies *(sociedades anônimas)* to collectively file civil liability actions against controlling shareholders or decision-makers to protect their "individual homogeneous rights". This addresses the arbitrability of minority shareholders' collective rights in Brazil.

The bill emphasizes increased transparency in arbitration proceedings and would require arbitral institutions to publish awards in those shareholders' disputes organized by subject. However, exceptions may apply, with the Securities and Exchange Commission of Brazil (CVM) intervening to protect commercially sensitive information.

A corporate malpractice case prompted the reform proposal by one of Brazil's major retailers, highlighting information asymmetry issues. Greater accountability in the regulation of Brazil's capital markets was thus called for.

PL 2925/23 aims to enhance private enforcement mechanisms by lowering the threshold for minority shareholders to bring civil liability actions against directors, officers, controlling shareholders, or intermediaries of public offerings, among others, for breach of fiduciary duties, including negligence, fraud, or other unlawful acts. The threshold would go from 5% to 2.5% of the company's capital, provided they were shareholders at the time of the damage and have the same class of shares, or their total shareholding is at least BRL 50 million (approximately USD 10.3 million in January 2024). The CVM could adjust this figure in exceptional cases.

This adjustment raises concerns about shareholders' legitimacy and potential res judicata effects, as decisions would benefit all shareholders in the same category, except those filing individual lawsuits.

The bill's proponents believe it will deter abusive misconduct by controlling shareholders and officers. However, there is a trade-off, exposing these actors to potential abuse of minority shareholdings.

Currently, PL 2925/23 awaits an order from the President of Congress to be included in the plenary session agenda following a failed attempt to prioritize the bill.

## Arbitration, Risk Analysis, and Insurance Relations: New Connections

Last but not least, in 2023, the STJ handed down a decision in which it ruled that insurers are bound by the arbitration clause in the contract insured by the policy. According to the ruling rendered in the Special Appeal ("**REsp**") n. 1.988.894, in such cases, the insurer's knowledge of the arbitration clause is assumed and the arbitration clause is deemed an element to be taken into account in the insurer's risk assessment under the terms of article 757 of the Brazilian Civil Code.

The conclusion is not unrestricted and specifically covers guarantee insurance cases in which it is impossible to rule out the insurer's prior knowledge of the existence of an arbitration clause in the maritime cargo transportation contract covered by the policy. In this scenario, since the contract was undoubtedly submitted to the insurance company, it had the opportunity to analyze the risks established thereunder, including the arbitration clause - which is, as stated by the STJ, one of the essential elements of the transaction and, therefore, cannot be ignored.

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LATIN AMERICA

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## Mota Engil v. Paraguay

On December 8, 2023, a Permanent Court of Arbitration ("PCA") tribunal composed of José Emilio Nunes Pinto (president), Guido Tawil (claimant's appointee), and Claus von Wobeser (respondent's appointee) issued its final award in Mota-Engil v. MOPC.

The dispute arose out from a failed rapid-bus transit system called Metrobus. The project – backed by Inter-American Development Bank funding – started in 2017 and encountered difficulties and problems related to access to the construction site. After several months of negotiations and two Memorandum of Understanding (MoU), the contract was terminated by the MOPC in February 2020. Mota Engil lodged its request for arbitration in December 2019.

In its final award, the tribunal found the MOPC and Paraguay liable for:

- Failure to grant access to the construction sites;
- Failure to obtain the necessary permits for the works; and
- For executing the performance bond and advanced payment guarantee in violation of the tribunal's provisional order forbidding so.

In this context, the tribunal awarded Mota Engil damages for around US$ 16 million, which includes damages for breach of contract, restitution of withheld amounts, and damages for the State's decision to draw on the performance bond in its entirety, in violation of the tribunal's provisional orders.

However, the tribunal also awarded damages to Paraguay for defects in the works and decided that the MOPC correctly terminated the contract because of Mota Engil failed to maintain the performance bond.
Mota Engil was also awarded 40% of its costs. The tribunal indicated that 10% of this award on costs was due to the MOPC's defiance of the tribunal's order, preventing it from drawing on the performance bond, which the MOPC did anyway.

