

ICC Dispute Resolution Bulletin

2022 | ISSUE 2

The lower half of the cover features a solid blue background. On the left side, there is a vertical black bar. Overlapping the blue background and the black bar are two large, thick, black curved lines that sweep upwards and to the right, creating a dynamic, abstract shape.

ICC Dispute Resolution Bulletin | 2022 Issue 2

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

Editors-in-Chief | Rédacteurs en chef

Julien Fouret

Yasmine Lahlou

Editorial Board | Comité de rédaction

Christian Albanesi

Stavros Brekoulakis

Farouk El-Hosseny

Karina Goldberg

Imad Khan

Sara Nadeau-Séguin

Damien Nyer

Olena Perepelynska

Sulabh Rewari

Rafael Rincon

Othmane Saadani

Michele Sabatini

Sabina Sacco

Leyou Tameru

Charis Tan

Sherlin Tung

Angeline Welsh

Jennifer Younan

Dispute Resolution Services Publications

Stéphanie Torkomyan, Publications Manager

Claire Héraud, Senior Publications Assistant

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

ICC Publication No. @22BUL2
ISBN: 978-92-842-0636-0
ISSN: 2520-6052

Price | Prix

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

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

Publication date | Date de parution

September 2022 | Septembre 2022

Published by ICC | Édité par ICC

Président, directeur de la publication : John Denton

Head Office

33-43 avenue du Président Wilson
75116 Paris, France

Directeur général, directeur adjoint de la publication : Emmanuel Jolivet

Copyright © 2022 International Chamber of Commerce (ICC)

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

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

Disclaimer

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

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

Trademarks

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

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

Subscriptions/Individual issues

publications@iccwbo.org

The ICC Dispute Resolution Bulletin is available :

- ICC Knowledge 2 Go at <https://2go.iccwbo.org/>

- ICC Digital Library at <http://library.iccwbo.org/>

Contents

| | |
|--|---|
| > Claudia Salomon | |
| Message from the President | 5 |
| > Julien Fouret and Yasmine Lahlou | |
| Welcome from the Editors-in-Chief | 7 |

GLOBAL DEVELOPMENTS

| | |
|--|----|
| > Rafael Rincón | |
| Colombia: Supreme Court Strengthens Private Party Autonomy in Adopting Rules for Conducting International Arbitrations | 9 |
| > Charlene Sun, Elena Rizzo | |
| United States: D.C. Circuit Finds that Foreign Court's Order Setting Aside Award Has No Bearing on District Court's Jurisdiction | 13 |
| > Chiann Bao, Queenie Lau | |
| Hong Kong: First Instance Court Clarifies Limitations to <i>Iura Novit Arbiter</i> | 16 |
| > Antonia Birt, Arthad Kurlekar | |
| India: Offshore Arbitration for Indian Parties – A Comment on the <i>PASL Wind Solutions</i> Case and Its Potential Impact in the Middle East | 19 |
| > Sarah Monnerville Smith, Gabriel Bulteel | |
| France: Supreme Court Confirms Impact of International Sanctions on the Validity and Enforcement of Arbitral Awards | 23 |
| > Maryna Saienko | |
| Ukraine: Adoption of a New Law Regulating Mediation | 29 |

COMMENTARY

| | |
|--|----|
| > Mélanie van Leeuwen | |
| Diversity in Action | 32 |
| > Andreas Frischknecht, Greta Körner and Alex Lupsaiu | |
| Who Decides? Judicial Review of Arbitral Jurisdiction in the U.S. and Germany – particularly under Article V(1)(c) of the New York Convention | 40 |

ICC COMMISSION REPORTS

| | |
|---|----|
| > Pierre Mayer | |
| Corruption and Arbitration: Recent Developments in French Case Law | 51 |

ICC ACTIVITIES

- > Susan Munro, Robert Pé
ICC Court's Belt & Road Commission: Going Forward 55
- > Ten Tips on How to Make an Arbitration Award Work: Lessons from
the ICC Scrutiny Process 57
- > Gabriela Lopez Stahl
**ICC YAAF: Top Ten Tips on How to Better Match the Arbitration Process
with Businesses' Expectations** 62
- > Dr Helena HC Chen
ICC Institute Advanced Training on Dispute Boards 65
- > Reshma Oogorah
10th ICC MENA Conference on International Arbitration 68

BOOK REVIEWS

- > Manuel Tomas
**Can International Arbitration Stand the Test of Mandatory Rules
and Compliance?** 72
- > Hyewon Lee
**Arbitrators' Conflict of Interest: Perspectives from Users, Institutions,
and State Courts** 75
- > Professor Dr. Walter Doralt, Dr. Brooke Marshall
Discretion Meets Due Process in International Commercial Arbitration 78

PDF VERSION

- > [Click to download a pdf version of the Bulletin](#)

Message from the President

Claudia Salomon

President, ICC International Court of Arbitration



As the President of the ICC Court, I am focused on ensuring that every aspect of international arbitration has a client mindset.¹

This means that the parties – essentially our clients – are the ones driving the service requirements. In my first year in this role, I have

met with in house counsel around the globe to get their feedback and better understand their priorities. And the common themes we hear – whether the company or dispute is large or small – are business needs predictability, efficiency and a process they can trust.

This is our charge and our commitment – to deliver a suite of dispute resolution services that meet the needs of global business.

2021 Statistics

The 2021 Statistics, which will be detailed in the forthcoming Statistical Report, show some important records for ICC Arbitration, demonstrating our continued increasing global scope:

- > **840** cases were filed under the ICC Arbitration Rules and **13** under the Appointing Authority Rules. Our International Centre for ADR,² which handles cases under the Mediation, Expert, Dispute Board or DOCDEX rules, reached a new record of **80** filings in 2021.
- > The ICC Court approved a record number of **630** awards, of which 465 final awards, 123 partial awards, and 42 awards by consent – the highest total number of awards and final awards to date.
- > Parties in the 2021 filings came from **143** countries and independent territories worldwide.

- > **21%** of new cases involved a state or state entity; the total number of state and state entities (**222**) comprised **33** states and **189** state-owned parties from all parts of the world.
- > Arbitrators came from **99** jurisdictions, the widest geographical representation to date.
- > ICC arbitrations were seated in **127** different cities spread over **71** countries worldwide – a new record.
- > Cases were governed by the laws of **120** different nations, states, provinces and territories.

And we saw important improvements with gender diversity of arbitrators – but more work still needs to be done:

- > 2021 saw **1,525** confirmations/appointments of **1,060** individuals, with a higher percentage of arbitrators being confirmed/appointed only once (**70%**, compared to 66% in 2020), and a decreased number or arbitrators being confirmed/appointed twice or more (**30%**, compared to 34% in 2020). A similar proportion of single and repeat confirmations/appointments applied within both groups of men in 2021 (69%–31%) and women (72%–28%).
- > The number of confirmations and appointments of women arbitrators further rose to **371** (compared to 355 in 2020) representing **24.3%** (compared to 23.4% in 2020) of all confirmations/appointments. The **266** women arbitrators confirmed/appointed in 2021 came from **56** jurisdictions.
- > **39.5%** of the arbitrators appointed by the ICC Court were women (up from 37% in 2020); **26%** of the arbitral tribunal chairs nominated by the co-arbitrators were women; **17.5%** of the arbitrators nominated by the parties were women.

You have my commitment that we are focused on diversity, broadly defined, and you can expect more initiatives in this regard.

¹ Claudia T. Salomon, 'International Arbitration with a Client Mindset', *ICC Dispute Resolution Bulletin*, 2021, issue 2.

² www.iccadr.org

YAF is now YAAF

We have rebranded the ICC Young Arbitrators Forum to *ICC Young Arbitration and ADR Forum* to include ADR and underscore the wide array of our dispute resolution services.³ ICC YAAF offers exciting networking events and opportunities to introduce the new generation of practitioners to the field of international arbitration and ADR.

Reconstituted Belt & Road Commission

We reconstituted the ICC Belt and Road Commission to focus on the full range of Belt and Road dispute resolution related issues, particularly relating to China.⁴ Notably, Chinese parties have increased power in their contract negotiations. In 2021, more than 25% of parties in ICC Arbitration came from Asia-Pacific, and Chinese parties were the eighth most frequent nationality among the parties in ICC Arbitration.

With a deep understanding of how to resolve disputes arising along the Belt and Road, the Commission will focus on significant commercial enterprises, especially Chinese parties, engaged in investment and trade along the Belt and Road. The Commission aims to raise awareness and build on ICC's reputation as a globally trusted dispute resolution provider to become the trusted 'go-to dispute resolution service provider for Belt and Road disputes.

Tengqun Yu, Vice President and General Counsel, China Railway Group Limited, takes the reins as Commission Chair, from **Susan L. Munro** and **Robert S. Pe**. We are immensely indebted to Susan and Robert and their colleagues on the Commission for their contributions to make the Commission an important platform to actively promote ICC dispute resolution services. **Zhijin (Donna) Huang**, ICC Director for Arbitration and ADR, North Asia, will act as the Secretary of the Belt and Road Commission.

Welcomed clarification on sanctions

Lastly, I note that we welcome Decision (CFSP) 2022/1271⁵ and Regulation (EU) No 2022/1269⁶ of the Council of the European Union concerning the Russian related financial sanctions which clarify, among other things, that the sanctions do not apply to arbitral proceedings in a Member State or the recognition or enforcement of a judgement or an arbitration award in a Member State regarding certain Russian public entities and their subsidiaries. The amendment undoubtedly helps in clarifying the scope of the EU Regulation and increases legal certainty for the business community. The amendment follows ICC's request to the French Treasury for clarification on this issue.⁷ We also note the initiative of the six European arbitral institutions which also sought clarification of the regulations via different channels.

³ 'ICC forum for young arbitrators changes name to reflect broad dispute resolution scope' (www.iccwbo.org, 20 July 2022)

⁴ 'New structure and focus announced for ICC Belt and Road Commission' (www.iccwbo.org, 22 June 2022)

⁵ Council Decision (CFSP) 2022/1271, 21 July 2022, amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

⁶ Council Regulation (EU) 2022/1269, 21 July 2022, amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

⁷ 'ICC welcomes EU Regulation amendment increasing legal certainty for the business community' (www.iccwbo.org, 5 Aug. 2022)

Welcome from the Editors-in-Chief

Julien Fouret and Yasmine Lahlou



Dear Reader,

Welcome to this new edition of the Bulletin, with a revamped look and fresh developments and perspectives on international arbitration across the globe.

Global Developments. In the Americas, Rafael Rincón examines a 2021 landmark ruling in which Colombia's Supreme Court expanded the scope of its 2012 pro-international arbitration statutory regime, which is modeled on the UNCITRAL Model Law and gives the parties broader procedural autonomy than under the domestic regime. According to Colombia's highest court's ruling, the international regime can apply to cases that are objectively international under the law, irrespective of the parties' label, and that the parties to domestic arbitrations can lawfully agree to adopt that more liberal regime.

In the United States, foreign sovereigns are generally not immune from lawsuits to enforce foreign arbitral awards under the so-called arbitration exception, where 'the [arbitration] agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards'. In a dispute in which Nigeria had raised its sovereign immunity and disputed the application of the arbitration exception because the award in question had been vacated abroad, Charlene Sun and Elena Rizzo report on a recent decision in which the Court of Appeals for the D.C. Circuit – where most lawsuits against sovereigns are brought – had to resolve the issue whether the validity of the award was relevant to the State's immunity defense or was an issue for the merits to be decided separately.

In the APAC region, Chiann Bao and Queenie Lau comment on a 2022 ruling by Hong Kong's First Instance Court, one of those rare instances in which the court vacated an award. Considering that arbitrators ought to avoid surprises, the court found that the HKIAC tribunal had impermissibly ruled on a claim that had not been put forward by the parties.

Antonia Birt and Arthad Kurlekar analyze the 2021 ruling whereby India's Supreme Court found that the 1996 Arbitration Act allowed that disputes purely between Indian parties be arbitrated outside India, in which case the recognition of their award in India is subject to the New York Convention.

As Europe is experiencing the impact of economic sanctions adopted in response to Russia's invasion of Ukraine, Sarah Monnerville Smith and Gabriel Bulteel comment on a 2022 French *Cour de Cassation* decision addressing the extent to which arbitrators are bound to apply international sanctions as well as the impact of those sanctions on the validity and enforcement of their awards.

Speaking of Ukraine, Maryna Saienko explains the law on mediation adopted by Ukraine in 2021, just two years after it had joined the Singapore Convention. We learn that although that country has had a long-lasting practice of mediation, this had remained largely unregulated until now.

Commentary. Opting for a catchy title, Melanie van Leuwen expands, in 'Diversity in Action', on her keynote address at this year's *Paris Arbitration Week*, in which she raised the alarm bell on the international arbitration community's need to urgently address the diversity gap or risk becoming obsolete and irrelevant.

In a compelling comparative law piece about the interpretation of Article V(1)(c) of the New York Convention, Andreas Frischknecht, Greta Körner and Alex Lupsaiu examine how courts in the United States and Germany approach arbitral jurisdiction and the degree to which it is subject to judicial review. Despite their methodological differences, those two jurisdictions have tended to reach remarkably similar outcomes.

ICC Commission reports. To assist our readers in staying abreast of the French courts' rich and complex case law on corruption and arbitration, the Bulletin is publishing Professor Pierre Mayer's keynote speech to the ICC Commission on Arbitration and ADR's meeting on 29 March 2022, in which he tackled recent case developments on the topic.

ICC Activities. Taking stock of their efforts to steer the ICC Court's Belt & Road Initiative Commission through the pandemic, the Commission's outgoing chairs Susan Munro and Robert Pé provide an overview of the Commission's initiatives over the past two years to educate and be useful to arbitration users in Asia, and describe the Commission's ongoing reinvention under a new leadership to focus on users based in mainland China.

In this section, you can also find the synopsis of a panel held during *New York Arbitration Week*, in which ICC Court Members Maria Chedid, Ndanga Kamau, Ina C. Popova and Todd Wetmore addressed the enigmatic yet vital award scrutiny process, and offered their 'Ten Tips on How to Make an Arbitration Award Work'.

Ten being the magic number, Gabriela Lopez Stahl, ICC YAAF's representative for North America, has summarized for us a recent panel discussion organized by YAAF during the inaugural *California International Arbitration Week*, in which the panelists shared their 'Top Ten Tips on How to Better Match the Arbitration Process with Businesses' Expectations'.

Turning to ADR methods to manage longer-term projects, Dr. Helena Chen reports on the ICC Institute's advanced training on dispute boards, which was held on the eve of the ICC MENA Conference in Dubai. After offering a general introduction to dispute boards, the faculty offered a practical perspective on dispute avoidance, the conduct of a formal DB procedure and the enforcement of dispute board conclusions.

Staying in Dubai, Reshma Oogorah attended for us the ICC MENA Conference on 17 May 2022, whose agenda included a glimpse into the future of the regional economies and a look back at the recent developments in international arbitration in the region, discussion of thorny legal issues such as the distinction between jurisdiction and admissibility, or the arbitrator's authority to revise the contract. Echoing Claudia Salomon's invitation for counsel and users to more broadly explore their tools for dispute resolution, the last panel discussed another ADR method, the expert determination.

Book reviews. Manuel Tomas reviews the latest dossier edited by George Affaki and Vladimir Khvalei on behalf of the ICC Institute of World Business Law, on *Overriding Mandatory Rules and Compliance in International Arbitration*, which is divided into eight chapters that comprehensively deal with the various facets of that broad topic. Mr Tomas finds it an 'excellent contribution' to the debate that is 'well-researched and thorough, offering a useful legal compass for arbitrators, counsel, business executives, law enforcement agencies and other stakeholders involved in strategic decision-making'.

Hyewon Lee has read for us ASA's special series bulletin titled *Clear Path or Jungle in Commercial Arbitrators' Conflict of Interest?*, a volume of 13 chapters edited by Felix Dasser, in which various authors delve into the issue from the perspective of the users, the arbitral institutions and the state courts, while others ponder whether more uniformity is needed to make sense of the jungle.

Finally, Professor Dr. Walter Doralt and Dr. Brooke Marshall deliver a laudatory review of *Due Process as a Limit to Discretion in International Commercial Arbitration*, co-edited by Prof. Franco Ferrari, Dr. Friedrich Rosenfeld and Prof. Dietmar Czernich. Finding the book 'unusual in more ways than one way', the reviewers praise the book's 'rigorous study of due process, as the title indicates, and more specifically of the limits derived from due process in international commercial arbitration'.

We hope you find this issue interesting and invite you to reach out to us or our colleagues on the editorial board to suggest or propose contributions.

We are all as always thankful to the authors and editorial board members who devote their energy to helping us maintain a vibrant and useful resource for all arbitration practitioners, to Stephanie Torkomyan, ICC Dispute Resolution Publications' Manager, and Claire Héraud, Senior Publications Assistant (DRS_Publications@iccwbo.org).

AMERICAS



Colombia

Supreme Court Strengthens Private Party Autonomy in Adopting Rules for Conducting International Arbitrations

Rafael Rincón

Founding Member, Zuleta Abogados Asociados, Bogotá, Colombia

The opinions expressed herein are those of the author and do not bind or represent Zuleta Abogados Asociados.

By decision of 3 November 2021, the Colombian Supreme Court of Justice established that private parties may agree to any procedural rules that govern the arbitration proceeding regardless of the nature of the arbitration. Therefore, parties may agree that domestic procedural rules are applicable to international arbitrations and, likewise, that international procedural rules and standards may govern domestic arbitrations. The Court's decision is a gateway that may allow private parties to eradicate procedural distinctions between domestic and international arbitration regimes.

Introduction

By enacting Law 1563 of July 2012 ('Arbitration Statute'), Colombia adopted an international arbitration regime based on the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ('UNCITRAL Model Law').

The Arbitration Statute adopts a dualistic approach by providing separate legal regimes for domestic and international arbitration. The Arbitration Statute's legal regime on domestic arbitration develops the rules applicable to domestic arbitration proceedings, most of which are based on traditional institutions of Colombian procedural law rooted in the Colombian Code of Civil Procedure (now derogated in its entirety by the Colombian General Code of Procedure).

Furthermore, the legal regime on international arbitration provided in the Arbitration Statute includes significant enhancements and modifications from its predecessor, Law 315 of 1996 ('Law 315').¹ Under Law 315, doubts existed as to whether local procedural rules intended for domestic arbitration would govern international arbitrations seated in Colombia. Moreover, a strict interpretation of local procedural rules prevented private parties from agreeing on flexible procedural rules in international arbitrations. Hence, local procedural

rules could negatively permeate the international arbitration legal regime. As to the nature of the arbitration, Law 315 stated that parties should expressly agree to be bound by international arbitration. Only if parties expressed this intention and fulfilled any of the criteria set forth in Article 1 of Law 315, the arbitration would be deemed international.²

Bearing in mind this scenario, the drafters of the Arbitration Statute intended to provide international arbitrations seated in Colombia with a broad and clear framework that would prevent a judge from relying on domestic arbitration provisions. Therefore, pursuant to the terms of the UNCITRAL Model Law, the Arbitration Statute limited the intervention of judges to specific events.³

¹ Law 315 exclusively comprised five articles and did not cover questions related with the nature of the arbitration agreement, arbitral proceedings, interim measures, or grounds for setting aside an award.

² Law 315: 'Article 1. Applicable criteria': 'An arbitration is international when the parties so agree, provided it also meets any of the following events: (1) The parties have their domicile in different States at the time of the conclusion of the arbitration agreement. (2) The place of performance of the substantial part of the obligations that is directly linked to the object of the dispute is outside the State in which the parties have their main domicile. (3) The place of arbitration is outside the State in which the parties have their domicile, provided this eventuality is agreed on in the arbitration agreement. (4) The matter that is the object of the arbitration agreement clearly involves the interest of more than one State and the parties thus expressly agreed. (5) The dispute referred to arbitration directly and unequivocally affects the interest of international commerce (...)'

³ For example, to a limited assistance in the appointment of arbitrators (Art. 73.5 of the Arbitration Statute), the challenge of arbitrators (Art. 76), gathering of evidence (Art. 100), and the ruling over the requests to set aside and enforce international arbitration awards (Arts. 107 and 111).

Furthermore, the Arbitration Statute incorporated objective criteria under which an arbitration is deemed international and excluded the provision provided for in Law 315 and upheld by Colombian Courts,⁴ whereby the parties needed to express their intention to be bound by international arbitration. Pursuant to Article 62 of the Arbitration Statute, an arbitration – seated in Colombia – is deemed international if:

The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their domiciles in different States; or

The place where a substantial part of the obligations of the commercial relationship is to be performed or the place where the subject-matter of the disputes is most closely connected is situated outside the State in which the parties have their domiciles; or

The interests of international trade are at stake in the dispute submitted to arbitration.⁵

The Arbitration Statute entered into force on 12 October 2012. Since then, the Colombian Supreme Court of Justice (the ‘Supreme Court’) has reviewed motions to set aside awards rendered by international arbitration tribunals seated in Colombia.

In this regard, the Supreme Court has previously ruled on a motion to set aside an ICC award rendered by an international arbitration tribunal seated in Colombia grounded on the argument that the parties were prevented from entering into an ICC arbitration agreement prior to the entry into force of the Arbitration Statute, and failed to expressly convey their intention to submit their disputes to international arbitration as required under Law 315. Therefore, the arbitration should be deemed domestic and the parties could not agree to submit the dispute to ICC Rules, given that these rules exclusively govern international arbitration.⁶ However, the Supreme Court held that: (i) the Arbitration Statute is applicable because the *dispute* submitted to arbitration arose after the entry into force of the said statute; and (ii) an arbitration is deemed international under the Arbitration Statute to the extent it meets any of the objective criteria provided thereunder. Therefore, the Parties are not obliged to express their intent under the Arbitration Statute. On this basis, the Supreme

Court dismissed the motion to set aside grounded on this argument and ruled that the arbitration agreement under the ICC Rules was valid.⁷

Similarly, on 3 November 2021, the Supreme Court issued a decision whereby it reviewed a new motion to set aside an award rendered by an international arbitration tribunal. This motion to set aside was grounded on the same arguments described in the preceding paragraph, as the arbitration agreement was executed prior to the entry into force of the Arbitration Statute. The Supreme Court used this opportunity to confirm its previous findings and expand upon the nature of the procedural norms that govern domestic and international arbitration proceedings in Colombia.

Factual background

On 22 June 2012, a Spanish company (Pestana Inversiones S.L.) and a group of Colombian companies (Sar1 S.A.S., Sar2 S.A.S., Sar3 S.A.S. y Sar4 S.A.S) entered into an agreement under which the Spanish company undertook to manage with full administrative autonomy a group of assets of a hotel in Bogotá, Colombia. Also, the Spanish company agreed to provide a guarantee to cover certain gaps of the gross operating profit of the hotel. The parties agreed to domestic arbitration administered under the Rules of a domestic arbitration center. The arbitration agreement was executed before the entry into force of the Arbitration Statute.⁸

Once the hotel became operational, its accounting records showed that the first three years of operation had gaps under 80% of the gross operating profit. Consequently, the Colombian companies requested the Spanish company to comply with the guarantee. However, the Spanish company refused the request.

After unsuccessful negotiations, the parties submitted the dispute to domestic arbitration. During the arbitration proceedings, the tribunal determined that the arbitration was international, since it met one of the objective criteria provided in the Article 62 of the Arbitration Statute. In this case, the parties were domiciled in different States at the time of the conclusion of the arbitration agreement (Spain and Colombia), and the arbitral tribunal deemed that the interests of international trade were at stake in the dispute submitted to arbitration.

⁴ *Termorio S.A. E.S.P. v. Electranta S.A. E.S.P.* (1 Aug. 2002), Colombia’s Council of State.

⁵ Art. 62 of the Arbitration Statute.

⁶ See Decision of the Supreme Court, Exp. SC001-2019, 15 Jan. 2019.

⁷ *Ibid.*

⁸ The Arbitration Statute, available at http://www.secretariasenado.gov.co/senado/basedoc/ley_1563_2012.html, entered into force on 12 Oct. 2012.

Therefore, the arbitral tribunal deemed that the arbitration was international and provided the parties with the opportunity to agree on the applicable procedural rules. After the withdrawal of the arbitrators – who were selected under the rules for domestic arbitration of a local arbitration centre (institutional arbitration) – and the appointment of new members to the tribunal, the parties did not reach an agreement on the applicable procedural rules. Hence, the arbitral tribunal applied the rules provided for international arbitration proceedings in the Arbitration Statute. Finally, the tribunal issued an award granting most of the requests made by the Colombian companies.

The Supreme Court's Decision

The Spanish company challenged the award before the Supreme Court by submitting a motion to set aside (*recurso de anulación*). Amongst other grounds, the Spanish company submitted that the award infringed sections 1(a), 1(b) and 1(d) of Article 108 of the Arbitration Statute,⁹ which are respectively tailored pursuant to the grounds provided for in Article 34(2)(a)(i), Article 34(2)(a)(ii) and Article 34(2)(a)(iv) of the UNCITRAL Model Law. In this regard, the Spanish company argued the award must be set aside since:

- > The tribunal ignored the will of the parties embodied in the arbitration agreement which stated expressly that their disputes shall be settled pursuant to domestic arbitration; and
- > The arbitral agreement is not a valid international arbitration agreement because it was entered into under Law 315, prior to the entry into force of the Arbitration Statute. In particular, the Spanish company stated that the parties did not express their intention to submit the dispute to international arbitration, as required under Law 315.

On 3 November 2021, the Supreme Court denied the motion to set aside,¹⁰ based on the following reasons:

- a) The criteria provided under Article 62 of the Arbitration Statute for an arbitration to be deemed international are objective and, as such, the parties may not modulate or amend them. Thus, in the event any of the objective criteria is met, the arbitration shall be deemed international.¹¹ Furthermore, the Supreme Court clarified that such criteria barred any statement or finding by the parties, including any agreement by the parties stating that the arbitration would be domestic.¹²
- b) In this vein, any and all arbitrations initiated after the entry into force of the Arbitration Statute shall be deemed international if one or more of the objective criteria set forth in its Article 62 are met.¹³
- c) Notably, irrespective of the domestic or international nature of the arbitration, private parties remain free to agree on the procedural rules, guidelines and standards to be followed by the tribunal when conducting the proceedings, so long as they guarantee the right to due process.¹⁴ Therefore, private parties may agree to apply international rules and standards for conducting domestic arbitrations or agree on domestic procedural provisions for conducting international arbitrations.¹⁵
- d) Arbitrators are entitled to adapt domestic proceedings into international arbitrations.¹⁶ Accordingly, international norms governing the conduct of arbitral proceedings protect due process and address public policy concerns. This is evidenced by the fact that the Supreme Court: (i) accepted that arbitrators were free to adapt domestic evidentiary proceedings and apply international norms for the practice of evidence; and (ii) that such adaptation did not prevent the parties from presenting their case before the arbitral tribunal.¹⁷

Based on the above-mentioned, the Supreme Court did not set aside the award.

⁹ Art. 108 of the Arbitration Statute. 'An arbitral award may be set aside by the judicial authority by the request of a party or *ex officio* if: (1) the party making the application furnishes proof that: (a) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Colombian law; or (...) (b) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (...) (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law.'

¹⁰ Decision of the Supreme Court dated 3 Nov. 2021 (Exp. SC4887-2021).

¹¹ *Id.* paras. 5.2.3 and 5.2.5.

¹² *Id.* paras. 5.2.3. and 5.2.5.

¹³ *Id.* para. 5.2.5.

¹⁴ *Id.* para. 5.2.3.

¹⁵ *Id.* para. 5.2.

¹⁶ *Id.* para. 5.2.5.

¹⁷ *Id.* para. 5.3.2.

Commentary

The decision by the Supreme Court provides several new insights for purposes of applying international rules and standards in arbitration seated in Colombia.

First, the international or domestic nature of an arbitration is not contingent upon the norms that govern the proceedings. An arbitration is deemed international under Colombian law to the extent it meets any of the criteria set forth in Article 62 of the Arbitration Statute. Notwithstanding the above, the Supreme Court recognized that private parties are free to agree on the norms governing the arbitration proceedings, irrespective of the nature of the arbitration.

This statement may serve as a gateway into the future, whereby international arbitration rules – such as the ICC Rules – could be applicable to domestic arbitrations. Although Colombian law requires that the Ministry of Justice approves the rules of arbitration of different arbitration centres for purposes of administering domestic arbitrations,¹⁸ the statement by the Supreme Court paves the way for a fruitful discussion that may enhance party autonomy in the context of domestic arbitration. Also, this decision opens, once again, the debate on whether a dualist approach to arbitration is necessary in Colombia, or whether it would be more efficient and harmonious to evolve to a monist regime inspired by the UNCITRAL Model Law.

Second, the Supreme Court's approach strengthens the international arbitration regime in Colombia. By recognizing that: (i) arbitrators enjoy discretion in adapting domestic arbitration proceedings into international arbitration proceedings; and (ii) such discretion allows the arbitrators to depart from local rules for the practice of evidence and apply international standards, the Supreme Court grants arbitrators the power to take the necessary measures to preserve international arbitration proceedings.

Furthermore, the Supreme Court states that such arbitral discretion is limited regarding due process and public policy. However, the Supreme Court recognized in this case that both local and international rules protect due process and public policy to the extent that neither party could point out to any event that prevented them from presenting their case. Hence, the Court implies that Colombia's international public policy and due process are also preserved through the application of international norms for the conduct of arbitral proceedings.

Finally, this decision contributes to the ongoing debate in Colombia, as to whether the autonomy granted by the Supreme Court to private parties in international arbitration may be extended to public entities in domestic arbitrations. Colombia's domestic arbitration regulation bars state entities from agreeing on procedural rules different from those provided in the domestic arbitration regime included in the Arbitration Statute.¹⁹ However, State entities are free to agree upon any norm for conducting an arbitration proceeding in the context of international arbitrations. Hence, the international arbitration regime may contribute to this debate by granting flexibility and efficiency to State entities in the context of domestic arbitrations.

Hopefully, this decision by the Supreme Court also opens a path for a legislative and institutional reform that address these concerns and allows to adjust any arbitration, regardless of its nature, to international best practices and standards.

¹⁸ According to Art. 8 of Decree 1829 of 2013, rules of arbitration centres shall only enter into force once the Ministry of Justice issues an approval.

¹⁹ Art. 2 of the Arbitration Statute: '(...) When the dispute involves contracts entered into by a public entity or whoever performs administrative functions, the arbitration proceeding shall be governed by the rules set forth in this law for institutional arbitration'.

AMERICAS



United States

D.C. Circuit Finds that Foreign Court's Order Setting Aside Award Has No Bearing on District Court's Jurisdiction

Charlene Sun, Elena Rizzo

Respectively Partner and Associate, DLA Piper LLP, New York

In March 2022, the D.C. Circuit rejected Nigeria's claim that U.S. courts lack jurisdiction to enforce a \$10 billion arbitration award on the basis that it was vacated in Nigeria. The validity or enforceability of an arbitral award is a question reserved for the merits phase and need not to be determined as part of a district court's jurisdictional inquiry. Nigeria's sovereign immunity was abrogated by application of the 'arbitration exception' to the FSIA.

In 2021, the District Court for the District of Columbia was called to decide on Process and Industrial Developments Limited's petition to confirm an award issued against Nigeria. The court dismissed Nigeria's sovereign immunity defense, on the basis that Nigeria had impliedly waived sovereign immunity by joining The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') and agreeing to arbitrate its dispute in a Convention state (known as the 'waiver exception' to the FSIA).¹ The court of appeals affirmed the decision on different grounds: it relied on the arbitration exception to the FSIA and declined to address the district court's interpretation and application of the waiver exception.² The court also concluded that a foreign court's order ostensibly setting aside an arbitral award had no bearing on the district court's jurisdiction and was instead an affirmative defense properly suited for consideration at the merits stage.

Background to the *P&ID v. Nigeria* dispute

At issue in the London-seated arbitration was a 20-year contract between Process & Industrial Developments Ltd. (P&ID) and Nigeria for the supply and processing of natural gas. P&ID claimed that Nigeria had failed to supply the agreed quantity of gas or construct the infrastructure it had agreed to build. In 2015, three years

into the arbitration, the arbitral tribunal issued an award on liability³ ('Liability Award') finding that Nigeria had breached the agreement.

Nigeria initially sought to set aside the Liability Award before the English courts. In February 2016, the English High Court of Justice ('English Court') denied Nigeria's set-aside application as untimely and presenting no grounds for extension.⁴ After its initial effort before the English courts was unsuccessful, Nigeria resorted to an action before its own local courts, which resulted in the Nigerian Federal High Court ('Nigerian Court') setting aside the Liability Award in 2016. The Nigerian Court's three-page decision lacked any reasoning or explanation.⁵

The arbitration proceeded in the meantime. The arbitral tribunal issued a final award⁶ ('Final Award') in P&ID's favor in the amount of US\$ 6.6 billion in damages plus interest.

In August 2019, P&ID sought enforcement of the Final Award before the English Court, which declared the Final Award enforceable.⁷ In December 2019, Nigeria applied

1 *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771 (D.C. Cir. 11 Mar. 2022), *aff'g on other grounds* 506 F. Supp. 3d 1 (D.D.C. 2020), *reh'g en banc denied*, No. 21-7003, 2022 WL 1480074, at *1 (D.C. Cir. 10 May 2022).

2 *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022).

3 *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Partial Final Award on Liability, 17 Jul. 2015.

4 *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, [2016] EWHC (QB) (Eng.).

5 The Federal High Court of Nigeria in the Lagos Judicial Division Holden at Lagos, 24 May 2016.

6 *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Final Award, 31 Jan. 2017.

7 *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, [2019] EWHC (Comm) 2241 (Eng.).

to the English Court for an extension of its deadline to set aside the Final Award based on alleged evidence of fraud that had been newly obtained in connection with a criminal investigation pending in Nigeria. The English Court set a future trial date to hear Nigeria's fraud claims after finding that evidence proffered by Nigeria 'established a strong prima facie case'.⁸

P&ID's confirmation efforts and Nigeria's sovereign immunity claims before U.S. courts

District Court finds that Nigeria implicitly waived sovereign immunity by joining the New York Convention and agreeing to arbitrate in a state party to the Convention ('implicit waiver' exception, FSIA, 28 U.S.C. § 1605(a)(1)).

