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International Arbitration

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This article surveys significant legal developments in international arbitration in 2020.

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I. North America

A. United States

1. *Arbitration Developments in U.S. Courts*

a. Arbitration Agreements

In its sole arbitration case this term, the U.S. Supreme Court resolved a historical circuit split concerning whether a party to an international arbitration agreement governed by the New York Convention may compel arbitration against a non-signatory by applying state law principles of contract, agency, and corporate law traditionally applied in domestic arbitrations governed by Chapter 1 of the Federal Arbitration Act (FAA).[2] In *GE Energy Power Conversion France SAS Corp. v. Outokumpu Stainless USA, LLC*, the Court unanimously held that state law principles may be applied to determine whether a non-signatory can invoke or be bound by an arbitration agreement.[3] The Court concluded that Article II(3) of the New York Convention does not expressly preclude "the application of domestic laws that are more generous in enforcing arbitration agreements," and that "[t]his silence [was] dispositive."[4] The Court held that GE, a non-signatory to the arbitration agreement, could invoke the state law doctrine of estoppel to compel arbitration.[5]

Justice Sotomayor's concurrence emphasized that lower courts should apply state law principles to permit non-signatories to enforce arbitration agreements consistently with the "principle of consent to arbitrate."[6]

b. Delegation of Arbitrability

In *Jock v. Sterling Jewelers Inc.*, the Second Circuit addressed whether absent members of a class arbitration authorized arbitrators to certify a class.[7] The parties' arbitration agreement was governed by the American Arbitration Association rules (AAA Rules).[8] The AAA Rules contain supplementary rules permitting an arbitrator to determine, as a threshold matter, when arbitration can proceed on behalf of a class.[9] Based on this, the

2. *See generally* GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 139 S. Ct. 2776 (2019). *Compare* Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 40–45 (1st Cir. 2008), *and* Aggarao v. MOL Ship Mgmt. Co., 675 F.3d 355, 380 (4th Cir. 2012), *and* Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 413–14 (4th Cir. 2000), *with* Yang v. Majestic Blue Fisheries, LLC, 876 F.3d 996, 998 (9th Cir. 2017), *and* Outokumpu Stainless USA, LLC v. Converteam SAS, 902 F.3d 1316, 1320 (11th Cir. 2018), *rev'd sub nom.* GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 139 S. Ct. 2776 (2019).

3. *GE Energy Power Conversion Fr. SAS Corp.*, 140 S. Ct. at 1642.

4. *Id.* at 1645.

5. *Id.* at 1648.

6. *Id.*

7. Jock v. Sterling Jewelers, Inc., 942 F.3d 617, 622 (2d Cir. 2019).

8. *Id.* at 623.

9. *Id.* at 623–24.

court determined that despite absent class members not affirmatively opting in to arbitration, incorporation of the AAA Rules nonetheless provided the absent class members' consent "to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration."[10] The arbitration agreement expressly delegated "[q]uestions of arbitrability" and "procedural questions" to the arbitrator, which the court found was consistent with Supreme Court precedent and governing Ohio law.[11]

In *MZM Construction Company, Inc. v. New Jersey Building Laborers Statewide Benefit Funds*, the Third Circuit similarly considered the "mind-bending" question of arbitrability, this time on the narrow issue of whether it was for the court or the arbitrator to decide if a valid agreement to arbitrate exists when one party challenged the underlying contract but made no specific claims with respect to the arbitration provision itself.[12] Noting that this case presented the additionally complicated issue of a delegation provision that expressly reserved "the authority to decide whether an [a]greement exists" to the arbitrator,[13] the court nevertheless found that Section 4 of the FAA, which requires the court to be "satisfied" that an agreement to arbitrate exists, "tilt[ed] the scale in favor of a judicial forum when a party rightfully resists arbitration on grounds that it never agreed to arbitrate at all."[14]

c. Enforcement of Awards

i. Partiality as a Ground for Vacatur

Courts continued to weigh in on the issue of arbitrator bias and the standard for "evident partiality." In *Monster Energy Co. v. City Beverages LLC*, Monster initiated a JAMS-administered arbitration and ultimately obtained an award in its favor.[15] After Monster moved to confirm the award, City Beverages sought vacatur under the FAA based on "evident partiality."[16] The Ninth Circuit held that vacatur was warranted because the arbitrator's "failure to disclose his ownership interest" in JAMS "coupled with the fact that JAMS ha[d] administered ninety seven arbitrations for [plaintiff] Monster over the past five years," creating a "reasonable impression of bias."[17] The Ninth Circuit's test for partiality requires a party to demonstrate a "reasonable impression of partiality" only, but other circuits have required that a "reasonable person would have to conclude that an

10. *Id.* at 623.

11. *Id.* at 624-26 (noting that Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019) "leaves undisturbed the proposition . . . that an arbitration agreement may be interpreted to include implicit consent to class procedures").

12. MZM Constr. Co. Inc., v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386, 392 (3d Cir. 2020).

13. *Id.* at 396.

14. *Id.* at 401.

15. Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1133 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020).

16. *Id.* at 1133–34.

17. *Id.* at 1132, 1138.

arbitrator was partial to one party to the arbitration."[18] As the Supreme Court denied *certiorari* in June 2020, circuits remain split on this standard.

A few months later, the U.S. District Court for the District of Columbia issued its decision in *Pao Tatneft v. Ukraine*, denying Ukraine's attempt to vacate an arbitral award for evident partiality on the alleged basis that the president of the arbitral tribunal failed to disclose that he had accepted a "prestigious and lucrative appointment" from the law firm representing Tatneft in a "major investment arbitration."[19] Critically, the court concluded that to prevail in the context of a *foreign* arbitral award issued under UNCITRAL Arbitration Rules, "Ukraine would need to demonstrate both that [the arbitrator's] failure to disclose the . . . appointment somehow violated UNCITRAL Rules and that there was substantial prejudice flowing from any alleged violation," *i.e.*, the disclosure "would have been disqualifying."[20] The court made clear that a challenge to "impartiality in a proceeding to enforce a foreign arbitration award is higher than the FAA's evident partiality standard" that applies to domestic arbitration awards, and concluded that Ukraine had not met this higher burden.[21]

ii. Jurisdiction Over Enforcement Actions

In *Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, the Tenth Circuit joined the Second, Third, Fourth, and Ninth Circuits[22] in holding that "the proper jurisdictional inquiry" in an action to enforce an arbitral award looks to whether plaintiff's "injury" arbitration proceeding itself.[23] While the Supreme Court has not yet addressed the inquiry for specific personal jurisdiction in an action to enforce a foreign arbitral award, this is one additional circuit that has considered the issue and reviews the connection between the forum and the defendant's conduct in the underlying dispute.

d. Coronavirus and Arbitration

In a departure from normal circumstances this year, courts contended with the impact of the COVID-19 pandemic and considered arguments, on many occasions raised by sovereign defendants, that the novel coronavirus

18. *See, e.g.*, Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 325 (6th Cir. 1998) (quoting Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984)).

19. Pao Tatneft v. Ukraine, No. CV 17-582 (CKK), 2020 WL 4933621, at *5 (D.D.C. Aug. 24, 2020), *appeal docketed*, No. 20-7091 (D.C. Cir. Nov. 4, 2020).

20. *Id.* at *8 (emphasis added).

21. *Id.* at *6, 8.

22. *See, e.g.*, Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100, 101 (2d Cir. 2006); Telcordia Tech Inc. v. Telkom SA Ltd., 458 F.3d 172, 178–79 (3d Cir. 2006); Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208, 214-15 (4th Cir. 2002); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1123–24 (9th Cir. 2002).