The MOPC also objected to the admissibility of Mota Engil's claims, arguing that they were time-barred because it failed to comply with the multi-tiered dispute resolution clause provided for in their contract, which established the submission of the dispute, first, to an engineer, then to a dispute resolution commission, then to direct negotiations, and then finally to arbitration (a mechanism typical of FIDIC contracts).

The tribunal rejected this argument, indicating that in a memorandum of understanding of 2018 (MoU), the parties agreed to submit any controversy arising from their contract directly to arbitration, deviating from the original mechanism established in the contract and therefore, Mota Engil's claims could not be time-barred. Otherwise, the relevant

clause in that MoU would have lacked effet utile, which was not the correct interpretation under Paraguayan contract law. The tribunal also noted that the dispute resolution commission was never constituted, and therefore compliance with that step before resorting to arbitration was impossible.

## The Attorney General's Office Decision to Publish Arbitral Awards Involving the Paraguayan State as a Party

On September 20, 2023, the Office of the Attorney General of the Republic of Paraguay (Procuraduría General de la República - PGR) ordered that the arbitration awards that involve the Paraguayan State as a party shall be published on the Institution's website. This was established through PGR Resolution No. 265/2023, based on Law No. 5282/2014 "De libre acceso ciudadano a la información pública y transparencia gubernamental".

PGR Resolution No. 265/2023 mentions that the public order is considered an exception to the confidentiality of arbitration and that there is a legal obligation for the Attorney General's Office to disclose the arbitral awards that involve the Paraguayan State as a party. It also mentions that arbitral awards are comparable to resolutions of the Judiciary, so they must also be considered public information.

The awards are now published on the PGR website in a simple and user-friendly manner. The cases are listed with a summary that includes the cover of the case, the subject matter and the amount of the claim, the status of the case, and who the members of the arbitral tribunal were. The full texts of the awards are also available in PDF format.

Currently, 23 arbitral awards are available on the PGR website, of which 14 were resolved against the Paraguayan State and 9 in favor. The latest and most recent award published is the case of Mota Engil v. Paraguay, which we allude to in this publication.

## Recognition of Local Arbitral Awards Before Enforcement?

Law 1879/2002, the Paraguayan Arbitration Law, is an almost exact copy of the UNCITRAL Model Law on International Commercial Arbitration (1985) ("Model Law"). However, while the Model Law was designed primarily with international arbitration in mind, the Paraguayan legislator also decided to extend the local law's scope of application to national arbitrations. Thus, Paraguay's arbitration law applies to national and international arbitrations seated in Paraguay.

Article 2 of the Paraguayan law clarifies that certain articles, including those on the recognition and enforcement of arbitral awards, apply "even when the seat of arbitration is outside the national territory". In other words, these articles apply to arbitral awards issued in arbitrations seated in Paraguay and foreign arbitral awards.

In this context, the question arises: should an arbitral award issued in an arbitration seated in Paraguay - national or international - go through the recognition process before its enforcement, just like a foreign arbitral award? Or is there a different applicable process, only of enforcement?

Another year has passed, and there is still no consistent case law on the matter.

There is one line of case law according to which an arbitral award in a Paraguayan seated arbitration should not be subject to the recognition process. This position is based on first, an interpretation of the scope of application of the New York Convention (1958), of which Paraguay is

a contracting State, according to which the recognition process should only apply to foreign arbitral awards; and second, on a provision of the local Code of Civil Procedure, according to which a judicial or arbitral ruling can be enforced under its rules once said ruling is "consented, executed or firm". The courts have held that since judicial and arbitral rulings are treated equally, there is no need to go through a recognition process particular to arbitral rulings, and instead, direct enforcement should be sought.

The other line of case law suggests that a harmonic interpretation of the Paraguayan arbitration law and the Code of Civil Procedure results in the same approach for the recognition and enforcement of arbitral awards, which applies to awards issued in Paraguay as to foreign awards. According to this position, when the procedural norm provides that an arbitral award can be enforced only once it is firm or executed, one must first look at the arbitration law. Arbitration law clearly provides that its scope of application encompasses local arbitrations and, thus, arbitral awards rendered in Paraguay. Further, the specific articles that deal with the recognition and enforcement of arbitral awards, following the terminology of the UNCITRAL Model Law, provided that they apply "irrespective of the country [in which the award] was made", including awards issued in Paraguay.