In 2018, P&ID petitioned the U.S. District Court for the District of Columbia ('District Court') to recognize the Final Award pursuant to the New York Convention and Federal Arbitration Act (FAA) 9 U.S.C. § 201 *et seq.* Nigeria moved to dismiss for lack of jurisdiction, asserting sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.* In October 2018, the District Court denied Nigeria's motion to argue sovereign immunity separate from the merits.⁹ In June 2020, the Circuit Court found that the District Court erred in ordering Nigeria to defend the merits while its assertion of sovereign immunity under the Foreign Sovereign Immunities Act remained unresolved and remanded the issue of sovereign immunity to the District Court.¹⁰

In the ensuing proceeding, P&ID alleged that the District Court had the power to hear this type of dispute (subject-matter jurisdiction) under Sections 1605(a)(1) and 1605(a)(6) of the FSIA. Under Section 1605(a)(1) – or the 'waiver exception' to jurisdictional immunity – a foreign state's presumptive immunity from the jurisdiction of the U.S. courts may be abrogated through either explicit or implicit waiver. On the other hand, Section 1605(a)(6) – the so-called 'arbitration exception' – abrogates jurisdictional immunity from an action to enforce an agreement [to arbitrate] or to confirm an award made pursuant to such an agreement to arbitrate, provided that 'the agreement or award is or may be governed by a treaty or other

international agreement in force for the United States calling for the recognition and enforcement of arbitral awards'.¹¹

The District Court focused its analysis on the waiver exception and denied Nigeria's motion on the basis that Nigeria implicitly waived its sovereign immunity by joining the New York Convention – an international treaty obligating member states to recognize and enforce arbitral awards issued in other member states – and agreeing to arbitrate its dispute with P&ID in the United Kingdom, a Convention state. While noting that D.C. Circuit law on whether becoming a New York Convention signatory and agreeing to arbitrate in a Convention state is sufficient to constitute a waiver of foreign sovereign immunity under the FSIA was unsettled, the District Court relied upon Second Circuit precedent holding that 'when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory State must have contemplated enforcement actions in other signatory States'.¹²

The District Court declined to resolve the application of the arbitration exception under 28 U.S.C. § 1605(a)(6), or Nigeria's argument that the exception was inapplicable because the Nigerian Federal High Court had set aside the Liability Award. It noted, however, that the Nigerian set-aside decision was arguably irrelevant to the court's jurisdictional analysis and was instead more properly suited for consideration at the merits stage.¹³

Nigeria appealed.

⁸ *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, [2020] EWHC 2379, para. 196.

⁹ *Process & Indus. Devs. v. Fed. Republic of Nig.*, No. 18-cv-594 (CRC), 2018 U.S. Dist. LEXIS 226627 (D.D.C. 1 Oct. 2018).

¹⁰ *Process & Indus. Devs. v. Fed. Republic of Nig.*, 447 U.S. App. D.C. 316, 319, 962 F.3d 576, 579 (2020).

¹¹ FSIA, 28 U.S.C. § 1605(a)(1) and (6) provide: '(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; (...) (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable' (emphases added).

¹² *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 506 F. Supp. 3d 1, 8 (D.D.C. 2020) (citing *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 578-579 (2d Cir. 1993)).

¹³ *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 506 F. Supp. 3d at 6 n. 1.

Court of Appeals affirms District Court's ruling on the basis of the 'arbitration exception' (FSIA, 28 U.S.C. § 1605(a)(6)), and concludes that a foreign court's order ostensibly setting aside an arbitral award has no bearing on the District Court's jurisdiction.

Although the District Court centered its jurisdictional analysis on the waiver exception to immunity, on appeal, the Court of Appeals for the D.C. Circuit ('Court of Appeals') focused instead on the other exception to sovereign immunity raised by P&ID, the arbitration exception.

In its decision dated 11 March 2022, the Court of Appeals concluded that 'the application of the arbitration exception here is straightforward', noting that the New York Convention is 'exactly the sort of treaty' that the U.S. Congress 'intended to include in the arbitration exception'.¹⁴ The Court of Appeals recalled its own decision issued just two months prior in *LLC SPC Stileks v. Republic of Moldova*,¹⁵ which reaffirmed the holding in *Chevron Corp. v. Republic of Ecuador* that 'the arbitrability of a dispute is not a jurisdictional question under the FSIA',¹⁶ and held that three jurisdictional facts must be established in order to demonstrate the applicability of the arbitration exception: (i) the existence of an arbitration agreement, (ii) an arbitration award and (iii) a treaty governing the award.¹⁷

Applying that reasoning here, the Court of Appeals found that all three elements had clearly been met: (i) the agreement between P&ID and Nigeria contained an agreement to arbitrate; (ii) the arbitral tribunal, seated in London, issued an award to P&ID; and (iii) that award is governed by the New York Convention, to which Nigeria, the United States, and the United Kingdom are all parties. In line with its prior holdings in *Chevron* and *Stileks*, the Court of Appeals dismissed Nigeria's argument that the arbitration exception did not apply because P&ID lacked a valid and enforceable award in light of the Nigerian Court's set-aside order, holding that 'the validity or enforceability of an arbitral award is a merits question', and that 'the district court need not determine the validity of the arbitral award as part of its jurisdictional inquiry'.¹⁸

Conclusion

The *P&ID* decision represents the D.C. Circuit's latest application of the legal standard first established in *Chevron* governing the application of the arbitration exception.

Just one month after the *P&ID v. Nigeria* decision was issued, its rationale was applied in the case of *Hulley v. Russian Federation*, which had previously been stayed pending the outcome of the Dutch courts' ruling on Russia's application to set aside the \$50 billion award in that case. Based on the 'recent and binding guidance' of the Court of Appeals' ruling in *P&ID v. Nigeria*, the District Court lifted the stay of its consideration of Russia's motion to dismiss on sovereign immunity grounds, finding that the assessment of the District Court's jurisdiction is 'independent of any Dutch court ruling to set-aside – or not – the award'.¹⁹

This recent string of decisions appears to streamline the D.C. Circuit's jurisprudence governing the applicability of the arbitration exception to foreign sovereign immunity, and reflects movement toward a broad application of that exception in the District of Columbia, the default venue for cases against foreign states and their instrumentalities.

¹⁴ *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022) (citations omitted).

¹⁵ *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871 (D.C. Cir. 2021).

¹⁶ *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200 (D.C. Cir. 2015) at 878.

¹⁷ *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022) (citing *Stileks*, 985 F.3d at 877).

¹⁸ *Id.* at 776.

¹⁹ *Hulley Enters. v. Russian Fed'n*, Civil Action No. 14-1996 (BAH), 2022 U.S. Dist. LEXIS 68521, at *24-25 (D.D.C. 13 Apr. 2022).

ASIA/PACIFIC



Hong Kong

First Instance Court Clarifies Limitations to *Iura Novit Arbiter*

Chiann Bao

Independent arbitrator, Arbitration Chambers (with offices in Hong Kong, New York and London)

Queenie Lau

Barrister-at-law, Temple Chambers, Hong Kong Special Administrative Region of the People's Republic of China

In *Arjowiggins HKK2 Ltd v X Co*, the respondent in the arbitration applied to set aside the final award arguing that the arbitral tribunal went beyond the parties' submission to arbitration. The application was granted on the basis that the arbitral award sought to grant relief that was never claimed in the parties' pleadings.

Background

Arjowiggins HKK2 Ltd v X Co [2022] HKCFI 128 relates to an arbitration commenced in 2018 (the 'Arbitration') – an episode in a long-running dispute between Arjowiggins HKK2 Ltd ('HKK') and X Co. The dispute concerns the parties' joint venture in Mainland China operated through a joint venture company (the 'JV Company'). The Tribunal made its final award on 5 August 2020 (the 'Final Award'), and the respondent in the arbitration applied to the Hong Kong Court to set aside the Award.

The parties entered a Joint Venture Contract (the 'JV Contract') in October 2005. Their relationship irretrievably broke down, and the joint venture became deadlocked. Voluntary liquidation ensued, and a liquidation committee (the 'LC') was appointed. The voluntary liquidation progressed slowly, and eventually X Co sought the JV Company's compulsory liquidation. A compulsory liquidation order was granted on 19 June 2019, and shortly before the hearing of the 2018 Arbitration, a compulsory liquidation group ('CLG') was appointed on 28 October 2019 as the compulsory liquidation committee.

The pleadings in the Arbitration focused on whether X Co was entitled to exclusive possession of the JV Company's account books and documents (the 'JV Documents'):

- > X Co claimed it was entitled to exclusive possession of the JV Documents, that HKK had the JV Documents, and that HKK should deliver the JV Documents to X Co.¹
- > HKK denied it was in possession or control of the JV Documents, and also denied X Co's entitlement to the JV Documents. HKK claimed that the LC was the proper organ to have possession of the JV Documents until a compulsory liquidation committee was appointed.²

The tribunal handed down a Partial Final Award. It found HKK had the JV Documents.³ On the other hand, the tribunal held that X Co was not entitled to the JV Documents, and had no right to call for their delivery.⁴ According to HKK, that disposed of the parties' pleaded cases.

Nonetheless, the tribunal invited further submissions on orders it should make regarding disposal of the JV Documents.⁵ X Co claimed that HKK should deliver the JV Documents to X Co for X Co to make copies before delivery up to the CLG, or that HKK should deliver the JV Documents to the CLG (the 'Claim').⁶ HKK argued that the tribunal had no jurisdiction to make further orders: CLG did not exist when the Arbitration was commenced, and in the Arbitration X Co had not sought

1 Paras. 8-9.

2 Paras. 10-11, 16-17.

3 Para. 23.

4 Paras. 24-26.

5 Para. 29;

6 Para. 30.

relief that the JV Documents be delivered to the CLG.⁷ Further, HKK highlighted that the way in which the JV Company should be ‘properly liquidated’ had never been in issue in the Arbitration.⁸

The tribunal then handed down the Final Award, holding that: (1) the question of whether HKK had the JV Documents had been at the core of the Arbitration and was not a new question; (2) that question concerned the rights and obligations of the parties under the JV Contract, which was within the jurisdiction of the tribunal; and (3) X Co was entitled to the remedy of procuring the delivery up of the JV Documents to the CLG.⁹

Summary of the Court’s approach

HKK applied to set aside the Final Award, arguing that the Final Award went beyond the parties’ submission to arbitration, and should be set aside under, *inter alia*, s. 81(1) Arbitration Ordinance (Cap. 609) and Article 34(2)(a)(iii) Model Law.¹⁰ HKK complained that there was never a pleaded case, nor any dispute submitted in the Arbitration, that HKK was in breach of an obligation to assist in the liquidation of the JV Company pursuant to the JV Contract, or that the JV Documents should be delivered up to the CLG or any party other than X Co.¹¹

Mimmie Chan J agreed with HKK. The learned judge held that:

- > Pleadings, not evidence, delimits the scope of orders a tribunal can make;¹²
- > Whilst X Co argued that strict rules of pleadings and procedures are not insisted upon for arbitration proceedings on the basis that arbitration is a more informal manner of dispute resolution, the learned judge was of the view that however informal procedure may be in arbitration, surprises should be avoided.¹³ The touchstone is fairness, and parties to an arbitration should know in advance the claims and remedies the other side seeks so that they can consider all possible defences and decide what evidence to adduce.¹⁴

Applying those principles, Mimmie Chan J considered that the determinative question was whether HKK was surprised by the Claim.¹⁵ She held that HKK could not have reasonably anticipated the Claim from the pleadings and evidence served before the commencement of the Arbitration.¹⁶ The Arbitration focused on whether X Co was entitled to the JV Documents, and the issue of the parties’ breach of their respective duties under the JV Contract to facilitate or complete the liquidation was not pleaded, nor did the Tribunal have complete evidence on this matter.¹⁷

Mimmie Chan J also dismissed three factors that *prima facie* suggested the Court had jurisdiction over the Claim.

1. Whilst X Co had pleaded that HKK had possession of the JV Documents and the JV Company’s liquidation, the relief X Co had claimed throughout the Arbitration was that it was the only party entitled to the possession and delivery of the JV Documents, and HKK was entitled to prepare its case to answer X Co’s specific claim only.¹⁸ A party cannot simply plead all the rights and duties contained in an agreement, and pick and choose (or ask the tribunal to pick and choose) at the end of the hearing which rights to enforce and to seek the issuance of an award on that basis only.¹⁹
2. Although the tribunal let the parties make submissions on the Claim, it does not follow that the tribunal has jurisdiction over the Claim. Whether the tribunal has jurisdiction over an issue depends instead on whether the parties had referred it to arbitration, and the parties in this case had not agreed to refer the Claim to arbitration.²⁰
3. The HKIAC Rules require tribunals to adopt procedures that would avoid unnecessary delay or expense provided those procedures ensure the parties’ equal treatment and afford the parties reasonable opportunities to present their cases, but those rules only go to the arbitration’s procedure but not a tribunal’s jurisdiction.²¹

7 Para. 31.

8 Para. 32.

9 Para. 34.

10 Para. 2.

11 Para. 35.

12 Para. 37.

13 Para. 44.

14 Para. 45.

15 Para. 47.

16 Para. 50.

17 Para. 41.

18 Para. 46.

19 Para. 50.

20 Paras. 29, 42, 52.

21 Para. 43.

Major takeaways

The following key points arise from this Decision:

- > Tribunals do not have jurisdiction to award relief that has not been claimed in the pleadings. It is not sufficient to only plead the facts that would entitle one to relief, without claiming the relief itself. The pleaded facts relied upon by X Co in the present case were ‘of HKK being in possession of the JV Documents; of X Co’s contractual claim and right under the JV Contract to enforce the parties’ obligations to comply with PRC law and to seek delivery up of the JV Documents; and of the onset of compulsory liquidation’.²²
- > If a tribunal lacks jurisdiction to award particular relief because the parties have not claimed that relief in their pleadings, the tribunal cannot confer jurisdiction on itself by inviting or letting the parties make submissions on that relief.
- > Rules that require tribunals to adopt procedures that avoid unnecessary delay or expense do not allow tribunals to sidestep the issue of jurisdiction.

Mimmie Chan J also offered an interesting observation on pleadings in arbitration, noting that if the parties themselves use formal, litigation style pleadings in arbitration, and their submissions are made on the basis of those pleadings, ‘it may be artificial to draw a real distinction between arbitration and court litigation’.²³ This suggests there is no standard on how strictly the rules of pleadings and procedure should be applied in arbitration. Rather, the appropriate strictness depends on how formally the parties themselves approach their pleadings and submissions.²⁴

Broader significance

The extent to which a tribunal is permitted to traverse beyond the parties’ pleadings and submissions goes hand in hand with academic debate on whether the doctrine *iura novit arbiter* (i.e. the tribunal knows the law) should be embraced. Under this doctrine, the arbitrator knows the law and is therefore empowered to go beyond the scope of the parties’ submission to arbitrate.

There is suggestion in Hong Kong legislation and case law that arbitrators have some degree of latitude. For example, by virtue of s. 56(7) of the Arbitration Ordinance (Cap. 609), an arbitral tribunal may, absent agreement to the contrary by the parties, decide whether and to what extent it should take the initiative in ascertaining the facts and the law relevant to the proceedings. Further, in *Pacific China (Holdings) Ltd v Grand Pacific Holdings Ltd* [2011] 4 HKLRD 188,²⁵ the Court held, inter alia, that in light of the tribunal’s special experience or knowledge in a particular field (in that case, US law), the tribunal’s failure to allow comment on certain New York authorities it had identified was not such a serious matter as to constitute a violation of Article 34(2) of the Model Law.²⁶

However, s. 56(7) of the Arbitration Ordinance and decisions such as *Pacific China (Holdings) Ltd v Grand Pacific Holdings Ltd* cannot be taken in isolation, and regard must also be made to s. 81 of the Arbitration Ordinance (reproducing Article 34 of the Model Law), which lists the grounds for setting aside an award in Hong Kong. Pursuant to s. 81, an important ground for challenging an award is where the party seeking to set aside the award was unable to present its case. The Decision of Mimmie Chan J in *Arjowiggins HKK2 Ltd v X Co* is a good example of the application of s. 81: although the arbitrator knows the law and can investigate matters to some extent, the Court remains concerned about due process and fairness, and parties should not be taken by surprise. Flexibility in procedure to a certain degree does not mean that a tribunal can confer jurisdiction on itself.

²² Para. 33

²³ Para. 44.

²⁴ As noted in *S Co v B Co* [2014] 6 HKC 421, para. 95, many parties use arbitration as a less formal way of resolving their disputes. Usually, to give that intention effect, strict rules of pleadings and procedure are not insisted upon in arbitration, and pleadings will not be narrowly or technically construed. Indeed, even for pleadings filed in court proceedings, it is sufficient for a party to plead the material facts relied upon, and not the legal consequences.

²⁵ Paras. 143-145. The Court of Appeal agreed with the first instance judge on this point (see *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1)* [2012] 4 HKLRD 1, para. 82) whilst overturning the first instance decision on other grounds, mainly in light of various procedural decisions made by the Tribunal.

²⁶ See also C. Bao, ‘Jura Novit Arbiter: Truth or Fiction?’, *American Review of International Arbitration*, (2021) Vol. 32, p. 403; Lim and Lai, ‘Jura Novit Curia in Hong Kong Arbitration Law’, *Jura Novit Curia in International Arbitration* (Ch 9), 2018.

ASIA/PACIFIC



India

Offshore Arbitration for Indian Parties – A Comment on the *PASL Wind Solutions* Case and Its Potential Impact in the Middle East

Antonia Birt

Partner, Curtis Mallet Prevost Colt Mosle LLP, Dubai

Arthad Kurlekar

Associate, Curtis Mallet Prevost Colt Mosle LLP, Geneva

On 20 April 2021, the Supreme Court of India rendered its decision in *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited*, allowing two Indian parties to choose a foreign seat of arbitration. In doing so, the Court addressed arguments based on the interpretation of the Indian Arbitration Act 1996, the New York Convention and public policy.

Introduction

In *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited* ('PASL'),¹ the Supreme Court of India ('Court') decided whether 'two companies incorporated in India can choose a forum for arbitration outside India',² and whether such awards could be considered as 'foreign awards' to which the New York Convention applied.³

In 2017, PASL Wind Solutions Pvt Ltd ('PASL Ltd.') and GE Power Conversion India Private Limited ('GE') entered into a settlement agreement with respect to certain disputes that arose out of a transaction for the supply of convertors. Both companies were incorporated in India. The arbitration clause provided for the settlement of disputes in accordance with the ICC Rules, seated in Zurich, and subject to Indian law as the 'substantive law applicable to the dispute'.⁴ GE applied for the enforcement of the eventual award before the Gujarat High Court under Section 47 and 49 of the Indian

Arbitration Act, 1996, as amended ('Arbitration Act'),⁵ i.e. under Part II of the Arbitration Act which gives effect to the New York Convention in India.

On the basis of these facts, the Court affirmed both the foreign choice of seat and that the award is a foreign award to which the New York Convention applies establishing a remarkable precedent with wide-ranging implications. Prior to this case, High Courts had issued contradictory decisions.⁶ This case was the first time that the Supreme Court ruled on the issue, settling the debate. This comment considers the key reasons for the Court's decision, the scope of its application, and its potential impact on Indian business abroad.

What did the Parties argue, and what did the Court find

The appellant opposing the award set out three main arguments. First, it argued that allowing two Indian parties to designate a foreign seat of arbitration was in contravention of public policy as envisaged in Section 23 of the Indian Contract Act read with the

1 *PASL Wind Solutions Private Limited v GE Power Conversion India Private Limited*, Civil Appeal No. 1647 of 2021 ('PASL') available on the website of the Supreme Court of India at https://main.sci.gov.in/supremecourt/2021/2818/2818_2021_33_1501_27661_Judgement_20-Apr-2021.pdf

2 PASL, para. 2.

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 330 U.N.T.S. 38.

4 PASL, para. 3.5.

5 Indian Arbitration Act, 1996, as amended by the Indian Arbitration (Amendment) Act, 2021, India Code, available at https://www.indiacode.nic.in/bitstream/123456789/1978/1/AAA1996__26.pdf

6 *Sasan Power v North American Coal Corporation* (2016)(2) ArbLR 179 (Madhya Pradesh High Court); *GMR Energy Limited v. Doosan Power Systems India Private Limited* (2017) Supreme Court Cases OnLine Del 11625 (Delhi High Court); Cf. *Addhar Mercantile Private v Shree Jagdamba Agrico Exports* (2015) Supreme Court Cases OnLine Bom 7752 (Bombay High Court).

Arbitration Act.⁷ Second, that such an arbitration did not fall under the definition of ‘international commercial arbitration’ provided under Section 2(f) of the Arbitration Act contained in Part I (which provides material context to the application of Section 44 by virtue of being the only definition section in the Arbitration Act).⁸ Third and connectedly, it argued that Section 44 of the Arbitration Act,⁹ which allows for the recognition of foreign awards under the New York Convention scheme, does not apply to such awards as they are not ‘foreign awards’ for the purposes of the Arbitration Act.¹⁰

Addressing the appellant’s arguments, the respondent argued that public policy within the meaning of Section 23 of the Contract Act only applied to cases where clear public harm would occur, which was not true for the case at hand.¹¹ Relying on the seminal case of *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services (‘BALCO’)*,¹² it argued that the Supreme Court had adopted a well-accepted position that Part I of the Arbitration Act (which applied to arbitration proceedings seated in India), and Part II (which applied to ‘foreign awards’), were mutually exclusive.¹³ Therefore, the definition of ‘international commercial arbitration’ contained in Part I of the Arbitration Act could not provide material context in interpreting Section 44 in Part II of the Arbitration Act dealing with foreign awards. Accordingly, neither the definition of ‘international commercial arbitration’, nor any other context, changed the fact that the PASL award was a foreign award.¹⁴

The Court based its decision on four central pillars. First, it agreed with the respondent’s interpretation that Part I and Part II of the Arbitration Act were mutually exclusive.¹⁵ Thus for the Court, the definition section in

Part I of the Arbitration Act, including the definition of ‘international commercial arbitration’, was not material to the interpretation of Section 44 under Part II of the Arbitration Act.¹⁶

Second, the Court found that nothing in the Arbitration Act or the New York Convention prohibited an award in an arbitration seated outside of India, between two Indian parties, from being considered a foreign award to which the New York Convention applied.¹⁷ The Court observed that Article I of the New York Convention, which defines the scope of its application to arbitral awards, only does so on the basis of territoriality referring to awards, i.e. ‘made in the territory of a State other than the State where the recognition and enforcement is sought’ and without reference to nationality of the parties involved in the dispute.¹⁸ The Court reasoned that since Section 44 of the Arbitration Act was designed to enact Article I of the New York Convention, no nationality-based limitation could be read into the provision, in line with the New York Convention.¹⁹ Rather, the Court highlighted that parties had autonomy to choose a foreign seat of arbitration.²⁰

This left the Court with one major argument to address, i.e. whether such a choice of a foreign seat of arbitration was in contravention of public policy within the meaning of Section 23 and Section 28 of the Indian Contract Act.²¹ The question was whether the choice of a foreign seat of arbitration by two Indian parties potentially usurped mandatory jurisdiction of Indian courts. Recognising the broad jurisprudence in India setting out a narrow conception of public policy and the recent judicial and legislative support for this position, the

7 See PASL, para. 4.1.

8 PASL, para. 4.2.

9 Indian Arbitration Act, 1996, as amended by the Indian Arbitration (Amendment) Act, 2021, India Code, available at https://www.indiacode.nic.in/bitstream/123456789/1978/1/AAA1996__26.pdf

10 PASL, para. 4.5.

11 PASL, para. 5.5. Section 23, Indian Contract Act, 1872, as amended, available at <https://legislative.gov.in/sites/default/files/A1872-09.pdf>

12 *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services*, (2012) 9 SCC 552 (‘BALCO’).

13 PASL, para. 5.2.

14 PASL, para. 5.3, arguing that the definition of a ‘foreign award’ under Section 44 of the Indian Arbitration Act is in *pari materia* with Foreign Awards (Recognition and Enforcement) Act, 1961; see also, *Atlas Export Industries v. Kotak & Co* (1999) 7 SCC 61.

15 The Court accepted the respondent’s reliance on BALCO and in particular the court’s observation that ‘[w]e are unable to agree with the submission ... that there is any overlapping of the provisions in Part I and Part II; nor are the provisions in Part II supplementary to Part I. Rather there is complete segregation between the two parts.’ BALCO, para. 120; PASL, para. 40. This means that for the Court, the definition of international commercial arbitration in Section 2(f) of the Arbitration Act (Part I) played no role in the definition of a foreign award under Section 44 (Part II).

16 PASL, paras. 12 and 13; Section 44 of the Arbitration Act, states: ‘unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India’.

17 PASL, paras. 15–26.

18 New York Convention, Art. I(1).

19 PASL, paras. 23–25.

20 PASL, para. 61, stating ‘[n]othing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals, as has been held hereinabove’.

21 Indian Contract Act, 1872, as amended, available at <https://legislative.gov.in/sites/default/files/A1872-09.pdf>. In the relevant part, Section 23 of the Indian Contract Act states: ‘The consideration or object of an agreement is lawful, unless – it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law.’ In the relevant part, Section 28 of the Indian Contract Act states: ‘Every agreement – by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights ... is void to that extent.’

Court found that such an award would not contravene Section 23 or 28 of the Indian Contract Act and was consistent with public policy.²²

The Court found that to the extent that there were any concerns of evading Indian law as a result of the application of the foreign seat (and foreign conflict of law rules), the parties could have recourse against the award both in the form of annulment before the courts of the seat and objections to the enforcement of the award before Indian courts. Thus, if any mandatory rules of Indian public policy were evaded, Indian courts would have eventual control at the stage of enforcement in India. It concluded as a result that there was 'no clear and undeniable harm caused to the public in permitting two Indian nationals to avail of a challenge procedure of a foreign county [sic] when, after a foreign award passes muster under that procedure, its enforcement can be resisted in India'.²³ In doing so, however, the Court did not consider the possibility of enforcement of the award outside India, in which case the Indian courts would not have any jurisdiction. The Court reasoned that even an Indian national habitually resident outside of India could choose to apply a foreign substantive law to an arbitration with an Indian national, since any arbitration with such a person would qualify as 'international commercial arbitration' under Section 2(f) of the Arbitration Act. In such a case, two Indian nationals (one resident in India and one outside) would still be able to apply a foreign law. This confirmed the Court's conclusion that a choice of a foreign seat of arbitration by two Indian parties was not contrary to public policy.

How the decision was received

The decision has been welcomed by several commentators and practitioners as a positive development for fostering arbitration in India. It is argued that it preserves the autonomy of parties to adapt their dispute resolution procedures to their needs.²⁴ For example, a company incorporated in India,

but which primarily conducts business in other states such as in the Middle East, could benefit from the advantages of opting for a seat where its predominant business or that of its partners is located, even if all parties involved are Indian entities.

Critics of the judgment argue that the decision demonstrates an inherent lack of faith in the Indian judiciary to efficiently handle arbitration-related disputes as Indian parties can opt-out of at least the supervisory jurisdiction of Indian courts.²⁵

Irrespective of the policy implications of the decision, the Court attempted to decipher what it felt was the choice made by the legislature. Perhaps the Indian Supreme Court is not alone in its attempt to protect party autonomy. While judicial decisions are scant, commentators and practitioners have addressed a similar position in other jurisdictions.

Future implications

While the decision in PASL may promote party-autonomy by allowing Indian parties to choose an arbitral seat from a broader pallet of jurisdictions, it comes with certain caveats. First, the decision is necessarily coloured by the facts with which the Court was presented, namely a dispute between Indian parties, with Indian substantive law, and a foreign seat of arbitration. Crucially, neither party disputed the application of Indian substantive law, nor challenged the law applicable to the arbitration agreement (with the presumption being the application of Indian law). It remains to be seen whether the Court would extend the same reasoning to situations where Indian parties choose a dispute resolution process which is further removed from the application of Indian law e.g. not only a foreign seat, but a foreign substantive law or perhaps with a choice of foreign law governing the arbitration agreement.

22 PASL, para. 59: In agreeing to a neutral forum outside India, parties agree that instead of one bite at the cherry under Section 34 of the Arbitration Act, where an arbitration between two Indian nationals is conducted in India [with the grounds for setting aside the award being available under Section 34(2A)], what is instead put in place by the parties is two bites at the cherry, namely, the recourse to a court or tribunal in a country outside India for setting aside the arbitral award passed in that country on grounds available in that country (which may be wider than the grounds available under Section 34 of the Arbitration Act), and then resisting enforcement under the grounds mentioned in Section 48 of the Arbitration Act.

23 PASL, para. 59.

24 G. Bajaj and S. Pramod, 'The Supreme Court upholds party autonomy on choice of foreign seat', (DLA Piper, 3 June 2021); S. Parikh, S. Patil, S.K. Sambyal, 'Party Autonomy Reigns Supreme: The Indian Supreme Court Rules that Two Indian Parties Can Choose a Foreign Seat of Arbitration' (Kluwer Arb. Blog, 19 May 2021); L. Subramaniam Iyer and A. Dash, 'Party Autonomy or

Contracting out of Indian Courts – Analysis of PASL Wind Solutions (P) Ltd. v. GE Power Conversion (India) (P) Ltd.', 7 Aug. 2021, Supreme Court Cases Online, available at <https://www.sconline.com/blog/post/2021/08/07/foreign-arbitral-seat/>

25 V. Sumant Kolhe, 'PASL v GE: India and Parties' Fillip to Foreign-seated Arbitration, but at What Cost?', 17(2) *Asia International Arbitration Journal* (2021), 193-198 arguing 'it is uncertain if PASL's outcome further strengthens India's position as an arbitration friendly jurisdiction globally. In-fact, considering that the number of ad-hoc arbitrations trump the number of references made to institutional arbitration in India, foreign arbitral institutions may have the cake and eat it too'; see, L. Subramaniam Iyer and Dash, at n. 25 who state '[u]nder the guise of party autonomy it is not open to Indian citizens/Indian entities who are otherwise subject to the Indian judicial system, to contract out of the same, with respect to purely domestic transactions/disputes sans foreign element. Any such attempt would impinge upon the sovereign judicial power of the State to adjudicate the disputes arising between its citizens with respect to domestic transactions.'

With this caution however, the judgment provides footing for Indian companies to negotiate arbitration clauses with a foreign seat of arbitration. The question is then - who does this benefit the most? In our view, the decision may have a positive impact on the options available for Indian parties with international businesses. For example, the Dubai International Financial Centre ('DIFC') presents a unique option as an arbitral seat.²⁶ In light of the PASL decision, two Indian parties may choose DIFC as the seat of arbitration.²⁷

The availability of foreign seats also has other implications. For instance, it potentially increases access to arbitrators and arbitral institutions from different backgrounds and legal cultures which may better serve the parties' interests. This may also compel Indian arbitration institutions to modernise and harmonise their practices to continue competing with internationally-used arbitral institutions. This, in turn, may bring in advances to Indian arbitration.

26 The DIFC as the seat of arbitration would allow Indian parties with interests in the Middle East or elsewhere to choose an off-shore, common law administering jurisdiction, with effective enforcement mechanisms, and by extension the DIFC courts as the courts with supervisory jurisdiction.

27 The DIFC Arbitration Law 2008 does not provide for any limitations as to who may choose to apply DIFC Law. In 2020, pursuant to a bilateral treaty, the Indian Ministry of Law and Justice declared that the UAE is a reciprocating territory for the enforcement of foreign judgments. As such, Indian parties choosing to seat their arbitration in the DIFC may now benefit from a simpler and faster enforcement mechanism between the UAE (and thus DIFC) and India.

EUROPE



France

Supreme Court Confirms Impact of International Sanctions on the Validity and Enforcement of Arbitral Awards

Sarah Monnerville Smith

Counsel, Eversheds Sutherland, Paris

Gabriel Bulteel

Intern, Eversheds Sutherland, Paris

French courts have recently held that a failure by an arbitral tribunal to apply UN and EU sanctions could lead to the setting-aside or to the refusal of enforcement of the award in France, provided that the dispute falls within the scope of application of these sanctions. French courts have also drawn a distinction between the UN and EU sanctions on the one hand, and sanctions enacted by the U.S. on the other hand.

Introduction

In an unprecedented decision of 3 June 2020,¹ the Paris Court of Appeal provided useful guidance on the impact of international sanctions on the validity and enforcement of arbitral awards in France. The Court found that, while sanctions against Iran adopted by the Security Council of the United Nations ('UN') and by the European Union ('EU') form part of French international public policy, unilateral sanctions enacted by the United States ('U.S.') do not. The Court also held that a failure by an arbitral tribunal to apply UN and EU sanctions could lead to the setting-aside or to the refusal of enforcement of the award in France, provided that the dispute falls within the scope of application of these sanctions.

The *Cour de cassation* confirmed this landmark decision on 9 February 2022,² ending a legal battle initiated in 2008 over a contract to convert an Iranian gas field into underground storage.³

Sanctions against Iran and the EU Blocking Statute

Since 1979, various economic and trade sanctions have been adopted against Iran. The first sanctions were imposed by the U.S. in November 1979 following the hostage crisis, and included the freeze of Iranian assets (such as bank deposit, gold and other properties) as well as a trade embargo. The sanctions were lifted as part of the Algiers Accords of 19 January 1981.

The U.S. adopted new economic sanctions and embargo measures during the Reagan and Clinton Presidencies. The U.S. first adopted so-called 'primary' sanctions and, from 1996 onwards, 'secondary' (or extraterritorial) sanctions. While the primary sanctions prohibited U.S. persons and entities from most business dealings with Iran and Iranian entities, the aim of the 'secondary' sanctions was to prevent non-U.S. persons and entities from engaging in certain business activities involving Iran.

1 **Paris Court of Appeal (ICCP-CA), 3 June 2020, No. 19/07261**, commented by: M.-L. Bizeau, *Introductory Note To Sofregaz v. NGSC (CA Paris)*, International Legal Materials. 60. 1-22 (2021); J. Hage Chahine, 'UN and EU Sanctions Versus U.S. Sanctions: Two Different Yardsticks Commentary on the Decision of the Paris Court of Appeal (International Commercial Chamber) (5th Pole, Chamber 16) of 3 June 2020, No. 21/2020', *Journal of International Arbitration*, Vol. 38 Issue 1, pp. 71-82; J.-Y. Garaud, C. Martini, et al., 'Ordre public international : le juge de l'annulation face à l'invocation des sanctions économiques onusiennes, européennes et américaines, note sous Paris, Pôle 5 – Ch. 16, 3 juin 2020', *Revue de l'Arbitrage*, Vol. 2020 Issue 4, pp. 1142-1157 ; M. Laazouzi, 'Contrat international et contrôle d'office du respect par l'arbitre des mesures de sanctions internationales et européennes visant certains secteurs économiques d'un État étranger', *Rev. des Contrats*, Déc. 2020, n° 117e3, p. 60 ; J. Jourdan-Marques, 'Chronique d'arbitrage : l'arbitrage à l'épreuve du déséquilibre significatif', *Dalloz Actualités*, 29 July 2020.