23. Compañía de Inversiones Mercantiles, S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V., 970 F.3d 1269, 1287 (10th Cir. 2020).

warranted delay in enforcement proceedings. In *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, the defendant Egypt sought a stay of U.S. proceedings to enforce an ICSID award given its pending application to annul the award.[24] In light of the "massive fiscal crisis exacerbated by the ongoing global COVID-19 pandemic," the court granted the stay, finding that the "balance of hardships" favored Egypt.[25]

By contrast, in *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, where the defendant Guatemala was already granted one extension to arrange for payment of an arbitral award "in light of the difficulties presented by the COVID-19 pandemic," the court dismissed a request for an additional extension.[26] The court reasoned that Guatemala failed to "offer any good reason why the Republic took no action in the several months that passed after the Court entered final judgment and before the pandemic began."[27]

2. *28 U.S.C. § 1782*

In 2020, an emerging circuit split regarding the availability of discovery under 28 U.S. Code § 1782 for use in private international arbitrations deepened. The Fourth Circuit held that § 1782 applies to private international arbitrations, while the Seventh Circuit, joining the Second and Fifth Circuits, found that § 1782 does not authorize discovery for private foreign arbitrations.[28]

On March 30, 2020, the Fourth Circuit ruled in *Servotronics* that a private international commercial arbitral tribunal seated in the United Kingdom qualified as a "foreign tribunal" for purposes of § 1782, and that the statute, accordingly, permits U.S. discovery for use in the arbitration.[29] The Court's ruling turned on its determination that private arbitration was a "product of government-conferred authority" under both U.S. and UK law.[30]

By contrast, in *Servotronics*, a case involving the same underlying arbitration, the Seventh Circuit interpreted § 1782 narrowly to exclude private foreign arbitrations.[31] The Court observed that construing § 1782 broadly would lead to the illogical result that parties in private foreign arbitrations would have greater access to federal court discovery assistance in the United States than parties to U.S. domestic arbitrations, and thus concluded that § 1782 referred to "a state-sponsored, public or quasi-

24. Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, No. CV 18-2395 (JEB), 2020 WL 2996085, at *4 (D.D.C. June 4, 2020).

25. *Id.*

26. TECO Guat. Holdings, LLC v. Republic of Guat., No. CV 17-102 (RDM), 2020 WL 2934951, at *1, *2 (D.D.C. June 2, 2020).

27. *Id.* at *2.

28. Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020).

29. *Id.*

30. *Id.* at 212–13 (rejecting Boeing's argument that the arbitral panel at issue "deriv[ed] its authority not from the government, but from the parties' agreement").

31. Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 690 (7th Cir. 2020).

governmental tribunal" and not a private foreign arbitration.[32] A certiorari petition filed by Servotronics in December 2020 is pending.[33]

In June 2020, the Second Circuit in *Hanwei Guo v. Deutsche Bank* reaffirmed its precedent and determined that "foreign or international tribunal" under § 1782 excluded private foreign arbitrations.[34] Having found that the tribunal at issue, which was constituted under the auspices of the China International Economic and Trade Arbitration Commission, "derive[d] its jurisdiction exclusively from the agreement of the parties" and "function[ed] essentially independently" from the Chinese government, the Second Circuit concluded that the tribunal was not "state-sponsored" and therefore did not constitute a "foreign or international tribunal" within the meaning of § 1782.[35]

B. MEXICO

In 2020, the international arbitration community in Mexico focused on developments in the renewable energy sector, with the López Obrador administration's energy authorities fully deploying a political and regulatory strategy aimed at, among other things, strengthening the state-owned utility *Comisión Federal de Electricidad* (CFE).

The strategy includes a decree issued by the National Energy Control Center (CENACE)[36] and a policy issued by the Ministry of Energy (SENER)[37] (the Policies), which are intended to, among other things, change market dispatching rules. The Policies grant CFE's power plants priority to dispatch first, prevent new projects from entering into

32. *Id.* at 695–96.

33. Petition for Writ of Certiorari, Servotronics, Inc. v. Rolls-Royce PLC, 2021 WL 1072280, 12–15 (Mar. 22, 2021) (No. 20-794) (offering three reasons to grant review: 1) the Circuits are split; 2) the issue is narrowly defined in this case; and 3) the Seventh Circuit supposedly misapplied "[t]ime-[h]onored [c]anons of [s]tatutory [c]onstruction" when it concluded that the phrase "tribunal" was ambiguous under the statute.).

34. Guo v. Deutsche Bank Sec., 965 F.3d 96, 100 (2d Cir. 2020) (reaffirming its decision in Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999)); *see also* Republic of Kaz. v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) (holding that "foreign tribunal" under § 1782 did not include private international arbitral tribunals).

35. *Guo*, 965 F.3d at 107–08.

36. *ACUERDO para garantizar la eficiencia, Calidad, Confiabilidad, Continuidad y seguridad del Sistema Electrico Nacional, con motive del reconocimiento de la epidemia de enfermedad por el virus SARS-CoV2 (COVID-19)* [National Electric System Covid-19 Guarantee], GOBIERNO DE MEXICO CENACE [Mexican National Center for Disease Control] (April, 29 2020) [hereinafter *CENACE Covid-19 Guarantee*], https://www.cenace.gob.mx/Docs/16_MARCO REGULATORIO/SENyMEM/(Acuerdo%202020-05-01%20CENACE)%20Acuerdo %20para%20garantizar%20la%20eficiencia,%20Calidad,%20Confiabilidad,%20Continuidad %20y%20seguridad.pdf.

37. *ACUERDO por el que se emite la Política de Confiabilidad, Seguridad, Continuidad y Calidad en el Sistema Eléctrico Nacional* [AGREEMENT by which the Policy of Reliability, Security, Continuity and Quality in the National Electric System is issued], DIARIO OFICIAL DE LA FEDERACIÓN [DOF] (May 15, 2020) [hereinafter *SENER Agreement*], https://dof.gob.mx/nota_detalle.php?codigo=5593425&fecha=15/05/2020.

commercial operation for an undefined term, and open the door for regulators to curtail existing power plants.[38]

Such sudden changes from the major 2013 reforms quickly raised the alarm of industry stakeholders, risking over $6.4 billion in investment with the CENACE decree—a considerable portion of which is of foreign origin—for projects that were pre-operational,[39] and a larger sum for projects already in operation with the SENER policy.

While stakeholders have been generally successful in seeking protection from the Mexican courts against the effects of the Policies, companies have also explored investment arbitration under bilateral or multilateral investment treaties to which Mexico is a party.

C. CANADA

In *Uber Technologies Inc. v. Heller*, a majority of the Supreme Court of Canada held that challenges to arbitral jurisdiction may be made to the court where there is a real prospect that referring such a challenge to an arbitrator could result in the challenge never being resolved.[40] The arbitration agreement in question provided that disputes under the agreement were to be arbitrated in the Netherlands and that the plaintiff was to pay an upfront fee.[41] The majority found that the agreement made arbitration "realistically unattainable" for the plaintiff and therefore unenforceable.[42]

In *9354-9186 Québec Inc. v. Callidus Capital Corp*, the unanimous Supreme Court of Canada held that third-party litigation funding is not *per se* illegal.[43]

In *International Air Transport Association v. Instrubel, N.V.*, the Supreme Court of Canada upheld a Quebec Court of Appeal decision permitting the enforcement of a foreign arbitral award in Canada, resulting in the seizure of funds held in Switzerland, where such funds were collected by an entity.[44]

D. NAFTA/USMCA

The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020.[45] Chapter 14 of USMCA deals with Investments,[46] and supersedes Chapter 11 of the North American Free Trade Agreement

38. *See id.*; *CENACE Covid-19 Guarantee*, *supra* note 36.