The lack of predictability of the approach of the local courts considerably impacts the decision on how to file an action to obtain enforcement of an arbitral award issued in a Paraguayan seated arbitration. It is desirable that the courts adopt a uniform stance in the future to ensure legal certainty. Ultimately, however, the pro-arbitration stance that the local courts have frequently reaffirmed is auspicious for enforcing arbitral awards, irrespective of the country in which they were made.

## ABOUT THE AUTHORS

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MIDDLE EAST AND TURKEY

# Israel


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*With more global companies undertaking business in Israel in recent years, infrastructure, construction, and cross-border agreements have noticeably increased. Unfamiliar with the Israeli legal system and the governing law, these companies often bypass Israeli laws and jurisdiction in their agreements, opting for arbitration. However, international arbitration ("**IA**") had long remained underdeveloped in Israel, with the Arbitration Law enacted in 1968 ("**Arb. Law**") dealing primarily with local arbitration, without addressing the specific challenges and unique features of international arbitration.*

*Against this backdrop, the International Commercial Arbitration Bill, 2023 ("**ICAB**") proposal has been introduced, aiming to add Israel to the list of 87 countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration (2006) ("UNCITRAL Model Law"), substantially changing Israel's landscape of arbitration. ICAB is slated to be adopted within a few weeks of mid-January 2024.*

*In this article, we will review the most significant changes enacted by ICAB and offer a quick review of its influence on urgent relief and their enforcement under Israeli Law.*

## Highlights of the ICAB

The most important contribution of the ICAB is the distinction between local and international arbitration. While the Arb. Law defines IA awards as given outside of Israel; the ICAB establishes a clear definition of IA, compatible with Article 1(3) of the UNCITRAL Model Law. The only difference between the ICAB and the UNCITRAL Model Law is that the ICAB does not recognize the parties' autonomy to agree to conduct the arbitration as IA even when the dispute does not fully comply with the definition set in the ICAB. The intention is to retain local arbitration proceedings under the Arb. Law. However, the current discussions in

Parliament seem to point to this section being re-introduced in a manner that would promote and preserve party autonomy even more than the current form of the UNCITRAL Model Law.

The definition of IA raises questions regarding the scope of proceedings that apply to this term, mostly since it is common for foreign companies acting as main contractors in Israeli infrastructure projects to be incorporated as an Israeli vehicle, whether for tax reasons or due to the state's requirements in national projects executed via tenders. In such cases, the ICAB will not necessarily apply, and the arbitration will be governed by the Arb. Law.

Another important change lies within Article 6 of ICAB, which sets limits on the court's powers to intervene with the arbitral jurisdiction except in matters it expressly allows. The ICAB intends to convey to IA users that the judicial system will act as a supporting authority for arbitral disputes but will refrain from intervening in most issues that may arise as part of IA proceedings. This section expresses the great importance of parties' autonomy, its supremacy in such matters, and the need for courts to recognize and promote it. This principle also reflects the tendency in Israeli case law to refrain from interfering with arbitral proceedings and awards or to do so only in the rarest circumstances.

## Urgent Interim Measures – Current and Future Position

Perhaps the most significant change compared to the existing Arb. Law lies within Articles 18-26 to ICAB dealing with urgent interim measures, allowing parties to enforce urgent relief more easily.

The Arb. Law offers two options for a party seeking urgent relief bonded by a cross-border Israel-related IA dispute:

- File for an Emergency Arbitration ("EA") to the selected institution before the constitution of an arbitral tribunal.
- Request an urgent relief from the Israeli courts.

## Israel's Judicial Authority and its Advantages in the Matter of Urgent Relief

The authority of Israeli courts to grant interim relief is anchored in legislation and several case laws and is not anticipated to vary distinctively under the ICAB.

Article 16(a)(5) of the Arb. Law grants Israeli courts a jurisdiction to grant urgent relief which runs in parallel to the equivalent jurisdiction of the appointed arbitrator in matters, and Article 75 of the Israeli Courts Law, 1984 allows the Israeli court (adjudicating a civil matter) to issue remedies as it deems fit.