2 **Cour de cassation, 1st Civil Division, 9 Feb. 2022, No. 20-20.376.**

3 The President of the *Tribunal de commerce* of Paris issued its first order on 10 Dec. 2009, No. 2008084230.

Considering that these ‘secondary’ (or extraterritorial) sanctions violated international law, the EU responded by adopting a Blocking Statute (‘EU Blocking Statute’) on 22 November 1996,⁴ with the aim of counteracting the effects of these extraterritorial U.S. sanctions. The Blocking Statute prohibits EU operators from complying with extraterritorial U.S. sanctions listed in its Annex, unless the EU operators have obtained authorisation from the European Commission on the basis that non-compliance ‘would seriously damage their interests or those of the [EU]’.⁵

From 2006 onwards, a new series of sanctions were enacted against Iran in light of concerns regarding Iran’s nuclear program. The UN Security Council (UNSC) adopted sanctions by resolutions in 2006, 2007 and 2008,⁶ including a ban on the supply of nuclear-related materials and technology, the freezing of the assets of certain individuals and companies, and an arms embargo. Similarly, the EU imposed a series of autonomous economic and financial restrictive measures against Iran in 2007, 2010 and 2012 onwards, to be complied with by persons and entities subject to the jurisdiction of the EU.⁷

The UN and EU nuclear-related sanctions and the U.S. secondary sanctions were lifted in 2016, following the Joint Comprehensive Plan of Action (JCPOA) reached on 14 July 2015 between Iran, China, France, Russia, the United Kingdom, the U.S. and Germany, together with the EU. However, in 2018, the U.S. withdrew from the JCPOA and reinstated the secondary sanctions against Iran.

In response, the EU Blocking Statute was updated to extend its scope to these secondary U.S. sanctions against Iran in order to ‘mitigate their impact on the interests of EU companies doing legitimate business in Iran’.⁸ In 2021, the European Commission launched a public consultation with the purpose of amending the EU Blocking Statute to ‘further deter and counteract the unlawful extraterritorial application of sanctions

to EU operators by countries outside the EU’, and to ‘streamline the application of the current EU rules, including by reducing compliance costs for EU citizens and businesses’.⁹ The Commission’s report on the public consultation notes the widespread dissatisfaction with various aspects of the regulation, including ‘the vagueness of the language used, the lack of operational framework as well as the lack of proper implementation are hindering the effectiveness of the regulation’.¹⁰

Background to the dispute

On 6 March 2002, Sofregaz, now TCM FR S.A. (‘TCM’), entered into an agreement (the ‘Agreement’) with the National Iranian Oil Company (‘NIOC’) for the conversion of a gas field into underground storage located about 70 km from Tehran. The Agreement was governed by Iranian Law and contained an arbitration clause under the ICC Rules of Arbitration.

NIOC’s rights under the Agreement were assigned to the National Iranian Gas Company (‘NIGC’) in 2004 which, in turn, transferred them to the Iranian company National Gas Storage Co. (‘NGSC’) in 2007.

The project was to be executed in three successive phases. Pursuant to the Agreement, Bank of Industry and Mines (‘BIM’) issued a standby letter of credit in U.S. dollars to guarantee the performance of the Agreement. BIM also issued two performance bonds, which were subsequently counter-guaranteed by the French bank Natixis.

Difficulties arose between the parties regarding the execution of the first phase of the project, and on 27 May 2008, TCM informed NGSC that the banks were refusing to extend the guarantees required for the second and third phases of the project.

On 27 June 2008, TCM proposed to terminate the Agreement by mutual consent and to enter into a new contract (i) denominated in Euros and (ii) removing TCM’s obligation to provide a bank guarantee.

On 26 August 2008, NGSC declined this offer and decided to terminate the Agreement for non-performance and contractual breach. Following the termination of the contract, NGSC called upon the guarantees issued by BIM, which, in turn, called upon the counter-guarantees.

4 Council Regulation (EC) No 2271/96 of 22 Nov. 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (‘EU Blocking Statute’).

5 EU Blocking Statute, Art. 5.

6 SC Res. 1737, U.N. Doc. S/RES/1737 (2006); SC Res. 1747, U.N. Doc. S/RES/1747 (2007); SC Res. 1803, U.N. Doc. S/RES/1803 (2008).

7 Council Regulation (EC) 423/2007 of 19 April 2007 concerning restrictive measures against Iran, OJ L103, 20.4.2007, p. 1; Council Regulation (EU) 961/2010 of 25 Oct. 2010 on restrictive measures against Iran and repealing Regulation (EC) 423/2007; Council Regulation (EU) 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) 961/2010.

8 Press release of the European Commission ‘Updated Blocking Statute in support of Iran nuclear deal enters into force’ (www.ec.europa.eu, 6 Aug. 2018).

9 ‘Unlawful extra-territorial sanctions – a stronger EU response (amendment of the Blocking Statute’, <https://ec.europa.eu/>, Public consultation closed on 4. Nov. 2021.

10 European Commission, Summary of Results of the Open Public Consultation on the Review of the Blocking Statute (Council Regulation (EC) No. 2271/96), 17 Dec. 2021, at p. 4.

TCM sought to prevent payments under the guarantees and counter-guarantees through summary proceedings in France, arguing that the calls upon the guarantees were abusive and fraudulent. On 10 December 2009, TCM succeeded in obtaining an order prohibiting the banks to make payments under the guarantees and counter-guarantees, but this order was overturned by a decision of the Paris Court of Appeal of 7 June 2011, which was upheld by the *Cour de cassation* on 12 March 2013.¹¹

Arbitral proceedings and Decision of the Paris Court of Appeal

On 16 January 2014, TCM started arbitration proceedings under the ICC Rules of Arbitration against NGSC arguing, inter alia, that the termination of the Agreement by NGSC was wrongful and that NGSC was not entitled to keep the proceeds of the guarantees.

In an award dated 27 December 2018 (the 'Award'), the Paris-seated arbitral tribunal rejected TCM's claims for wrongful termination of the Agreement and ordered TCM to pay various sums, including 70% of the costs of the arbitration.

On 2 April 2019, TCM filed an application to set aside the Award before the international commercial division of the Paris Court of Appeal arguing, in particular, that the arbitral tribunal had failed to take into account the impact of international sanctions against Iran on the performance of the Agreement.

In support of its application to set aside the Award, TCM relied on three different grounds: (a) the arbitral tribunal had failed to comply with its mandate, (b) violation of due process, and (c) the enforcement of the award would be contrary to international public policy.¹²

On 3 June 2020, the Paris Court of Appeal rejected TCM's application for annulment. On the alleged violation of French international public policy – the most interesting and unprecedented part of the decision – the Court first determined:

- > whether the sanctions invoked by TCM form part of French international public policy; and

- > if so, whether their disregard by the arbitral tribunal was such as to characterize an 'effective and concrete' violation of French international public policy that could result in the annulment of the arbitral award.

In its appeal, TCM argued that international UN, EU and U.S. sanctions against Iran were overriding mandatory rules (*'lois de police'*) that formed part of French international public policy. On this basis, TCM then argued that by giving effect to a contract subject to international sanctions, enforcing the Award would be contrary to French international public policy.

a) Are economic sanctions part of French international public policy?

According to the Court of Appeal, while UN and EU sanctions form part of French international public policy, unilateral sanctions imposed by the U.S. do not.

UN sanctions. The Court recalled that international sanctions adopted by resolutions of the UN Security Council are binding on all UN Member States and thus on France. As such, they may be assimilated into France's domestic legislation under 'foreign overriding public policy rules and/or truly international overriding public policy rules'.¹³ The Court further found that these sanctions form part of French international public policy insofar as they are intended to contribute to the maintenance or restoration of international peace and security, and accordingly embody rules and values whose disregard must be considered to be incompatible with the French legal system.¹⁴

EU sanctions. The Court held that international sanctions adopted by the EU, and therefore part of the domestic legal order in France, may be assimilated to 'French overriding mandatory rules' since they convey values of which violation cannot be tolerated by the French legal order.

Whilst this decision is unprecedented in France, it is worth noting that the Italian Supreme Court had reached the same conclusion in 2018 in the *Iraq v. Armamenti case*,¹⁵ in which it ruled that UN and EU sanctions form part of international public policy and apply notwithstanding the law applicable to the contract.

11 Respectively, Order of 10 Dec. 2009 from the president of the *Tribunal de Commerce* of Paris, No. 2008084230; Paris Court of Appeal, 7 June 2011, No.10/04113; *Cour de cassation*, Commercial Division, 12 March 2013, No. 11-22.048, *Inédit*.

12 Art. 1520, 3°, 4°, and 5° of the French Code of Civil Procedure.

13 Paris Court of Appeal (ICCP-CA), 3 June 2020, *supra* note 1, para. 54.

14 *Id.* para. 55.

15 *Government and Ministries of the Republic of Iraq v. Armamenti e Aerospazio S.p.A. et al.*, Italy No. 189, Supreme Court of Cassation of Italy, Case No. 23893, 24 Nov. 2015, cited in *Yearbook of Commercial Arbitration* 2016, 503.

Unilateral sanctions enacted by the United States.

The Court considered that unilateral sanctions adopted by the U.S. against Iran ‘cannot be regarded as the expression of an international consensus’, since the extraterritorial scope of the sanctions imposed by the U.S. is disputed by both the French authorities and the EU.¹⁶ In this regard, the Court relied on ministerial replies, and the EU¹⁷ and French Blocking Statute (recently amended)¹⁸ – the purpose of which is to protect against the effects of the extraterritorial application of U.S. law and sanctions. The Paris Court of Appeal, therefore, concluded that unilateral sanctions enacted by the U.S. authorities do not form part of French international public policy.

This reasoning of the Court is in line with that adopted in the *MK Group* decision,¹⁹ where an award was set aside on the ground of fraudulent evasion of a foreign overriding mandatory law that was deemed part of French international public policy – as reflecting ‘international consensus’.

b) Can an arbitral tribunal’s failure to apply sanctions lead to the annulment of an award?

In light of the requirement set by French case law for an ‘effective and concrete’ violation of international public policy, the Paris Court of Appeal held that a failure by an arbitral tribunal to apply UN and EU sanctions can lead to the setting aside or refusal of enforcement of the award in France, provided that the dispute falls within the scope of application of these sanctions.

According to the Court, the mere failure to take into account EU or UN sanctions, ‘if only as legal facts’ (*‘fût-ce comme faits juridiques’*)²⁰ does not suffice to set aside an arbitral award.

The Court carefully assessed the scope of the UN sanctions and concluded that they were not applicable *ratione materiae*, as they were limited to nuclear activities and did not cover the gas sector, which was the subject-matter of the Agreement.

As for the EU regulations invoked by TCM,²¹ the Paris Court of Appeal found that the EU regulations were inapplicable *ratione materiae* as were limited to nuclear activities²² or inapplicable *ratione temporis*.²³

Decision of the Cour de cassation

In its decision of 9 February 2022, the *Cour de cassation* dismissed TCM’s appeal and confirmed the reasoning of the Paris Court of Appeal.

TCM argued that by deciding that the Award did not violate French international public policy – on the basis that the EU and UN sanctions against Iran did not apply to the Contract – the Court had assessed compliance with international public policy of the Agreement and not of the Award itself. TCM therefore alleged a violation of Article 1520, 5° of the French Code, which provides that an award can be set aside if ‘the recognition or the enforcement of the award is contrary to international public policy’.

16 Paris Court of Appeal (ICCP-CA), 3 June 2020, *supra* note 1, para. 63.

17 See *supra* notes 5 and 8.

18 Law No. 68-678 (26 July 1968) ‘relative à la communication de documents et renseignements d’ordre économique, commercial, industriel, financier ou technique à des personnes comptant de sa saisine physiques ou morales étrangères’, modified by Law No. 80-538 (16 July 1980). See also Décret No. 2022-207 (18 Feb. 2022) ‘relatif à la communication de documents et renseignements d’ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères’; R. Kleiman, A. Werl, ‘Modernisation de la loi de blocage: un accompagnement renforcé face aux juridictions étrangères’, *Option Droit & Affaires* n° 585, 18 mai 2022.

19 Paris Court of Appeal, 16 Jan. 2018, No. 15/21703, *Dalloz* 2018. 1635, note M. Audit.

20 Paris Court of Appeal (ICCP-CA), 3 June 2020, *supra* note 1, para. 70.

21 Council Regulation (EC) 423/2007 of 19 April 2007 concerning restrictive measures against Iran, OJ L103, 20.4.2007, p. 1; Council Regulation (EU) 961/2010 of 25 Oct. 2010 on restrictive measures against Iran and repealing Regulation (EC) 423/2007, 2010 O.J. (L 281) 1; Council Regulation (EU) 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) 961/2010, 2012 O.J. (L 88) 1.

22 As noted by the Paris Court of Appeal, Council Regulation (EC) 423/2007 (*supra* note 21) takes up the scope of UN Security Council Resolution No. 1737 of 23 Dec. 2006, to which it expressly refers to in its recitals, the latter being limited to nuclear and arms-related activities. The Court therefore considered that Council Regulation (EC) 423/2007 was inapplicable *ratione materiae* (Paris Court of Appeal (ICCP-CA), *supra* note 1, paras. 82-83).

23 The Paris Court of Appeal stated that, according to Art.11§2(c) of the Council Regulation (EU) No 961/2010 of 25 Oct. 2010, the contract in dispute which gave rise to the arbitral award was likely to fall within the material scope of said Regulation. However, the Court raised that, Art. 14 of the Council Regulation (EU) No. 961/2010 provided that: ‘Article 11(2)(c) shall not apply to the granting of a financial loan or credit or to the acquisition or extension of a participation, if the following conditions are met: (a) the transaction is required by an agreement or contract concluded before 26 July 2010; and (b) the competent authority has been informed at least 20 working days in advance of that agreement or contract.’ In light of this Article, the Paris Court of Appeal concluded that, since the disputed contract was signed on 6 March 2002 and terminated on 26 Aug. 2008, it did not fall within the scope of the restrictive measures provided for by Council Regulation (EU) No. 961/2010, which was therefore inapplicable *ratione temporis* (Paris Court of Appeal, *supra* note 1, paras. 88-91).

The *Cour de cassation* dismissed all of TCM's arguments. It ruled that the Court of Appeal was right in finding that as long as EU and UN sanctions did not apply to the Agreement either *ratione materiae* or *ratione temporis*, the enforcement or recognition of the award rendered in relation to the Agreement did not violate French international public policy.

It is noteworthy that the *Cour de cassation* referred to the requirement for an 'effective and concrete', ('*effective et concrète*') violation of French international public policy.²⁴ The Court seems to have moved away from such requirement in the *Belokon* case²⁵ issued later in 2022, in which the Court no longer referred to a 'manifest, effective and concrete' but to a 'characterized violation' of public international order.²⁶

Also noteworthy, the *Cour de cassation* refers to UN sanctions as being akin to 'French overriding mandatory rules' whilst the Paris Court of Appeal had concluded they were 'foreign or truly international overriding mandatory rules'. Commentators have criticized the Court of Appeal's qualification for the following reasons.²⁷ Firstly, when assessing an award's compliance with French international public policy, French Courts ought to determine whether a value deemed fundamental for the French legal order could be infringed. Secondly, UN sanctions are binding on France. They are therefore primarily, French overriding mandatory rules and the reference to their 'truly international' character is, *prima facie*, irrelevant. In fact, as noted by a commentator,²⁸ the terminology used by the Paris Court of Appeal – which was not endorsed by the *Cour de cassation* – seemed to be intended as guidance for arbitral tribunals that, contrary to supervising state courts, do not recognize the concept of 'forum' or 'foreign' overriding mandatory rules.

Conclusion

It is now clearly established that when ruling on the validity of an award, French courts must take into account UN and EU sanctions when applicable:

- (i) even if the parties had failed to invoke the same before the arbitral tribunal; and
- (ii) *ex officio* if the parties had not raised the argument in the application for annulment.²⁹

To ensure the validity of their awards, Paris-seated arbitral tribunals must therefore assess whether the contract at issue falls within the scope of UN or EU sanctions, and take these into consideration when applicable.

However, questions remain unanswered. Would an award applying or taking into account extraterritorial sanctions covered by the EU Blocking Statute be set-aside on the ground that it violates French international public policy? Would an EU national arbitrator violate the EU Blocking Statute by holding that a contract can be terminated or that non-performance can be excused on the basis of sanctions that are blocked under the Blocking Statute?

In that regard, the European Commission Guidance Note ('Guidance Note'), however, specifies that the EU Blocking Statute 'nullifies the effect in the EU of any foreign decision, including court rulings or arbitration awards, based on the listed extraterritorial legislation' (emphasis added) and applies to 'national authorities, including national jurisdictions and arbiters'.³⁰

As express sanctions clauses are increasingly being included in international contracts, should arbitrators be guided by the interpretation in the *Bank Melli v. Deutsche Telekom* case (2021),³¹ where the Court of Justice of the European Union (CJEU) held that if, *prima facie*, an EU operator has terminated its contracts with an entity targeted by U.S. secondary sanctions in order to comply with those sanctions, it is that EU operator who has the burden of proving that this was not the reason for

24 *Cour de cassation*, 1st Civil Division, 9 Feb. 2022, No. 20-20.376, para. 10.

25 *Cour de cassation*, 1st Civil Division, 23 March 2022, No. 17-17.981.

26 C. Seraglini, P. Giraud, L. Jandard, 'Arbitrage - Droit de l'arbitrage – Chronique', *La Semaine Juridique Ed. Générale* n° 23, 13 Juin 2022, doct. 724, para. 7.

27 M. Laazouzi, *supra* note 1, p. 60. Some authors have also disputed the characterization of 'loi de police' or 'overriding mandatory provisions' for économiques sanctions enacted by States. See P. Mayer, 'L'arbitre et les sanctions économiques' in *Mélanges en l'honneur du professeur Laurent Aynès* (LGDJ, 2019).

28 M. Laazouzi, *supra* note 1.

29 Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International N.V.* [1999] E.C.R. I-3055, para. 36. C. Jarrosson, L. Idot, *Répertoire de droit européen – Arbitrage*, Dalloz Janvier 2010 (actualisation : Sep. 2018); Y. Brulard and Y. Quintin, 'European Community Law and Arbitration - National Versus Community Public Policy', *Journal of International Arbitration*, Vol. 18 Issue 5, pp. 533–548; C. Seraglini, J. Ortscheidt, *Droit de l'arbitrage interne et international* (Lextenso, 2019), para. 979.

30 'Guidance Note — Questions and Answers: adoption of update of the Blocking Statute' (2018/C 277 I/03), at para. 4.

31 *Bank Melli Iran, Aktiengesellschaft nach iranischem Recht v. Telekom Deutschland GmbH*, CJEU, Grand Chamber, 21 Dec. 2021, case C-124/20.; J. Dunin-Wasowicz, N. Burnichon, 'CJEU Offers Initial Guidance on the Application of the EU Blocking Statute', *Revue Internationale de la Compliance et de l'Éthique des Affaires* n° 2, Avril 2022, comm. 92.

termination. The CJUE also invited Member States' courts to assess whether the non-termination of the contracts would disproportionately affect the EU company (in this case, Telekom Deutschland).

It is likely that further guidance will be provided in the amended version of the EU Blocking Statute, which is expected later this year (2022).³²

³² See *supra*, notes 9 and 10.

EUROPE



Ukraine

Adoption of a New Law Regulating Mediation

Maryna Saienko

Mediator, Ukrainian Mediation Center; Business-mediator, Mediation Center of the Kyiv Chamber of Commerce and Industry; Member of NGO 'National Association of Mediators of Ukraine'; Managing partner, Law Firm ZAKON PEREMOGY

Mediation has been used in Ukraine as an alternative dispute resolution procedure for the last decades but has remained largely unregulated. Following initiatives of the professional mediation community and Ukraine's signature of the Singapore Convention in August 2019, a law on mediation was adopted in November 2021.

Introduction

Many developments related to the implementation of mediation in Ukraine have been introduced in various spheres, such as judicial mediation, school mediation, family mediation, and mediation in the field of restorative justice. Despite mediation skills, experience, and practice among Ukrainian legal practitioners, mediation was not a very popular tool for resolving disputes in Ukraine among businesses or individuals.

Lack of proper legislation was among the most common reasons that hindered the development of mediation in Ukraine even though certain acts provided for mediation as a way to reconcile the parties to the dispute or create preconditions for this.¹

Ukraine's signature of the UN Convention on International Agreements on Mediation (hereinafter - the 'Singapore Convention') in August 2019 together with 45 other countries marked a significant step for the development of mediation.²

Previously, the Ukrainian society actively discussed if a special law on mediation was at all necessary. The opponents to its adoption argued that in some countries, such as the United Kingdom, the lack of a special law

for a long time had not hindered the development of mediation. However, Ukraine's signing of the Singapore Convention brought the professional discussion to a new level, as the adoption of a separate law became a condition for its ratification and implementation.

Over the last years, the professional mediation community in Ukraine has increased efforts to promote mediation as an alternative modern way of resolving disputes, conducting educational activities among the population, the business environment, and state and municipal authorities. The community of mediators in Ukraine, in particular united under the auspices of the NGO 'National Association of Mediators of Ukraine', adopted a *Code of Ethics for Mediators*,³ introduced an online roster of mediators in Ukraine, developed common principles for trainings on mediator skills, mediation training for courts, mediation as a social service providing free of charge in specific circumstances,⁴ with other projects aimed at promoting mediation and the development of a dialogue culture in Ukraine, among which the drafting of the bill on mediation.

The law on mediation

While several attempts were made as of 2011 to pass a separate law on mediation,⁵ the Law 'On Mediation' n°1875-IX ('the Law') came into force on 15 December 2021.⁶ The Law constitutes a landmark for mediation in Ukraine as it:

- References to mediation were included in certain laws and regulations, in particular: the Law 'On Public-Private Partnership' (1 July 2010, n° 2404-V), Law 'On Free Legal Aid' (2 June 2011 n° 3460-VI), Law 'On Social Services' (17 Jan. 2019 n° 2671-VIII), Decree of the President 'On the Concept of Improving the Judiciary to Establish a Fair Court in Ukraine in Accordance with European Standards' (10 May 2006 n° 361/2006), Decree of the President 'On the concept of criminal justice for juveniles in Ukraine' (24 May 2011 n° 597/2011), Order of the Ministry of Social Policy (17 Aug. 2016, n° 892) 'On approval of the State Standard Social mediation services'.
- https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements

- Available online (in Ukrainian) at <http://namu.com.ua/ua/info/mediators/nseyenf-yekhyyny-pyeekakhua/>.
- <https://zakon.rada.gov.ua/laws/show/z1243-16?lang=en#Text>
- T. Kyselova, 'Integration of Mediation into Ukrainian Court System: Policy Paper', Council of Europe, Kyiv, 2017, pp. 8-9.
- <https://zakon.rada.gov.ua/laws/show/1875-20#Text>

- > establishes the profession of mediator;
- > allows to integrate mediation into the judicial process;
- > contributes to raising public awareness of mediation and trust to it;
- > ensures Ukraine's compliance with its obligations under the Singapore Convention and other international treaties aimed at harmonizing Ukrainian legislation with EU legislation.

The Law offers a framework, by regulating key issues and setting general guidelines and standards. Mediation is defined as an extrajudicial, voluntary, confidential, structured procedure, during which the parties try to prevent or resolve a dispute through negotiations, with the help of one or more neutral, independent, and impartial mediator(s).⁷

The Law also protects the equality of rights of the parties to the mediation, and defines the tasks of a mediator (e.g. facilitate parties' communication, and assist with the negotiations and in reaching an understanding).

Importantly, the Law only provides for facilitative mediation and does not provide for the use of so-called 'evaluation mediation' or other models (transformative, research, etc.) popular in several countries. Yet, the mediator has the right to provide parties with consultations and recommendations for the conduct of a mediation and recording of the results. However, he or she is not entitled to provide advice and recommendations on decision-making, nor to decide on the merits of the dispute.

According to the Law, a mediator can be an individual who has undergone basic training as a mediator, in Ukraine or abroad. At the same time, basic training of mediators comprises a minimum of 90-hour training, including a minimum 45-hour practical training towards the development of practical skills. Parties to the mediation, state and municipal authorities, and associations of mediators, may impose additional requirements on mediators they involve or whose services they use (e.g. specific training, age and education requirements, practical experience, etc.).

The Law does not require mediators to have Ukrainian citizenship or training in Ukraine, which confirms the flexibility of the provisions. Therefore, foreigners who

have followed a 90-hour training, completed in Ukraine or abroad, which meets the criteria set out above, can be mediators in Ukraine.⁸

The training of mediators is carried out by educational institutions that keep rosters of their graduates.⁹ It should be noted that the Law establishes the principle of 'plurality' of rosters of mediators, which means the possibility for various self-regulated associations of mediators and entities that provide mediation to maintain rosters.

Associations of mediators have their own professional ethics' codes of for mediators or rely on existing ones. The mediator must adhere to its professional ethical norms and inform the parties in advance of the relevant code of ethics, to provide the parties with the opportunity to get acquainted with its content.

Important issues to consider – as they will impact the pace of promotion of mediation in Ukraine – include the guarantees for the mediator and parties to mediation, as well as the legal force of agreements reached as a result of mediation. The Law provides for the following:

- > A mediator cannot be examined as a witness in a case concerning information that became known to him/her during the preparation for and conduct of mediation.
- > The participation of the party in a mediation process may not be considered an admission of liability, recognition of claims or waiver of claims.
- > The agreement based on the outcome of the mediation has the same legal force as any other agreement concluded by the parties. In case of non-compliance or improper performance, the parties can apply to a court, or local/international arbitration in the manner prescribed by law. Such agreement should not contain provisions that violate the rights and interests of third parties, state or public interests. If concluded during a court proceeding, the agreement is formalized as an amicable agreement and is subject to recognition/approval by a court decision.

Mediation can be conducted at any stage of dispute (before applying to court or local/international arbitration; during pre-trial investigation, or court/arbitration proceedings; or during the enforcement of a court decision or arbitral award). Legal incentives are also in place to encourage the use of mediation

⁷ See Arts. 1 and 4-8 of the Law. The Law is also in line with international standards, see e.g. 'European Code of Conduct for Mediation Providers' (2018), available at <https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6>.

⁸ Arts. 9 and 10 of the Law.

⁹ See e.g., <https://www.ukrmediation.com.ua/en/educational-programms-umc>; <http://mediation.ua/platforma-dlya-obucheniya/>; <https://law.chnu.edu.ua/mediats/>. See also Art. 10 of the Law.

by litigants (e.g., refund of a 60% of the court fee).¹⁰ During court proceedings, the court shall suspend the proceedings and allocate sufficient time to resolve the dispute in mediation (no more than 90 days).¹¹

The Law allows the use of mediation in civil, family, labor, land, economic/commercial, administrative disputes, and in cases of administrative offenses and even criminal proceedings. However, it is not conducted in conflicts that affect or may affect the rights and legitimate interests of third parties, who are not parties to the mediation.

In the field of commercial disputes, there is an increasing demand to mediate corporate disputes between shareholders, between business owners and top management, between contractual parties, between companies that jointly implement large (construction) projects.¹²

The Law does not contain restrictions on the possibility of mediating disputes involving foreign individuals or legal entities. Ukrainian mediators can therefore act as mediators in any disputes involving a foreign element. Moreover, many of them have narrow specialization, extensive experience in successful mediation, and speak foreign languages.

Prospects for the development of mediation in Ukraine

The adoption of the Law was one of the steps to ensure Ukraine's compliance with its obligations under the Singapore Convention. Draft legislation is currently being prepared, and we expect Ukraine to ratify the Singapore Convention in the near future.

The adoption of the Law appears as a necessary foundation for the development and institutionalization of mediation in Ukraine. The limited provisions leave a lot of room for market self-regulation, but also for reliance on international standards and practice.

The professional community of Ukrainian mediators is aware of the challenges ahead as there is still skepticism among practitioners and users. The market, which is still in its early stage, requires further development of the rules for interaction among its 'players', and for potential users to realize the value of mediation. While Ukraine is facing events of historical scale, mediation should be viewed as an opportunity for individuals and businesses to choose and manage their future, an effective tool for preventing conflicts, and the possibility to build civilized dialogues within society, communities, and groups.

¹⁰ Code of Commercial Procedure, Art. 130, available at <https://zakon.rada.gov.ua/laws/show/en/1798-12?lang=uk#Text>.

¹¹ Id. Art. 229.

¹² Pre-partnership mediation, also popular in Ukraine, should be singled out as it aims at reaching an agreement on the terms of the future partnership of business co-owners – a conscious introduction to partnership significantly contributes to an increased and more effective interaction and dynamic business development.

Diversity in Action

Mélanie van Leeuwen

Mélanie van Leeuwen is a Partner at Derains & Gharavi in Paris and serves as the Chair of the ICC Commission on Arbitration and ADR.

With special thanks to Prof. Avv. Michelangelo Cicogna for suggesting the title of this article and to Nicoleta Iftodi and Oliver Whitehead for their invaluable help in the preparation of this article.

This article, which is based on the keynote speech delivered to open the 2022 edition of the Paris Arbitration Week, addresses the steps to be taken by international arbitration stakeholders individually (users, arbitral institutions, outside counsel, and arbitrators) to provide an urgent global response to the diversity gap in international arbitration. A failure to take responsibility will impede the quality, efficiency, and legitimacy of international arbitration as a self-standing means of dispute resolution, in which the public expects to see a reflection of its own diversity.

He who is different from me does not impoverish me – he enriches me. Our unity is constituted in something higher than ourselves – in Man... For no man seeks to hear his own echo, or to find his reflection in the glass.

Antoine de Saint-Exupéry

Introduction

While a decent start has been made over the last couple of years¹ to diversify the field of arbitration, it very much remains work in progress. Where the issue was approached in the past as a matter of choice, it has become a matter of necessity, on which the future of arbitration as a self-standing means of dispute resolution depends.

Inequality and discrimination are as old as humanity. The accumulation of property comes with inequality because those owning property gain power over those

who do not.² The tendency of those who own property to want to concentrate it in the hands of like-minded people is as old as humankind.

During the 20th century, much effort was made by governments to reduce the inequalities exacerbated by the industrial revolution.³ Irrespective of race, gender, and class, people were given social protection, access to education, healthcare and the right to vote. Apart from the need for a productive workforce, the rationale of those policies was that equal rights and opportunities would lead to the economic prosperity of populations and societies as a whole.⁴

At the outset of the 21st century, the internet manifested itself as one of the most empowering means of exercising the right to equal opportunity, allowing people access to vast amounts of information. People living in the most remote areas of the world can follow what happens anywhere around the globe. As such, the internet bridges the gaps between continents and connects people and businesses. However, while globalization and the internet have united the world horizontally, they may have divided it vertically.⁵

1 P. Hodges QC, M. Tai, E. Kantor, 'Inside arbitration: diversity – what has been done so far and can the arbitration community do more?', Herbert Smith Freehills (22 Feb. 2022); C. Albanesi, M. Nosedà Zorrilla de San Martín, C. Warner and S. Lee (Linklaters), 'Guest blog: Gender diversity in arbitral tribunals – The challenges ahead' (<https://iccwbo.org>, 9 Dec. 2021): 'In 2020, ICC made 1,520 appointments and confirmations. With 355 women arbitrators confirmed or appointed by the ICC Court, the percentage of women sitting in ICC arbitral tribunals reached 23.4% in 2020, a record for the arbitral institution. Last year also saw female appointees make up 37% of the ICC Court's total arbitrator appointments, 28% of co-arbitrator chair appointments and 16% of party appointments, all figures seeing an increase compared to 2019.'; D. Sabharwal, M. Wright, 'The Diversity Dilemma in Arbitrator Appointments' (Kluwer Arb. Blog, 30 July 2018): 'A less positive story emerged in relation to the other aspects of diversity we profiled: a third or less of respondents agreed that progress has been made over the past five years in relation to age (35%), geographic (34%), cultural (31%) and especially ethnic (24%) diversity'.

2 J.J. Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1754).

3 E.H. Hunt, 'Industrialization and Regional Inequality: Wages in Britain, 1760–1914', (1986) 46 *The Journal of Economic History* 4, pp. 935–966.

4 A. D'Amato, 'International Human Rights at the Close of the Twentieth Century', (1988) 22 *The International Lawyer* 1, pp. 167–177.

5 Y.N. Harari, *Sapiens: A Brief History of Humankind* (McClelland & Stewart, 2014), p. 369.

Today, in 2022, the world is more globalized than ever. Everything and everyone is connected. The COVID pandemic, climate change, a container ship blocking the Suez Canal, and the Ukraine-Russia crisis are all examples of circumstances that may not have originated in our home countries, but quickly affected our daily lives and changed the parameters of the manner in which we conduct our business. Supply chain challenges, food scarcity, rising energy prices, shortage of raw materials and migration are the tangible consequences of those developments. As humankind is now fully interconnected, people no longer have the luxury of ignoring crises elsewhere in the world as their lives and business are likely to be affected at some point.

The international arbitration community is tasked with the resolution of the disputes that the global economy generates. Arbitration, as an organized form of dispute resolution, has existed for approximately 120 years.⁶ It is based on the parties' voluntary submission to the jurisdiction of an arbitral tribunal, waiving their fundamental right of access to the state court, afforded by law.⁷ The legitimacy of arbitration as a self-standing means of dispute resolution stands or falls with the trust that the users place in the decision-makers, the quality of the process they conduct and the fairness of the decisions they render.⁸ The role that arbitrators play in the administration of international justice comes with tremendous responsibility.

Over the last 120 years, that responsibility has been exercised principally from the calm, comfort, and confidentiality of private hearing rooms. With the onset of the internet, the public at large found out that in the context of investor-state dispute settlement (ISDS) sovereign interests were being decided by private arbitrators. As a result, the arbitration system itself became subject to public scrutiny and criticism.⁹ The confidentiality of arbitration – a feature that used to be one of its valued tenets – caused indignation and public outrage in the ISDS context.¹⁰

As public scrutiny threatened to compromise the trust of the users and the legitimacy of the system, transparency initiatives were launched to safeguard the credibility of arbitration, not only in the investment treaty setting but also in the commercial context.¹¹

In addition to challenging the confidentiality of arbitrations, public criticism also focused on the very limited and homogeneously composed pool of 'private judges' who regularly serve as arbitrators and decide the large majority of international disputes. While there are diverging views in the arbitration world as to whether that perception is right or wrong, it has become obvious that calls for more diversity can no longer be ignored.