39. *En riesgo inversiones por US$ 6,400 millones en renovables: ASOLMEX, AMDEE* [Investments of US $ 6.4 billion in renewables at risk: ASOLMEX, AMDEE], ENERGÍA A DEBATE (May 7, 2020), https://www.energiaadebate.com/energia-limpia/en-riesgo-inversiones-por-us-6-400-millones-en-renovables-asolmex-amdee/.

40. Uber Technologies Inc v Heller, 2020 SCC 16, ¶ 46 (Can.).

41. *See generally id.* at 4.

42. *Id.* at ¶ 97.

43. 9354-9186 Québec Inc. v. Callidus Capital Corp., 2020 SCC 10, ¶ 94 (Can.).

44. *See generally* Int'l Air Transp. Ass'n v. Instrubel, N.V., 2019 SCC 61 (Can.).

45. Press Release, Michael R. Pompeo, Secretary of State, Entry into Force of the United States-Mexico-Canada Agreement (July 1, 2020), https://2017-2021.state.gov/entry-into-force-of-the-united-states-mexico-canada-agreement/index.html.

(NAFTA), which allowed for investor-State arbitration.[47] USMCA continues to allow NAFTA Chapter 11 arbitration for "legacy investments" until July 1, 2023.[48] NAFTA arbitrations filed before July 1, 2020, may continue notwithstanding USMCA's entry into force, and arbitrations relating to "legacy investments" that commence after that date may continue under NAFTA even if they have not concluded by July 1, 2023.[49]

For those investors and investments lacking "legacy" NAFTA protection, USMCA generally offers limited arbitration rights. It allows no right of arbitration for U.S. or Mexican investors against Canada, and it prohibits Canadian investors and their investments from raising claims against the U.S. or Mexico.[50] For most U.S. and Mexican investors, arbitration rights are limited in Annex 14-D to circumscribed claims for violations of the national-treatment and/or most-favored-nation-treatment obligations (but not including claims with respect to the establishment or acquisition of an investment) and for direct (but not indirect) expropriation.[51] Investors seeking arbitration under Annex 14-D are also required to exhaust local remedies in the domestic courts of the Respondent state until they obtain a final decision, or until thirty months have elapsed.[52] For U.S. and Mexican investors with a "covered government contract" in specified industry sectors, broader NAFTA-style arbitration rights are available under Annex 14-E.[53] To date, no arbitration claims have been filed under USMCA Chapter 14.

II. ICSID

In June, an International Centre for the Settlement of Investment Disputes (ICSID) tribunal issued an award in *Strabag SE v. Libya* holding that Libya must pay €74.9 million in damages to Strabag SE (Strabag), an Austrian construction firm whose property was lost or damaged during and after the 2011 revolution in Libya.[54]

The bulk of Strabag's claims were based on contracts relating to road and infrastructure projects that a joint venture company, which was sixty percent owned by Strabag's subsidiary and forty percent owned by the Libyan Investment and Development Company, entered into before 2011 with

46. United States-Mexico-Canada Agreement ch. 14, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 30, 2018), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf [hereinafter USMCA].

47. North American Free Trade Agreement ch. 11, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

48. USMCA, art. 14.C.1-3 & 6; *see also id.*, art. 14.2.3. (Note that Annex 14-C of the USMCA is not applicable to arbitration claims against Mexico or the United States that fall within the ambit of Annex 14-E (related to "Covered Government Contracts").

49. *Id.*, art. 14.C.4–5.

50. *Id.*, art. 14.2.4; *see also id.*, art. 14.D.1.

51. *Id.*, art. 14.D.3.1(a)-(b).

52. *Id.*, art. 14.D.5.1(a)-(b).

53. *Id.*, Annex 14-E.

54. Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, ¶¶ 1–3 (June 29, 2020).

three Libyan government entities.[55] Libya argued that the tribunal lacked jurisdiction over those claims under the umbrella clause in the Austria-Libya bilateral investment treaty because none of the parties to those contracts were parties to the arbitration, but the tribunal rejected that argument, holding that "an array of public authorities had a major hand in the conclusion and performance of the contracts," such that Libya "did, indeed, 'enter into' the obligations in the disputed contracts within the meaning of [the umbrella clause] of the Treaty."[56] The tribunal also rejected Libya's argument that the parties' disputes must be litigated in Libyan courts—which is what the contracts provided—because the widespread violence and disorder since 2011 had left Strabag with "no viable mechanisms for settling disputes with the Libyan State entities involved here other than resorting to Treaty arbitration."[57]

III. Europe

A. England & Wales

In March 2020, the Court of Appeal held in *A v. C* that under Section 44 of the Arbitration Act 1996, which gives the Court powers "in support of arbitral proceedings," it can make orders against non-parties to an arbitration.[58] In this case, the court found it could order that an English non-party witness could be deposed in support of a New York-seated arbitration.[59]

In October 2020, *Enka v. Chubb* resolved English law's view of the proper law of the arbitration agreement.[60] The Supreme Court held that where parties have not expressly chosen the law governing the arbitration agreement but have expressly or impliedly chosen the law governing the contract containing the arbitration agreement, that choice will — generally — apply to the arbitration agreement because it is the parties' implied choice.[61] If there is no express or implied choice of the law of the arbitration agreement, it will generally be most closely connected with the curial law.[62]

In November 2020, the Supreme Court also clarified in *Halliburton v. Chubb* that an arbitrator's duty of disclosure is a legal duty in English law, which requires disclosure of matters that might reasonably give rise to justifiable doubts as to the arbitrator's impartiality.[63] The scope and duty of disclosure will be affected by the custom and practice of the relevant field/

55. *Strabag*, ICSID Case No. ARB(AF)/15/1, Award ¶¶ 5, 8.
56. *Id.*, ¶¶ 138, 187.
57. *Strabag*, ICSID Case No. ARB(AF)/15/1 at ¶¶ 5, 8.
58. A and B v. C, D and E [2020] EWCA (Civ) 409 [para. 6] (Eng.).
59. *Id.*
60. Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb [2020] UKSC 38 [¶ 2] (appeal taken from EWCA).
61. *Id.*
62. *Id.*
63. Halliburton Company v. Chubb Bermuda Insurance Ltd. [2020] UKSC 48 [para. 55].

industry. That duty, however, does not override the arbitrator's duty of privacy and confidentiality owed in another arbitration.[64] Failure to disclose relevant matters is a factor to take into account in assessing a real possibility of bias.[65]

Finally, the London Court of International Arbitration issued its new rules for 2020, which further aim to improve efficiency and predictability.[66]

B. IRELAND

In anticipation of Brexit, the Irish government continues to promote Ireland as an international arbitration seat, including by supporting the Legal Services Brexit Initiative. The initiative highlights Ireland's arbitration capabilities and position as an English-speaking common law jurisdiction in the EU Bloc.

Further, a notable High Court decision on arbitration clauses was both timely and on point. In *Narooma Ltd v. HSE*, Ireland's Health Service Executive (HSE) entered into a contract for the urgent acquisition of ventilators during the COVID-19 pandemic.[67] After becoming concerned about the plaintiff (and alleged representations about its status as agent/distributor for the Chinese manufacturer), HSE refused to proceed with the contract.[68] The disputes clause stated, "Both Parties, by mutual consent, resolve to refer any dispute to [arbitration]."[69] The plaintiff claimed there was no valid arbitration clause because this language was merely an agreement to agree whether to refer a dispute to arbitration. The contract was based on a template downloaded from the internet and neither party received legal advice on it.[70]

The Court held that the clear meaning of the words was that the parties had resolved to refer any dispute to arbitration (the only meaning consistent with the context and commercial purpose).[71] As Article 8 of the Model Law is in force in Ireland via Section 8 of the Arbitration Act, the Court referred the parties to arbitration.[72]

64. *Id.*

65. *Id.*

66. London Court of International Arbitration Rules (2020), https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx [hereinafter LCIA Rules].