The Supreme Court addressed this matter in **CA 102/88 Maadanei Avaz Hakesef v. Cent Or S.A.R.l., 42(3) P.D. 201 (1988)**. This case involved a contract with an arbitration clause with the seat in London, governed by English law. The Supreme Court determined that Israeli Courts have parallel jurisdiction to IA on matters of temporary relief, even on an ex-parte basis. The court ruled that the interim process is not the substance of the matter, and, as such, it does not interfere with the arbitrator's jurisdiction.

Considering the concurrent jurisdiction, there are a few advantages of the interim procedure handled by the Israeli courts as opposed to the EA mechanism, making the former more appealing.

First is the **enforcement** obstacle of interim relief granted by the EA mechanism, since under the current Arb. Law (Articles 23 and 37), any interim decision granted by the EA mechanism is deemed an "order"

rather than an "award", and, as such, its enforcement requires the Israeli Court to hold a de-novo examination of the party's arguments and rights. Unlike an EA order, an interim relief granted by an Israeli court comes into force immediately. This option may also serve as an intermediate solution until the appointment of an arbitral tribunal or the constitution of an EA.

Second is the **timeframe** for granting each one of the relief. For example, according to Appendix V of the International Chamber of Commerce Arbitration Rules (2021) ("ICC Rules"), an emergency arbitrator must be appointed within two days, and the order must be issued within 15 days of both parties filing their respective submissions (and even longer in some cases). While under Israeli law, urgent relief might be granted in just a few hours in matters such as asset seizure and prohibitive injunctions.

In addition, Israeli courts may grant relief on an **ex-parte basis**.

Lastly, appealing for interim relief before an Israeli court is more **cost-efficient**: while Appendix V of the ICC Rules sets the opening fees as high as USD 40,000, making it an expensive mechanism in case of relatively small disputes under Israeli court jurisdiction, the fee is based on the amount of the requested relief, or the award claimed.

Given these four clear advantages of the Israeli procedure as opposed to the EA mechanism and because of the vast majority of arbitration institutions allow parties to file requests for relief with a competent judicial authority (for example, article 29(7) of the ICC Rules), it is much easier, efficient and therefore more common to immediately seek relief before Israeli courts.

## Advantages in Handling Urgent Interim Measures and Their Enforcement in Light of the Upcoming ICAB

The final proposed set of modifications under the ICAB will allow easier enforcement of urgent relief granted in international and domestic arbitrations while keeping Israel's concurrent judicial authority.

As one of the main goals of the ICAB is to encourage courts to refrain from intervening in awards and orders given in IA proceedings, under Articles 24 and 25 of ICAB, Israeli courts are provided with a narrow list of reasons allowing them to deny enforcement of interim relief granted by an arbitral tribunal. Therefore, enforcement of interim relief will be preferable to its denial, with Article 25(a)(2)(a) even allowing the court to redraft the remedy of an urgent relief (without altering its essence) in case it does not align with its jurisdictional powers.

Nevertheless, the ICAB still gives preference to Israeli courts regarding urgent relief. For instance, Article 18 provides a closed list of urgent remedies available to the arbitral tribunal. More accurately, the arbitral tribunal will be authorized to grant interim remedies intended inter alia to preserve the existing situation, prevent harm to the arbitration process, avoid damage or preserve assets against which a future arbitration award may be enforced, or preserve evidence that may be essential to the proceedings.

Moreover, although the original UNCITRAL Model Law allows parties to request urgent relief on an ex-parte basis, the ICAB proposal in its current form does not expressly regulate the enforcement of ex-parte emergency measures granted by arbitrators."

On the other hand, as Article 26 of ICAB determines that Israeli courts will keep their existing authority for urgent interim relief, including the power to issue ex parte interim orders, they will have the legal authority to grant any interim remedy as they see fit. However, ICAB determines that a court **must** consider the unique characteristics of IA when exercising its jurisdiction to grant urgent interim relief.

The new bill promotes the use of EA and urgent relief by IA (by changing the enforceability status), but only partially, and will keep the advantage of the courts regarding extremely urgent and ex-parte applications in place.