The reality of today's globalized world is that the public expects to see a reflection of its own diversity in government, business, media, boards and the judiciary.¹² There is no reason why arbitration would be shielded from that development. In order for the users to maintain confidence in the administration of justice through arbitration and for the system to be perceived as legitimate by the public at large, the international arbitration sector must reflect the world whose disputes it resolves. Given that roughly 60% of the world's population is Asian, 50% of the world's population is female and 15% of the world population is affected by some form of disability,¹³ it is readily apparent that the arbitration community does not yet mirror the world whose disputes it resolves.

Diversity is no longer 'nice to have', as it has long-time been treated, but it is a necessity without which arbitration will no longer be capable of catering for the needs and meeting the expectations of its users.

6 F.D. Emerson, 'History of Arbitration Practice and Law', (1970) 19 *Cleveland State Law Review* 1, pp. 155–164.

7 A.M. Steingruber, *Consent in International Arbitration* (Oxford University Press, 2012); United Nations, 'Alabama claims of the United States of America against Great Britain', in *Reports of International Arbitral Awards* (2012), Vol. XXIX, pp. 125–134.

8 J. Karton, 'Diversity in Four Dimensions: Conceptualizing Diversity in International Arbitration', in G. Colombo, J. Karton, F. Balcerzak, S. Ali (eds.), *Sustainable Diversity in International Arbitration* (Edward Elgar, 2022), pp. 8–9.

9 L. Malintoppi, A. Yap, 'Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?', in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd ed., Oxford University Press, 2018), p. 153.

10 C. Knahr, A. Reinisch, 'Transparency versus Confidentiality in International Investment Arbitration – The *Biwater Gauff* Compromise', (2007) *The Law and Practice of International Courts and Tribunals* 6, p. 97.

11 Dr F. Adeleke, *The Role of Law in Assessing the Value of Transparency and the Disconnect with the Lived Realities under Investor-State Dispute Settlement*, Working Paper No. 06/2015, p. 9; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, para. 22: 'Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function.'; C.A. Rogers, 'Transparency in International Commercial Arbitration', (2006) 54 *University of Kansas Law Review* 1301; S. Kumar, R. Pratap Singh, 'Transparency and Confidentiality in International Commercial Arbitration', (2020) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 86, Issue 4 (2020), pp. 463–481.

12 S. Haridi, 'Towards Greater Gender and Ethnic Diversity in International Arbitration', (2015) 2 *BCDR International Arbitration Review*, pp. 305–307.

13 UNFPA, Population trends, available at <https://asiapacific.unfpa.org/en/populationtrends>; World Bank, Statistics Population, available at <https://data.worldbank.org>; World Health Organization, Statistics, available at <https://www.who.int/news-room/fact-sheets/detail/disability-and-health>.

The good news is that the international arbitration sector embarks on the diversification process from a position of relative strength. International arbitration is inherently diverse as it brings together parties, lawyers, and arbitrators from different countries, who generally apply multiple sets of applicable laws. Navigating the cultural and legal differences in international arbitrations requires not only solid knowledge of the law and of the case file, but also interpersonal skills, judgment and a level of gravitas to conduct the proceedings. In order to overcome those differences and to make the arbitral process work, open-mindedness is essential.

And that is where it becomes tricky. Most arbitration practitioners are convinced that they are open-minded. Yet, everyone is biased in their own way. Everyone sees the world and approaches business through their own frame of reference. People naturally gravitate towards people with a similar appearance, a similar education, a similar social background and similar professional experience. All actors in the arbitral process are loaded with bias. Because every person is biased in some shape or form, it is imperative to stop thinking that others prevent the arbitration sector from diversifying. As we are all responsible for and perpetuate the flaws in the system, we all carry responsibility for fixing the flaws of system too.

In order to redress the lack of diversity in the international arbitration sector, three steps must be taken: we must raise awareness of the issue¹⁴ (I); we must recognize and focus on the benefits of diversity (II); and we must take action (III).

I. Raising awareness

In the arbitral process, there are several barriers that limit diversity. The principle of party-autonomy – another valued tenet of international arbitration¹⁵ – is one of the most important limiting factors. When asked to select counsel or an arbitrator for a bet-the-company case, everyone looks for candidates in their own circles of like-minded people. Inhouse counsel and private practitioners seek predictability and look for professionals whom they can trust because they received a similar education, they gained similar professional experience and they go about decision-making in a similar manner as they do. In that process, practitioners tend to rely on the information and experience of other valued colleagues whom they trust

and – more often than not – resemble. For important cases, in-house counsel, external counsel, arbitrators and arbitral institutions will always seek out seasoned arbitrators, with a gilded track-record and stellar rankings, who are necessarily part of the international arbitration establishment, because – as the saying goes – nobody ever got fired for buying IBM.

Although no one is against diversity – or at least not openly – the noble diversity efforts tend to be reserved for smaller, less complex and lower value cases. In those cases, parties apparently find it easier to appoint women, less seasoned arbitrator, professionals from a different ethnic background, or differently abled persons. A frequently heard excuse for homogenously composed tribunals is that diversity can never come at the expense of quality. In those instances, it is routinely assumed that there are no suitable female arbitrators, younger arbitrators or arbitrators from a specific region with the requisite qualification for a particular dispute. However, that assumption is not rooted in the lack of available talent in the rapidly growing arbitrator pool, but rather in the lack of effort and willingness to look beyond the familiar circles.¹⁶ As such, the real question is by what standard suitability must be defined and whether those outside the relatively homogeneously composed international arbitration establishment can simply be dismissed as non-suitable.

Lawyers are trained to ask questions, to be rigorous, to investigate and to verify facts. That same rigor must be applied in selecting counsel and arbitrators with more diverse profiles. The internet provides unrivalled tools to identify and contact potentially suitable candidates. A good faith effort to identify diverse candidates will reveal that there is no shortage of talent and that the pool of suitably qualified arbitrators is much larger than assumed. Arbitration practitioners have a permanent duty to query whether a candidate is someone they feel comfortable with or whether they are objectively the best qualified person for the role.

14 ICCA Reports Series No. 8 Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings (2020), p. 78.

15 C. Chatterjee, 'The Reality of The Party Autonomy Rule in International Arbitration', (2020) 20 *Journal of International Arbitration* 6, pp. 539–540.

16 S. Haridi, *supra* note 12, pp. 313–314.

II. Focus on benefits

The guilt-ridden approach that diversity is the morally right thing does not advance matters much. Rather, the focus should be turned to the fact that diversity comes with tangible and quantifiable benefits. There is ample sociological research that proves that diversity improves the quality of the decision-making process and its outcome.¹⁷ There are three main reasons why diverse groups – which include arbitral tribunals – make better, more balanced decisions and systematically outperform homogeneously composed groups.¹⁸

First, a diverse group focuses on facts. Shared assumptions come with shared blind spots. For that reason, like-minded people are subject to the same cognitive biases. As a result, they tend to drift towards the same beliefs and adopt a mode of thinking that leads to self-righteousness, the pursuit of less rational courses of action and delusions of certainty. Because members of a diverse group do not share the same social code and references, they focus on the relevant facts, which greatly reduces the risks of ‘group-thinking’.¹⁹

Second, diverse teams process facts more carefully. In the absence of a common frame of reference and values, diversely composed groups examine a wider array of information and process facts in a more careful and systematic manner. As people with different training and different experience ask different questions, they also systematically challenge each other’s views and force each other to test the relevant facts and consequences from different angles.²⁰ Challenged in their assumptions and opinions by their co-arbitrators, members of a diversely composed tribunal will have to better justify their own conclusions. In that process, arbitrators are forced to also focus on facts and aspects they had not initially considered relevant and to break away from entrenched thinking patterns.²¹

On the other hand, members of a diversely composed tribunal will feel less comfortable than the members of a homogeneously composed tribunal and will have to work harder to reach a decision. Yet, that should not be an issue as arbitrators are service providers who are paid to render a quality professional service.

Thirdly, as follows naturally from the first two reasons, a diversely composed group generates a better work product. Cognitive and cultural diversity leads to a more comprehensive analysis of arguments and the available evidence and thus to more balanced decision-making.²² Consequently, the quality of the decision of a diversely composed tribunal is likely to be superior to the decision rendered by a tribunal entirely constituted of persons from a limited pool of arbitrators who regularly sit together and decide a disproportionately large number of arbitrations. As the quality of decision-making increases through diversity, so will the users’ confidence in the arbitration sector. Litigants who are satisfied that they have had an opportunity to present their case and who feel heard, are more likely to abide by the rule of law and to respect the outcome of the arbitration. Consequently, diversity enhances legitimacy.²³

Cynics might point out that it is not the role of one-off arbitration users to salvage the legitimacy of the system, and that their only objective is to win the case they are involved in. While that inclination is understandable, it would be short-sighted to ignore the importance of diversity in arbitration. Concerns about diversity may ultimately translate into public policy concerns about the legitimacy of the award, which, in turn, have the potential of undermining the enforceability of awards. From the perspective of procedural economy, the worst possible outcome is that all the time and costs invested in an arbitration are wiped out by the annulment of the ensuing award or the refusal to enforce it.

As the cynics are unlikely to be convinced by anything other than self-interest, the next sections will focus on what each of the stakeholders of the arbitration stands to gain from more diversity in the arbitral process. The stakeholders can be divided roughly into four categories: (1) the user, (2) the arbitral institution, (3) the outside counsel, and (4) the arbitrator.

17 E. Larson, ‘New Research: Diversity + Inclusion = Better Decision Making at Work’, (www.forbes.com, 2017); C. Albanesi, M. Nosedà Zorrilla de San Martín, C. Warner and S. Lee, *supra* note 1; D. Sabharwal, M. Wright, *supra* note 1.

18 P. Chatterjee, V. Desai, ‘Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?’, (Kluwer Arb. Blog, 1 Mar. 2020): ‘Research and reports have suggested that 87% of times teams with age, gender and geographic diversity and inclusive approach achieve the best results.’

19 S. Haridi, *supra* note 12, p. 309; N. Allen, L. Díaz de Córdova, et al., ‘If Everyone Is Thinking Alike, Then No One Is Thinking: The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making’, (2021) 38 *Journal of International Arbitration* 5, pp. 621–624.

20 N. Allen, Leonor Díaz de Córdova, et al., *supra* note 19, at pp. 609–619.

21 D. Sabharwal, M. Wright, *supra* note 1; P. Hodges QC, M. Tai, E. Kantor, *supra* note 1; J. Kartor, ‘Four Dimensions of Diversity in International Arbitration’, (2022) CICA, p. 3; *ICCA Reports Series*,

supra note 14, p. 14.

22 J.J. van Haersolte-Van Hof, ‘Diversity in Diversity’, in A.J. van den Berg (ed), *Legitimacy: Myths, Realities, Challenges*, ICCA Congress Series, Vol. 18 (ICCA & Kluwer Law International, 2015) p. 642.

23 P. Hodges QC, M. Tai, E. Kantor, *supra* note 1; J. Kartor, *supra* note 8, at pp. 8–9.

1) What is in it for the user?

Quality matters. A more diversely composed tribunal provides the user with a better end product.²⁴ If diverse arbitration is on offer and leads to better-quality awards, it is difficult for the management of a company to justify to its board, to its shareholders and to its stakeholders that it opted for and invested significant time and money in a process of a lower standard. For the same reasons it is indefensible for in-house counsel to retain a homogeneously composed counsel team and appointed a tribunal composed of ultra-busy arbitrators who regularly sit with each other.²⁵

2) What is in it for the arbitral institution?

Arbitral institutions carry responsibility for access to and the administration of justice on the international plain, comparable to the responsibility of a ministry of justice and the judiciary in the national system. It is a tremendous responsibility towards the international business community.

International dispute resolution is a competitive business. If an institution does not ensure that its arbitral tribunals are diversely composed and render awards of the highest possible quality, the competition will. It will only be a matter of time for the market to recognize that the competitors' awards are of a superior quality, which will subsequently drive users to resolve their future disputes under the auspices of different institutions.

It is thus not surprising that arbitral institutions have been among the staunchest supporters of diversity in international arbitration, as well as the most effective actors in achieving change.²⁶ For instance, the overall percentage of female arbitrators sitting in International Chamber of Commerce (ICC) arbitral tribunals reached 24.3% in 2021²⁷ (up by nearly one percentage point from 23.4% in 2020),²⁸ representing 17.5% of party appointments and 39.5% of appointments by the ICC Court (up from 37% in 2020). The London Court of International Arbitration (LCIA) reported in 2021 that the overall percentage of female arbitrators amounts to 32%: with only 16% of party-appointed female arbitrators²⁹ and 47% of the arbitrators selected by the LCIA Court. The Stockholm Chamber of Commerce (SCC) reported over 2021 that the total number of

women appointed as arbitrator amounted to 29%, with 17% female party-appointed arbitrators in 2021 and 49% of the SCC appointments.³⁰ The Singapore International Arbitration Centre (SIAC) reported that, in 2021, 35.8% of the overall number of arbitrators appointed were female.³¹

While gender diversity is relatively easy to track and report on, because if the sensitive personal data involved, it is much more complicated to generate reliable statistics about other aspects of diversity necessary to diversify the arbitrator pool, such as ethnicity, LGBTQ and disability/different ability.³²

3) What is in it for counsel?

In the short term, the objective of outside counsel is to win the case for their client. In the long run, it is to build a track-record that will enhance their reputation as successful arbitration counsel, with a thriving practice, which will enable them to attract additional clients to grow their business.

If counsel do not recruit lawyers and bring in team members from diverse backgrounds, other law firms will. Considering that the opponent will benefit from a wider range of perspectives and richer input, there is a substantial risk that the opponent's diversely composed legal team will outsmart the homogeneously composed counsel team. The counsel team that is not sufficiently diverse is likely to lose the arbitration, setting the development of its track record and reputation two steps back.

4) What is in it for the arbitrator?

An arbitrator is appointed by the user, by counsel, by the arbitral institution or a combination thereof. Although arbitrators are often assumed to have a peripheral role only in the diversification process, their impact can be significant. In the vast majority of cases, co-arbitrators play a role in the appointment of the presiding arbitrator because they are either requested to appoint the president themselves or in consultation with the appointing parties, and their counsel. Through the candidates that they suggest and the opinions they express on the identified candidates, they can play a key role in the diversification process.³³ However, in order to make a meaningful contribution, arbitrators should

24 P. Hodges QC, M. Tai, E. Kantor, *supra* note 1.

25 J.J. van Haersolte-Van Hof, *supra* note 22, at p. 642.

26 C. Albanesi, M. Nosedá Zorrilla de San Martín, C. Warner and S. Lee, *supra* note 1; D. Sabharwal, M. Wright, *supra* note 1.

27 The author of this article was given advance notice of this statistic, prior to its publication.

28 C. Albanesi, M. Nosedá Zorrilla de San Martín, C. Warner and S. Lee, *supra* note 1.

29 LCIA, 2021 Annual Casework Report, available at <https://www.lcia.org/lcia/reports.aspx>.

30 SCC Statistics 2021, available at <https://sccinstitute.com/statistics/>.

31 SIAC, Annual Report 2021, available at <https://siac.org.sg/wp-content/uploads/2022/07/SIAC-AR2021-FinalFA.pdf>. The report does not provide information as the number of party or institution appointments.

32 'The ICCA-IBA Roadmap to Data Protection in International Arbitration', *ICCA Reports* No. 7 (Sept. 2022), sections I.D and II.B.3.

33 G. Anderson, R. Jerman, S. Tarrant, 'Diversity in international arbitration' (Thomson Reuters, 2020), p. 4.

not content themselves by suggesting names from the small pool of colleagues with whom they routinely sit arbitrators but consider the particular characteristics of the dispute and identify the factors that are relevant to determine the suitability of a candidate for the particular case. It is good practice to articulate those factors and map the field of potentially suitable candidates.

As stated above, open-mindedness is an indispensable quality for an arbitrator. An open mind is not only essential when considering and deciding the issues in dispute; it is also critical in enabling users, counsel and arbitral institutions to constitute diversely composed tribunals, capable of rendering the prime quality awards that the parties need and expect. Apart from the fact that also arbitrators will want to check the diversity box and report that they live by the policies they preach, there is also a clear business case for their efforts towards diversely composed tribunals. If arbitrators fail to approach the composition of tribunals with an open mind, they will end up turning around in the closed circle of like-minded arbitrators and they will deprive the users and themselves of the prime quality awards that diversity and inclusion generate, while other arbitrators will.

III. Action

With the first two steps addressed – awareness and benefits of diversity – the third and last step that needs to be taken is action.

It is often suggested that diversification is a natural process that will take its course. But where is that process today? In the mid-nineties, the arbitrator-pool was composed exclusively of middle-aged and elderly Caucasian men.³⁴ In fairness, a lot has changed since then and the arbitration world has made serious efforts towards the diversification of the arbitrators' pool.

Starting in the mid-1990s, *ArbitralWomen* was founded to, among others, advance the interests of female practitioners and to promote women and diversity in international alternative dispute resolution.

In the early 2000s, arbitration institutes started appointing younger lawyers in order to give them an opportunity to gain experience and build a track record as an arbitrator.

Ten years later, around 2015, members of the arbitration community came together and drew up the 'Equal Representation in Arbitration' (ERA) Pledge, with the aim of increasing, on an equal opportunity basis, the number of women appointed as arbitrators in order to achieve fairer representation in the short term, and full gender parity in the longer term.³⁵ At the time, it was estimated that about 12% of the arbitrators were women.³⁶ According to the statistics of the leading arbitral institutions, in 2021, some have doubled or even tripled that percentage in 2021.³⁷ While the growth rate over this seven-year window may appear impressive at first glance, one cannot ignore the fact that in absolute terms only very few female arbitrators are appointed in those arbitration.

Change did occur as a result of the ERA Pledge. The arbitration community was compelled to address the over-representation of men and the under-representation of women, because institutions, law firms and clients were put under pressure not only to sign the Pledge, but to report on how the Pledge undertaking is being implemented in practice.³⁸ While many leading arbitral institutions have significantly increased the number of women appointed, the reality is nevertheless that party appointments – which make up the majority of arbitral appointments – continue to lag far behind.³⁹

In September 2019, the international arbitration community was called to action again, this time to address the under-representation of African arbitrators in tribunals. A group of academics and practitioners launched the *African Promise*, asking signatories to commit to improving the profile and representation of African arbitrators, especially in arbitrations with a link to Africa.⁴⁰

34 L. Greenwood, C.M. Baker, 'Getting a Better Balance on International Arbitration Tribunals', (2012) 28 *Arbitration International* 4, p. 653 (quoting the description of the majority of international arbitrators as 'pale, male and stale').

35 *ICCA Reports Series*, supra note 14, pp. 64, 114; P. Hodges QC, M. Tai, E. Kantor, supra note 1; C. Albanesi, M. Nosedá Zorrilla de San Martín, C. Warner and S. Lee, supra note 1; Indu Malhorta, 'Diversity in Treaty Arbitrations', in G. Banerji, P. Nair, et al. (eds.), *International Arbitration and the Rule of Law: Essays in Honour of Fali Nariman* (PCA, 2021), pp. 455–468.

36 *ICCA Reports Series*, supra note 14, pp. 41–42; E. Vicente Maravall, 'Increasing Transparency and Diversity in Arbitrator Election: The Givers' Proposal', in C. González-Bueno (ed.), *40 under 40 International Arbitration* (Dykinson, S.L. 2018), p. 52.

37 See percentages mentioned above at II.2: 'What is in it for the arbitral institution?'

38 E. Vicente Maravall, supra note 36, at p. 56; A. Raha, S. Jain, J. Gupta, 'Growing Gender Diversity in International Arbitration: A Half Truth?' (Kluwer Arb. Blog, 28 Sept. 2021).

39 C. Albanesi, M. Nosedá Zorrilla de San Martín, C. Warner and S. Lee, supra note 1.

40 P. Hodges QC, M. Tai, E. Kantor, supra note 1; J. Ballantyne, 'African Promise aims to promote diversity on tribunals', *GAR*, 8 Oct. 2019.

In 2020, the International Council for Commercial Arbitration (ICCA) published the Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, which explored the underlying issues causing women to leave the legal profession.⁴¹ In this report, the ICCA Taskforce reported that women comprised just over 20% of all arbitrators, up from around 10% in 2015. By way of comparison, the UK annual Diversity of the Judiciary Report for the year 2021 revealed that 33% of partners in UK law firms are women (and only 25% for equity partners).⁴²

As of January 2021, regional and ethnic diversity has also been placed on the arbitration agenda.⁴³ Under the motto 'Let's Get REAL Arbitration', the arbitration community has been called to order by a movement called REAL: Racial Equality for Arbitration Lawyers.⁴⁴ REAL has formulated six strategic goals to foster racial equality in the ranks of counsel and arbitrators, and to combat racial bias and discrimination.⁴⁵ To date, unfortunately, attempts to foster ethnic and regional diversity in arbitration have seen limited global success.⁴⁶ While the REAL initiative is just as worthy of the arbitral community's support as the call for gender diversity, the arbitration community is yet to embrace the REAL initiative in the manner it embraced the ERA Pledge. In order to ensure the genuine understanding of cultural, legal and commercial aspects of a dispute, the natural solution is to appoint arbitrators who have roots in the relevant cultures, jurisdictions and businesses.

Lastly, as recently as January 2022, the inclusion of professionals with disabilities – or rather, differently abled persons – is put on the agenda. The ICC Commission on Arbitration and ADR has established a Task Force whose mission is to facilitate and enable disability inclusion in international arbitration, to raise awareness of the issues encountered, and to identify the

adaptations that can be made to enable persons with special needs to do their jobs in the international dispute resolution sector.⁴⁷

Conclusion

The lack of diversity in international arbitration is a global problem that requires a global response. However, as arbitration is a decentralized sector involving many different actors, with many different interests, based in different countries and jurisdictions around the world, the power to address the issue is unfortunately fragmented too. While some progress has been made on age and gender diversity, the diversity spectrum is broad and requires careful consideration and action by all.

The Dutch saying goes: 'Improving the world, starts with yourself'. In order to safeguard the well-balanced administration of international justice through arbitration, all players in the arbitration sector have to start taking responsibility for diversity and inclusion, in their own cases, their own firms, their own departments, their own companies and in their own arbitral institutions. Waiting for others to solve the arbitral community's diversity problem is not an option. The diversification of arbitration is a global problem that can be solved by means of wide-spread individual actions. If individual actors do not rise to the occasion, there is the risk – like with climate change – that the system will sink before an adequate solution is put in place. Pledge-like commitment and affirmative action (wherever possible) towards diversity goals, as well as regular reporting on progress toward those goals, are indispensable means to deliver on the diversity challenge.

If the arbitration community fails to take responsibility and make the necessary changes quickly, it is unlikely that the international arbitration sector will be capable of continuing to meet the demands and expectations of its users. The urgency of action towards diversity is reinforced by the fact that the arbitration community is already years behind the judiciary of many countries,

41 ICCA Reports Series, supra note 14.

42 P. Hodges QC, M. Tai, E. Kantor, supra note 1; Ministry of Justice of the United Kingdom, 'Official Statistics Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics',

43 A. Kamath, 'The Path to Becoming a Modern International Arbitrator: Implications for Diversity and Systemic Legitimacy', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* (Kluwer Law International 2021, Vol. 87 Issue 3) p. 314.

44 N. Allen, L. Díaz de Córdova, et al., supra note 19, at p. 602; REAL website, available at <https://letsgetrealarbitration.org/>.

45 B. Acevedo, *REAL Gets Real: Launch of Racial Equality for Arbitration Lawyers* (Kluwer Arb. Blog, 20 avr. 2021).

46 White & Case, *Diversity on arbitral tribunals: What's the prognosis?*, 6 May 2021: 'Ethnic diversity, in particular, continues to be an area where respondents feel there is a distinct need for improvement. As in our 2018 survey, the statement that recent progress has been made in relation to ethnic diversity had the least agreement among the five listed aspects of diversity, with only 31% of respondents agreeing'.

47 This Task Force aims to study and analyse the ways in which ICC can meet the needs of those in the international arbitration community who may need accommodations or changes for the way they work. For more information, see 'ICC names new Disability and Inclusion Task Force leadership' (www.iccwbo.org, 3 Dec. 2021); and www.iccwbo.org/commission-arbitration-ADR. In 2022, ICC received the GAR Award for Equal Representation in Arbitration Pledge, recognising ICC's work to make arbitration more inclusive. Latest initiatives include the launch of a disability task force, the building of a LGBTQIA network, and the 'Hold the Door Open' programme aiming to give young arbitration practitioners in Africa an opportunity to gain practical experience by observing arbitration hearings.

which understood that litigants who use the justice system expect to see a cross-section of society reflected on courts and diversified their judiciary accordingly.⁴⁸

The distinguished Madeline Albright, who sadly passed away in March 2022, famously remarked in the context of the emancipation of women that '(t)here is a special place in hell for women, who don't help other women'.⁴⁹ The same is true for arbitration lawyers. Arbitration lawyers who do not help other arbitration lawyers to seize their opportunity, to participate in and to contribute to our inspiring, fascinating and diverse international arbitration world, do not deserve their seat at the table. *Noblesse oblige*. The members of the arbitration community need to think outside the box, go the extra mile and get out of their own comfort zone. All actors in the arbitration sector need to open their minds, invest time and work with people beyond their known professional circle. If everyone plays their part, arbitral tribunals will soon be more diverse, they will render better, higher quality awards and diversity will no longer be the Achilles heel but rather a widely acknowledged tenet of international arbitration.

48 J.J. van Haersolte-Van Hof, *supra* note 22, at p. 646. See also Commission on Women in the Profession, 'How Unappealing An Empirical Analysis of the Gender Gap among Appellate Attorneys', ABA (2021); The Law Society of England and Wales, 'Advocating for change: Transforming the future of the legal profession through greater gender equality: International Women in Law Report' (2019).

49 M. Albright, Keynote speech at Celebrating Inspiration Luncheon with the WNBA's All-Decade Team (2006).

Who Decides? Judicial Review of Arbitral Jurisdiction in the U.S. and Germany — particularly under Article V(1)(c) of the New York Convention

Andreas Frischknecht, Greta Körner and Alex Lupsaiu

Andreas Frischknecht is a Partner with Chaffetz Lindsey LLP in New York and acts as counsel in international commercial arbitration and arbitration-related litigation, with a particular focus on award enforcement. He has extensive experience with a variety of recurring issues in cross-border disputes, including sovereign immunity, data privacy and discovery in aid of foreign proceedings under 28 U.S.C § 1782.

Greta Körner is an attorney admitted to practice in New York and fully qualified to practice law in Germany (Ass. jur.).

Alex Lupsaiu is an associate with Chaffetz Lindsey LLP in New York. He represents clients in arbitration proceedings and other commercial disputes, particularly in the renewable energy and manufacturing sectors.

In this article, the authors show that courts in the United States and Germany differ fundamentally in their approach to arbitral jurisdiction and the degree to which it is subject to judicial review. But, despite the stark differences in theory, the practical outcomes in both jurisdictions appear remarkably similar. In Germany, as in the United States, decisions upholding arbitral jurisdiction appear to be the norm, and parties asserting that a particular claim or dispute is beyond the scope of their agreement to arbitrate are likely to face a steep uphill climb.

Introduction

It is axiomatic that ‘arbitration is a creature of contract’, such that ‘a person may only be compelled to arbitrate a dispute to the extent that he has agreed to do so’.¹ Consistent with this foundational principle, Article V(1)(c) of the New York Convention (the ‘Convention’) provides that an enforcing court ‘may’ refuse to enforce an arbitral award ‘at the request of the party against whom it is invoked’ if that party furnishes proof that ‘[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration’.² By its terms, therefore, the Convention contemplates judicial scrutiny of arbitral jurisdiction at the enforcement stage.

In the U.S., the application of Art. V(1)(c) has been complicated by courts’ tendency to view the power to decide arbitral jurisdiction in binary terms as vested *either* in the arbitral tribunal *or* the reviewing court. As framed by the U.S. Supreme Court, the question thus boils down to ‘*who decides*’ whether the parties agreed to submit their dispute to arbitration.³ Yet, the lower federal courts have been quick to find that the parties intended to delegate this authority to the arbitral tribunal based merely upon their incorporation

by reference of institutional rules authorizing the arbitrators, consistent with competence-competence principles, to determine their own jurisdiction in the first instance. The practical result is that, in most cases, a tribunal’s finding of jurisdiction will not be subject to independent judicial review in a subsequent U.S. enforcement proceeding.

Germany, by contrast, has taken a very different approach. In principle, parties there are *always* entitled to an independent judicial determination of arbitral jurisdiction, regardless of whether the arbitral tribunal *also* has the power, under competence-competence principles, to rule on its own jurisdiction. Indeed, in Germany, parties cannot validly derogate, by contract, from the rule that only the state courts have final authority to determine jurisdictional issues. Yet, despite German judges’ seemingly unfettered power to overrule an arbitral tribunal’s jurisdictional determinations, a review of the relatively few published German court decisions in this area suggests that German courts, in practice, rarely make use of that power. As a result, despite the stark differences in approach, the bottom line in both the U.S. and Germany is that a challenge to jurisdiction at the enforcement stage, in most cases, is unlikely to succeed.

¹ *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002).

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, Art. V(1)(c).

³ *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019).

I. United States

A. Highly deferential review of arbitral jurisdiction

1. Decision in the *First Options* case

In the U.S., the framework for judicial review of an arbitral tribunal's determinations concerning its own jurisdiction derives from the U.S. Supreme Court's seminal 1995 decision in *First Options of Chicago, Inc. v. Kaplan*.⁴ There, the Court addressed the question of whether arbitral tribunals or courts 'should have the primary power to decide' whether the parties 'agreed to arbitrate the merits' of their dispute.⁵ The Court referred to the latter question as one of 'arbitrability',⁶ but outside the U.S., it more typically would be characterized as a question of arbitral jurisdiction.

Whether arbitral tribunals or courts have primary authority to determine arbitrability, the Court explained, turns on whether 'the parties agree[d] to submit the arbitrability question itself to arbitration'.⁷ If so, the Court reasoned, the standard for judicial review of a tribunal's determination as to arbitrability 'should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate'.⁸ In that circumstance, a tribunal's jurisdictional determinations are not subject to any closer judicial scrutiny than its decision on the merits.⁹ Thus, where the parties have agreed to arbitrate issues of arbitrability, *First Options* instructs that a reviewing court 'should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances'.¹⁰ And, virtually in the same breath, the Court's unanimous opinion includes even more categorical language, to the effect that 'a court *must defer* to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration'.¹¹

Given this framework, the critical question becomes 'how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration'.¹² In that respect, the Court made clear, a reviewing court 'should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so'.¹³ The rationale for this heightened standard, the Court explained, ultimately lies in 'the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration'.¹⁴

At issue in *First Options* was a married couple's objection that they never agreed to arbitrate their dispute with a stock clearing firm. The Supreme Court found insufficient evidence that the couple 'clearly agreed to have the arbitrators decide (i.e. to arbitrate) the question of arbitrability'.¹⁵ In particular, the Court deemed the mere fact that the couple had 'fil[ed] with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction' insufficient to show 'a clear willingness to arbitrate that issue, i.e. a willingness to be effectively bound by the arbitrator's decision on that point'.¹⁶ To the contrary, the Court explained, 'insofar as the [couple] forcefully object[ed] to the arbitrators deciding their dispute with [the stock clearing firm], one naturally would think that they did not want the arbitrators to have binding authority over them'.¹⁷

First Options concerned a domestic arbitration, but U.S. courts take the same approach when considering a jurisdictional challenge to the enforcement of a foreign award under Art. V(1)(c) of the Convention. This uniform approach is consistent with the U.S. Federal Arbitration Act, which provides that the law governing domestic awards in Chapter 1 of the Act also applies to proceedings to enforce a Convention award under Chapter 2 of the Act 'to the extent that [Chapter 1] is not in conflict with [Chapter 2] or the Convention as ratified by the U.S.'.¹⁸

Federal courts have found no conflict between *First Options*, which permits delegation of arbitrability to the arbitrator, and the requirements of the Convention under Art. V(1)(c). Instead, they have merely noted that 'every country adhering to the competence-competence principle allows *some form of judicial review* of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that

4 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

5 *Id.* at 942.

6 *Id.*

7 *Id.* at 943.

8 *Id.*

9 As discussed in the subsequent Part on the German approach, this is not the case for review of arbitral decisions in Germany. In Germany, courts will scrutinize jurisdictional decisions by a tribunal more closely, reflecting a value judgment by German courts that merits decisions deserve more deferential review.

10 *First Options of Chicago*, 514 U.S. at 943.

11 *Id.* (emphasis added). On the other hand, if 'the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently'. (emphasis in original). *Id.*

12 *Id.* at 944.

13 *Id.*

14 *Id.* at 945.

15 *Id.* at 946.

16 *Id.*

17 *Id.*

18 9 U.S.C. § 208.

no valid arbitration agreement ever existed'.¹⁹ However, there has been no suggestion that Art. V(1)(c), which permits judicial review of an arbitrator's jurisdiction, requires *independent* or *de novo* judicial review of an arbitral tribunal's finding of jurisdiction (that is, review without deference to the tribunal's existing determination) where the competence-competence principle authorized the tribunal to determine its own jurisdiction in the first instance. On the contrary, the Second Circuit has held that, where a party has 'clearly and unmistakably agreed to arbitrate issues of arbitrability', that party 'is not entitled to an independent judicial redetermination of that same question' in a subsequent enforcement proceeding under the Convention.²⁰

2. 'Clear and unmistakable' evidence of agreement to delegate primary authority to arbitral tribunal

Incorporation of institutional rules. The Supreme Court in *First Options* did not elaborate on what might constitute sufficiently 'clear and unmistakable' evidence of the parties' intent to delegate the issue of arbitrability (i.e. arbitral jurisdiction) to the tribunal. However, the lower federal courts have almost uniformly held that the parties' incorporation by reference, in their arbitration agreement, of institutional arbitration rules that include a competence-competence provision satisfies the 'clear and unmistakable' standard.²¹

At first blush, the Tenth Circuit might appear to have reached a different conclusion in *Riley Manufacturing Company, v. Anchor Glass Container Corporation*,²² where the court held that domestic courts retain the authority to review arbitrability even where the parties' arbitration agreement incorporates institutional rules. However, as the Tenth Circuit has since observed in a more recent decision, *Riley Manufacturing* involved an

earlier version of the AAA rules that did not include a provision concerning the arbitration of arbitrability.²³ Thus, *Riley Manufacturing* does not call into question the general consensus among U.S. federal courts that the parties' incorporation of institutional rules that follow the competence-competence principle constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability.²⁴

Yet the case law provides little, if any, supporting analysis or reasoning for why such incorporation by reference should be deemed sufficient under *First Options*. For example, *Shaw Group Inc. v. Triplefine International Corp.* involved a dispute over the construction of a nuclear power plant in Taiwan and a dispute resolution clause providing for arbitration under the ICC rules.²⁵ The Second Circuit found clear and unmistakable evidence of the parties' intent to arbitrate arbitrability where they broadly agreed to refer 'all' disputes to arbitration under the ICC Rules, which reflect the competence-competence principle.²⁶ The court observed that, under applicable Second Circuit precedent, contractual language referring 'all' disputes to arbitration is sufficiently 'plain and sweeping' to capture disputes about arbitrability. Moreover, the court found that because the ICC Rules confer 'initial responsibility' upon the arbitral tribunal to determine arbitrability, their incorporation evidences the parties' clear and unmistakable intent to arbitrate arbitrability.²⁷ However, the court did not explain why conferring 'initial responsibility' upon the tribunal could be deemed tantamount to delegating the *final* decision on arbitrability to the arbitrators, without the possibility of meaningful judicial review.