67. Narooma Ltd. v. HSE [2020] IEHC 315, ¶¶ 2–3 (Ir.).

68. *Id.* ¶ 4.

69. *Id.* ¶ 52.

70. *Id.* ¶¶ 8–9.

71. *Id.* ¶ 101.

72. *Id.* ¶¶ 57–58.

C. France

On October 8, 2020, the International Chamber of Commerce (ICC) announced the adoption of the 2021 ICC Arbitration Rules ("ICC Rules"),[73] which will enter into force on January 1, 2021. Notable revisions include the addition of Article 11(7), which requires each party to "promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration."[74] Article 11(7) marks a step toward more transparency in third-party funding arrangements, bringing the ICC Rules in line with the IBA Guidelines on Conflicts of Interest in International Arbitration and the 2018 Hong Kong International Arbitration Centre (HKIAC) Rules.

Also noteworthy are the new Article 7(5),[75] which allows the joinder of additional parties after the constitution of a tribunal, and Article 12(9),[76] which empowers the ICC Court to appoint each member of the tribunal, notwithstanding any agreement by the parties on the method of constitution, "in exceptional circumstances . . . to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award."[77]

The 2021 ICC Rules also contain two new provisions applying to investment arbitrations based on treaties. Article 13(6), aimed at ensuring the tribunal's neutrality, provides that no arbitrator shall have the same nationality as any party to an arbitration, unless the parties agree otherwise.[78] The new Article 29(6)(c) also codifies the ICC Court's established practice of not allowing emergency arbitrations for investor-State disputes.[79]

In the *Sheikh Faisal v. CFF* and *Sorelec v. Libya* decisions, the Paris Court of Appeal, deciding on annulment applications, reaffirmed its position that in matters involving allegations of corruption, it has the power to review *de novo* all legal and factual elements necessary to establish the unlawfulness of agreements and to assess whether the recognition or enforcement of awards would manifestly, effectively, and specifically violate international public policy.[80] In line with its previous case law,[81] the Court ruled that arbitral awards shall be annulled where it is established by a set of serious, precise,

73. *ICC Unveils Revised Rules of Arbitration*, Int'l Chamber of Commerce (Aug. 10, 2020), https://iccwbo.org/media-wall/news-speeches/icc-unveils-revised-rules-of-arbitration/; *see also* 2021 Arbitration Rules, Int'l Chamber of Commerce https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/rules-of-arbitration-2021/ (last visited Jun. 4, 2021).

74. *Id.* art. 11(7).

75. *Id.* art. 7(5).

76. *Id.* art. 12(9).

77. *Id.*

78. *Id.* art. 13(6).

79. *Id.* art. 29(6)(c).

80. *Cour d'appel* [CA] [regional court of appeal] Paris, 1e ch., June 30, 2020, 17/22515; Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Nov. 17, 2020, 18/02568.

and concordant indicia that the agreement under scrutiny was obtained through corruption.[82]

In the *Kout Food Group* decision, the Paris Court of Appeal ruled that, absent any express choice-of-law provision, the law of the arbitration seat will govern the validity of the arbitral award.[83] This was an express divergence from the London High Court, which denied enforcement of the award on the ground that the arbitration agreement was governed by the law applicable to the contract.[84]

D. GERMANY

On January 16, 2020, the *Oberlandesgericht Frankfurt am Main* (OLG) (Higher Regional Court Frankfurt) (OLG) issued a controversial decision, providing the arbitration community with an obiter dictum on the consequences of dissenting opinions in arbitral awards.[85] The OLG opined that a dissenting opinion by the minority arbitrator violates the procedural *ordre public*, which results in the risk of annulment of the award.[86] The reasoning behind this is that generally, except for the German Federal Constitutional Court and some State Constitutional Courts, judges in Germany are prohibited from rendering dissenting opinions because they are bound to uphold the secrecy of deliberations (*Beratungsgeheimnis*).[87] The decision is subject to an appeal to the Bundesgerichtshof (German Federal Supreme Court).

COVID-19 has accelerated the use of technology solutions, which have been adopted by the arbitration community in Germany. In addition to existing flexibility in departing from in-person hearings in favor of videoconferencing,[88] the Deutsche Institution *für Schiedsgerichtsbarkeit* (German Arbitration Institute) announced[89] further distinct procedures for the administration of pending and future arbitrations, including (i) an

81. *Cour d'appel* [CA] [regional court of appeal] Paris, 1e ch., Apr. 10, 2018, REV. ARB., 2018(3), at 574–81; Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Feb. 21, 2017, 15/01650.

82. *Cour d'appel* [CA] [Regional Court of Appeal] Paris, 1e ch., Nov. 17, 2020, 18/02568.

83. *See Cour d'appel* [CA] [Regional Court of Appeal] Paris, 1e ch., June 23, 2020, 17/22943 (Fr.)

84. *See* Kabab-Ji SAL v. Kout Food Group, [2020] EWCA (Civ) 6, ¶ 16.

85. *Oberlandasgericht* [OLG] [Higher Regional Court] Jan. 16, 2020, 26 Sch. 14/18 (Ger.), https://openjur.de/u/2261758.html.

86. *Bürgerliches Gesetzbuch* [BGB] [Civil Code], § 1059, ¶ 2, sentence 2 *translation available at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.).

87. OLG, *supra* note 85.

88. German Arbitration Institute, 2018 DIS Arbitration Rules at Annex 3, ¶ G (March 1, 2018), *available at* https://www.disarb.org/en/tools-for-dis-proceedings/dis-rules.

89. *Announcement of Particular Procedural Features for the Administration of Arbitrations in View of the Covid-19, Pandemic*, GERMAN ARBITRATION INSTITUTE, (July 1, 2020) *available at* https://www.disarb.org/en/about-us/update-covid-19.

automatic extension of time limits,[90] and (ii) exclusive transmission of communications and invoices by e-mail.[91]

E. Russia

In June 2020, new Russian procedural legislation entered into force and introduced some critical amendments aimed at protecting sanctioned Russian entities struggling to secure their rights in foreign jurisdictions, including:

- A default rule that Russian state commercial courts have exclusive jurisdiction over disputes (i) involving entities under foreign sanctions or (ii) originating from anti-Russian sanctions;[92]
- "Barriers to access to justice" for a sanctioned person as a new ground for unenforceability of a prorogation agreement in favor of a foreign court or an arbitration agreement with a seat outside Russia;[93]
- The possibility of obtaining anti-suit injunctions in Russia in respect of foreign arbitration or court proceedings commenced in violation of this change in law, which can trigger liability up to the amount in dispute.[94]

The legislation does not define barriers to access to justice, but according to public deliberations on the law and emerging court practice, this may include any difficulties in paying arbitration charges or hiring a lawyer, or any other difficulties related to participation in the proceedings.[95] Russian courts apply this novelty to arbitration agreements concluded even before the law entered into force.[96]

F. Spain

In June 2020, the Constitutional Court rendered a judgment on an appeal based on the infringement of fundamental rights, reinforcing its doctrine on the scope of the courts' control of arbitral awards.[97] The judgment ultimately strengthens arbitration as a dispute resolution mechanism. As minimum court intervention in favor of party autonomy is inherent to arbitration, an annulment action must be understood as a process of external control over the award's validity that does not allow a review of the award's