## ABOUT THE AUTHORS


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MIDDLE EAST AND TURKEY

# Turkey

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*Throughout 2023, Türkiye has took taken important steps in refining its approach to international arbitration with national and international developments As Turkish courts deliver remarkable rulings in the field of arbitration, Türkiye has navigated a tough year marked by two international arbitration awards involving different states. Despite these challenges, Türkiye has remained committed to enhancing its role in international arbitration by ratifying a new bilateral investment treaty. We are excited to share the significant developments concerning arbitration of 2023 with you in this review, shedding light on Türkiye's development with regard to the arbitration practice.*

## Recent Developments in Investment Treaty Arbitration

### Ratification of a Bilateral Investment Treaty

As per the Presidential Decree issued on April 25, 2023, the Belarus-Türkiye BIT (2018) became effective on December 30, 2022, replacing the former treaty between the two nations.

### Disputes

While no claims have been brought against Türkiye in 2023, Güriş İnşaat ve Mühendislik Anonim şirketi, which is a Turkish construction company, has filed a case (Güriş v. Saudi Arabia) with the International Centre for Settlement of Investment Disputes ("ICSID") against Saudi Arabia on August 21, 2023. The company claims it has suffered a denial of justice within the Saudi judicial system.

### Awards

Despite not being an investment treaty arbitration, an important decision rendered in 2023 deserves to be highlighted for its significance. The ongoing dispute between the Republic of Türkiye and Iraq is finally endedover with the decision given on February 13, 2023, in the arbitration administered by the International Chamber of Commerce ("ICC"). The arbitration commenced in 2014 when Iraq brought the case before the ICC against Türkiye after Kurdish oil was loaded onto a tanker in Ceyhan. Iraq claimed that Türkiye violated the Iraq Türkiye Pipeline ("ITP") Agreement with its actions. The dispute basically concerned the Energy Framework Agreement between Türkiye and the Kurdish Regional Government ("KRG"), and Türkiye's actions taken in accordance with that agreement, which were contrary to the ITP, like oil loading and denying Iraqi access to the facilities. On 13 February 2023, the arbitral tribunal awarded Iraq over 1.9 billion USD before offsetting Türkiye's counterclaims.

Another important decision was given on March 3, 2023. The arbitral tribunal rendered its award in the Westwater Resources v. Türkiye case, administered under ICSID according to the ICSID Arbitration Rules (2006). The tribunal found that Türkiye breached the BIT with the US by revoking uranium licenses from Adur Madencilik Limited Şirketi, Westwater Resources Inc.'s subsidiary. However, the tribunal found no link between this breach and the claimed profit losses, citing low uranium prices and funding issues. Westwater, therefore, received just $1.3 million for costs, and none of the $36.5 million sought, as the claim for lost profits could not be substantiated.

In 2023, Turkish investors ended the protracted legal dispute as Tekfen Holding and TML successfully settled their case against Libya. The intricate legal saga, originating in 2018 with a partial award that denied jurisdiction over Libya but held the state-owned Libyan Man-Made River Authority ("MMRA") liable for around USD 40 million, finally reached a resolution. In mid-2023, Tekfen Holding revealed that negotiations with MMRA had commenced following the partial award. These negotiations, which had in fact concluded in 2022, ultimately resulted in MMRA agreeing to pay approximately 35.4 million USD to settle the claims. Tekfen Holding and TML had also pursued a treaty claim under the Libya-Turkey BIT before the ICC, but the tribunal rejected the claim.

# Commercial Arbitration – Desicisions by the Court of Cassation

### Law Governing the Arbitration Agreement

The identification of the law governing arbitration agreements has become increasingly intricate, drawing heightened attention—especially in the aftermath of the UK Supreme Court's Enka v. Chubb Russia and Chubb Europe judgment. The Turkish Court of Cassation dealt with the issue in its recent decision.

The dispute arose from a personal guarantee agreement in which a bank extended a loan to a Maltese company in 2014, secured by the personal guarantee of its ultimate owner. Despite a deadline for repayment by September 1, 2016, neither the borrower nor the guarantor fulfilled their obligations, leading to settlement negotiations. These negotiations culminated in creating an agreement titled "Extension of the Personal Guarantee Agreement" (the "Extension") in 2019. The Extension changed the forum selection from German courts to ICC arbitration seated in Istanbul, Turkey, with the governing law specified as German. Following further discussions, the guarantor eventually signed the Extension. However, disputes resurfaced shortly after its execution, prompting the bank to initiate an ICC arbitration against the guarantor based on the arbitration clause in the Extension. The personal guarantor then challenged jurisdiction based on, among others, the lack of consent.