19 *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003) (emphasis added); see also David Horton, *Arbitration About Arbitration*, 70 Stan. L. Rev. 363, 382 (2018).

20 *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 74 (2d Cir. 2012).

21 A rare example of a case in which a federal district court in Illinois, in the absence of controlling appellate authority in the Seventh Circuit, bucked this prevailing consensus is *Taylor v. Samsung Elecs. Am., Inc.*, No. 19 C 4526, 2020 WL 1248655, at *4 (N.D. Ill. 16 Mar. 2020). The court there acknowledged that 'the overwhelming majority of courts that have addressed this point have concluded that an arbitration agreement's incorporation by reference of a rule like this is sufficient to delegate to the arbitrator the determination of validity and arbitrability', but the court nonetheless disagreed. As it explained, '[i]t is hard to see how an agreement's bare incorporation by reference of a completely separate set of rules that includes a statement that an arbitrator has authority to decide validity and arbitrability amounts to "clear and unmistakable" evidence that the contracting parties agreed to delegate those issues to the arbitrator and preclude a court from answering them'. *Id.*

22 *Riley Manufacturing Company, v. Anchor Glass Container Corporation*, 157 F.3d 775 (10th Cir. 1998), at 780.

23 See *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017).

24 *Id.*

25 *Shaw Group Inc. v. Triplefine International Corp.*, 322 F.3d 115, 118 (2d. 2003).

26 *Id.*

27 *Id.* at 125.

Other Circuits have adopted a similar approach.²⁸ In *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, the Fifth Circuit, without further elaboration, ‘agree[d] with most of our sister circuits that the express adoption of [the AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability’.²⁹

It is hard to overstate the significance of these decisions holding that incorporation by reference of institutional rules precludes independent judicial review of the arbitral tribunal’s jurisdictional determinations. Parties routinely incorporate institutional rules by reference in their arbitration agreements, and virtually all of the main institutional rules contain a competence-competence provision. Consequently, the practical effect of the federal courts’ broad reading of what constitutes ‘clear and unmistakable evidence’ of the parties’ intent under *First Options* is that the vast majority of jurisdictional determinations by arbitral tribunals are effectively shielded from independent judicial review in the United States.

Procedural stipulation. Even in an *ad hoc* arbitration, absent any institutional rules authorizing the arbitral tribunal to determine its own jurisdiction, a party may be deemed to have agreed during the arbitration itself to grant the arbitral tribunal primary authority to determine its own jurisdiction. For example, in *Beijing Shougang Mining Investment Co. v. Mongolia*, three Chinese companies commenced an *ad hoc* arbitration, seated in New York, against Mongolia under the 1991 Mongolia-China bilateral investment treaty. The arbitration concerned an alleged expropriation by Mongolia of the claimants’ investments in an iron-ore mine in that country. The tribunal rendered an award dismissing the investors’ claims for lack of jurisdiction, concluding that the treaty conferred jurisdiction only over disputes over

the amount of compensation owed for an expropriation, but not over the threshold question of whether an expropriation had occurred.

The claimants subsequently petitioned the district court in the Southern District of New York to set aside the jurisdictional award and compel arbitration with Mongolia, but the court declined to do so and instead confirmed the award.³⁰ The claimants then appealed to the U.S. Court of Appeals for the Second Circuit, arguing that the district court should have reviewed the jurisdictional award *de novo* because the parties did not ‘clearly and unmistakably’ delegate the determination of arbitrability to the tribunal under *First Options*.

The Second Circuit disagreed. It found clear and unmistakable evidence of the parties’ intent based upon a procedural agreement reached during the course of arbitration.³¹ Specifically, ‘in Procedural Order No. 1, the Parties agreed that the first phase of the arbitration would cover jurisdictional and liability disputes’ (with a second quantum phase to follow if necessary). That agreement, the court held, ‘was sufficient in the context of the present arbitration to evidence the Parties’ intent to submit arbitrability issues to arbitration’.³²

As *First Options* makes clear, a party’s decision to contest arbitrability before the tribunal, standing alone, is not clear and unmistakable evidence of that party’s intent to arbitrate arbitrability. However, in *Beijing Shougang*, the Second Circuit deemed it significant that the parties reached a procedural agreement that the first phase of the arbitration would encompass jurisdictional disputes ‘after it had already become clear that the key jurisdictional issue to be argued during the first phase was the scope of the [treaty’s] arbitration clause’.³³

Moreover, Procedural Order No. 1 was not the sole basis for the Second Circuit’s decision. Rather, the claimants’ ‘conduct during the arbitration’ further ‘reinforced’ the court’s conclusion that they ‘intended to submit issues of arbitrability to the arbitrators’.³⁴ In particular, toward the end of briefing, the claimants submitted a letter ‘requesting that the tribunal issue an order specifically for the purpose of remind[ing] the parties that any award rendered by the Tribunal is *final* and binding[.]’³⁵ The court emphasized that claimants’ letter ‘strongly

28 *Fallo v. High-Tech Inst.*, 559 F.3d 874, 880 (8th Cir. 2009), stating without elaboration: ‘the parties’ incorporation of the AAA Rules is clear and unmistakable evidence that they intended to allow an arbitrator to answer [the question of arbitrability]’; *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), stating, without elaboration: ‘[w]e...conclude that the 2001 Agreement, which incorporates the AAA Rules ... clearly and unmistakably shows the parties’ intent to delegate the issue of determining arbitrability to an arbitrator’ (reversed on other grounds); *Terminix Int’l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005), (stating, without elaboration, ‘[b]y incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid’); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005), (stating, without elaboration, ‘when ... parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties’ intent to delegate such issues to an arbitrator’).

29 *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012).

30 *Beijing Shougang Mining Inv. Co. Ltd. v. Mongolia*, 415 F. Supp. 3d 363 (S.D.N.Y. 2019), *aff’d*, 11 F.4th 144 (2d Cir. 2021).

31 *Beijing Shougang Mining Inv. Co. v. Mongolia*, 11 F.4th 144, 147-48 (2d Cir. 2021).

32 *Id.* at 154.

33 *Id.* at 148.

34 *Id.* at 157.

35 *Id.* at 158 (internal quotation marks omitted, emphasis and alteration in original).

belie[d]' their argument 'that they did not believe that the tribunal had authority to conclusively determine jurisdictional issues'.³⁶

B. Limited judicial review where parties are deemed to have delegated primary authority to arbitral tribunal

As just discussed, a U.S. court will not review *de novo* an arbitral tribunal's decision concerning its own jurisdiction where the parties are deemed to have delegated that authority to the tribunal. However, it is less clear whether a court retains some authority to conduct a more limited review under those circumstances. As discussed above (I.A.1), *First Options* contains seemingly contradictory language concerning the court's residual power to scrutinize arbitral jurisdiction. On the one hand, the U.S. Supreme Court instructed that courts 'should give considerable leeway to the arbitrator' (apparently leaving room for at least some limited form of review).³⁷ But the Court added, in ostensibly categorical terms, that a reviewing court 'must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration'.³⁸

Despite this seemingly conflicting language, the lower federal courts have generally settled on reviewing jurisdictional challenges with deference to the tribunal's determination. For example, as previously noted, the Second Circuit has held that where the parties clearly and unmistakably agreed to arbitrate issues of arbitrability, the party resisting confirmation of the award 'is not entitled to an independent judicial redetermination of that same question'.³⁹ Rather, the court found that a 'deferential standard of review [is] properly applied to foreign awards'.⁴⁰ The court justified this conclusion primarily in pragmatic terms, based on its concern that permitting *de novo* review of arbitrators' determinations concerning their own jurisdiction 'would entail an enormous waste of resources contrary to the purposes of the New York Convention'.⁴¹

Similarly, in *Chevron Corp. v. Republic of Ecuador*, the U.S. District Court for the District of Columbia found that an arbitrator's jurisdictional determination was entitled to 'substantial deference' in the face of clear and unmistakable evidence of the parties' intent to arbitrate

arbitrability.⁴² Notably, the federal courts have declined to articulate a precise standard of review, likely because jurisdictional challenges typically fail if the tribunal's determination is afforded even a modest degree of deference.⁴³ Indeed, some courts, such as the Eight Circuit in *Fallo v. High-Tech Institute*, have affirmed an arbitrator's determination while omitting discussion of a standard of review altogether. Rather, the court there flatly held that where there is clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, the parties intended the arbitrator to answer that question.⁴⁴ The bottom line is that, whenever parties are deemed to have delegated the initial decision on jurisdiction to the arbitral tribunal, any judicial review of the tribunal's decision will be conducted with a very light touch, such that any attempt to challenge the tribunal's jurisdictional determination is likely to fail.

C. Criticism of federal courts' broad reading of *First Options*

The federal courts' liberal application of the 'clear and unmistakable evidence' standard under *First Options* has been the subject of scholarly criticism. Most notably, Professor George Bermann of Columbia Law School recently submitted an *amicus curiae* brief in the U.S. Supreme Court criticizing the nearly unanimous view among federal courts that incorporation of institutional rules containing a competence-competence provision constitutes clear and unmistakable evidence of intent to delegate arbitrability to the arbitral tribunal.⁴⁵ Professor Bermann argued that a competence-competence provision merely confers authority upon arbitrators to decide their own jurisdiction in the first instance, but does not grant them the *exclusive* authority to determine jurisdiction.⁴⁶ As he put it, the competence-competence principle 'empowers tribunals, but does not disempower courts'.⁴⁷

36 *Id.*

37 *First Options*, 514 U.S. at 943.

38 *Id.* (emphasis added).

39 *Schneider*, 688 F.3d at 74; see also *Beijing Shougang Mining Inv. Co.*, 11 F.4th at 161: '[E]ven if we would not necessarily reach the same interpretation, any difference in opinion is not enough to conclude that the arbitrators stray[ed] from interpretation and application of the agreement and effectively dispense[d] [their] own brand of ... justice.' (internal citations and quotations omitted).

40 *Schneider*, 688 F.3d at 74.

41 *Id.*

42 *Chevron Corp. v. Republic of Ecuador*, 949 F.Supp.2d 57, 67 (D.D.C. 2013).

43 *Id.* at 68: 'The Court need not determine exactly what standard of deference to employ, as even under a very mildly deferential standard, the Tribunal's decision appears well reasoned and comprehensive.'

44 *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); the court simply held without elaboration that 'the district court erred when it held that it had the authority to determine the question of arbitrability because the parties' incorporation of the AAA Rules is clear and unmistakable evidence that they intended to allow an arbitrator to answer that question'. For a further reference to this case, see *supra* note 28.

45 **Brief of Amicus Curiae** Prof. George A. Bermann in Support of Respondent, *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2020) (No. 19-963) at p. 4. Although Prof. Bermann submitted his amicus brief while the Supreme Court was considering the merits of the case, the Court declined to address Bermann's argument criticizing the federal doctrine.

46 *Id.* at p. 11.

47 *Id.* at p. 8.

Professor Bermann further noted, as observed above (I.A.2), that the federal courts have not explained how or why incorporation of institutional arbitration rules satisfies the 'clear and unmistakable' test, particularly given (i) the basic tenet that parties should not be forced to arbitrate issues they did not agree to arbitrate, and (ii) the fact that parties frequently do not consider whether the institutional rules referenced in their arbitration agreement adhere to the competence-competence principle (and how that might impact their subsequent ability to seek judicial review).⁴⁸ Since Professor Bermann is also the chief reporter of the American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, it is perhaps unsurprising that the Restatement similarly concludes that the incorporation of arbitral rules does not constitute clear and unmistakable evidence of an intent to arbitrate arbitrability.⁴⁹

II. Germany

Outside the U.S., the notion that an arbitral tribunal's power to determine its own jurisdiction, standing alone, restricts or even outright precludes any subsequent judicial review appears to be something of an outlier.⁵⁰ Germany, for example, has codified the following contrary rule: while the arbitral tribunal has the power to rule on its own jurisdiction (*Kompetenz-Kompetenz*), the final decision is allocated to the state courts.

A. Similar jurisdictional analysis in domestic arbitrations and under Article V

Conceptually, German judges approach issues of arbitral jurisdiction from the almost diametrically opposite perspective of their American counterparts. The German courts' approach is shaped by the fact that German law governing the enforcement of domestic awards not only authorizes courts to determine jurisdictional issues but provides that courts *must* have the final say on matters of arbitral jurisdiction. German courts take the same approach when considering the enforcement of foreign awards under the New York Convention.

1. Mandatory court review of arbitral jurisdiction in domestic proceedings

In domestic arbitrations, a party can raise a jurisdictional defense in different ways, depending on the stage of the proceedings.⁵¹ First, a party may seek 'preventive' review of the prospective tribunal's jurisdiction before the arbitral proceeding has commenced. In many cases, this occurs when the party desiring to arbitrate files an application to compel arbitration.⁵² However, it is also possible for a party desiring to avoid arbitration to apply for a preventive ruling that arbitral jurisdiction is lacking.⁵³ Second, during the pendency of the arbitral proceeding, a party may seek 'parallel' review by appealing an arbitral tribunal's interim decision on jurisdiction to the Higher Regional Court.⁵⁴ Finally, at the enforcement stage, a party may seek 'repressive' review,⁵⁵ either by way of an application to set aside,⁵⁶ or as a defense to an application to confirm the arbitral award.⁵⁷ In all of these scenarios, the German court will review arbitral jurisdiction *de novo*.

51 The following terms are taken from Münch, *Münchener Kommentar zur ZPO* (6th ed., 2022), Sect. 1040, para. 30.

52 This occurs by way of a so-called '*Schiedsseinrede*' pursuant to Sect. 1032(1) ZPO. It provides: 'Where an action is brought before a court in a matter that is the subject of an arbitration agreement, the court is to dismiss the action as inadmissible, provided that the respondent has raised a corresponding objection prior to commencement of the hearing on the merits of the case, unless the court finds that the arbitration agreement is null and void, ineffective or incapable of being performed'.

53 See Sect. 1032(2) ZPO, which provides: 'Until the arbitral tribunal has been formed, a request may be filed with the court to have it determine the admissibility or inadmissibility of arbitral proceedings'. This rule is particular to German law and was not provided for by the UNCITRAL model law. The drafters of the German law included the option for a preventive ruling, which already existed under the old law, for reasons of 'procedural economy', see *Federal Law Gazette*, BT-Drs. 13/5274, p. 38.

54 See Sect. 1040(3) ZPO, which provides: 'Where the arbitral tribunal considers that it has jurisdiction, its decision on an objection raised pursuant to subsect. (2) generally takes the form of an interlocutory decision. In this case, either party may request a court decision within one month of having received the written notice of the interlocutory decision...'.

55 See *Münchener Kommentar zur ZPO* (2nd ed., 2014) *supra* note 51.

56 Pursuant to Sect. 1059(2)(1)(c) ZPO, which provides: 'An arbitral award may be set aside only if: ... the party filing the application shows sufficient cause that: ... the arbitral award deals with a dispute not contemplated by the separate arbitration agreement or not covered by the terms of the arbitration clause, or that it contains decisions that are beyond the scope of the arbitration agreement; however, where it is possible to separate that part of the arbitral award relating to points at issue that had been submitted to arbitration from the part relating to points at issue that had not so been submitted to arbitration, only the latter part of the arbitral award may be set aside ...'.

57 Pursuant to Sect. 1060(2) ZPO, which provides 'The application for a declaration of enforceability is to be denied, and the arbitral award is to be set aside, if one of the grounds for setting aside designated in Sect. 1059(2) is given'.

48 *Id.* at p. 13.

49 Restatement (Third) U.S. Law of International Commercial Arbitration, § 2.8, reporter's note b(iii) (Tentative Draft No. 4, 2015) (approved, <http://2015annualmeeting.org/actions-taken>).

50 Borris/Hennecke, Wolff (ed.), *New York Convention - Article-by-Article Commentary* (2nd ed. 2019), Art. V para. 199: 'courts are not bound by the arbitral tribunal's decision on jurisdiction under almost all arbitration laws'. For an overview of allocations of jurisdictional competence in different national legal regimes, see Born, *International Commercial Arbitration*, Vol. 1, (2nd ed., 2014), § 7.03, pp. 1076–1236.

Among these three phases, judicial review is most common during the pendency of the arbitration, when a party appeals an interim decision of the tribunal.⁵⁸ Sect. 1040 ZPO delineates the roles and powers of the arbitral tribunal and the courts in that scenario and exemplifies Germany's approach to judicial review of arbitral jurisdiction in general. Pursuant to Sect. 1040(1) ZPO, if an arbitral proceeding is already underway and a party raises an objection to the tribunal's jurisdiction, the tribunal has authority to rule on its own jurisdiction (competence-competence), irrespective of whether the parties have included a competence-competence clause in their arbitration agreement. Sect. 1040(1) ZPO provides:

The arbitral tribunal may decide on its own competence, and in this context also regarding the existence or the validity of the arbitration agreement. [...]

However, this competence-competence is not absolute; rather, Sect. 1040(3)(2) ZPO explicitly invests the courts with final authority to determine arbitral jurisdiction. As a matter of principle, a decision by an arbitral tribunal concerning its own jurisdiction should take the form of an interim award.⁵⁹ The tribunal's jurisdictional determination is merely 'provisional' because the aggrieved party may challenge it before the state courts through an interlocutory appeal pursuant to Sect. 1040(3)(1),(2) ZPO.⁶⁰ Under that provision:

Where the arbitral tribunal believes it has competence, it shall rule on an objection ... in an interim decision as a matter of principle. In such event, each of the parties may apply for a court decision to be taken, doing so within one month of having received the written notice as to the interim decision.

Thus, while the tribunal has the 'first word' concerning its competence, the state courts invariably have the 'final word' if the aggrieved party appeals.⁶¹ This provision is based on Article 16 of the UNCITRAL Model law, and its adoption in 1998 brought about a change in German jurisprudence.⁶² Before the adoption of the Model law, parties could, if they wished, validly allocate the final authority to decide jurisdictional matters to the tribunal in their arbitration agreement.⁶³ But under current Sect. 1040 ZPO, parties no longer have that option. The *Bundesgerichtshof* (BGH), Germany's highest court of civil jurisdiction, has held that parties cannot contract out of the state courts' mandatory final authority to determine jurisdictional issues.⁶⁴ Accordingly, a competence-competence clause purporting to allocate the final decision exclusively to the arbitral tribunal would be invalid under German law.⁶⁵ This result is consistent with the legislative intent behind the adoption of the Model law in 1998,⁶⁶ and the interpretation of the new statute by legal scholars prior to the BGH's decision.⁶⁷ Some academics even argue that in the German legal system, this rationale is indispensable because arbitration agreements affect the parties' access to (state) justice, and the state courts' final authority to determine arbitral jurisdiction safeguards this important principle, which is embedded in the German constitution.⁶⁸

61 Münch, supra note 51, para. 2.

62 Germany adopted the model law in 1998 (Schiedsverfahrens-Neuregelungsgesetz, 22.12.1997, BGBl. 1997 I, p. 3224). Art. 16(3) UNCITRAL model law provides: 'The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award'.

63 Münch, supra note 51, para. 50; see BGH, 5 May 1977 – III ZR 177/74, NJW 1977, 1397, 1400, in which the Court held that 'parties may validly agree that doubts as to the jurisdiction of the arbitral tribunal are to be decided by the tribunal itself. Constitutional ... objections against this do not prevail'. Therefore, under the old law, state court review was restricted to the validity of the Kompetenz-Kompetenz clause. As long as it was validly concluded, state courts were not allowed to overrule the tribunal's decision on its own jurisdiction; see also *Federal Law Gazette*, BT-Drs. 13/5274, p. 44.

64 BGH, 13 Jan. 2005 – III ZR 265/03, NJW 2005, 1125; see also Huber/Bach, *Commentary on BGH*, 13 Jan. 2005 – III ZR 265/03, *SchiedsVZ* 2005, 95, 99: 'The courts' competence to finally decide is mandatory and may not be derogated by party agreement'; see also BGH, 24 July 2014 – III ZB 83/13, NJW 2014, 3652.

65 *Id.* This approach of holding agreements to finally resolve jurisdictional disputes by arbitration invalid has not been adopted by all UNCITRAL model law jurisdictions and has not been without criticism, see Born, supra note 50, §7.03[A], p. 1097.

66 *Federal Law Gazette*, BT-Drs. 13/5274, p. 44.

67 For an overview, see Huber/Bach, supra note 64, p. 95 at footnote 10.

68 See Buchwitz, supra note 58, p. 252; Voit, *Zivilprozessordnung*, Musielak/Voit (eds.) (19th ed., 2022), Sect. 1040, para. 1: '[Sect. 1040 ZPO] ensures that the final decision on [jurisdiction]

58 Buchwitz, *Schiedsverfahrensrecht* (1st ed., 2019), p. 259.

59 Pursuant to Sect. 1040(3)(1) ZPO, while the interim award procedure is the rule, deviations are possible and the tribunal may also rule on its jurisdiction in the final award. In practice, this may occur where the objection of lack of jurisdiction is obviously meritless, i.e., ultimately only serves to delay the proceedings; in this case, it may be obvious to hear the case very quickly and to affirm jurisdiction incidentally only in the decision on the merits, see Münch, supra note 51, para. 27.

60 Academics have called this concept 'provisional competence-competence': Münch, supra note 51, para. 4 et seq.: 'provisorische Kompetenz-Kompetenz des Schiedsgerichts'. It is noteworthy that arbitral proceedings continue during the interlocutory appellate procedure in front of the Higher Regional Court. Sect. 1040(3)(3) ZPO holds that 'For the period during which such a petition is pending, the arbitral tribunal may continue the arbitration proceedings and may deliver an arbitration award'. This ensures that the arbitration process isn't slowed down in the face of state court intervention.

The principle that courts have plenary authority to review arbitral jurisdiction and owe no deference to the arbitral tribunal's jurisdictional determinations applies at every procedural stage.⁶⁹ In other words, a German court will conduct the same plenary review of the arbitral tribunal's jurisdiction both in the context of an application to compel arbitration and in post-arbitration proceedings to set aside or enforce an award.⁷⁰

2. Same standard of (plenary) review for jurisdictional challenges to awards under the New York Convention

German courts also take the same approach when considering a jurisdictional defense to enforcement of a New York Convention award under Art. V(1)(c) of the Convention. Germany has implemented the Convention by reference in its Code of Civil Procedure (ZPO). Thus, Sect. 1061(1) ZPO provides generally that the recognition and enforcement of foreign arbitral awards is governed by the Convention.⁷¹ The party seeking enforcement of a Convention award must apply to the competent Higher Regional Court (*Oberlandesgericht* or 'OLG') for a declaration of enforceability.⁷² The party resisting enforcement may then raise any defense under

Art. V(1), including a jurisdictional defense under the Art. V(1)(c), before the Higher Regional Court. While the language of Convention Art. V(1) ('may be refused') suggests that courts have discretion to enforce an award even where one of the defenses enumerated in that provision has been established, German case law and academic commentary holds that courts possess no such discretion.⁷³ Rather, if the enforcing court finds that one or more grounds for non-enforcement under Art. V(1) exist, it must deny the application for a declaration of enforceability on those grounds.⁷⁴

Importantly, when considering an Art. V defense to enforcement, the enforcing court makes its own assessment and is not bound by the arbitral tribunal's legal or factual determinations.⁷⁵ This principle applies to all Art. V defenses, including under Art. V(1)(c). In fact, commentary holds that courts will review the jurisdiction of the tribunal *de novo* even if the parties have included a competence-competence clause in their arbitration agreement designed to preclude judicial review of the tribunal's jurisdictional determinations.⁷⁶ In other words, the domestic rule that parties cannot validly grant to the arbitral tribunal the sole or final authority

is always left to the state court. This takes account of the fact that the arbitration agreement affects the parties' right to access to justice'. The right to access to justice ('*Justizgewährungsanspruch*') follows from Art. 2(1) of the German Constitution in conjunction with the rule of law principle and includes 'the right of access to courts and a fundamentally comprehensive factual and legal examination of the subject matter of the dispute, as well as a binding decision by the judge' (see e.g., German Constitutional Court, 9 Dec. 2009 – 1 BvR 1542/06, NJW-RR 2010, 1474, 1475).

69 Münch, supra note 51, para. 49.

70 *Id.*

71 Sect. 1061 (1) ZPO holds that '(1) The recognition and enforcement of foreign arbitration awards is governed by the Convention of 10 June 1958 on the recognition and enforcement of foreign arbitral awards (published in *Federal Law Gazette* (Bundesgesetzblatt, BGBl) 1961 II p. 121). The stipulations of other treaties concerning the recognition and enforcement of arbitration awards shall remain unaffected hereby'. In determining the applicability of the convention, German law follows an exclusively territorial approach: The classification of an award as foreign or domestic is determined solely by the place of arbitration pursuant to Sect. 1025(1) and (4) ZPO. As an example, an award between two German limited liability companies with an arbitration in Zurich, Switzerland under the DIS Rules falls under the New York Convention (*OLG München*, 14 Nov. 2011 – 34 Sch 10/11, *SchiedsVZ* 2012, p. 43). The category of 'non-domestic' awards does not exist under German law, see Münch, supra note 51, Sect. 1061, para. 7, holding that a separate category for 'non-domestic' awards would contradict the clear categorization of the territoriality approach. Unlike the U.S. approach, German law dictates that when the place of arbitration is in Germany, the award is considered domestic and, consequently, the New York Convention does not apply.

72 Enforcement actions of foreign awards fall within the jurisdiction of the Higher Regional Courts (*Oberlandesgerichte*) pursuant to Sect. 1062(1) (No. 4) ZPO. The Higher Regional Courts are the second highest courts in ordinary civil jurisdiction in Germany; they are positioned above state courts (*Landgerichte*) and below the Federal Court of Justice (*Bundesgerichtshof*). Sect. 1062(1) (No. 4) ZPO provides: 'The higher regional court designated in the arbitration agreement or, if no such designation was made, the higher regional court in the district of which the place of arbitration is located, is competent for decisions on applications regarding: ... 4. ... the

declaration of enforceability of the arbitral award (Sect. 1060 et seq.), or the setting aside of the declaration of enforceability (Sect. 1061)'.

- 73 Adolphsen, *Münchener Kommentar zur ZPO* (6th ed., 2022), UNÜ Art. 5, para. 4; *OLG Düsseldorf*, 21 July 2004 – VI-Sch (Kart) 1/02, juris para. 25, referring to Art. V(2)(b): 'This provision, despite its wording suggesting a different interpretation, is to be understood as meaning that if the arbitral tribunal has ordered the respondent to perform contrary to public policy, the award is to be denied recognition, with no room for discretion'.
- 74 The Federal Government noted this during the legislative process of implementing the New York Convention in 1960, see *Federal Law Gazette*, BT-Drs. 3/2160, p. 26.
- 75 BGH, 27 Apr. 2017 – I ZB 61/15, NJOZ 2018, 866, 867, para 13; *OLG Koblenz*, 27 Nov. 2012 – 2 Sch 2/12, juris para. 15; Geimer, *Zivilprozessordnung*, Zöller (ed.) (34th ed., 2022) Sect. 1061, para. 20, 24.
- 76 Schlosser, *Kommentar zur Zivilprozessordnung*, Stein/Jonas (eds.) (23rd ed., 2014), Annex to Sect. 1061, para. 156: 'Germany does not recognize any competence-competence, even with regards to foreign arbitral tribunals. ... A fortiori, the exequatur court is not bound by any competence-competence, even if it is recognized in the country of the seat of the arbitration'; see also Geimer, supra note 75, Annex to Sect. 1061 ZPO, Art. V New York Convention, para. 1: 'It is irrelevant if the tribunal decided that there is a valid arbitration agreement; the tribunal has no competence-competence in the sense that it could render a decision on the validity of the arbitration agreement which is binding for the state court'; D. Solomon, 'Interpretation and Application of the New York Convention in Germany', *Recognition and Enforcement of Foreign Arbitral Awards, Ius Comparatum*, Bermann (ed.), 2017, p. 348: 'However, it is always possible and necessary for the German court to review the foreign decision for any violation of German public policy. As far as decisions of the arbitral tribunal concerning the existence of a valid arbitration agreement are concerned, German courts do not grant the tribunal any *Kompetenz-Kompetenz*'. Note that some of these commentators refer to Art. V(1)(a) of the Convention, which allows for refusal to enforce an award where the arbitration agreement is invalid, but that this principle equally applies to the defense of Art. V(1)(c).

to determine matters of arbitral jurisdiction also applies, *mutatis mutandis*, in enforcement proceedings under the Convention.

For completeness, we note that a German court may decline to examine a jurisdictional challenge under certain circumstances – but not out of deference to the arbitral tribunal. For example, a court may decline to entertain a jurisdictional defense to enforcement where the resisting party is deemed to have waived its objection.⁷⁷ Moreover, where an award has been the subject of set-aside proceedings in the country of origin (that is, at the arbitral seat), a German court ordinarily will defer to an existing decision by the courts in that country concerning the arbitral tribunal's jurisdiction (or lack thereof).⁷⁸

B. No successful challenge to enforcement under Art. V(1)(c) among the relatively few reported cases

Jurisdictional objections to enforcement under Art. V(1)(c) of the Convention have not played a major role in the reported German case law.⁷⁹ Notably, among the few published decisions in which the party resisting enforcement invoked a jurisdictional defense under Art. V(1)(c), we did not find a *single reported instance*

where enforcement was refused.⁸⁰ Instead, all reported decisions have granted enforcement of the foreign award.⁸¹

For example, the *OLG (Higher Regional Court) Naumburg* took this approach in a 2011 decision enforcing an award rendered in a Zurich-seated ICC arbitration.⁸² The claimant in the underlying arbitration there sought indemnification from the respondent for a penalty it had paid to a third party. Among the issues the arbitral tribunal considered in reaching its decision was whether the third party had a valid claim against the claimant. The tribunal found that it did. In the subsequent enforcement proceeding in Germany, the respondent argued that the tribunal exceeded its authority by ruling on the existence of the penalty claim, and that enforcement should be denied on that basis under Art. V(1)(c).⁸³ But the court disagreed; it characterized the tribunal's ruling on the penalty issue as merely incidental to the indemnification claim.⁸⁴ In reaching that issue, the court explained, the tribunal did not exceed its authority, particularly as the parties' arbitration agreement covered 'all ensuing disputes':

At this point it should be noted that the parties have expressly assigned 'all ensuing disputes' to the arbitral tribunal - this does not in principle imply a limitation to the relationship between the two main parties.⁸⁵

77 A party is generally precluded from challenging the jurisdiction of the tribunal at the enforcement stage if it participated in the arbitral proceedings without timely challenging the jurisdiction of the tribunal. For an overview, see Solomon, *supra* note 76, p. 347, who notes that '[i]n most cases, this type of waiver is accepted by the courts without making it clear whether the waiver arises out of the law governing the arbitration procedure or the law of the enforcing state'. The European Convention on International Commercial Arbitration ('EuC') specifically provides for such a preclusion: pursuant to Art. V(2) EuC, a party may not raise objections to the jurisdiction of the arbitral tribunal if it has failed to raise this objection during the arbitral proceeding as required by Art. V(1) EuC. In the context of the New York Convention, the EuC then precludes the defense under Art. V(1)(c) due to the 'more favorable law provision' of Art. VII(1) of the Convention. Under the old law, Art. V defenses were also precluded where a party did not make use of existing remedies against the award at the place of arbitration within a statutorily prescribed time limit. In a decision in 2010, the BGH clarified that under the new law, such wide-ranging preclusion is no longer available. The court held that only under narrow circumstances may a waiver result from such behavior, primarily when it constitutes an infringement of the good faith principle, *BGH*, 16 Dec. 2010 – III ZB 100/09; see also Kröll, *Arbitration in Germany - The Model Law in Practice*, Böckstiegel, Kröll, Nacimiento (eds.) (2nd ed. 2015), Sect. 1061 ZPO, para. 56.

78 See, e.g. *OLG Brandenburg*, 20 May 2020 – 11 Sch 1/19, NJOZ 2020, p. 1545, 1551, para. 80 et seq; see also D. Solomon, *supra* note 76, p. 348.

79 See D. Solomon, *supra* note 76, p. 357: 'Article V(1)(c) of the Convention has not played a major role in German decisions on recognition and enforcement of foreign awards'.

80 The authors are aware of twenty-six reported decisions between the years of 1976 and 2020 (i.e., encompassing an extended period both before and after Germany's adoption of the Model law in 1998) in which the party opposing enforcement raised the Art. V(1)(c) defense. In these cases, the court (sometimes very briefly) discussed this ground for refusal but ultimately denied its presence and/or noted that the party was precluded from raising the defense (for the doctrine of preclusion in this context, see *supra*, note 77). Note that there is one case in which the BGH overturned a decision by the *OLG Frankfurt* refusing enforcement on Art. V(1)(c) grounds, but the decision of the *OLG Frankfurt* was not reported, see *BGH*, 12 Feb. 1976 – III ZR 42/74, NJW 1976, 1591.

81 This alone does not necessarily mean that no decisions refusing enforcement on the basis of Art. V(1)(c) exist. In Germany, not all court decisions are published or reported. Generally, judges themselves determine whether a decision is 'worthy of publication'. A study from 1993 found that between 1987 – 1993, only 0.46% of all German court decisions were published, Reinhard Walker, *Die Publikationsdichte - ein Maßstab für die Veröffentlichungslage gerichtlicher Entscheidungen*, JurPC Web-Dok. 36/1998, para. 7. A more recent paper estimates that the adjusted publication rate of German ordinary courts (criminal and civil cases) did not once surpass 1.01 % in several years assessed between 1971 and 2019, Hanjo Hamann, *Der blinde Fleck der deutschen Rechtswissenschaft – Zur digitalen Verfügbarkeit instanzgerichtlicher Rechtsprechung*, Juristenzeitung 2021, p. 656, 658. However, one would assume that a decision refusing enforcement would be deemed 'worthy of publication' and therefore be reported. It is therefore evident that the number of decisions refusing enforcement on the basis of Art. V(1)(c) is either non-existent or very small.