90. *Id.* §§ 4, 9.
91. *Id.*
92. *Arbitrazhno-Protsessualnyi Kodeks Rossiiskoi Federatsii* [APK RF] [Code of Arbitration Procedure] art. 2481, ¶ 1 (Rus.).
93. *Id.* ¶ 4.
94. *Id.* art. 2482, ¶ 10.
95. *Extension of Exclusive Jurisdiction of Russian Courts Over the Disputes With Russian Sanctioned Entities: Potential Unenforceability of Prorogation Agreements and Anti-Suit Injunctions*, ALRUD (June 10, 2020), https://www.alrud.com/publications/5efb161c8b4b1e5752512f2a/.
96. *Id.*
97. S.T.C., June 15, 2020 (B.O.E., No. 46) (Spain).

merits.[98] Public order as a pretext for analysis of the merits of the award must be subject to the constitutional canons of reasonableness and non-arbitrariness.[99] Otherwise, it would distort arbitration and ultimately violate the will of the parties.[100]

G. UKRAINE

In 2020, the Ukrainian Parliament took its first steps toward adopting the long-awaited Law on Mediation[101] and initiated changes to the Law on Arbitration (*Treteisky*) Courts,[102] aimed at greater transparency and wider use of domestic arbitration (*Treteisky*) courts.

In cooperation with USAID, the Ukrainian government also took steps toward establishing an International Commercial Court within the Ukrainian court system.[103] Once instituted, the court is expected to be narrowly specialized and have jurisdiction over disputes with foreign elements.[104]

In September, domestic Ukrainian arbitration institutions—ICAC and MAC at the UCCI—amended the Rules to address the impacts of quarantine restrictions and to enhance the effectiveness of arbitrating disputes and the enforceability of awards.[105]

This year, Ukrainian courts have taken a uniform approach in recognizing awards rendered in favor of Russian companies: awards can be enforced in Ukraine only after the creditor is removed from the sanctions list.[106]

H. SWITZERLAND

To preserve its position as one of the most advanced and popular venues for international arbitration, Switzerland enacted extensive amendments to its international arbitration laws, which will go into effect on January 1,

98. *Id.*

99. *Id.*

100. *Id.*

101. Draft Law on Mediation, 2020 (No. 3504), *available at* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=3504&skl=10.

102. Draft Law on Changes to the Law of Ukraine on Arbitration (Treteisky) Courts, 2020, (No. 3460), *available at* http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id&pf3511=68803.

103. *On the New International Commercial Court from Ivan Lishchyna*, UKRAINIAN BAR ASSOCIATION (Aug. 04, 2020), https://uba.ua/eng/news/7757/.

104. *Id.*

105. *The Ukrainian Chamber of Commerce and Industry (the UCCI) Approved the Amendments to the Rules of the International Commercial Arbitration Court (the ICAC) and the Ukrainian Maritime Arbitration Commission (the UMAC)*, INT'L COM. ARBITRATION COURT, https://icac.org.ua/en/novyny-ta-publikatsiyi/tpp-ukrayiny-zatverdyla-zminy-do-reglamentiv-mkas-i-mak-pry-tpp-ukrayiny/ (last visited Mar. 28, 2021).

106. Avia-Fed-Service JSC v. Artem SJSHC, Resolution of the Supreme Court, Case No. 824/174/19 (June 25, 2020), *available at* https://reyestr.court.gov.ua/Review/90143722.

2021.[107] International arbitration is now exclusively regulated by Chapter 12 of the Federal Statute on Private International Law, which clarifies that an arbitration is "international" if at least one party to the arbitration agreement had its seat or domicile outside of Switzerland at the time the arbitration agreement was concluded.[108] Parties may, however, opt out and can voluntarily submit to the rules governing domestic arbitrations. The new rules also provide for state courts to appoint and replace arbitrators in case the parties failed to agree on specific procedures for doing so in the arbitration agreement.[109] The written form requirements for arbitration agreements have also been modernized to account for all forms of modern communication that may prove the existence of an arbitration agreement.[110] Finally, the new rules provide for challenges to arbitral awards to be decided by the Swiss Federal Court, and arbitral awards can be challenged regardless of the amount in dispute.[111] Moreover, the revised law codifies other legal remedies against a final award, most importantly the so-called Revision, which allows the reopening of arbitration proceedings in limited circumstances.[112] A request that an award be set aside can also now be filed in English in addition to the official languages of Switzerland; but, the decision will be rendered in one of the official languages.[113]

I. SWEDEN

On February 4, 2020, the Supreme Court of Sweden requested a preliminary ruling[114] from the Court of Justice of the European Union (CJEU) on whether the CJEU's *Achmea* ruling[115] requires that it set aside two arbitral awards rendered in *PL Holdings v. Poland* under Poland's BIT with the Belgium-Luxembourg Economic Union. Specifically, the Supreme Court of Sweden has asked the CJEU whether Articles 267 and 344 of the Treaty on the Functioning of the European Union, as interpreted in *Achmea*, hold that an arbitration agreement between an E.U. Member State and investor is invalid in the context of an intra-E.U. BIT if the Member State freely accepts the investor's request for arbitration and does not object on jurisdiction.[116]

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107. Vanessa Alarcon Duvanel, King & Spalding, *Switzerland Updates Its Arbitration Law*, JDSUPRA, https://www.jdsupra.com/legalnews/switzerland-updates-its-arbitration-law-8213272/ (last visited Apr. 4, 2021).

108. *Loi Fédérale sur le droit international prive* [LDIP] [The Federal Act on Private International Law], *Systematische Sammlung des Bundesrechts* [SR] [systematic compilation of federal law] Dec. 17, 1987, SR 291, art. 176.

109. *Id.* art. 179.

110. *Id.* art. 178.

111. *Id.* art. 191.

112. Duvanel, King & Spalding, *supra* note 107.

113. *Id.*

114. *Högsta Domstolen* [HD] [Supreme Court] 2020-02-04 Ö 1569-19 (Swed.).

115. Case C-284/16, Slowakische Republik v. Achmea BV, 2017 E.C.R. 1.

116. *See* ICLG.COM, https://iclg.com/practice-areas/investor-state-arbitration-laws-and-regulations/sweden (last visited Jun. 4, 2021).

The case is on appeal from the Svea Court of Appeal, which in 2019 largely upheld the two awards after finding that *Achmea* did not prohibit States and investors within the EU from agreeing to arbitrate a specific dispute based on the intentions of the parties (concluding that Poland's conduct in the arbitration evidenced such an agreement) and that Poland's *Achmea*-based objection to the validity of the arbitration agreement was untimely and thus waived under the Swedish Arbitration Act.[117]

The Supreme Court of Sweden is currently awaiting the CJEU's preliminary ruling, which could have significant ramifications for parties in intra-E.U. BIT arbitrations.

IV. Pacific Rim

A. Australia

In 2020, *Eiser Infrastructure v Spain*, arising from Spain's renewable energy reforms, was Australia's most significant decision.[118] The Federal Court of Australia granted leave to enforce two arbitral awards against Spain under the ICSID Convention. The court held that in ratifying the ICSID Convention, Spain submitted to the jurisdiction of Australian courts with respect to enforcement of ICSID awards and waived its sovereign immunity under Australian law.[119] This decision considered the first step of recognizing and enforcing arbitral awards but did not consider the execution of judgments against the Spanish, sovereign-owned assets.[120] Because execution may still be subject to sovereign immunity limitations, this decision could prove a pyrrhic victory for the investors.