In the Final Award, the Sole Arbitrator determined that German law, not Turkish law—the law of the seat of arbitration—governed the substantial validity of the arbitration agreement. Citing recent English judgments, the Sole Arbitrator asserted that the issue of consent should be governed by the law applicable to the underlying contract, which, in this case, was German law. The Sole Arbitrator maintained jurisdiction and ordered the guarantor to pay the outstanding amount under the Loan Agreement.

Subsequently, the guarantor sought set-aside actions in Turkish courts, arguing that the Sole Arbitrator unlawfully assumed jurisdiction due to an invalid arbitration agreement under Turkish law. Additionally, the guarantor contended that the award violated public policy as the Sole Arbitrator applied German law, not Turkish law, to the substantive validity of the arbitration agreement.

However, the Regional Appellate Court and the Court of Cassation rejected these arguments, affirming the Sole Arbitrator's jurisdiction. Both courts determined that the Sole Arbitrator correctly evaluated the substantive validity of the arbitration agreement based on German law—the governing law of the underlying contract. Moreover, the Court held that the award did not violate public policy, as the Sole Arbitrator applied the appropriate law to the substantial validity of the arbitration agreement.

## "Arbitration Term" and Set-Aside Action

Under Turkish lex arbitri, arbitral awards must be delivered within a year after appointing a sole arbitrator or preparing the first minutes of the arbitral tribunal's meeting. Failure to comply with this "arbitration term" could lead to the setting aside the arbitral award by Turkish courts.

Although the one-year period can be extended by mutual agreement of the parties or, in the case of institutional arbitration, by the institution's decision or the Turkish courts, issues rarely arise in practice. In a recent decision, the Court of Cassation set aside an arbitral award, emphasising that the parties had not extended the arbitration term, resulting in the award being rendered after the mandatory one-year period.

In another related decision, the Court of Cassation cautioned parties to arbitration agreements to ensure the extension of the arbitration term when necessary. The Court stated that the parties should have been aware of the arbitration term and should have sought an extension if they intended for the arbitration procedures to continue.

## Non-Participating Arbitrator

In a late 2023 decision, the Turkish Court of Cassation examined the influence of non-participating arbitrators on set-aside proceedings. The dispute arose from the termination of a construction contract and the subsequent claims for damages. Initially, all three arbitrators actively engaged in the arbitration proceedings. However, during the deliberations of the arbitral tribunal, one arbitrator could not attend one or more sessions for specific reasons that were duly communicated. As a result, the remaining two arbitrators proceeded to render a decision, excluding the signature of the absent arbitrator, ultimately rejecting the claim.

The claimant subsequently turned to the Turkish courts, seeking a set aside on the grounds that the decision was rendered by only two arbitrators, contrary to the arbitration agreement's requirement for three arbitrators. The Regional Appellate Court set aside the award in response to these arguments. Upon further appeal, the Court of Cassation emphasised a crucial distinction. If the third arbitrator was not invited to the deliberations (which, in this case, was not true), and the decision was issued by the remaining two arbitrators, then the award should be set aside. However, if the arbitrator was invited to the deliberations (i.e., was allowedto be present), the failure of that arbitrator to attend should not automatically result in a set-aside decision.

## No Obligation to Appoint Tribunal Appointed Expert

In 2023, the Court of Cassation reiterated that arbitral tribunals are not obligated to appoint tribunal-appointed experts. In certain arbitration proceedings, counsel may anticipate the tribunal appointing its technical or quantum experts to review the party-appointed expert's findings or analyse the parties' positions, influenced by the practices in some national courts, including Turkish courts. However, the Court of Cassation clarified once again in 2023 that arbitral tribunals have the discretion to determine whether appointing a tribunal-appointed expert is necessary based on the circumstances of each case. Consequently, any attempts to challenge arbitration awards on the grounds of the tribunal's refusal or failure to appoint such experts are unlikely to succeed.