82 *OLG Naumburg*, 4 Mar. 2011 – 10 Sch 4/10, *SchiedsVZ* 2011, 228.

83 *Id.* at p. 229.

84 *Id.* at p. 230.

85 *Id.* at, p. 230.

Likewise, the *OLG Koblenz* found no jurisdictional defect in an arbitral award rendered outside the time limit stipulated in the procedural rules the parties had incorporated into their arbitration agreement.⁸⁶ Those procedural rules called for the tribunal to render its award within ten months following the conclusion of the arbitration agreement.⁸⁷ However, the tribunal in the ensuing arbitration seated in Strasbourg, France, did not issue its award until 19 months after the arbitration agreement was concluded.⁸⁸ In considering the claimant's enforcement application, the German court emphasized its independent authority to review the enforceability of the award under the Convention:

When examining the requirements of Art. 3 et seq. of the New York Convention, the state court is bound neither by the legal assessment nor by the factual findings of the arbitral tribunal.⁸⁹

The court acknowledged that the award theoretically could be framed as 'beyond the scope of the submission to arbitration' within the meaning of Art. V(1)(c) of the Convention.⁹⁰ However, the court rejected the respondent's argument that the award was jurisdictionally defective on that basis: it reasoned that the arbitral proceedings were based on a valid arbitration agreement, and there was no reason not to continue them even after the ten-month deadline had passed. Citing a similar decision by the French *Cour de Cassation*, the court thus found that the expiration of the time limit did not render the arbitration clause inoperative.⁹¹

In another recent decision, the *OLG Brandenburg* rejected a party's attempt to restrict the scope of an arbitration clause to only claims arising directly from the parties' contract. The claimant in that case sought to enforce an award arising out of a Vienna-seated arbitration under the Vienna International Arbitration Centre ('VIAC') rules. The sole arbitrator had awarded the claimant damages on both contractual and statutory grounds. In resisting enforcement, the respondent subsequently invoked Art. V(1)(c) of the New York Convention, among other defenses. Specifically, the respondent argued that the arbitration clause, which provided for arbitration of all 'disputes or claims arising out of or in connection with *this contract*, including

disputes relating to its validity, breach, termination or nullity' (emphasis added), did not extend to statutory claims, such as tort claims.⁹²

The German court analyzed the sole arbitrator's jurisdiction *de novo*, concluding that the arbitrator had not exceeded her competence in awarding tort damages on statutory grounds. In particular, the court found that the arbitration clause covered both contractual and statutory claims.⁹³ The court reasoned that the clause's wording did not distinguish between contractual and statutory claims. Nor could the clause's intent and purpose justify restricting its scope of application to only claims arising directly out of the contract.⁹⁴ The court explained that the parties had chosen to use the VIAC model arbitration clause, and that the purpose of such model clauses is precisely to cover, as comprehensively as possible, all disputes arising from the contract without differentiating between different types of claims.⁹⁵ The court stressed that such a differentiation depending on the type of claim could be validly assumed only where the parties explicitly so provide.⁹⁶

Finally, in a case that began before the *OLG Hamburg* but was ultimately decided by the *Bundesgerichtshof*, both courts rejected a jurisdictional challenge based on the identity of the counterparty. That case involved a Seoul-seated Korean Commercial Arbitration Board ('KCAB') arbitration in a dispute arising out of a distributorship agreement.⁹⁷ The tribunal awarded the claimant certain outstanding payments and other damages.⁹⁸ During the arbitration, the respondent unsuccessfully objected to the tribunal's jurisdiction, asserting that its contractual counterparty was in fact the claimant's subsidiary rather than the claimant itself.⁹⁹ The claimant, having prevailed, later sought to enforce the resulting merits award in Germany; the respondent, in turn, objected to enforcement under Art. V(1)(c) of the Convention.

The *OLG Hamburg* granted enforcement of the award, finding no excess of jurisdiction under Art. V(1)(c) because the respondent's objection based on the identity of the counterparty did not implicate the arbitral tribunal's competence.¹⁰⁰ Rather, the court held, the

86 *OLG Koblenz*, 27 Nov. 2012 – 2 Sch 2/12, juris.

87 *Id.* at para. 22.

88 *Id.*

89 *Id.* at para. 15.

90 *Id.* at para. 22.

91 *Id.*

92 *OLG Brandenburg*, 20 May 2020 – 11 Sch 1/19, NJOZ 2020, p. 1545, 1549.

93 *Id.* at p. 1553, para. 95 et seq.

94 *Id.* at p. 1553, para. 97.

95 *Id.*

96 *Id.*

97 *OLG Hamburg*, 29 June 2015 – 6 Sch 19/14, BeckRS 2016, 538 and subsequently *BGH*, 27 Apr. 2017 – I ZB 61/15, NJOZ 2018, 866.

98 *OLG Hamburg*, supra note 97, at p. 538, para. 3.

99 *Id.* at para. 2.

100 *Id.* at para. 15.

respondent's argument concerned the merits of the case.¹⁰¹ In the ensuing appellate proceedings before the *BGH*, the respondent argued that the *OLG Hamburg* had decided the case on the implicit, erroneous assumption that it was bound by the tribunal's decision concerning its own jurisdiction. By taking this approach, the respondent claimed, the *OLG Hamburg's* decision violated its right to be heard. However, the *BGH* rejected this argument and affirmed the lower court's ruling: The *BGH* found no indication that the *OLG Hamburg* had assumed it was bound by the arbitral tribunal's determination. Rather, the lower court considered the objection unfounded because it did not concern the jurisdiction of the tribunal, but the substantive merits of the claim.¹⁰² On that basis, the *BGH* held that the *OLG Hamburg's* decision:

[...] does not violate the principle that the final decision on the jurisdiction of the arbitral tribunal is reserved to the state courts.¹⁰³

C. Pro-enforcement outcomes despite *de novo* review

While the sample size of reported German court decisions is small, a review of the cases suggests the reason jurisdictional objections are rarely successful is that German courts, while they review the arbitral tribunal's jurisdiction *de novo* and without deference to the tribunal, nonetheless tend to interpret the underlying arbitration agreement broadly.

Indeed, it is a well-established principle under German law that an arbitration agreement's objective scope is to be interpreted broadly.¹⁰⁴ For example, what type of claims are covered by an arbitration agreement is to be determined by a broad reading of the arbitration clause.¹⁰⁵ Academics have observed that this gives effect to the principle that 'things that belong together should also remain together', as this is usually closest to the parties' true intent.¹⁰⁶

As the decisions discussed above show, German courts appear to apply this same principle in the context of foreign awards and enforcement under the Convention. As a result, absent unusual circumstances, a jurisdictional challenge to enforcement in Germany under Art. V(1)(c) of the Convention is unlikely to

succeed. Ultimately, one can argue that this outcome is consistent with the pro-enforcement bias of the Convention itself.¹⁰⁷

Conclusion

Perhaps it should come as no surprise that courts in both Germany and the U.S. tend to uphold arbitral jurisdiction in the vast majority of cases. There is no reason to think that arbitrators routinely exceed their jurisdiction; on the contrary, most tribunals are careful to remain within the limits of their authority. Hence, in the ordinary case, the distinction between 'independent' and 'deferential' judicial review is unlikely to affect the outcome.

But, at the margins, independent judicial review nonetheless provides a critical safety valve to ensure that the principle of consent, from which arbitral legitimacy derives, is vindicated in circumstances where an arbitral tribunal truly has exceeded its jurisdiction. To that extent, it serves a real and important purpose. And, in that respect, the differences between the German and American approaches to judicial review are fundamental. Thus, in principle, German courts are both empowered and required to overrule an arbitrator's finding of jurisdiction if it cannot be supported by even a broad reading of the parties' arbitration agreement. The arbitral tribunal's reasoning does not constrain the court's analysis in any way.

By contrast, the authority of courts in the U.S. to consider issues of jurisdiction upon which an arbitral tribunal has already passed is far more limited, at least in the vast majority of cases where the parties are deemed to have delegated to the tribunal the primary authority to determine its own jurisdiction. The line between highly deferential review, and no meaningful review at all, is often hard to discern, and the risk remains that even a substantially erroneous finding of jurisdiction might be allowed to stand under this 'hands off' approach. That risk would be considerably reduced if courts were to follow the Restatement's approach and find that the mere incorporation of institutional rules in an arbitration agreement does not amount to clear and unmistakable evidence of the parties' intent to arbitrate arbitrability.

101 *Id.*

102 *BGH*, 27 Apr. 2017 – I ZB 61/15, NJOZ 2018, 866, para. 12.

103 *Id.* at para. 13.

104 See e.g., *BGH*, 27 Feb. 1970 – VII ZR, 68/68 and Münch, *supra* note 51, Sect. 1029, para. 125, with further references. The author emphasizes that this principle does not apply to the subjective scope of the arbitration agreement.

105 Saenger, *Zivilprozessordnung* (9th ed., 2021), Sect. 1029, para. 15.

106 Münch, *supra* note 51, at footnote 104, para. 129.

107 The general principle set forth by Art. III, that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them', has been referred to by a number of courts as embodying Convention's 'pro-enforcement bias', *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016 ed.), Art. III, p. 78.

Corruption and Arbitration: Recent Developments in French Case Law

Pierre Mayer

Pierre Mayer is an Emeritus Professor of the University of Paris I (Panthéon-Sorbonne) and a founding Partner of the firm Mayer Greenberg – International Arbitration in Paris. He acts as arbitrator or counsel in commercial and investment treaty-based proceedings, involving all types of contracts within different sectors, including energy, transport, telecommunications, projects, M&A, etc. Professor Mayer has published numerous books and articles on arbitration law and practice, and private international law, including a reference textbook on French international private law and a general course at the Hague Academy of International Law. He is a member of the board of the Comité français de l'arbitrage, and member of the Council of the ICC Institute of World Business Law.

During the ICC Commission on Arbitration and ADR ('the Commission') meeting held on 29 March 2022, Pierre Mayer delivered a keynote speech on corruption and arbitration in recent French case law. The Commission Steering Committee and members were honored to hear Professor Mayer's views, which opened the discussions on the work carried out by the ICC Commission Task Force 'Addressing Issues of Corruption in International Arbitration'.

Introduction

This speech discusses the review French courts exercise over an award ordering the performance of a contract that one party claims (i) has been obtained by corruption or (ii) was aiming at corrupting some authority (to obtain a contract).

Describing the position of French courts is not an easy task, because there are several trends in French case law. It is, fortunately, unanimously held that corruption is against public policy. More precisely, where the contract is international, it is against '*ordre public international*', which in the French terminology does not refer to a component of the international legal order but is part of the French legal order (and, in fact, the core of public policy in France).

A violation of the '*ordre public international*' cannot be tolerated. Pursuant to Article 1520 of the Code of Civil Procedure, the award shall be set aside 'if its recognition or enforcement would be contrary to international public policy'. That provision applies to awards rendered in France. French court cannot set aside awards rendered abroad; those will be refused leave to enforce (*exequatur*) if such enforcement would be contrary to international public policy.

The competent court is, for all cases, the Court of Appeal, and most often the Paris Court of Appeal. An appeal from the Court of Appeal to the *Cour de cassation* is always possible but must be based on legal, as opposed to factual, grounds.

Unfortunately, the Paris Court of Appeal and the *Cour de cassation* have held opposite views as to the extent of review to be exercised over arbitral awards. And what makes things even more complex is that both courts have, with time, radically modified their respective position.

The context is that of a strong opposition between two trends. One is usually called the *maximalist* view, and the other the *minimalist* view.

The *maximalist* view rests on the idea that public policy – and even more so international public policy – matters, and that the arbitrator, being a private person, is not its natural guardian. It belongs to a state organ – the judge – to guard it, and there must therefore be a strict review over the award.

The *minimalist* view, by contrast, considers that the judge should trust the arbitrator to correctly apply public policy rules. This trend insists that the finality of awards is an essential component of the French approach to arbitration, and that the judge does not have, in practice, the same ability as an arbitrator to gather evidence in a complex factual situation. More specifically, in the field of corruption, there may also be the idea that corruption is endemic in certain countries and that there is no point trying to eradicate it; that it is part of the economic system in those countries; and that it is shocking, for a State, to invoke corruption in which its own bodies have participated.

I am not taking a position here on any of these arguments, which all are part of the debate.¹

I will now describe the evolution that has led to the present situation, and of course what the present situation is. In order to do this, I will distinguish two factual situations:

- > corruption was alleged before the arbitral tribunal, which nevertheless declared that there was no corruption, hence the appeal;
- > corruption was not alleged, no one invoked its existence, and the tribunal, even if it had a strong suspicion, did not raise the issue *ex officio*. Having been ordered to perform the contract, or to pay damages, the respondent brings an appeal against the award, alleging corruption.

I. The allegation of corruption was raised before the arbitral tribunal and was dismissed

For this situation, four stages can be identified in the development of French case law.

1. The Cytec case

In 2008, the *Cour de cassation* rendered its judgement in the *Cytec* case.² The case was not about corruption but about competition law; corruption cases, strangely, were rare in those times. In the *Cytec* case, the Court decided on public policy in general and there was no reason corruption would be subject to different principles.

The Court took a *minimalist* view, limiting the scope of review of the award in two ways:

1. The review had to be intrinsic, i.e. the court could only look at the award itself, not at the elements of the dispute, not even at the litigious contract.
2. A revision, i.e. calling into question the facts considered established by the tribunal, the interpretation of the law, the reasoning, etc., was *prohibited* – all this was sanctified.

One then wondered if any review of conformity to public policy was still possible. There remained a faint one, as

the *Cour de cassation* accepted one exception to its essentially negative position: the Court must react where the violation is ‘flagrant’, i.e. where by simply reading the reasons of the award, it appears obvious, to any reader, that public policy has been infringed. This, of course, is rare.

The *Cour de cassation* also mentioned that the violation must be ‘effective and concrete’ – ‘*flagrant, effective and concrete*’; in France, we like to juxtapose three adjectives in this manner.

2. The schism of the Paris Court of Appeal: a radical change of approach

As of 2014, the First Chamber of the Paris Court of Appeal rendered a series of decisions, essentially relating to corruption and money laundering. The violation of public policy did not have to be ‘*flagrant, effective and concrete*’ anymore; it only had to be ‘*manifest, effective and concrete*’. While commentators are still discussing what ‘manifest’ exactly means, this term is clearly not as strong as ‘flagrant’, since by reading the decisions rendered then, one sees that the review was not in any way limited. There was no prohibition of revision: any factual statement in the award could be criticized; the evidence could be discussed; the Court did not refrain from looking into the record of the arbitral proceedings; it even ordered the production of new documents and accepted evidence from the parties.

To mention only two famous cases: the first in the field of money-laundering (the *Belokon v. Kirghizstan* case),³ the second in the field of corruption (the *Alstom Transport v. ABL* case).⁴ In both cases, the reasoning of the Court extends to almost twenty pages of the *Revue de l'arbitrage*, to reach the conclusion that the award must be set aside (*Belokon*), or that *exequatur* should be refused (*Alstom*).

3. A brief interlude (prior to the Cour de cassation decision in the Belokon case)

In 2018, a new chamber was created within the Paris Court of Appeal, the ‘International Chamber of the Paris Court of Appeal’. Appeals against arbitral awards are now brought before that chamber. Its jurisprudence appears as a kind of compromise, rather leaning towards the position of the *Cytec* decision: the review is limited to the contents of the award itself, and revision is

1 On P. Mayer's position on the choice between the maximalist and the minimalist reviews, see ‘L'étendue du contrôle, par le juge étatique, de la conformité des sentences arbitrales aux lois de police’, in *Vers de nouveaux équilibres entre ordres juridiques, Mélanges en l'honneur de Hélène Gaudemet-Tallon* (Dalloz, 2008), p. 459 et seq.

2 Cass. Civ. 1re, 4 June 2008, *Cytec*, *Revue de l'arbitrage*, 2008.473, note I. Fadlallah; *Dalloz*, 2008.2560, S. Bollée; *ibid.*, p. 3111, obs. Th. Clay; *La Semaine Juridique, ed. générale*, 2008, I, 164, obs. Ch. Seraglini; *ibid.*, act. 430, J. Ortscheidt; RTD com., 2008.518, obs. É. Loquin; *Journal du Droit International*, 2008.1107, note A. Mourre.

3 *Belokon v. Kirghizstan*, Paris Court of Appeal, 21 Feb. 2017, *Dalloz*, 2017, p. 2054, obs. S. Bollée; *ibid.*, 2570, obs. Th. Clay; *Journal du Droit International*, 2017, p. 1361, note E. Gaillard; *Revue de l'arbitrage*, 2017, p. 915, note S. Bollée et M. Audit; *Revue de Droit Comparée*, 2017, p. 304, obs. X. Boucobza et Y.-M. Serinet; *Gazette du Palais*, 18 July 2017, p. 32, obs. D. Bensaude; *Global Arbitration Review*, 23 Feb. 2017, obs. L. Yong.

4 *Alstom Transport v. ABL*, Paris Court of Appeal, 28 May 2019, *Revue de l'arbitrage*, 2019, p. 850, obs. E. Gaillard.

prohibited. Within this limited review, the Court examines the indices of corruption mentioned in the award, which it cannot modify or complement, and decides whether they are sufficiently ‘serious, precise and converging’ to characterize a violation of international public policy. In other words, the Court limits its review to the probative value of the indices as they are described in the award.⁵

4. In 2022: The *Cour de cassation* decision in the *Belokon* case

On 23 March 2022,⁶ the *Cour de cassation* rendered its judgment on the appeal (*pourvoi en cassation*) made against the 2017 *Belokon* judgment. The Court dismissed the *pourvoi* and approved the position of the Court of Appeal. In other words, it rejected the *minimalist* view, established by the *Cytec* case in 2008, and adopted an unambiguously *maximalist* view.

Three sentences of this important decision deserve quoting.

[The Court of Appeal] recalled ... it was its duty to determine whether the recognition or enforcement of the award would hinder the objective of fighting against money-laundering. (at para. 8)

(...)

[The Court of Appeal] rightly held ... that its review was not limited to the evidence submitted to the arbitrators; and that it was not bound by their findings, assessments, and characterizations. (at para. 9)

(...)

[T]he Court of Appeal did not carry out a new investigation or a revision of the merits of the award but made its own assessment ... as to whether there were “serious, precise and converging” indices that the [Bank] had been taken over by [Mr Belokon] in order to develop ... money laundering activities. (at para. 10)

In its first part, this second sentence means that the review is in no way restricted: new evidence may be adduced in the appeal proceedings. In its second part, the sentence implies that what was once considered as prohibited revision is not revision at all, as confirmed by the third sentence.

In other words, the prohibited revision is a revision *on the merits*. It consists for the reviewing court in systematically checking whether it reaches the same conclusion as the one adopted in the decision under review, and in refusing recognition in case of discrepancy. On the other hand, when the court exercises its review over a certain and precise condition for recognition (e.g. jurisdiction of the arbitral tribunal, or absence of violation of public policy), there is no reason to limit the extent of that specific review. This has been since 1964,⁷ and still is, the position of French courts in the field of recognition of foreign judgments.

In addition to what the *Cour de cassation* said, it is also interesting to note what it did not say. It did not say that the violation had to be ‘manifest, effective and concrete’ – rightly so, in my opinion. The wording of Article 1520 is sufficiently clear; what should be determined is whether ‘the recognition or the enforcement of the award is compatible with international public policy’. Nevertheless, the Court noted that according to the judgment of the Court of Appeal, public policy had been violated ‘*de manière caractérisée*’ (‘markedly’) (at para. 11).

Two weeks after the decision was issued, the International Chamber of the Paris Court of Appeal rendered a judgment in which it reproduced the main parts of the *Belokon* decision.⁸ The views of the two French courts that play an essential role in the field of international arbitration, the Paris Court of Appeal and the *Cour de cassation*, are now uniform, and it is unlikely that they will be modified in a near, or even distant, future.

2. The issue of corruption was not raised before the arbitral tribunal

This situation is illustrated by two recent judgments of the International Chamber of the Paris Court of Appeal. Both judgements related to investment cases where the arbitral tribunal had ordered the respondent State – Libya in one case,⁹ Gabon in the other¹⁰ – to pay the investor a certain sum of money in performance of the contract. The States had not invoked in their defence that the contracts had been obtained by corruption. But,

⁵ This position is clearly stated in the judgment in the *Securipart v. Bénin* case: Paris Court of Appeal, 27 Oct. 2020, *Revue de l'arbitrage* 2021, p. 754, obs. P. Mayer.

⁶ *Belokon v. Kirghizstan*, Cass. civ. 1re, 23 March 2022, n° W 17-17.981 (free translation).

⁷ Cass. civ. 1re, 7 Jan. 1964, *Munzer*, *Revue critique de DIP*, 1964, p. 344, obs. H. Batiffol, *Journal du Droit International*, 1964, p. 302, obs. B. Goldman, *La Semaine Juridique*, 1964. II. 13590, obs. M. Ancel.

⁸ Paris Court of Appeal, 5 April 2022, n° RG 20/03242.

⁹ *Sorelec v. Libya*, Paris Court of Appeal, 17 Nov. 2020, n° 18/02568; *Journal du Droit International*, 2021, p. 1021, obs. I. Fadlallah; *Revue de l'arbitrage*, 2021, p. 762, obs. P. Mayer.

¹⁰ *Webcor v. Gabon*, Paris Court of Appeal, 25 May 2021, n°18/18708, *Revue de l'arbitrage*, 2021, p. 778, obs. P. Mayer.

having lost, they filed an appeal before the Paris Court of Appeal, alleging corruption. In both cases, the Court held that it belongs to the reviewing court to examine, in fact and at law, all elements allowing to determine if the recognition or the enforcement of the award violates international public policy in a ‘manifest, effective and concrete’ manner.¹¹ The Court concluded in both cases that there had been corruption, and annulled the arbitral awards.

It is to be noted that this *maximalist* view contrasts with the rather *restrictive* approach the same Court displayed in the same period (2020-2021) when reviewing awards denying the existence of corruption. This is not illogical. Given the way the Paris Court of Appeal understood the prohibition of revision, its role was necessarily limited each time the arbitral tribunal had already dealt with the allegation of corruption, gathered evidence, set out its reasoning, and concluded there had been no corruption. Where, by contrast, the issue of corruption has not been raised, no obstacle prevents the Court from examining the allegation made by the appealing party; the Court must fully examine any issue raised before it.

However, the Court first had to resolve the issue of admissibility of the appeal. In the *Gabon* case, the investor argued that the appeal was not admissible, because no allegation of corruption had been made before the arbitral tribunal. The investor interpreted the silence of the State as a waiver of the right to invoke corruption. The Court disagreed, stressing that public policy considerations can always be invoked, even for the first time in appeal, by a party or even *ex officio* by the Court.

It could, of course, be objected that it is too easy for the State to remain silent before the arbitral tribunal on the existence of an act of corruption (and concentrate on another defense), and file an appeal based on an allegation of corruption if it loses. At a minimum, this would lead to a loss of time and money: if the arbitral tribunal had found there had been corruption, there would have been no need of adding judicial proceeding to the arbitral proceedings.

There are appeals (*pourvois*) pending against these two judgements of the Paris Court of Appeal. In the *Gabon* case, the *Court of cassation* will have to take a position on the issue of admissibility of the appeal, which means that the saga has not quite come to an end.

11 *Sorelec v. Libya*, at para. 36; *Webcor v. Gabon*, at para. 51.

ICC International Court of Arbitration

ICC Court's Belt & Road Commission: Going Forward**Susan Munro***Foreign Registered Lawyer, K&L Gates, Hong Kong; Member, ICC Hong Kong National Committee; Former Co-Chair, ICC Belt & Road Commission***Robert Pé***Arbitrator, Arbitration Chambers, Hong Kong/United Kingdom; Member, ICC International Court of Arbitration, Former Co-Chair, ICC Belt & Road Commission*

The ICC Belt & Road Commission ('Belt & Road Commission') aims to raise awareness of, and building on, ICC's reputation as a globally trusted dispute resolution service provider. With Justin D'Agostino as its first chair in 2018, the reins of the Belt & Road Commission were then handed over in March 2020 to Robert Pé and Susan Munro. In June 2022, under the leadership of Claudia Salomon, President of the ICC International Court of Arbitration, Tengqun Yu (Vice President and General Counsel, China Railway Group) was appointed to take the Belt & Road Commission forward post-pandemic and strengthen knowledge of the important role ICC dispute resolution services can play for mainland Chinese parties involved in Belt & Road Initiative disputes.

With its unique global footprint that broadly spans the geographical reach of the Belt and Road Initiative (BRI), and its long experience of resolving large-scale cross border infrastructure disputes, ICC is the go-to institution for (BRI) trade and investment disputes. ICC is indeed ideally positioned to assist parties participating in BRI infrastructure projects in ancillary commercial projects, such as provision of engineering design services and specialized engineering equipment, and in connection with related financing and trade arrangements.¹ It is notable that in 2021, more than 25% of parties participating in ICC Arbitration worldwide came from the Asia-Pacific region and that among those parties, Chinese parties were the eighth most frequent participants, underscoring ICC's importance in the region.²

During the mandate of Susan Munro and Robert Pé, Co-chairs from 2020 to 2022, the Belt & Road Commission was comprised of approximately ten members, supported by a cohort of Ambassadors, whose role was to promote the role of ICC in BRI disputes globally. In their work, the Co-Chairs were assisted by Dr. Zhijin (Donna) Huang, ICC Director for Arbitration and ADR, North Asia, who acts as the Belt & Road Commission Secretary.³

Throughout the period of the pandemic, the Co-Chairs focused on keeping the Belt & Road Commission relevant and visible through participation in online webinars, conferences, and contributions to publications. Highlights included:

- > A webinar in 2020 on 'Force Majeure: Practical Implications in Times of Crisis' sponsored by the Belt & Road Commission, at which Lord Neuberger, former President of the UK Supreme Court gave a keynote address discussing legal issues in connection with Force Majeure.
- > Co-Chairs and former Commission member Baptiste Rigaudeau participated in a China-focused online conference organized by the ICC Africa Commission in June 2021 alongside the 5th ICC Africa Conference on International Arbitration. Here was lively discussion focused on managing disputes arising out of BRI projects.⁴

1 The People's Republic of China (PRC) announced its Belt & Road Initiative in 2017. More recently, the PRC's BRI has focused on medical and IT trade and investment channels.

2 <https://iccwbo.org/media-wall/news-speeches/new-structure-and-focus-announced-for-icc-belt-and-road-commission/>.

3 See the full list of Commissioners and members and ICC's Belt and Road presence at <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/>.

4 A first event with the ICC Africa Commission was held in December 2019, with Justin D'Agostino as Chair of the Belt & Road Commission. Discussions addressed the promise of BRI investments in Africa, and the challenges and opportunities associated with these investments. For more information on the ICC Africa Commission, see <https://iccwbo.org/dispute-resolution-services/africa-commission/>; see also, N. Kamau, 'Three Years Since the ICC Africa Commission Was Launched', *ICC Dispute Resolution Bulletin*, issue 2021-2.

- > Co-Chairs represented the Commission in connection with panels held during Hong Kong Arbitration Week in 2020 and 2021. Former Commission member Kim Rooney together with Susan Munro presented online at the 'High Level Dialogue on Arbitration Among OBOR Countries', which was held in mainland China in November 2021 and at which Claudia Salomon gave a keynote speech.⁵
- > Co-Chairs, together with Dr. Huang and Baptiste Rigaudeau, published a chapter addressing dispute resolution in relation to the BRI.⁶

Overall, the Co-Chairs can report that there have been enthusiastic responses to the Belt & Road Commission's participation in a wide variety of online events, promoting ICC's reputation and relevance and focusing attention on mainland China.

ICC's dispute resolution services are likely to become increasingly important in relation to cross-border and BRI disputes, not least due to the stresses on global systems and supply chains that continue to emerge. In addition to its decades of experience in the resolution of disputes involving parties from various BRI jurisdictions, ICC has an excellent range of tools that can be used to support the early stages of cross-border disputes, including the 'ICC Guidance Notes on Resolving Belt and Road Disputes Using Mediation and Arbitration',⁷ and the 'ICC Note on Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of ICC Arbitrations seated in Hong Kong and Administered by the Secretariat Asia Office', which mean that parties who agree to Hong Kong as the seat of arbitration and to ICC as the institution administering the dispute will have access to preliminary relief from the courts of mainland China.⁸

In 2022, the Co-Chairs resigned their positions to usher in a new era for the Commission. Alongside the appointment of the new Chair, Tengqun Yu (Vice President and General Counsel, China Railway Group), the Belt & Road Commission has been restructured to focus on users of ICC dispute resolution services based in mainland China.⁹ To ensure the needs of the commercial community are met, the Belt & Road Commission includes members from state-owned enterprises, private enterprises, multinational enterprises, academia, and renowned arbitration practitioners from leading law firms. In addition, half of the Commission members are general counsel or in-house counsel. This echoes Alexis Mourre's statement, ICC Court President when the Belt & Road Commission was established in March 2018, on 'the importance of engaging key stakeholders within both corporates and governments all along the Belt and Road, to ensure that we are offering the best possible service to parties on all sides'.¹⁰

It has been an honor and privilege to serve as Co-chairs of the Belt & Road Commission for the past two years, which have seen great changes impacting BRI disputes and arbitration in general. We very much look forward to the next actions and the successful evolution of the Belt & Road Commission in future years.

5 OBOR refers to One Belt One Road, another acronym for the Belt & Road Initiative. The event was co-organized by the ICC Court of Arbitration, ICC China, CIETAC, and CMAC (China Maritime Arbitration Center).

6 'The BRI and International Chamber of Commerce Arbitration', in CDR-The Belt and Road Initiative 2021 (<https://iclg.com/>, 21 Sept. 2021).

7 Available online and in the ICC DRS app.

8 The ICC Note dated 1 Dec. 2019 is available online and in the ICC DRS app. In 2019, the Hong Kong Office of the ICC Court was confirmed by the Supreme People's Court of the People's Republic of China and the Hong Kong SAR Government as an **authorised institution** for purposes of the Arrangement concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR. See also H. Shi, 'ICC Guidance Note on the Arrangement – Mainland Chinese Courts Can Order Interim Measures in Support of ICC Arbitrations Seated in Hong Kong', *ICC Dispute Resolution Bulletin*, Issue 2020-1; A. Chinn, V. Li, E. Li, 'Hong Kong: A Game Changer – Interim Measures from the Mainland Chinese Courts in Support of Hong Kong Arbitrations', *ICC Dispute Resolution Bulletin*, issue 2019-3.

9 The full list of current members is available at <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/>.

10 <https://iccwbo.org/media-wall/news-speeches/icc-court-launches-belt-road-initiative-commission/>

International Court of Arbitration

Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process

15 November 2021, online

During the 2021 New York Arbitration Week (NYAW), members of the ICC International Court of Arbitration ('Court') provided ten practical tips on how to improve the quality and enforceability of arbitral awards. These tips were based on frequent issues that arise during the scrutiny of draft awards. The discussion demonstrated the value of the scrutiny process to parties and identified common pitfalls encountered by arbitrators when drafting awards.

The panelists included Maria Chedid (Partner, Arnold & Porter, San Francisco; Alternate Member, ICC Court); Ndanga Kamau (Founder, Ndanga Kamau Law, Kenya/Netherlands; Vice President, ICC Court); Ina C. Popova (Partner, Debevoise & Plimpton, New York; Member, ICC Court); and Todd Wetmore (Partner, Three Crowns, Paris; Vice President, ICC Court). The text below is a synopsis of the full event which can be viewed [online](#).

What is scrutiny?

Scrutiny of draft awards, a distinctive feature of ICC arbitration, is designed to enhance the quality and enforceability of awards. Pursuant to Article 34 of the ICC Rules of Arbitration ('ICC Rules'),¹ no award shall be rendered by an arbitral tribunal until the award is approved by the Court. Scrutiny is a mandatory gateway through which an award must pass before it is notified to the parties. During the scrutiny process, the Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, the Court also may draw the arbitral tribunal's attention to points of substance.

The scrutiny process involves multiple layers of review and may take up to three to four weeks.² As a first step, the Secretariat of the Court reviews the draft award and prepares suggested comments, setting out observations on various drafting and substantive points.

The Court then reviews the award with the assistance of the Secretariat's comments and identifies the points to be brought to the attention of the arbitral tribunal. The Court also decides whether to approve the award as drafted, approve the award subject to its comments being subsequently addressed by the arbitral tribunal, or not approve the award and invite the arbitral tribunal to provide a further revised draft.³

When the Court scrutinizes draft awards, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration (see Article 7 of Appendix II to the ICC Rules). The consideration of mandatory law aligns with the general rule that both the Court and the arbitral tribunal shall make every effort to ensure that the award is enforceable at law (Article 42 of the ICC Rules).

Below are ten practical tips for arbitrators to improve the quality and enforceability of their awards. These tips can also assist counsel in international arbitration craft their submissions.⁴

1. Consult the ICC Award Checklist

The ICC Award Checklist ('Checklist') is an invaluable resource that the Secretariat provides to arbitral tribunals at the beginning of the arbitral process.⁵ Though not exhaustive, the Checklist highlights key elements of a draft award that are frequently missing. The Checklist provides guidance for newer arbitrators and helpful reminders for more experienced arbitrators.

1 <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>

2 See paras. 168-171 of the ICC Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration, which address the timing of scrutiny.

3 'In 2020, the Court approved 564 awards (142 partial awards, 383 final awards and 39 awards by consent). The vast majority of draft awards were approved subject to certain points raised for the consideration of arbitral tribunals. Only four draft awards were approved without any comments. A further 47 draft awards (7% of the total awards scrutinized in 2020) were not approved when first scrutinized by the Court and were returned to the arbitral tribunal for further consideration', see ICC Dispute Resolution 2020 Statistics.

4 The provided tips do not bind the Court and do not represent or reflect an official position of the Court.

5 The ICC Award Checklist and other ICC practice notes are available at <https://iccwbo.org/dispute-resolution-services/arbitration/practice-notes-forms-checklists/>.

The Checklist includes reminders, for example, to:

- > identify all parties and representatives in the arbitration;
- > provide details about the relevant arbitration agreement(s);
- > summarize the history of the proceedings;
- > fully reason jurisdictional decisions and the tribunal's disposal of the parties' claims; and
- > fix the final costs of the arbitration.

2. Support findings on jurisdiction and the merits by reference to specific contract provisions, provisions of law or case law; provide specific reasons for conclusions pertaining to the persuasiveness of evidence and on credibility

Because jurisdictional decisions are especially prone to challenge before domestic courts, it is crucial to have such decisions well-reasoned and substantiated. When a jurisdictional objection is raised, it is essential to make clear which parties are bound by the arbitration agreement(s), on what basis, and what law is applicable when analyzing this issue. In practical terms, as the ICC Award Checklist states, the award should quote the entire arbitration agreement(s), including any amendments, and address the issue of the (non) signatories to the relevant contractual documents.