B. China and Hong Kong

In August 2020, Guangzhou Intermediate People's Court held that if a foreign arbitration institute made an arbitral award within the territory of China, the arbitral award may be considered a Chinese award involving foreign matters.[121] This ruling allowed parties to petition a Chinese court to enforce the award based on Chinese law and settled a long-standing debate, confirming that China-seated awards made by a foreign arbitration institution shall be regarded as locally enforceable Chinese awards.[122] This

117. *Hovrätt* [HovR] [Court of Appeals] 2019-02-22 Ö 8538-17 (Swed.).
118. *Eiser Infrastructure v. Kingdom of Spain* [2020] FCA 157 (Austl.).
119. *Id.* ¶¶ 209, 211.
120. *Id.* ¶¶ 6, 67.
121. 布兰特伍德工业有限公司、广东阀安龙机械成套设备工程有限公司申请承认与执行法院判决、仲裁裁决案件一审民事裁定书 [Brentwood Industries, Inc. v. Guangdong Fa-anlong Mechanical Equipment Manufacture Co. Ltd.] https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=bded4e3c31b94ae8b42fac2500a68cc4 (Guangzhou Int. People's Ct., Aug. 6, 2020) (China).
122. *See id.*

decision will clear the way for foreign institutions to conduct arbitrations in China.

In October 2020, the Hong Kong Court of Final Appeal decided that Hong Kong courts could grant broad remedies in actions to enforce awards. This decision protects prevailing parties facing a refusal to honor a non-monetary award. The court held that when a non-monetary award has not been complied with, the enforcing court could fashion any apt remedy from the full range of remedies available in an ordinary common law action.[123]

As of October 22, 2020, Hong Kong International Arbitration Centre (HKIAC) has handled thirty-two applications to Chinese courts for interim measures; Chinese courts granted at least seventeen applications to preserve assets.[124] The total value of the assets sought to be preserved was around RMB 10.7 billion (approximately $1.6 billion).[125] On November 27, 2020, the Hong Kong Government and the Supreme People's Court of China signed the Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, making several amendments to the arrangement entered into in 2000.[126]

C. TAIWAN

After more than thirty meetings of a taskforce—including experts from Taiwan, United Kingdom, and Australia—the Chinese Arbitration Association submitted a bill of the Arbitration Act based on the UNCITRAL Model Law.[127] The Bill introduces mechanisms the current Arbitration Act lacks, such as interim measures and preliminary orders.[128] It also resolves issues such as grounds for arbitrator withdrawal and challenge, statute of limitations[129] when an arbitral award is annulled, and the definition of foreign-arbitral awards.

123. Xiamen Xinjingdi Group Co. Ltd. v. Eton Prop. Ltd. et. al., [2020] H.K.C.F.A.R. 32, ¶ 126 (H.C.).

124. *HKIAC Report on the PRC-HK Interim Measures Arrangement: Responses to Frequently Asked Questions*, HONG KONG INT'L ARBITRATION CENTRE (Oct. 22, 2020), https://www.hkiac.org/sites/default/files/ck_filebrowser/20201022%20HKIAC%20Report%20on%20PRC-HK%20Interim%20Measures%20Arrangement.pdf.

125. *Id.* ¶ 2.3.

126. Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland & the Hong Kong Special Administrative Region, China-H.K., Nov. 27, 2020.

127. *International Arbitration 2020*, CHAMBERS & PARTNERS, https://practiceguides.chambers.com/practice-guides/comparison/505/5496/8800-8805-8808-8813-8819-8827-8831-8836-8840-8842-8846-8850-8854 (last updated Aug. 18, 2020).

128. *Id.*

129. *Id.*

D. SINGAPORE & ASEAN

In October 2020, Singapore amended its International Arbitration Act.[130] Significant changes relevant to arbitrations seated in Singapore are the addition of default procedures for appointing arbitrators in multi-party arbitrations[131] and explicitly providing enforcement of confidentiality provisions by an arbitral tribunal or a court.[132]

The Court of Appeal declined to uphold an artificial interpretation of an arbitration agreement, finding that the proper seat of Arbitration was Singapore, and the applicable law was Singapore law.[133] The Court of Appeal also applied the Tribunal Versus Claim Test for deciding whether an issue went toward jurisdiction or admissibility.[134] It held that issues of time barring arising from statutory limitation periods went to admissibility, even if the applicable statute of limitation was classified as substantive or procedural.[135]

The Singapore High Court set aside an arbitration award due to the "breach of natural justice" resulting from the tribunal's refusal to hear a party's witness evidence.[136] The High Court also found in another case that the ninety-day time limit for setting aside an award cannot be extended due to fraud discovered after that period.[137]

In July 2020, the Singapore International Arbitration Centre announced it expects revised arbitration rules in 2021.[138]

Myanmar recognized and enforced a foreign, arbitral award for the first time.[139] Cambodia's National Commercial Arbitration Centre announced in July 2020 that it is revising its arbitration rules and expects to release the revised rules next year.[140]

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130. Ch. 143A International Arbitration Act (I.A.A) of 1994, *amended by* No. 34 I.A.A. (Supp. 2020) (Sing.), https://sso.agc.gov.sg/Acts-Supp/32-2020/Published/20201111?DocDate=20201111#al-.

131. *Id.* § 3.

132. *Id.* § 4.

133. BNA v. BNB [2019] SGCA 84.

134. BBA v. BAZ [2020] SGCA 53.

135. *Id.*

136. CBP v. CBS (Sing.), Judgment, [2020] SGHC 23, ¶ 49 (Jan. 31, 2020), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sghc-23-pdf.pdf.

137. Bloomberry Resorts & Hotels v. Global Gaming Phil. (Sing.), [2020] SGHC 01, ¶ 46 (Jan. 3, 2020), https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/-2020-sghc-01-pdf.

138. *SIAC Announces Commencement of Revisions for SIAC Arbitration Rules*, SIAC PRESS RELEASE (July 7, 2020), *available at* https://www.siac.org.sg/.

139. Yoshiaki Muto, Hiroshi Kasuya & Dominic Sharman, *Client Alert: International Arbitration Update No. 10: Landmark Recognition and Enforcement of a Foreign Arbitral Award in Myanmar*, Baker McKenzie (Aug. 6, 2020), https://www.bakermckenzie.co.jp/wp/wp-content/uploads/20200806_ClientAlert_International_Arbitration_Update_No.10_E.pdf.

140. Sarath Sorn, *Arbitration Rules Under Review*, KHMER TIMES (July 28, 2020), https://www.khmertimeskh.com/50749327/arbitration-rules-under-review/.