### ABOUT THE AUTHORS

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MIDDLE EAST AND TURKEY

# United Arab Emirates

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## Overview of the Arbitral Landscape of the United Arab Emirates

The United Arab Emirates ("**UAE**") legal system comprises a federal judicial system and two financial-free zones with independent legal systems. The federal system operates on a civil law system, drawing upon the principles of Sharia law. On the other hand, the two freezones, the Dubai International Financial Centre ("**DIFC**"), and the Abu Dhabi Global Market ("**ADGM**"), are based on common law, each with a court system similar to that of England and Wales. The UAE federal legal system is often called the "onshore" system, with the DIFC and ADGM legal systems referred to as "offshore" systems.

Consequently, if the seat of an arbitration is any onshore city, it would be governed by Federal Law No. 6 of 2018, as amended ("**UAE Arbitration Law**"). If the seat is the DIFC or the ADGM, DIFC Law No. 1 of 2008 ("**DIFC Arbitration Law**") or the ADGM Arbitration Regulations 2015 ("**ADGM Arbitration Regulations**") respectively apply. The DIFC and ADGM laws are largely based on the UNCITRAL Model Law on International Commercial Arbitration 2006 ("**UNCITRAL Model Law**"). English law is directly applicable and binding on ADGM Courts.

## Recent Developments to the Laws and Regulatory Framework of the UAE

### Federal Law No. 15 of 2023 amending Federal Law No. 6 of 2018 on Arbitration

On 29 September 2023, the amendment to the UAE Arbitration Law came into effect. Significant amendments introduced include:

- Permitting the appointment of an arbitrator where the arbitrator serves on the board of directors/trustees of the arbitration institute under which the arbitration is held. The amendment further protects impartiality through the threat of an annulment of the award and making the arbitral institution and arbitrator liable to the impacted party where a breach of the conditions stipulated under law takes place.
- The provision of a remote or physical hearing upon party agreement, or by the tribunal in the absence of agreement.
- Requiring arbitral tribunals to prepare minutes of hearings and provide them to the parties after the hearing.

- Allowing a tribunal to conduct an arbitration procedure entirely without hearings, on the basis that written submissions are sufficient for it to make its award.

These amendments bring the UAE Arbitration Law further in line with international standards.

# Federal Decree-law no. 14/2023 on Trade Through Modern Technological Means

This law forbids arbitration for any disputes arising from a digital contract (i.e., a virtual contract between a virtual merchant and a consumer) worth less than AED 50,000.

# Abu Dhabi International Arbitration Centre or arbitrateAD

In December 2023, the Abu Dhabi Chamber of Commerce and Industry announced the formation of a new center, arbitrateAD. ArbitrateAD will replace the previous Abu Dhabi Commercial Conciliation and Arbitration Centre ("**ADCCAC**") from 1 February 2024. ADCCAC will continue to administer the cases currently before it. The introduction of arbitrateAD adds to the expansive list of arbitral institutions with offices in UAE, providing arbitration users a variety of options to administer their disputes.

# DIAC Annual Report 2022

Based on its latest report, Dubai International Arbitration Centre ("**DIAC**") registered 340 new cases in 2022 with a combined value of AED 11.2 billion (USD 3.1 billion), with 49% of the disputes relating to the construction sector. The surveyed disputes spanned over 48 countries. It is worth bearing in mind that this follows DIAC's reorganization of, which was undertaken in 2021.

# Recent Cases relating to Arbitration in the UAE

As a civil law jurisdiction, onshore UAE Courts are not bound by judicial precedent. Nonetheless, these decisions remain an important tool in understanding the interpretation of UAE laws by judges in the UAE. For this reason, parties in arbitration proceedings in the UAE routinely make reference to domestic case law. The below updates are limited to the onshore Courts.

## Case No. 10/2023, ruling of the General Assembly of the Dubai Court of Cassation

In this case, the General Assembly of the Dubai Court of Cassation (the "**DCC**") found that the arbitration agreement remains valid where arbitration proceedings are terminated due to a party's failure to pay its advance on costs. Consequently, parties can initiate arbitration proceedings once they can pay the advance on costs. The General Assembly of the DCC's ruling, followed by Dubai courts in practice, is a welcome clarification in light of conflicting past judgments.