When addressing jurisdictional objections, it is also important to identify the non-jurisdictional issues, such as those pertaining to admissibility. For instance, an issue may arise regarding whether a party has complied with mandatory pre-arbitration steps. As such, properly labeling these issues as they are addressed in the award is essential.

When addressing the merits of the case, and analyzing the parties' claims, arbitral tribunals should include specific references and citations to case law and evidence relied upon, just as parties are expected to do in their briefs. They should also cite to the parties' specific submissions and exhibits when referring to the parties' arguments, and avoid making conclusions based only on general references to 'parties' submissions' or 'evidence in the record'.

Furthermore, arbitral tribunals should identify the legal elements and evidentiary standard to be met for each claim or cause of action under the relevant applicable law. They should also explain why, for instance, a party has not met its burden of proof.

Similarly, general views to the effect that the arbitral tribunal found an expert or fact witness to be 'credible' should be accompanied by some explanation as to why

the arbitral tribunal found the testimony persuasive.

In the context of expert witness testimony, the arbitral tribunal should consider stating why it found the expert's conclusions to be well-founded or correct and specify the elements taken into account (e.g. calculation method applied, elements of comparison, the base amount(s) used, and the relevant period(s) of time).

When the arbitral tribunal has assessed expert/fact witness evidence based on general statements that it found the clarifications of a witness 'unconvincing' without further elaboration, the Court has requested that the arbitral tribunal include a summary of the testimony, the criteria applied in its evaluation and references to the relevant parts of the transcript.

3. Tread carefully with non-participating parties

When a case involves a non-participating party (i.e. a party fails to participate in the proceedings either from the outset or at a later stage, or the party comes in and out of the proceedings intermittently), the scrutiny process will focus in particular on the procedural history of the matter, decisions on jurisdiction, and the arbitral tribunal's reasoning on the merits.

To demonstrate that due process was consistently respected and that the non-participating party was given a fair opportunity to be heard, the Court expects to see a detailed procedural history in the award of all pertinent steps. The Court is therefore focused on whether the award contains references to the way notices were sent or attempted, when the attempts were made and notices received, how records of the notices were kept, and whether the non-participating party was informed of the consequences of its non-participation. Such detailed documentation can show that all means have been taken to inform the non-participating party of each step of the procedure.

In cases involving a non-participating party, arbitral tribunals also need to decide on their own jurisdiction per Article 6(3) of the ICC Rules. The award therefore should address the existence of a binding arbitration agreement and contain reasoning for this decision, and a determination on this point should be included in the dispositive section of the award.

Additionally, arbitral tribunals are expected to reflect in the award that they have even-handedly considered the evidence and neither automatically accepted the participant's arguments nor advocated for the non-participating party's case. In summary, the award should show how the arbitrators independently tested all claims and reached their conclusions.

4. Carefully approach *jura novit arbiter/curia*

When grappling with the possible application of *jura novit arbiter/curia*, arbitral tribunals are invited to proceed cautiously so they do not exceed their mandate, defy the parties' legitimate expectations, or override mandatory provisions of the *lex arbitri*, including any due process rules.

Arbitral tribunals should carefully consider the applicable legal framework, how it applies, and when and how the parties' comments should be solicited on legal arguments that the parties may have not raised. Inviting party comments can help prevent surprises down the line, show that the relevant law is properly applied, and support the enforceability of the award.

For example, during the scrutiny process, if the Court notices an authority cited that is not associated with a submission from the parties, it will usually enquire whether that authority or legal argument was raised by the parties, and if so, where it is in the record and how the opposing party responded. This omission can bring to light an issue of form (e.g. a missing exhibit) or point to a substantive concern (e.g. whether the tribunal raised a legal issue on which the parties did not have an adequate opportunity to comment).

In one instance, an arbitral tribunal applied the *jura novit curia* principle to raise a statute of limitations issue where neither party had raised or referred to the application of that principle in its submissions. The Court invited the arbitral tribunal to consider whether the parties would not be surprised by such decision as neither party had been given the opportunity to comment on that point. The Court also invited the arbitral tribunal to consider to what extent the *jura novit curia* principle under that governing law applied to issues concerning the statute of limitations. Following the scrutiny process, the arbitral tribunal confirmed that this principle of *jura novit curia* was applicable under the relevant law and included references to the principle in support of its conclusions in the award.

5. Treacherous waters of dissenting opinions — moderate your tone and address the points raised by the other side

While most awards are unanimous, in some instances, an arbitrator is unable to agree with the other members of the arbitral tribunal and will dissent from the majority decision. Dissents may be limited to only some issues and may be expressed with or without the filing of a separate dissenting opinion.⁶

If a dissenting opinion is filed, the arbitral tribunal should ensure that it meets the mandatory requirements of the applicable law/local law, which may have specific conditions or prohibitions on dissents. In addition, a dissent may be filed when a breakdown in relations between the members of the arbitral tribunal has occurred. In such case, arbitrators in the majority and the dissenter are invited to moderate their language and tone when referring to each other. Finally, the majority should consider whether it has adequately addressed, where appropriate, the points raised by the dissenting arbitrator.

6. Fraud/illegality allegations — don't avoid red flags

Tackling allegations of fraud can be tricky and the scrutiny process can help ensure that the award appropriately addresses such issues. Arbitral tribunals should not jump to conclusions that implicate fraud, but should pay appropriate attention to any red flags that give rise to legitimate questions of fraud that may require additional inquiry.

The Court may invite the arbitral tribunal to ensure that matters which could be red flags are properly addressed given that an award may be set aside for contravening public policy, failing to decide all issues, or if the arbitral tribunal goes too far, deciding something that the parties have not argued. Arbitral tribunals should be vigilant to deal with these sorts of issues, if they arise, in an appropriate level of detail in the award.

In one case, an arbitral tribunal initially concluded that, while one could see red flags, it did not have either the duty or the power to consider *sua sponte* whether the contract at issue had an illegal object or was tainted by illegality. During the scrutiny process, the Court drew the arbitral tribunal's attention to points of substance and whether additional steps had to be taken. The Court invited the arbitrators to consider diving deeper into the red flag issue, expanding on the standard of proof for these types of allegations under the applicable law, addressing best practices for red flags under the governing framework, and explaining how they applied the law and standards to the record before them. After several rounds of exchanges, the draft award was approved and notified to the parties.

⁶ 'In 2020, of the 289 partial and final awards rendered by three-member tribunals, 46 awards (16%) were rendered by majority. All majority awards were accompanied by a dissenting opinion,

incorporated in the award itself in 18 cases or made by way of a separate document in 28 cases', see **ICC Dispute Resolution 2020 Statistics**.

7. Beware of awards by consent and check whether they align with the applicable mandatory requirements

Although consent awards may appear to be straightforward, they require a degree of caution. When drafting consent awards, arbitrators must balance the need to respect the parties' agreement with ensuring that they are not unwittingly part of something nefarious. Appropriate precautions are required to ensure that awards by consent are not vehicles for money-laundering, corruption, fraud, or do not run against public policy by virtue of the agreements or settlement terms that they incorporate. If the Court has any doubts in this respect, it will invite the arbitral tribunal to make the appropriate inquiries.

The applicable law may also have an impact on the scope of agreements/settlement terms that can be ratified in awards by consent. In one instance, where the settlement agreement was drafted in very broad terms, the Court invited the arbitral tribunal to check whether the parties' settlement agreement needed to be in line with the scope of the parties' claims in dispute in the arbitration. The arbitral tribunal considered that, under the applicable law, settlement agreements could be drafted in broad terms, the parties' settlement agreement was in line with what was before the arbitral tribunal and did not contravene any mandatory requirements.

8. Write an enforceable dispositive section and don't rule *infra petita* or *ultra petita*

The dispositive section of an award should provide rulings on all requests for relief and reflect decisions made in the body of the award. It should avoid replicating the reasons or analysis from the body of the award, avoid declarations/orders that were not requested, and not include procedural directions. The dispositive section should instead respond directly to the relief sought by the parties (i.e. the orders/declarations the parties seek).

The crucial test at the scrutiny stage is whether the dispositive section addresses all of the claims – and nothing but the claims – that the parties have raised. The draft award contains a serious defect if an arbitral tribunal fails to address a claim/relief the parties have raised (*infra petita*) or if the arbitral tribunal grants relief that has not been claimed (thereby ruling *ultra petita*).

To ensure that all claims have been addressed in the draft award, arbitral tribunals should carefully track the relief sought by the parties from the inception of the

case (and incorporated in the Terms of Reference) until the parties' final submissions and also pay attention to what may have been subsequently withdrawn.

9. Costs — be rigorous

Costs decisions are not always addressed thoroughly in draft awards. These decisions typically follow two basic approaches in ICC awards: either the loser pays the successful party's costs (often referred to as 'costs follow the event') or each party pays its own costs regardless of the outcome.⁷ Frequently, the outcome of a case is not decisively in favor of one side or the other: there is mixed success, which can raise important questions as to how that scenario should be reflected in the allocation of costs.

The parties' conduct during the proceedings and considerations of reasonableness may also impact the allocation. The requirement that the costs be reasonable serves as an important check protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders.

While the allocation of costs is within the arbitral tribunal's discretion under Article 38 of the ICC Rules, the allocation may be subject to specific terms agreed upon by the parties in the arbitration agreement. The process for arriving at a decision on costs may also subsequently be agreed upon by the parties during the pendency of the arbitration. In one case, the parties had agreed that the arbitral tribunal should first render an award on the merits and then decide the costs. Because the tribunal also allocated costs in its draft award when deciding the merits of the matter, the Court alerted the arbitral tribunal during the scrutiny process that it needed to follow the sequence that had been agreed by the parties.

In short, when scrutinizing an award, the Court will consider whether the arbitral tribunal has clearly set out the parties' positions on costs in their draft awards, specified the total amounts claimed (by all sides), provided an assessment of the reasonableness of the parties' legal and other costs (e.g. time spent, number of lawyers, number of submissions and complexity of the matter), and included a decision on who should pay these costs, in what specific proportion, and why.

⁷ For more information and a study of ICC awards, see ICC Arbitration and ADR Commission Report on **Decisions on Costs in International Arbitration** (2015).

10. Interest — seek clarifications from the parties when appropriate

Parties often neglect to address in sufficient detail issues pertaining to interest, and instead make a general conclusory request for interest or rely upon a general statement at the end of their submissions requesting from the arbitral tribunal any relief that the arbitral tribunal may deem appropriate. Arbitral tribunals in draft awards also frequently give insufficient attention to requests for interest, especially in cases in which the parties have not provided fulsome submissions on the issue.

Issues regarding interest which may need further attention include: (i) whether the party seeks interest on all amounts awarded, including arbitration costs, or only on certain amounts; (ii) the start and end dates for the calculation of interest; (iii) the applicable rate; (iv) whether interest should be simple or compound; and (v) whether post-award interest should run on accumulated pre-award interest in addition to the principal claims, at the same rate, or at a different rate.

To avoid the need to seek supplemental submissions on interest at a late stage of the proceedings, arbitral tribunals should ensure that the parties have fully ventilated the issues in their submissions. When drafting the award, the arbitral tribunal can then fully state the reasons for its decision to grant or deny the request for interest, with reference to the parties' submissions, and if interest is awarded, its justifications for the type of interest awarded.

This synopsis was prepared by Marek Krasula, Director, ICC Arbitration and ADR, North America; Abbey Pellino Hawthorne, Deputy Director, ICC Arbitration and ADR, North America; and Stephanie Torkomyan, Publications Manager, ICC Dispute Resolution Services. They wish to thank Shivani Garg and Joao Gabriel Campos for their assistance.

ICC Young Arbitration and ADR Forum

ICC YAAF: Top Ten Tips on How to Better Match the Arbitration Process with Businesses' Expectations

16 March 2022, Los Angeles/online

Gabriela Lopez Stahl

Law Clerk, White & Case LLP, Los Angeles; ICC YAAF Representative (North America)

Organised as part of California's inaugural International Arbitration Week, this **ICC YAAF** event featured in-house counsel, arbitrators, and outside counsel who shared ten tips on how to better align the arbitration process with businesses' expectations. Panelists Amy Endicott (Partner, Arnold & Porter Kaye Scholer LLP), Brody Greenwald (Partner, White & Case LLP), Miguel Loza Jr. (Of Counsel, Gibson, Dunn & Crutcher LLP), Nathan O'Malley (Partner, Musick, Peeler & Garrett LLP), and Melissa Pastrana (Associate General Counsel, Amgen) focused on measures and procedural techniques to be considered from the moment the arbitration agreement is drafted until the final award is rendered.

#1. Think critically about the choice between arbitration and litigation

The panelists opened the discussion by advising practitioners not to skip the threshold question at the contract-drafting stage of whether arbitration or litigation is the most appropriate dispute resolution process. In practice, many attorneys assume, often correctly, that arbitration may have certain advantages over litigation, such as a speedier resolution, more confidentiality, and greater freedom of the parties to craft the dispute resolution procedures. However, it may not be the case that a client prioritizes speed or confidentiality in every instance. Only with the client's input can practitioners determine whether arbitration or litigation best aligns with the business' interests.

#2. Tailor the arbitration clause to the transaction and parties at issue

Drafting the dispute resolution clause is a key moment to architect the dispute resolution process and to advocate for the points that are most important to and beneficial for the client.¹ The panel highlighted mandatory pre-dispute steps as an example of an opportunity to reduce the element of surprise and manage client expectations in the early stages of a possible dispute.

In addition, the drafting phase is also a critical time to think about the transaction and relationship of the parties at issue, as well as any evidence that may be needed in a future dispute. A particularly salient point for practitioners to consider when drafting an arbitration clause is whether a third party outside of the arbitration agreement may have information that is relevant to the dispute. In certain jurisdictions, counsel may be able to preserve a client's ability to seek evidence from third parties by incorporating certain statutory provisions directly into the arbitration clause.

#3. Understand the role and level of participation of in-house counsel

In-house counsel play a critical role in the arbitration, particularly early in the proceedings. The panel stressed the importance of having a strong relationship with in-house counsel, understanding their views, and seeking their guidance on the best evidence and witnesses to put forward to present the strongest case possible. In addition to playing a facilitator role within the company, in-house counsel can also provide critical insights as to what the particular dispute means to the business and what would constitute a successful or unsuccessful outcome. Outside counsel can then prioritize accordingly.²

1 In addition to the ICC **Standard Arbitration Clause**, the ICC **Standard Mediation Clauses** provide for a multi-tiered dispute resolution process. See also the Introduction to the ICC Report '**Controlling Time and Costs**' ('Arbitration Agreement'), which provides suggestions on the drafting of arbitration agreements and the initiation of arbitral proceedings.

2 Addressing the participation of in-house counsel, the ICC Report '**Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives**' provides that 'The present guide is ... designed to help party representatives ... make appropriate decisions for effective case management. The guide will also assist outside counsel in working with party representatives to ensure well-planned and well-managed proceedings' (Introduction).

#4. Choose arbitrators wisely

Many practitioners have a particular candidate or certain criteria in mind when selecting an arbitrator. The panel advised practitioners to maintain the flexibility to select the arbitrator that is right for the dispute that ultimately arises. Speakers also encouraged young practitioners to break away from the conventional approach of relying on one's network for arbitrator appointments and emphasized the importance of presenting to the client a diverse slate of candidates to consider.

The panel noted that an arbitrator's legal background is also a key consideration as it can significantly impact the proceedings both procedurally and substantively.³ For example, whether an arbitrator has a civil or common law background may shape their views on document production or contract interpretation. Similarly, since questions relating to confidentiality and privilege may vary by jurisdiction, the parties should select arbitrators with whom they are comfortable to fairly navigate these questions.

#5. Be strategic in the approach to the first procedural order

Since the first procedural order may significantly impact how the proceedings unfold, counsel should give strategic thought to questions ranging from the rules concerning the production and submission of documents to the scope of responsive pleadings and the examination of witnesses and experts. Although some issues can be addressed in a pre-hearing conference or even after the hearing, most issues can and probably should be addressed in the first procedural order. The more specific the parties can be, the more certainty they will have in the arbitration. While acknowledging that the first procedural order has become somewhat standardized over time, the panel encouraged practitioners not to be afraid to innovate and ask for unconventional procedures. The panel also highlighted the importance of thinking carefully about the procedural schedule at this early stage of the proceedings.

3 E.g., the ICC Report 'Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management – 2019 Update' reads that '[c]areful consideration needs to be given to the selection of arbitrators, since not only will they decide the merits (without usually the possibility of any appeal on the merits) but they will have broad power to determine the procedure of the arbitration, including the manner in which evidence is to be presented and dealt with'. The Report further sets out a number of key qualities that parties should consider when selecting arbitrators in the context of a construction arbitration: a) Familiarity with the industry and cultural nuances, b) Familiarity with relevant law and/or main legal traditions, c) Strong case management skills, d) 'Balanced' tribunal, e) Availability, and f) Diversity (see '2. Selection of arbitrators').

#6. Use every opportunity to advance the client's case

The panel noted two additional points to keep in mind early in the proceedings. First, the first procedural order and procedural meeting are the *tribunal's first impression of the parties*. Counsel should therefore come prepared to put their best case forward and to use every opportunity to advance the client's case. Second, these preliminary steps are also the *parties' first impression of the tribunal*. Practitioners may assume that procedural issues are not particularly contentious or likely to make or break the case, but valuable information can be gleaned from these initial interactions that can later inform the parties' strategy. For example, how do the arbitrators interact with each other? Do the arbitrators give both counsel an equal opportunity to be heard? Who is driving the panel? How do the arbitrators feel about a particular issue? How quickly will they decide?

#7. Consider the timing, scope, and potential impacts of document production

The panel explained that one potential pitfall of having document production after the first round of submissions is that there is a risk the respondent may introduce new arguments and evidence in its final submission to which the claimant may not have an opportunity to respond. The claimant may then be in the difficult position of having to choose between accepting the record as is or requesting that the tribunal postpone the hearing to give both parties an equal opportunity to be heard. To avoid this scenario, the panel debated whether a sequential document production (where each party requests documents while preparing its first submission) may be a preferred approach.

The panel suggested that another way to mitigate the risk of new arguments and evidence late in the proceedings is to ensure that the claimant does not tell a truncated story or avoid addressing weaknesses in its case in its initial submission. Speakers observed that if the respondent cannot tell the complete story in its first submission without the documents produced in document production, then the inevitable result of the claimant's curtailed version of events is that the respondent will have to provide more elaborated comments in its final submission.⁴

4 E.g., Appendix IV, 2021 ICC Arbitration Rules provides: 'd) Production of documentary evidence: (i) requiring the parties to produce with their submissions the documents on which they rely; (ii) avoiding requests for document production when appropriate in order to control time and cost; (iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case; (iv) establishing reasonable time limits for the production of documents; (v) using a schedule of document production to facilitate the resolution of

#8. Weigh the pros and cons of bifurcation

An important consideration for counsel is that bifurcation is provided for in some, but not all, arbitration rules.⁵ Counsel will also need to consider whether there is strategic value in seeking bifurcation as many arbitrators may be reluctant to split off jurisdictional issues from the merits. While counsel often think of bifurcation as the separation of jurisdictional or quantum issues from the liability phase, the panel suggested that there may be technical questions on which the parties agree it would be useful to have preliminary expert reports and/or a hearing. This may be particularly true in cutting-edge cases where a deeper understanding of the relevant technology or science is needed and the arbitrators might benefit from a preliminary technical briefing.

#9. Remember your audience

The panel reminded young practitioners to always keep the arbitrators in mind throughout the proceedings. For example, an arbitrator's background might influence the most effective cross-examination approach to use at a hearing and whether the arbitrator finds persuasive a cross-examination style that seeks to impeach a witness' credibility on matters that are not directly relevant to the substance of the case. The panel also emphasized the importance of managing the client's expectations in this respect and ensuring the client knows what style of cross-examination to expect, particularly if counsel plans to adopt an aggressive or soft approach.

#10. Keep the client involved and updated as much as possible

One of the qualities that in-house counsel most appreciate in outside counsel is ease and transparency of communication. Speakers noted the importance of talking to in-house counsel like a peer and viewing them as a resource and partner. The panel also cautioned practitioners against feeling the need to manage in-house counsel. In-house counsel appreciate straight talk. They want to know the strengths and weaknesses of the case and would rather have more information than less.

issues in relation to the production of documents. The ICC Report 'Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives' further addresses 'Document Production' in its Topic Sheet 6.

5 Listing examples of case management techniques, Appendix IV, 2021 ICC Arbitration Rules provides: '(a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case'. See also ICC Reports on 'Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management – 2019 Update' (section '15. Splitting a case'), 'Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives', and 'Controlling Time and Costs'. Also available in the ICC DRS app.

ICC Institute of World Business Law

ICC Institute Advanced Training on Dispute Boards

16 May 2022, Dubai

Dr Helena HC Chen*Managing Partner, Chen and Chang, Attorneys-at-Law, Chinese Taipei*

The ICC Institute of World Business Law ('ICC Institute') provides research, training and information in relation to the development of international business law. The one-day training on dispute boards, held in English and Arabic language during the ICC MENA Conference on International Arbitration, was designed to equip participants with the skills and expertise needed to enhance dispute avoidance, become familiar with the Dispute Adjudication Board (DAB) process, advise or represent their clients establishing the Dispute Board (DB), or confidently act as a DB member.

David Brown (Partner, Clyde & Co, France; Member, ICC Institute of World Business Law) and **Cecilia Misu** (CMSQUARE GmbH, Germany; Vice President, Standing Committee, ICC International Centre for ADR) welcomed the participants and explained that this training encourages and expects discussions among participants, and that panel presentations would be followed by interactive workshops, as well as a simulation/role-play by the speakers, participating both in person and online.

General introduction to dispute boards

Adrian Cole (Independent Arbitrator, Mediator and Adjudicator, UAE) gave a general introduction to various alternative dispute resolution (ADR) mechanisms that the parties may agree upon. Some ADR mechanisms are non-adjudicative, including mediation and conciliation; others are adjudicative, including expert determination, dispute boards, Med-Arb, mini-trial and arbitration. The parties may agree in their contract to a multi-tiered dispute resolution clause, which involves more than one dispute resolution mechanism. In some jurisdictions, there are statutory adjudication procedures: for example, the one provided for by the Housing Grants, Construction and Regeneration Act 1996 (HGRA, also known as the Construction Act) in England.¹ Mr Cole took the dispute resolution clause in the FIDIC Yellow Book 1999 as an example to explain the procedure of a DAB contractual process.²

Alya Ladjimi (Manager, ICC International Centre for ADR, Paris) introduced the ICC Dispute Board Rules ('ICC Rules'),³ which govern DB proceedings administered by the ICC International Centre for ADR (the 'Centre') with the assistance of its Standing Committee. Under the ICC Rules, DBs are standing dispute resolution bodies often established at the outset of a contract and remain in place throughout its duration. In addition to construction contracts, where DBs are more commonly found, they can also be found in other agreements, including research and development, IP, production sharing and shareholders agreements. DBs assist the parties in avoiding disagreements as well as in resolving them through informal assistance and by issuing conclusions upon formal referrals. The Centre's main missions under the ICC Rules are:

1. Reviewing the attributes of the DB Members to be appointed with the assistance of the Standing Committee (Art. 3(1), Appendix I) and selecting the candidates. The president of the Standing Committee shall make the final decision on the appointment of the DB member (Art. 3(3), Appendix I).
2. Deciding upon challenges filed against a DB member or a FIDIC Dispute Avoidance/Adjudication Board (DAAB) member (Art. 3(4), Appendix I; Art. 3(1), Appendix III), with the assistance of the Standing Committee.
3. Where the Parties have provided for review of Decisions by the Centre, reviewing the Decisions of a Dispute Adjudication Board or a Combined Dispute Board with the assistance of the Standing Committee (Art. 3(5), Appendix I).

¹ <https://www.legislation.gov.uk/ukpga/1996/53/contents>

² Sub-Clauses 20.1 to 20.4 of FIDIC Yellow Book 1999.

³ <https://iccwbo.org/dispute-resolution-services/dispute-boards/rules/>

4. When the Centre is requested to fix the fees of the DB Members in accordance with the ICC Rules, the Centre shall do so upon consultation with the president of the Standing Committee (Art. 3(6), Appendix I).

Ms Ladjimi concluded her presentation noting that ICC DB proceedings increasingly involved state entities, with one state party in 2019, two in 2020, and four in 2021.

Aisha Nadar (Senior Consultant, Procurement Management and Dispute Resolution, Advokatfirman Runeland, Sweden) focused on the DB activities. The DB shall commence its activities after all DB members and the parties have signed the DB Member Agreement(s). The DB members shall familiarize themselves with the contract and the issues and schedule meetings and site visits, during which the DB shall review the performance of the contract and assist the parties in avoiding disagreements or provide informal assistance with respect to any disagreements. The parties may also request an urgent meeting or site visit. The DB may request the parties to produce any documents that the DB deems necessary to fulfil its function and may question the parties, their representatives and any witnesses they may call.

Dispute Avoidance

Cecilia Misu flagged that the occurrence of incompatibilities or mismatches between the parties' values, perceptions, interests or goals, leads to conflicts. She explored various factors of conflicts in projects from an owner's perspective (including failure to respond to issues in a timely manner; lack of communication among the project team; poor management, control, and coordination; unrealistic expectations, payment delays; change of works; late granting of possession and permits.

Factors of conflicts from an engineer's perspective include the lack of understanding of the existing agreement in the contract, lack of experience, incorrect calculation of work progress, failure to understand the price of work or the bid, estimation errors, delay in providing information or in issuing change orders or delivering documentation.

Ms Misu further highlighted factors of conflicts within construction projects, including ambiguous or unclear contractual provisions, interpretation of contracts in foreign languages, lack of familiarity with local conditions, shortcomings in the technical specifications, unrealistic or improper risk allocation, misunderstanding of a contract between business parties from the

perspective of a contract with a state entity. **Ms Misu** then presented a mock case on dispute avoidance for group discussion.

Formal DB procedure in case of dispute

In the first session in the afternoon, **Helena Chen** (Managing Partner, Chen & Chang, Attorneys-at-Law, Taiwan) and **Husni Madi** (CEO, Shura Construction Management, Jordan; Vice Chair, FIDIC Contracts Committee) delivered a joint speech on formal DB procedure in case of disputes. Referring to clauses in the FIDIC Yellow Book as an example,⁴ **Ms Chen** gave an overview of a DAAB procedure and highlighted the differences between an *ad hoc* and a *standing* DAAB. Since an *ad hoc* DAAB is constituted after a dispute has already arisen, it is less costly, and the parties can select members with a specific expertise for the matter in dispute. In contrast, a *standing* (or permanent) DAAB, given the costs associated, is more suitable for large and complex projects. A standing DAAB can conduct regular site visits and meetings and issue informal views or non-binding notes upon request of either party. Standing DAAB members may gain direct insights from the parties on their relationships and can assist them 'then and there'. Moreover, standing DAAB's recommendations or decisions might be effective tools to avoid the escalation of disputes to arbitration or litigation.

Mr Madi focused on fact witnesses, evidence of damages and post-hearings statements by referring to relevant provisions in the ICC Rules, noting that the DB has the power to require the parties to produce any documents that the DB deems necessary to fulfil its function (Art. 15).

A party shall refer a dispute to the DB by submitting a statement of case, which shall include, inter alia, 'relevant support for the referring party's position' and 'a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims' (Art. 19). Likewise, the responding party shall include 'relevant support for its position' in its response (Art. 20). After a hearing, the DB may request the parties to provide written summaries of their presentations (Art. 21(9)). **David Brown** then presented a mock case on dispute board procedure for group discussion.

4 See supra note 2.

Enforcement of DB conclusions

Finally, **Mr Brown** highlighted that under the 1999 FIDIC contracts a party may refer to arbitration or litigation if the other party fails to comply with a 'final and binding' DAB Decision. Nothing is provided as to the enforcement of a binding (but not final) DAB Decision (i.e. where one of the parties is dissatisfied with the Decision). This 'gap' in the 1999 FIDIC contracts provisions created doubts as to whether and how a binding (but not final) DAB Decision can be enforced, including doubts as to whether a successful party must refer again to the DAB the other party's failure to comply with a Decision prior to bringing the dispute to arbitration or litigation.⁵ The ICC Dispute Board Rules (as amended in 2015) clarified this issue, providing in Article 5(4) that:

If any Party fails to comply with a Decision rendered pursuant to this Article 5, whether it be binding or both final and binding, the other Party may refer the failure itself, without having to refer it to the DAB first, either to arbitration, if the Parties have so agreed, or, if not, to any court of competent jurisdiction.

The audience asked many questions, including whether a DB Conclusion can be produced as evidence in subsequent dispute resolution proceedings. In that respect, Article 27 of the ICC Rules provides that unless otherwise agreed by the parties, a Conclusion 'shall be admissible in any judicial or arbitral proceedings in which all of the parties thereto were parties to the DB proceedings in which the Conclusion was issued'.

⁵ The FIDIC Rainbow Suite 2017 has solved this 'gap' by providing in Sub-Clauses 21.7 (Red, Yellow and Silver books) that: 'In the event that a Party fails to comply with any decision of the DAAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration (...)'.

ICC DRS Regional Conferences

10th ICC MENA Conference on International Arbitration

17 May 2022, Dubai

For its tenth edition, the ICC MENA annual conference 'International Arbitration in MENA: Navigating the Latest Developments on international arbitration' reunited over 200 participants from 20 countries in Dubai. The fireside chat hosted by Claudia Salomon, ICC Court President, was followed by discussions on latest trends in the region, jurisdiction and admissibility, the arbitrator's authority to revise the contract, and why consider expert determination for dispute resolution. The next ICC MENA Conference will take place in Abu Dhabi on 20-22 February 2023.

Reshma Oogorah*International Arbitrator & Legal Counsel, Niyom Legal, UAE*

Welcome addresses and opening remarks

Dr. Dania Fahs (Regional Director MENA, International Court of Arbitration) welcomed participants to the conference refreshingly held in person in Dubai after two years of remote events. She also welcomed **Claudia Salomon** (President, International Court of Arbitration, Paris) to her first regional conference in the MENA region as President of the ICC Court.

On behalf of ICC UAE, **Fatima Balfaqeeh**, (Managing Director at RKAH Legal Consultancy and Vice Chair of the ICC UAE Arbitration & ADR Commission) shared heartfelt condolences on the passing of his highness Sheikh Khalifa bin Zayed Al Nahyan. She thanked ICC for its involvement in topics not just limited to arbitration but expanding to dispute boards and other alternative dispute resolution solutions that contribute to resolving disputes in the most robust, effective, and efficient manner.

In his opening remarks, **Alexander G. Fessas** (Secretary General, ICC International Court of Arbitration, Paris) noted that the ICC MENA Conference turned ten this year and had reached a milestone with over 200 attendees. Mr Fessas said that ICC embraces change as an opportunity, not just as a challenge. Changes are also expected with new services to be announced in 2023, which will mark the centenary of the ICC Court.

Fireside chat: Thinking MENA future economies – The digital transition and the emergence of new sources of capital

The panel focused on what is required to achieve the transformation of the region from an oil-based to a digital economy, and how to enable the trailblazers of the Middle East.

Fadi Ghandour (Executive Chairman, Wamda Capital, Co-Founder of Aramex, UAE) stressed that, looking at the big picture, there has been a shift in the region that has evolved into one of the most exciting frontiers of change. He noted that the eminent shift was accelerated by the pandemic, as in a crisis we see new emerging economies and industries, but that this was 'only the early stage of the story'.

For start-ups and SMEs to flourish, Mr Ghandour underscored four pillars required towards a successful ecosystem and to enable scalability: talent, access to market, legal infrastructure, and access to capital.

Nayla Comair Obeid (Founding Partner, Obeid & Partners; Professor of Law, Chartered Arbitrator, Lebanon, Paris, UAE; Vice-Chair, ICC; Council Member, ICC Institute of World Business Law) discussed the need to shift from heavy public expenditure to a more diversified economy and more reliance on the private sector. She addressed the need for new legislation and the fact that new legislation is already under way. For example, in the UAE, a new commercial transaction law allows 100% ownership in many sectors. Saudi Arabia also has implemented new reforms in private-public partnership and several legislations are being ratified.

Ms Salomon queried on the ingredients for promoting entrepreneurship in the region. **Mr Ghandour's** view was that there is access to capital and funding, but markets are opaque and remain fragmented. The MENA region is comprised of over 20 countries, with their own laws to navigate. He stressed the legal profession's support is needed to contribute to putting in place a soft infrastructure enabling companies to operate from one country to another with less friction. The other challenge is accessing and retaining talent, which is scarce and in huge demand. Talent is mobile and will leave if there are no opportunities. Finally, **Mr Ghandour** voiced out the need to remove legal impediments for women in the workplace.

Ms Salomon concluded by assuring the speakers and the audience that ICC is taking all recommendations on board to foster businesses' growth in the region, and has been deploying tools to help businesses through mentoring, training and providing digital support.¹ As they grow, SMEs may face disputes requiring arbitration but also other means of dispute resolution, and can rely on the ICC Court for the efficient resolution of their disputes.

Latest trends in international arbitration in MENA

Philippa Charles (Partner and Head of the International Arbitration department, Stewarts, UK) chaired the panel and invited the speakers to share their take-aways from the *Kabab-Ji* case where a French court upheld an ICC award finding that French law (as the law of the seat) would apply to the arbitration agreement, whereas the UK Supreme Court confirmed a decision holding that the law applicable to the arbitration agreement was the English law (as the choice of law to the whole agreement).²

On the law of the arbitration agreement being separable, autonomous and independent from the law applicable to the contract, **Nicholas Tse** (Partner and Head of International Arbitration, Alem & Associates, UAE) referred to Art. 6(1) of the UAE Arbitration Law,³ Sect. 23(1) of the DIFC Arbitration Law,⁴ and Art. 15 of the ADGM Arbitration Regulations.⁵ He mentioned Professor Dr. Maxi Scherer's comparative research on determining the proper law governing the arbitration agreement, showing that 51% of countries favor the law of the seat, 34% the law of the main contract, 9% the validation principle, and 6% the parties' common intent approach.⁶

Girgis Abd El-Shahid (Managing Partner, Shahid Law Firm, Egypt; Member, ICC Court) shared that the applicable law to the arbitration agreement could be determined as a matter of intent as opposed to one

of separability. **David Hume** (Counsel, Shearman & Sterling, UAE) shared that *Kababji* provides good reasons to draft a specific clause on the law of the arbitration agreement in contracts in addition to the governing law. Ms Charles confirmed that this was almost a necessity, which was perhaps not given enough consideration prior to the decision.