V. Africa

In 2020, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards strengthened its membership in Africa.[141] The Seychelles, Ethiopia, and Sierra Leone acceded to the New York Convention on February 3, August 24, and October 28, 2020 (respectively).[142]

Negotiations on the Investment Protocol to the African Continental Free Trade Area were expected to start at the end of 2020.[143] The Investment Protocol would replace the existing 171 intra-African bilateral investment treaties (BITs) with a single multi-lateral instrument, presenting a unified ISDS framework for all intra-African investments[144] and striking a harmonized balance between investment protection and the African States' right to regulate their public interests.[145]

In July 2020, the Arbitration Foundation of Southern Africa (AFSA) published its new draft of International Arbitration Rules for public comment, which includes *inter alia* the creation of a new AFSA International Court and provisions on the conduct of virtual hearings.[146]

A. Egypt

In October, the Egyptian Court of Cassation affirmed that estoppel and the prohibition of taking advantage of one's own wrongdoing are universally applicable principles in arbitration and beyond under Egyptian law.[147] The Court found that a party that fails to raise a procedural irregularity on time would be estopped from raising it in subsequent set-aside proceedings.[148] It also confirmed that parties to an Egyptian-seated arbitration need not be represented by Egyptian lawyers and acknowledged the increasing recourse to virtual arbitral hearings worldwide.[149]

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141. *See generally List of Contracting States*, N.Y. Arbitration Convention, http://www.newyorkconvention.org/countries (last visited Jun. 4, 2021).
142. *Id.*
143. Hamed El-Kady, *The New Landmark African Investment Protocol: A Quantum Leap for African Investment Policy Making?*, Kluwer Arbitration Blog (Sept. 24, 2020), http://arbitrationblog.kluwerarbitration.com/2020/09/24/the-new-landmark-african-investment-protocol-a-quantum-leap-for-african-investment-policy-making/.
144. United Nations Conference on Trade and Development (UNCTD), *World Investment Report*, *Special Economic Zones* at 20 (2019), https://unctad.org/system/files/official-document/wir2019_en.pdf.
145. El-Kady, *supra* note 143.
146. Jonathan W. Lim & Gregory Travaini, *AFSA Launches New International Arbitration Rules for Public Comment*, Kluwer Arbitration Blog, (July 23, 2020), at 1, http://arbitrationblog.kluwerarbitration.com/2020/07/23/afsa-launches-new-international-arbitration-rules-for-public-comment/.
147. Mohammed Abdel Wahab, *Egypt's Top Court Issues Wide-Ranging Decision*, Glob. Arbitration Rev. (Nov. 6, 2020), https://globalarbitrationreview.com/egypts-top-court-issues-wide-ranging-decision.
148. *Id.*
149. *Id.*

B. Nigeria

A unanimous ICSID award rejected two U.S. oil companies' $3 billion claims against Nigeria, ruling that Nigeria did not breach its duties to the claimants.[150] After finding that the Nigerian National Petroleum Corporation's actions and omissions were not attributable to Nigeria,[151] the Tribunal rejected the claimants' accusation that Nigeria's courts engaged in judicial expropriation.[152]

VI. South America

A. Argentina

Due to the COVID-19 pandemic and the effects of governmental restrictive measures, local practitioners expect an increase in arbitration cases.[153] With this concern in mind, these practitioners have joined efforts with their regional colleagues at the Latin American Arbitration Association to launch a permanent observatory body to monitor the evolution of arbitration in Latin America.[154]

Regarding investment arbitration, Argentina remains one of the most-sued countries[155] and expects a new flood of cases to arise from the announcement of the termination of several PPP contracts entered into by former governmental authorities in 2018.[156]

B. Uruguay

On November 17, 2020, Parliament approved the "General Law on Private International Law, which recognizes party autonomy to select the

150. Interocean Oil Dev. Co. & Interocean Oil Exploration Co. v. Fed. Republic of Nigeria, ICSID Case No. ARB/13/20, Award, ¶ 299 (Oct. 6, 2020), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw1189.pdf; Interocean Oil Dev. Co. & Interocean Oil Exploration Co. v. Fed. Republic of Nigeria, ICSID Case No. ARB/13/20, at ¶¶ 308, 310–315.
151. Interocean Oil Dev. Co. & Interocean Oil Exploration Co. v. Fed. Republic of Nigeria [hereinafter *Interocean Oil*], ICSID Case No. ARB/13/20, Award, ¶ 299 (Oct. 6, 2020), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw1189.pdf. For an analysis of the Tribunal's decision on attribution, *see* Alison Ross, *What The Award In Interocean v. Nigeria Tells Us*, Glob. Arbitration Rev. (Nov. 10, 2020), https://globalarbitrationreview.com/public-international-law/what-the-award-in-interocean-v-nigeria-tells-us.
152. *Interocean Oil*, at ¶¶ 308, 310–315; *see also* Ross, *supra* note 151.
153. *See* Practical Law Arbitration, *Latin American Arbitration Association launches permanent observatory body to monitor arbitration in Latin America*, Thomson Reuters (July 14, 2020), https://uk.practicallaw.thomsonreuters.com.
154. *Id.*
155. *See X-Ray of Investment Arbitration with Argentina, Spain and Venezuela at the Forefront*, CIAR Glob. (Oct. 30, 2019), https://ciarglobal.com/radiografia-del-arbitraje-de-inversiones-con-argentina-espana-y-venezuela-a-la-cabeza/.
156. *Id.*

law governing commercial contracts."[157] The outdated framework preceding this law did not permit free choice of law.

On June 3, 2020, in a case brought against Uber by one of its drivers in Montevideo, the Labor Court of Appeals held that Uruguayan courts had jurisdiction despite the contract's arbitration clause. The clause, which was rendered null and void, contemplated arbitration seated in Amsterdam.[158]

In the investment arbitration arena, in August 2020, Uruguay prevailed in a $4 billion case before the Permanent Court of Arbitration. Mining investors brought the case after one of the most ambitious projects in Uruguayan mining history failed. Dismissal was granted on jurisdictional grounds.[159]

C. BRAZIL

In Brazil, four decisions marked key developments in arbitration. For instance, the Superior Court of Justice decided that:[160] (i) Petrobras's shareholders could not arbitrate against the Federal Government (Petrobras's controlling shareholder), which is not party to a shareholders' agreement;[161] and (ii) state courts lack jurisdiction over the existence, validity, and amount of a debt arising from a contract subject to arbitration.[162]

In addition, the São Paulo Court of Appeal: (i) set aside an award where the presiding arbitrator had failed to disclose that he had previously been appointed by one of the parties in a similar case;[163] and (ii) found that Brazil-seated arbitrations may be subject to foreign law;[164] the dismissal of a request for production of evidence by the arbitrator does not per se violate due

157. *Documents & Laws*, PARLAMENTO DEL URUGUAY, https://parlamento.gub.uy/documentosyleyes/ficha-asunto/38377/tramite.

158. *See* Soledad Diaz, *Arbitrability of Disputes Between Apps and Drivers in Uruguay*, INT'L BAR ASS'N (Nov. 26, 2020), IBA - Arbitrability of disputes between apps and drivers in Uruguay (ibanet.org).

159. *See* Cosmo Sanderson, *Uruguay Defeats Multibillion-Dollar Mining Claim*, GLOB. ARBITRATION REV. (GAR) (Aug. 7, 2020), https://globalarbitrationreview.com/uruguay-defeats-multibillion-dollar-mining-claim.

160. Marci Hoffman, *Brazil – Legal System*, FOREIGN LAW GUIDE (Apr. 2, 2021), Brazil - Legal System — Brill (smu.edu).

161. S.T.J.J., C.C. No. 151130 2017.0043173-8, Relator: Min. Nancy Andrighi e Min. Acórdão Ministro Luis Felipe Salomao, 27.11.2019, Diário do Judiciário Eletrônico [d.j.e.], 11.02.2020, ¶ 3 (Braz.), https://scon.stj.jus.br/SCON/jurisprudencia/doc.jsp?livre=151%2C130&b=ACOR&p=false&thesaurus=JURIDICO&l=10&i=1&operador=e&tipo_visualizacao=RESUMO.

162. S.T.J.J., R.E. No. 1864686 2019.0167038-0, Relator: Min. Moura Ribeiro, 13.10.2020, Diário do Judiciário Eletrônico [d.j.e.], 15.10.2020, ¶ 2 (Braz.), https://scon.stj.jus.br/SCON/pesquisar.jsp.