## Case No. 1514/2022, ruling of the Dubai Court of Cassation

The DCC recently clarified the treatment of condition precedent in arbitration proceedings at post-award stage and cost awards.

Traditionally, under UAE law, non-compliance with conditions precedent was considered an issue of jurisdiction, leading to the courts setting aside awards where it found the conditions precedent had not been satisfied. In this case, however, the DCC found that non-compliance with conditions precedent was an issue of admissibility when examined in an action for recognition or setting aside of an arbitral award. This provides a high degree of discretion to the arbitral tribunal

in determining whether the conditions precedent were met, while the court's focus during post-award scrutiny would be whether a party was denied the right of defence or if the exercise of the arbitral tribunal's powers led to a breach of public order.

It should be noted that this decision is limited to the DCC's powers at post-award stage and does not impact arbitral proceedings. The judgment is also silent on whether arbitral tribunals are empowered to suspend proceedings if condition precedents have not been met, so this remains to be seen in future judgments.

The DCC also confirmed that the tribunal's power to award costs is subject to express party agreement. In absence of such an agreement, a tribunal cannot make an order for legal costs. It is worth noting that the arbitration in question was governed by the DIAC Rules 2007. The DIAC Rules 2022 now expressly empower tribunals to award party costs.

### Case No. 585/2023, ruling of the Dubai Court of Cassation

In a surprising development, DCC found that the invalidity of a contract due to public policy reasons extended to the arbitration agreement contained within that contract. The Court referenced the grounds for annulment of an award under Article 53 of the UAE Arbitration Law and found that the underlying contract was void. Therefore, the arbitral award in question could not be enforced as it would violate public policy in the UAE. It is well established that if the subject matter of a dispute relates to public policy, it is non-arbitrable. However, the Court went on to suggest a link between the invalidity of a contract and the arbitration agreement contained within that contract, which contradicts the doctrine of separability and the UAE's previous case law.

### Case No. 1045/2022, ruling of the Abu Dhabi Court of Cassation

In this case, the Abu Dhabi Court of Cassation (the "**ADCC**") found that an ICC Arbitration seated in Abu Dhabi was considered seated in the ADGM and subject to the ADGM Arbitration Regulations. It decided so because the ICC regional office was based in the ADGM. The ADCC also clarified that reference to an "Abu Dhabi, UAE" seat is not specific enough as both the onshore Abu Dhabi Courts and the ADGM Courts are courts of Abu Dhabi.

This judgment highlights the importance of distinguishing between onshore and offshore jurisdictions, which the parties should consider while entering arbitration agreements.

### Case No. 1078/2023, ruling of the Dubai Court of Cassation

Previously, parties to an arbitration agreement in the UAE would attempt to circumvent the arbitration procedure through the joinder of a third party to proceedings before the onshore UAE Courts. The DCC, however, has put a stop to such an approach, noting that third parties could be joined, and the case brought before the onshore UAE courts, only where there are claims against each third party that would not be covered by the applicable arbitration agreements. If the claims are purely contractual, they must be covered by the arbitration agreement and thus be brought in arbitration only against the proper parties to the contract.

### Case No. 828/2023, ruling of the Dubai Court of Cassation Case

In this case, the DCC held that subsequent contracts between the same parties may fall under an arbitration agreement contained in the initial contract where there is a sufficiently close factual connection and no contrary dispute resolution clause in subsequent dealing. Specifically, the dispute arose out of purchase orders that did not contain an arbitration agreement. Nonetheless, the DCC found that the dispute was governed by the arbitration agreement contained in the initial contract.

### Case No. 1603/2022, ruling of the Dubai Court of Cassation

The DCC found that an assignment of rights under the contract also transfers the arbitration clause to the third party assignee, notwithstanding that they have not agreed to or entered into the arbitration

agreement themselves. This is significant as it questions the concept of the privity of contract in arbitration agreements for arbitrations seated in the UAE.

The above two cases are welcome developments that ensure that an arbitration agreement can remain valid in subsequent dealings and cases of assignment.

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