Mr Hume discussed performance bonds, at the center of construction disputes in the aftermath of the pandemic. He explained that performance bonds are not simply cash in hand, but that such practice is implemented to allocate risk. One should focus on the substance of the instrument rather than on its name, notably a 'bond' or 'guarantee', as referred in Art. 414 of the UAE Civil Code and ICC's Guide on the ICC Uniform Rules for Demand Guarantee (URDG) 2010.⁷ Considerations when calling a bond should include, inter alia: (i) unconscionability, (ii) whether it is a true guarantee or a conditional bond, and (iii) whether the call is fraudulent or grounded in an alleged breach of the underlying contract.

Mr Abd El-Shahid addressed remedies, e.g. the treatment of non-compensatory damages in MENA seated international arbitrations (punitive damages, liquidated damages, declaratory relief) explaining that moral damages are different from reputational damages and may be claimed on the basis of loss of profit. Under Egyptian law, there have been different views over time: where one court decision held that companies may not claim reputational damages as companies do not have 'feelings',⁸ a different decision held that companies may be entitled to damages for loss of reputation.⁹

Ms Charles opened the debate on the issue of the arbitrator's duty of disclosure: the *Haliburton vs Chubb* case,¹⁰ and what learnings can be drawn and anticipated for the MENA jurisdictions.

Panelists noted that clients are justifiably cautious, as there is still significant disparity in the level of disclosure among different jurisdictions. While the scope of disclosure is overall expanding, which is for the better, discussions also stressed that the process may lead to due process paranoia and that it is important to look at such disclosures objectively as the decision is made retrospectively.

1 ICC Centres of Entrepreneurship, which provide tools, resources, and solutions to local entrepreneurs, have been established in several cities worldwide, including Beirut, Casablanca, and Istanbul: <https://iccwbo.org/resources-for-business/small-and-medium-sized-enterprises-smes/icc-centre-for-entrepreneurship/>.

2 *Kout Food v Kabab-Ji* (Paris CA, 23 June 2020); *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48. See also, P. Martin, C. Florin, 'Towards a Harmonised Framework for Determining the Governing Law of an Arbitration Agreement', *ICC Dispute Resolution Bulletin*, issue 2022-1.

3 UAE Federal Law No. 6 of 2018 on Arbitration.

4 DIFC Arbitration Law of 2008 (as amended by DIFC Law No. 6 of 2013).

5 ADGM Arbitration Regulations 2015 (as amended on 23 Dec. 2020).

6 See I. Amir, *The Proper Law of the Arbitration Agreement: A Comparative Law Perspective: A Report from the CIARB London's Branch Keynote Speech 2021* (Kluwer Arb. Blog, 21 May 2021).

7 See Art. 5 'Independence of guarantee and counter-guarantee', 'Uniform Rules for Demand Guarantees URDG - 2010 revision' (ICC, 2010). See also 'Guide to ICC Uniform Rules for Demand Guarantees - URDG 758' (ICC, 2011).

8 Cairo Economic Court Case No. 76 (2010), 28 June 2014.

9 Cairo Economic Court Case No. 3200 (2010), 27 Feb. 2011.

10 *Haliburton Company (Appellant) v Chubb Bermuda Insurance Ltd* (formerly known as *Ace Bermuda Insurance Ltd*) (First Respondent) [2020] UKSC 48.

Walking the thin line: Jurisdiction and admissibility

Floriane Lavaud (Counsel, Debevoise & Plimpton, New York, Paris) opened the panel by framing and defining the concepts of jurisdiction and admissibility. Jurisdiction being about whether the arbitral tribunal has the power to decide a claim, and admissibility being about whether the arbitral tribunal should exercise its power to decide a claim. While a lack of admissibility may not be a reason to invalidate an award, lack of jurisdiction is.

Mark Demitry (Counsel, ICC International Court of Arbitration, Abu Dhabi) explained that the distinction between jurisdiction and admissibility has practical implications, although parties tend to confuse them. According to Prof. Jan Paulsson,¹¹ one may ask whether the challenge is aimed at the claim (admissibility) or the arbitral tribunal (jurisdiction) to determine the issue at play. Article 6 of the ICC Rules¹² addresses the early identification of issues of jurisdiction or admissibility but there are some grey zones. For example, in some jurisdictions the failure to file for arbitration in a timely manner is qualified as an issue of jurisdiction and not admissibility. Mr Demitry recommended that parties seek to cure any foreseeable issues of admissibility and jurisdiction prior to, or at the early stages of, the arbitration.

Georges Vlavianos (Partner, DLA Piper, Qatar) addressed the benefits and drawbacks of multi-tier dispute resolution clauses, as the process:

- > allows a cooling-off period, without incurring costs and delays;
- > brings about fruitful and beneficial discussions;
- > preserves long-term commercial relationship;
- > enables parties to narrow issues in dispute.

The process, however, is inefficient if parties are entrenched in their positions. Drawbacks mentioned were that multi-tier clauses can impair parties' ability to secure interim measures, give rise to objections to jurisdiction and counterclaims, and statutory limitations may lapse.

On whether multi-tiered dispute resolution clauses are binding in the Middle East, Mr Vlavianos referred to the Dubai Court of Cassation (petition no 124/2008), which held that if the condition precedent is not satisfied, the request for arbitration should be inadmissible. If the pre-arbitration steps are not clearly defined, the

Court will be unable to determine if settlement was pursued.¹³ With regard to multi-tiered dispute resolution clauses such as in FIDIC contracts, courts in the MENA region have enforced multi-tiered dispute resolution clauses and will expect parties to comply with any pre-conditions to arbitration that they have agreed.¹⁴

Nadine Debbas Achkar (Independent Arbitrator, UAE) addressed five considerations to bear in mind in deciding whether or not to bifurcate the proceedings when faced with issues of jurisdiction or admissibility: (i) whether the issue is dispositive, (ii) whether the issue is separable or too intertwined (iii) cost, (iv) time, and (v) likelihood of success, frivolous/meritorious issue on a *prima facie* basis. She explained that an arbitral tribunal would be more inclined to bifurcate if the application is a meritorious one, and that today parties more frequently choose to bifurcate.

Calibrating the compass: The arbitrator's authority to revise the contract

As chair of the panel, **Amal Bouchenkaki** (Partner, Herbert Smith Freehills, United States) introduced the discussion on the tribunal's authority (statutory or contractual) to step in and revise contracts.

Reza Mohtashami QC (Partner, Three Crowns LLP, UK) addressed the revision of parties' agreement on liquidated damages, i.e. a predetermined amount of compensation as a result of a breach, which he expressed is a common feature in many projects. In his view, liquidated damages assure some degree of certainty for both parties as they normally represent a genuine pre-estimate of costs. In the UAE and Oman, there is discretion to adjust the amount of liquidated damages to reflect the value of losses, with a possibility to divert from the provisions of the contract.

Degör Boden (Founding Partner, Boden Law, Turkey) explained that the general principle of *pacta sunt servanda* is accepted under Turkish law but that the Turkish Code of Obligations (Art. 138) provides limitations, such as hardship. If an unforeseeable situation could not have been anticipated by the parties, the aggrieved party may request the judge to adapt the contract.

11 J. Paulsson, Jurisdiction and Admissibility Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (ICC, 2005), p. 601, available at <https://library.iccwbo.org/dr.htm>.

12 See ICC 2021 Rules of Arbitration, 'Article 6: Effect of the Arbitration Agreement'.

13 The Dubai Court of Cassation has also overturned a decision of the Court of Appeal that quashed a First Instance decision confirming an award, as the Court of Appeal ignored (i) the fact that the Respondent failed to mention the requirement to try and amicably settle in the arbitration and had therefore waived that requirement, and (ii) the fact that the Petitioner had written to the Respondent in an attempt to resolve the dispute amicably but the Respondent had no interest in doing so. See Dubai Court of Cassation, Petition No. 75/2015, in *Summaries of UAE Courts' Decisions on Arbitration 2012 - 2016*, H. Arab, L. Hammoud, G. Lovett (eds.) (ICC, 2017).

14 See e.g. Dubai Court of First Instance, Commercial Case 757 (15 Aug. 2016), and Dubai Court of Appeal, case 795/2018.

Sara Koleilat-Aranjo (Partner, Al Tamimi & Co, UAE) explained that the notions of hardship and *force majeure* are distinguishable under the law. The legal effect of *force majeure* is a (full or partial) termination of the contract as the obligation may not be performed. In Saudi Arabia, the Courts exercised powers to amend the contract based on the COVID-19 pandemic, which has been recognized as a hardship or *force majeure* event. While there is no statute on hardship or *force majeure* in common law (it is a creature of contract),¹⁵ there are such provisions in the DIFC Law.¹⁶

A hidden ADR gem: Slowly embracing expert determination for resolving disputes

Expert determination is increasingly gaining popularity. However, despite its fundamental advantages (speed, autonomy, and finality), this tool is not being deployed to its fullest potential.

Alia Ladjimi (Manager, ICC International Centre for ADR, Paris) presented the ICC Expert Rules (the 'Rules'),¹⁷ and clarified that the ICC International Centre for ADR (the 'Centre') can act as an appointing authority and administer an expert determination under the Rules.

Through a role play, panelists showcased the different stages of the procedure: parties' request to the Centre to appoint an expert and/or administer an expert determination,¹⁸ procedural issues and language, selection of the legal/technical expert and conflict checks, drawing up of the terms of reference, the expert's mission. The expert's report will be submitted to the Centre and Standing Committee for scrutiny. The Centre will approve the report upon advice of the Standing Committee and fix the final costs of the proceedings, including the expert's fees and expenses as well as ICC administrative expenses.¹⁹

Lara Hammoud (Senior Legal Counsel, ADNOC, Arbitrator, UAE) noted that expert determination is suitable for a wide range of scenarios where parties need an independent expert assessment or recommendation to reach a fair and successful result, or a (non-binding) report which could be used as a basis for settlement. For example, she has seen it being used successfully for the valuation of technical issues where facts were not contested (or not significantly contested). Ms Hammoud also shared that the procedure is less costly than arbitration, and more efficient if used as an optional (vs. mandatory) tool in a multi-tiered dispute resolution clause.

Frédéric Gillion (Partner, Pinsent Masons LLP, Singapore) explained that any dispute can be referred to expert determination, for example to investigate facts and underlying issues; or to test the facts and merits of the case. It can be used at any time when a dispute is ripe for determination.

Victoria Orlowski (Of Counsel, Gibson, Dunn & Crutcher LLP, USA; President, Standing Committee, ICC International Centre for ADR) noted that the expert determination clause should ideally be separate from the arbitration agreement and invited the parties to consider:

- > a good framework, delineating dispute resolution mechanisms and consider carve outs;
- > whether the expert determination will be binding or not;
- > whether the expert may provide a separate determination for a specific issue; and
- > whether to keep the procedure confidential.

The panel noted that experts are usually appointed too late in the arbitration, i.e. when pleadings have already been exchanged and facts have been established. This, unfortunately, disregards the main advantage of expert determination that can bring in expertise earlier in the process and at a lower cost.

In her closing remarks, **Dania Fahs** highlighted that Mr Ghandour's call for a holistic approach echoed ICC's global approach to dispute resolution, promoting a toolkit of dispute resolution and avoidance mechanisms to be used to their fullest potential.

The 10th ICC MENA Conference on International Arbitration was kindly sponsored by Al Aidarous Advocates and Legal Consultants, Shahid Law, Alem & Associates, Ankura, Diales, Global Advocacy & Legal Counsel, J.S. Held, Linklaters, Lazareff Le Bars, Nassif Arbitration, Youssef & Partners, Al Tamimi, Charles Russell Speechlys, DAC Consulting, Jus Mundi, Masin Project, Resolution Chambers.

15 See e.g., 'ICC Force Majeure and Hardship Clauses' (March 2020).

16 DIFC Contract Law (DIFC Law No.6 of 2004) implies a *force majeure* term into DIFC law governed contracts, see Art. 82(1): 'Except with respect to a mere obligation to pay, non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.' See e.g., 'Law in the time of COVID-19: force majeure under DIFC law' (www.tamimi.com, Apr. 2020).

17 ICC Expert Rules, in force as of 1 Feb. 2015.

18 Where such proposal or appointment is made at the joint request of all the parties in ongoing proceedings pursuant to ICC Rules of Arbitration, the proposal or appointment shall be free of charge (Art. 3, Appendix II to the Rules for Proposal of Experts and Neutrals/ Appointment of Experts and Neutrals).

19 See Rules for the Administration of Expert Proceedings (Appendix II on Costs).

Can International Arbitration Stand the Test of Mandatory Rules and Compliance?

Manuel Tomas

Partner, Foley Hoag, Paris



Overriding Mandatory Rules and Compliance in International Arbitration

By Georges Affaki and Vladimir Khvalei (Eds.)
ICC Institute of World Business Law, Dossier XIX, 2022
211 pages
ISBN: 978-92-842-0527-1

The 40th annual conference of the ICC Institute of World Business Law focused on 'Overriding Mandatory Rules and Compliance in International Arbitration'; a theme

that stands at the crossroads of several disciplines and is more topical than ever. Over the last decades, issues of compliance with economic sanctions, exchange and export control regulations in international trade and international arbitration have been particularly discussed. However, since 2014 with the number of sanctions against Russia, Russian entities and individuals, compliance has gained paramount importance, and parties involved in international trade must therefore be cautious.

As pointed out by Mr Affaki, one of the editors of the book, this theme was chosen after the Council of the Institute made several unsettling findings related to the issue of sanctions and international arbitration.¹ The book consists of eight chapters and the contribution of 16 authors. It provides a very useful overview of the impact such 'overriding mandatory-rules' can have on international arbitration and international trade, irrespective of the relevant legal framework.

In **Chapter one 'Overriding Mandatory Rules in International Arbitration'**, the authors note that international arbitrators must apply overriding mandatory rules that reflect transnational public policy. The arbitral tribunal will have to consider the effect of such rules, even in cases where they are not directly applicable through the governing law of the contract or the *lex arbitri*. According to the authors, the national monetary restrictions are closely tied to the idea of overriding mandatory rules because of their importance to States. Such monetary restrictions come in many forms, including foreign exchange control, financial sanctions, corrupt payments, money laundering, terrorism financing and debt moratoria. The authors further explain the distinction between unilateral (imposed by a State) and multilateral (emanating from the European Union and the UN Security Council) sanctions, and the implications this differentiation may have on arbitral and court decisions.²

Chapter two 'The Evolving Dynamics of Monetary Restrictions as International Arbitration's Next Big Challenge?' The authors study the relationship between monetary restrictions and the resolution of resulting disputes through international arbitration. The chapter starts by presenting the scope of a State's regulatory powers under public international law, potential investment treaty claims following monetary restrictions, and the defences available against such claims in international law. The chapter then moves on to examine the evolving dynamic in international arbitration, by studying the situation in different countries (e.g.

¹ E.g., is there an obligation for arbitral tribunals to apply multilateral sanctions or specific regulations (in relation to anti-money laundering or counter-terrorist financing) when none of the parties request the application of such rules?

² For a more general analysis on trade sanctions in international arbitration and litigation, see Mercedesh Azeredo Da Silveira, 'Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation', Part II, Chapters 4 and 5, pp. 65-190 (Kluwer Law International, 2014).

Argentina, Greece). The authors conclude this chapter by studying the adequacy of international arbitration for resolving monetary restrictions disputes.

Chapter three ‘Sovereign Debt Moratoria and Covid-19: Some Necessary Thoughts on Necessity’ is an analysis of how the ongoing COVID-19 pandemic might change the general scepticism towards sovereign debt moratoria into customary international law, in particular with respect to the justification of necessity. After reviewing the existing case law on the matter, the authors stress the difficulties for a State to invoke necessity as a justification. However, as more and more states will face the consequences of their debt because of COVID-19, the current law on necessity could also be challenged.³

In **Chapter four ‘Impact of Sanctions on International Arbitration’**, the author begins by referring to the ‘Lugoyov law’ adopted in Russia, as an example of the impact of sanctions on international arbitration.⁴ The chapter also provides a very comprehensive review of all the potential obstacles that a sanctioned party can encounter in international arbitration. This subject has been discussed previously in literature based on a general approach⁵ or a more focused approach.⁶ This chapter however reflects on all kinds of obstacles resulting from sanctions, and provides a comprehensive analysis of practical issues such as the payment of arbitration fees, and the enforcement of the award (or to the contrary, avoiding the setting aside of the award).

Chapter five ‘Overriding Mandatory Provisions and Arbitrability in International Arbitration: The Case of Multilateral and Unilateral Sanctions’ discusses the impact of sanctions on international arbitration from the perspective of arbitrability of disputes involving or relating to international sanctions. The authors study general principles⁷ and provide a useful overview of the different approaches adopted across jurisdictions.

In **Chapter six ‘Overriding Mandatory Rules and Arbitration in a Changing World’**, the author defines ‘mandatory rules’ and addresses the arbitrability of such rules. The chapter further examines how overriding mandatory rules have been applied in arbitration, if arbitration is the right forum to litigate these rules, and if arbitrators can be entrusted with the application of such rules.

Chapter seven ‘Anti-corruption Compliance in International Arbitration: The Shadow Theatre of Agent and Consultant Agreements’ focuses on the rise of anti-corruption compliance legislation and the disputes it has generated between multinational corporations and their foreign commercial agents/consultants. The author describes the recent trends in this field and highlights the difficulties arbitrators and judges may face when dealing with such disputes.

In **Chapter eight ‘Economic sanctions and the world trade organisation’**, the author analyses the compatibility of economic sanctions within the framework of the World Trade Organization (WTO). The justifications for such sanctions under WTO law are also set out based on a review of different legal instruments under the WTO framework. The author divides this chapter between an analysis of the sanctions adopted by the UN and sanctions adopted by a Member State for its own security.

The book is an excellent contribution towards understanding and assessing the challenges that overriding mandatory rules and compliance pose for international arbitration. It provides a detailed analysis of different national monetary restrictions, and addresses a broad variety of procedural and practical questions in disputes resolved by international arbitration.⁸ The publication is of particular relevance in the context of recent events in Ukraine and the

3 For a different approach see Onur Iran, ‘Can States successfully resort to the customary international defenses against the possible claims arising out of Covid-19 Measures?’, in *Revista Romana de Arbitraj*, 2020, Vol. 14 Issue 3, pp. 131-156. The author analyses here force majeure, necessity and distress and discusses whether these defenses could be invoked by the States against the possible claims arising out of COVID-19 measures.

4 The Lugoyov law (Federal Law of 8 June 2020 No. 171-FZ) allows Russian state courts to review on the merits cases that involve Russian parties (listed as sanctioned companies and individuals), even where there is an arbitration agreement.

5 Roman Zykov, ‘Chapter 8: The Impact of Unilateral Sanctions on Institutional Arbitration’, in Axel Calissendorff and Patrik Schöldström (eds), *Stockholm Arbitration Yearbook 2021*, Stockholm Arbitration Yearbook Series, Vol. 3 (Kluwer Law International, 2021) pp. 119–138; Iona Knoll-Tudor, **Paris Arbitration Week Recap: The Impact of Russian Sanctions on International Commercial Arbitration – From Arbitrability to Enforcement** (Kluwer Arbitration Blog, 13 Apr. 2022); Konstantin I. Kroll, ‘Impact of Sanctions on International Arbitration Involving Russian Parties’, in Aleksey Nikolaevich Zhiltsov (ed), *Commercial Arbitration [Коммерческий Арбитраж]*, The Chamber of Commerce and Industry of the Russian Federation 2020, Vol. 2020 Issue 2(4), pp. 59–64.

6 For an article focusing on EU Economic sanctions: Tamas Szabados, ‘EU Economic Sanctions in Arbitration’, in Maxi Scherer (ed), *Journal of International Arbitration*, 2018, Vol. 35 Issue 4, pp. 439–462.

7 The arbitrators are not in principle excluded from applying mandatory provisions, and the law of the seat of the arbitration will play an important role. Mandatory provisions of such laws may, despite the agreement to arbitrate, prevent or hinder an arbitral tribunal to retain jurisdiction in certain circumstances.

8 E.g., the interaction between economic sanctions and the *lex arbitri* or the law governing the arbitration agreement; the enforcement of an award in cases involving sanctions; or the various impacts of sanctions on arbitral proceedings, such as the retention of legal counsel and the organisation of hearings.

monetary restrictions they have triggered, such as the (re)introduction of economic sanctions against Russia and the multiplication of export controls.

In conclusion, this book – a compilation of contributions on the theme of the 40th Conference of the ICC Institute of World Business law – is well-researched and thorough, offering a useful legal compass for arbitrators, counsel, business executives, law enforcement agencies and other stakeholders involved in strategic decision-making.

The latest Dossiers of the ICC Institute of World Business Law 'Overriding Mandatory Rules and Compliance in International Arbitration' is available at ICC Knowledge 2 Go.

For more information on the ICC Institute, please visit www.iccwbo.org/icc-institute

Arbitrators' Conflict of Interest: Perspectives from Users, Institutions, and State Courts

Hyewon Lee

*Foreign Attorney, Peter & Kim, Seoul**

** As at the time of publication, Hyewon Lee is with Greenberg Traurig, Seoul office.*



Clear Path or Jungle in Commercial Arbitrators' Conflict of Interest?

By Felix Dasser (Ed.)
ASA Special Series No. 48
Kluwer Law International, 2021
190 pages
ISBN 9789403535418

It is general knowledge within the arbitration community that the impact of the parties' choice of arbitrators penetrates throughout an arbitral process.

The process of constitution of the arbitral tribunal predestines the fate of a case to a large extent, particularly given the presumptive finality of arbitral awards and the narrow grounds for annulment of awards. Similarly, successful challenge of an arbitral award on account of arbitrator bias after years spent on the case, jeopardises the users' confidence in and vitiates the many benefits of the arbitral system in its entirety.

It is for these reasons that appointments and challenges of arbitrators during the early stages of a case have become an oft fought battlefield for the parties. There is a constant tug of war between an attempt to ensure transparency, integrity and fairness as prescribed in various rules and legislations on the one hand and a dire need to deter, safeguard against, and even penalise pretextual misuses of these rules to fabricate bias and initiate frivolous challenges against legitimate arbitrator candidates on the other.

Against that background, this book captures discussions where the issue of conflict of interest of arbitrators was examined from various vantage points, including from the perspectives of users, arbitration institutions, and state courts. Contributions were put together by Felix Dasser to provide the readers with a comprehensive account of approaches taken by various stakeholders

with respect to the issue of ensuring independence and impartiality of arbitrators as well as an evaluation of where we stand as a community in our quest for a coherent and effective standard on the issue.

This book is divided into four panel discussions and 13 chapters; each chapter being authored by prominent arbitration practitioners. **Panel 1 'The View from the Users'**¹ introduces through chapters 2 and 3 the discussion and observations made by arbitration users including in-house counsel in prominent corporations. They note that in practice, parties are often reluctant to bring challenges against arbitrators for various reasons and that challenges are rarely successful even when undertaken.

Chapter 2 summarises users' observations. While some may prefer an arbitrator that acts as a partial advocate to tip the scale within the tribunal to the favour of the party appointing the arbitrator, most sophisticated users understand the benefit of opting for a more experienced and independent arbitrator in appreciating the merits of their case. The chapter also lists some factors and must-have qualities of party appointed arbitrators such as expertise in the field, familiarity with the parties' culture, diligence in closely studying the case file, and case management skills, to name a few. Chapter 2 also poses the question of whether party appointments inherently create arbitrator partiality but concludes that most consider parties' right to appoint their arbitrators to be fundamental and integral to the foundation of arbitration.

¹ Felix Dasser, Ulrich Hagel and James Menz.

Chapter 3 addresses, inter alia, the challenges in identifying latent biases and conflicts of interests of arbitrators that affect the arbitrators' conduct of the proceedings and/or outcome of a case. It also delves into the users' expectations, noting that while some consider the appointment mandate to include the task of ensuring that the nominating party's positions are heard within the tribunal, others see the parties' roles to be limited to screening a qualified arbitrator well versed in the substance at issue vis-à-vis generalist state court judges.

The authors also point out users' reservations against certain law firms' practices in conducting arbitrator due diligence noting specifically that too often candidate recommendations are made for generic reasons without a thorough analysis of why and how the candidate can best adjudicate the case at hand.

Panel 2 'Practical Experience: The View from Major Institutions'² explores the approaches taken by SIAC, LCIA and SCAI in chapters 4 through 6. Panel 2 confirms Panel 1's observation that challenges are rarely successful in practice. Panel 2 further outlines the process for disclosure and challenges, the organisational structure, and who within each institution decides on the challenges made. Panel 2 notes common sources consulted on the issue, and notes that all three institutions conceptually distinguish a challenge (post-appointment) from objection (pre-appointment). One apparent difference is that while SIAC and LCIA require the reasons for decisions on challenges to be spelled out and provided to the parties,³ the same is not required for cases administered by SCAI.

Panel 3 'Practical Experience: The View from State Courts'⁴ then introduces certain state court decisions on the issue of challenges against arbitrator(s) in chapters 7 through 11. Panel 3 notes that national legislation may be the means through which we could expect a greater uniformity owing to the widespread success of the UNCITRAL Model Law. However, the author notes that Article 12 of the Model Law only includes the vague reference to 'justifiable doubts as to [the arbitrator's] impartiality or independence' leaving the text open to various interpretations across jurisdictions including those by state judges. The book stresses that the lack of uniformity is also exacerbated by various non-Model Law jurisdictions.⁵

The authors for Panel 3 compare national legislative standards across four key non-Model Law jurisdictions for issues of threshold for conflict, disclosure, relevance of private instruments, and whether there is a duty for the parties to investigate. The authors equally note that courts in these jurisdictions have been conservative in their approach of setting aside awards on the basis of improper tribunal composition and take a closer look into key cases on the issue, including the controversial *Halliburton* case, the *Ometto* case, the *Monster Energy* case, among others.⁶

Panel 4 'The Debate: Is There Enough Uniformity? Not Enough? More Than Enough?'⁷ continues the discourse, particularly in Chapter 12 that includes a recitation of the debate that took place during the conference. The authors note the speakers' consensus that there needs to be a higher degree of uniformity in the way different state courts approach the issue to ensure predictability of outcome and to protect arbitral awards from the risk of being set aside or refused enforcement on this ground.

The authors also note the practitioners' concern that guidelines should not endorse over-disclosures as it impairs the parties' right of appointment in the unfortunate reality where disclosures have indeed made candidates susceptible to objections and challenges by 'litigious bad faith tacticians' notwithstanding the general principle that disclosures should not be processed as presumed partiality.

Finally, Chapter 13 delineates how the IBA Conflicts Guidelines and the ICC Arbitration Rules differ in their legal nature, source of legitimacy, goals, and practical purposes but concludes that they are highly complementary in nature. The author also briefly touches upon how the two instruments interact with each other by organising topics by key provisions.

Overall, the book has demonstrated that we may still be lost in the jungle created by various stakeholders and platforms in their efforts to articulate clear, expansive, and harmonised standards related to independence and impartiality of arbitrators. However, the author signals that we have come a long way in our attempt to safeguard the integrity of the arbitral procedures and to prevent those tools from being misused in unwarranted gambits. The author is positive about the community's attempts to clarify the standards embodied in working tools such as the IBA Conflicts Guidelines. The author

2 Claudia Annacker, Jamie Harrison, and Gabrielle Nater-Bass.

3 Authors refer to SIAC Practice Note for Administered Cases; LCIA Notes for Arbitrators; **LCIA Challenge database**, IBA Guideline on Conflict of Interest as non-binding references.

4 Felix Dasser, Diana Akikol, Laurent Gouiffès, Paula Hodges QC, Laurence Shore and Federico Alberto Cabona.

5 England, France, New York, Sweden, and Switzerland, among others.

6 *Halliburton Company v. Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817; *Ometto v. Abengoa Bioenergía Agrícola Ltda.*, 549 Fed. Appx. 41 (2nd Cir. 2014); and *Monster Energy Company v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019).

7 Charles Kaplan, Nathalie Voser, Paula Hodges QC, Álvaro López de Argumedo Piñero and Alexander Fessas.

notes that while such instruments are still limited in their application and legal force, they are widely resorted to by all stakeholders including even judicial courts.

Notwithstanding this, given that arbitration strives for tailor-made resolution of disputes where each case remains uniquely designed by the parties, our approach to this intractable problem should be to strike a fine balance between reaching a certain level of uniformity while taking caution not to jeopardise diversity, a much-celebrated attribute of arbitration, by undue generalisation and homogeneity.

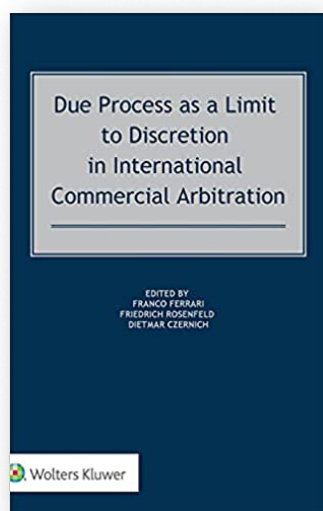
Discretion Meets Due Process in International Commercial Arbitration

Professor Dr. Walter Doralt

Chair for Civil Law, European Private Law and Comparative Law, University of Graz (Austria)

Dr. Brooke Marshall

Senior Lecturer in Law, University of New South Wales (Australia)



Due Process as a Limit to Discretion in International Commercial Arbitration

By Franco Ferrari, Friedrich Rosenfeld and Dietmar Czernich (Eds.)

Wolters Kluwer, 2020

455 pages

ISBN 9789403519500

The book 'Due Process as a Limit to Discretion in International Commercial Arbitration' is unusual in more ways than one. While books on

international commercial arbitration are not rare and if anything, their quantity has only been increasing in recent years, this volume is particular, both in its geographic scope and in its focus. It is a rigorous study of due process, as the title indicates, and more specifically of the limits derived from due process in international commercial arbitration. In substance, it provides a comparative approach to the topic with 19 country reports from a number of jurisdictions for which international arbitration is particularly relevant (Argentina, Brazil, Canada, China, Cyprus, France, Germany, Hong Kong, India, Italy, Japan, the Middle East, The Netherlands, Norway, Russia, Singapore, Switzerland and the UK).

The book starts with the general report (pp. 1-40), authored by the editors of the book, Professor Franco Ferrari (NYU), Dr. Friedrich Rosenfeld (Hanefeld Legal, Hamburg, Paris) and Professor Dietmar Czernich (University of Innsbruck), who are all well known in the world of arbitration and comparative law. The editors' focus is on those due process guarantees that circumscribe arbitrator discretion immediately prior to the rendering of an award. Their thesis is that recalcitrant parties unduly invoke such guarantees

as strategic maneuvering. Hence, a 'paranoiac' preoccupation with due process in the exercise of arbitral discretion is unmerited (pp. 1-3).

The general report offers a detailed overview of what international standards in due process are; a concept which they astutely describe as somewhat elusive in meaning, despite its undoubted relevance to arbitration. As can be expected, the general report then offers comparative insights derived from the reports which follow it. But it goes well beyond a mere reading compass or a summary of country reports. This is particularly visible, for instance, in their discussion of the normative basis of due process (pp. 3-6), addressed within what is termed a 'general framework'. Under this heading, the editors also turn to issues of interpretation, and the threshold for the relevance of breaches of due process. While of course not every breach of due process will be relevant legally, the differences between jurisdictions are extremely interesting. Some jurisdictions, for instance, will require breaches to be outcome-determinative, others simply require a qualified impact upon the award, while others still require a qualified breach and, finally, some systems set a combination of qualified breach with qualified impact as a threshold. Yet the authors note that the results of these approaches on the effectiveness of an award seem to converge in practice (p. 12). This is an interesting insight and may sound somewhat surprising, given the relatively marked differences outlined before. In terms of maximizing efficiency, the outcome is welcome,

as awards will not be set aside for relatively minor infractions of due process in most jurisdictions studied in the book.

Waivers by parties of due process guarantees are dealt with next – an issue of great interest from a practical point of view. The report highlights some of the general trends, such as the fairly generous acceptance of *ex-post* waivers, in contrast to waivers *ex-ante* (pp. 12-17). A further aspect addressed thereafter is the right to be heard (pp. 19-30). This principle can be of particular interest in light of the obligation derived from it, namely the arbitral tribunal's duty to be cognizant of and consider the parties' submissions and evidentiary offerings (pp. 26-30). Notably, one challenge for arbitrators, in practice, can be the sheer volume and length of submissions made by parties. The general report includes other aspects such as equal treatment, and substantive *versus* formal notions of equality of arms (pp. 30-32), proper notice and improper invocations of failures to ensure such notice (pp. 32-36) and of course, independence and impartiality (pp. 36-39), where the authors address, *inter alia*, *ex parte* communications and the circumstances under which these become relevant.

The reviewers can only mention some of the other reports here. One of interest is the French report: the insights offered by the author are especially illuminating on the French approach to setting aside awards both for violations of due process and violations of public policy. The brief overview on waivers under French law and on the new Article 1466 Code of Civil Procedure is informative and clear.¹ The German report² shows, among other things, the substantial number of relevant German court decisions on due process. These clarify many of aspects of due process under German law, and some of the observations will also be of comparative interest. Of the other reports, we were particularly impressed by the extensive Dutch report, providing numerous references and in-depth analysis³ and by the excellent Italian report.⁴ Of particular interest is the information on the position of the Italian Supreme Court with regards to case management issues, specifically in the context of cutoff dates imposed by the arbitral tribunal, which can preclude parties from making later submissions. The Italian Supreme Court permits such cutoff dates imposed by the arbitral tribunal - in the interest of efficiency - but it requires the arbitral tribunal to duly inform parties about the dates and limits

imposed. Similarly, the Swiss report⁵ is of interest for the overview it provides on one of Europe's most important arbitration jurisdictions. This can equally be said for the report on the UK.⁶

The book offers a valuable source for those interested in international commercial arbitration and for anyone with an interest in due process. We would of course have wished for even more jurisdictions to be included – Australia and Austria could be mentioned here – but then again, a selection is always necessary and perhaps a later edition of this book will expand the geographic reach further. Irrespective of this minor desideratum, the book can and should be strongly recommended. It is clear, well-written and provides an in-depth analysis on a key topic of great practical significance.

1 By Professor Caroline Kleiner, pp. 157-176. See especially pp. 160-165 and 165-167.

2 By Dr Friedrich Rosenfeld, pp. 177-195.

3 By Jacob van de Velden and Abdel Khalek Zirar, pp. 279-311.

4 By Associate Professor Francesca Ragno, pp. 237-250.

5 By Simon M. Hohler, pp. 375-397.

6 By Hattie Middleditch, pp. 399-428.