163. *See generally* T.J.S.P., Ap. Civ. No. 1076161-35.2017.8.26.0100, Relator: Francisco Casconi, DIÁRIO DA JUSTIÇA [D.J.E.S.P.], 08.09.2020, 472 (Braz.), https://tj-sp.jusbrasil.com.br/jurisprudencia/934380035/apelacao-civel-ac-10761613520178260100-sp-1076161-3520178260100/inteiro-teor-934380066.

164. *Id.*

process;[165] and (iii) an arbitration award cannot be set aside based on public information not disclosed by the arbitrator.[166]

D. CHILE

In September 2020, the Supreme Court granted an appeal in an arbitration that was arguably international and therefore governed by Chile's International Commercial Arbitration Act.[167] Under the Act, annulment is the sole recourse against an arbitral award.[168] The Court found that, even though the arbitration agreement provided for application of the international arbitration rules of the Chamber of Commerce of Santiago, the agreement was clear that the parties intended to allow an appeal against the award.[169] The Court's decision was not based on whether the arbitration was international, but rather on the voluntary nature of arbitration and on the principles of party autonomy and procedural good faith.[170]

E. COLOMBIA

In April, the Colombian Council of State, the highest court with jurisdiction over administrative issues, recognized an ICC arbitral award under the Colombian Arbitration Statute for the first time.[171] The Court granted a set-aside petition against an international arbitration award because the deciding tribunal violated the parties' agreed-upon procedure when it allowed Claimant to correct an expert opinion; but the Court denied Respondent a response.[172] The Court departed from requirements established by the Colombian Supreme Court,[173] the highest court with

165. *Id.*

166. *See generally* T.J.S.P, Ap. Civ. No. 1056400-47.2019.8.26.0100/50001, Relator: Fortes Barbosa, 26.08.2019, 16, DIÁRIO DA JUSTIÇA [D.J.E.S.P.], 205 (Braz.), https://jurisprudencia.s3.amazonaws.com/TJ-SP/attachments/TJ-SP_EMBDECCV_10564004720198260100_8fb54.pdf?AWSAccessKeyId=AKIARMMD5JEAO67SMCVA&Expires=1618583314&Signature=W5%2FFTfUUONdDzTKW0zP0t%2FomiDk%3D.

167. *See Corte Suprema de Justicia* [C.S.J] [Supreme Court of Justice], 14 de septiembre 2020, "*Sudamérica SpA y CCF Sudamérica SpA*," *Rol de la causa: 19.568-2020*, *internacional privado*, *Revista Chilena de Derecho* [R.CH.D] No. 6 p. 125 (Chile), http://wolterskluwerblogs.com/arbitration/wp-content/uploads/sites/48/2021/01/final-judgement.pdf.

168. *Id.*

169. *Id.*

170. *Id.* ¶ 6.

171. *Consejo de Estado* [C.E.] [Council of State], Sala Tercera, Apr. 17, 2020, M.P: Maria Adriana Marin, Expediente 2019-00015/63266 (Colom.) *available at* http://www.consejodeestado.gov.co/busquedas/buscador-jurisprudencia/index.htm.

172. *Consejo de Estado* [C.E.] [Council of State], Sala Tercera, Feb. 27, 2020, M.P: Maria Adriana Marin, Expediente 2018-00012/60714 (Colom.) *available at* https://www.kluwerarbitration.com/document/KLI-KA-ONS-20-25-018, § 8.2. (Colom.) *available at* https://www.kluwerarbitration.com/document/KLI-KA-ONS-20-25-018, § 8.2.

173. *Id.* § 8.2.4.viii; *see also Corte Suprema de Justicia* [C.S.J.] [Supreme Court], *Sala de Casación Civil y Agraria*, Jul. 11, 2018, Expediente 2017-03480, n.° SC5677-2018, M.P: Margarita Cabello Blanco.

jurisdiction over civil and criminal issues, reasoning that these requirements included conditions that are not provided by the Colombian Arbitration Act.[174] This decision may lower the bar to set aside international arbitration awards.

F. VENEZUELA

In March, the Swiss Federal Tribunal revived a $185 million claim when it set aside an award issued in *Clorox Spain v. Venezuela*, where the Permanent Court of Arbitration declined jurisdiction over Clorox's claim.[175] U.S. district courts also enforced two awards against Venezuela for a sum of nearly $444 million.[176] Venezuela now owes approximately $12.45 billion in international arbitration awards.[177]

G. PERU

Emergency Decree No. 020-2020 reformed Peru's international arbitration system after a Odebrecht Scandal that involved arbitrator bribes. The decree aims to protect procedural integrity where the State is a party.[178] Separately, Peru faced six arbitration claims.[179] Among these is a claim by

174. *Consejo de Estado* [C.E.] [Council of State], Sala Tercera, Feb. 27, 2020, M.P: Maria Adriana Marin, Expediente 2018-00012/60714 (Colom.) at § 8.2.4. *available at* http://www.consejodeestado.gov.co/busquedas/buscador-jurisprudencia/index.htm.

175. *Tribunal fédérale* [TF] [Federal Supreme Court] Mar. 25, 2020, 4A_306/2019 (Switz.), https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F25-03-2020-4A_306-2019&lang=de&type=show_document&zoom=YES&; Report of *Clorox v. Venezuela*, INV. POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/832/clorox-v-venezuela.

176. Commodities & Mins Enter., v. CVG Ferrominera Orinoco, C.A., No. 19-CV-25217-GAYLES (S.D. Fla. Sept. 23, 2020); Tenaris S.A. & Talta-Trading E Mktg. Socidade Unipessoal LDA v. Bolivarian Republic of Venez., No. 18-CV-1371, ¶ 3, (D.D.C. Jun. 17, 2020).

177. *See* ConocoPhillips v. Venezuela, INV. POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/245/conocophillips-v-venezuela; Crystallex v. Venezuela, INV. POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/403/crystallex-v-venezuela; *Rusoro and Venezuela Reach Billion Dollar Settlement*, GLOB. ARBITRATION REV. (Oct. 12, 2018), https://globalarbitrationreview.com/rusoro-and-venezuela-reach-billion-dollar-settlement; *Guaido Fails Halt US Enforcement Against Venezuela*, GLOB. ARBITRATION REV. (Nov. 6, 2019), https://globalarbitrationreview.com/guaido-fails-halt-us-enforcement-against-venezuela (This figure is approximate and only includes investment arbitration cases. Venezuela owes $1.2 billion to Crystallex International Corporation, $1.3 billion to Rusoro Mining Ltd., $0.5 billion to Ol European Group, and $0.25 billion to Tenaris and Talta; PDVSA owes $9 billion to ConocoPhillips; and CVG Ferrominera Orinoco owes $0.2 billion to Commodities & Minerals Enterprise.).

178. Diego Martínez Villacorta & Emily Horna Rodríguez, *Peruvian Arbitration System Before and After the Covid-19 Pandemic*, GLOBAL ARBITRATION REV. (Oct. 13, 2020), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/peruvian-arbitration-system-and-after-the-covid-19-pandemic.

179. Of the six cases registered against Peru, six were registered at ICSID. *See* Odebrecht Latinvest S.à.r.l. v. Republic of Peru (ICSID Case No. ARB/20/4); Freeport-McMoRan v. Republic of Peru (ICSID Case No. ARB/20/8); SMM Cerro Verde Neth. B.V. v. Republic of

Odebrecht seeking $1.2 billion related to Peru's actions against the company following the corruption Scandal.[180] Odebrecht alleges Peru canceled the $7 billion *Gasoducto Sur Peruano* natural gas pipeline project, banned the company from contract bidding, and forced it to divest interest in projects.[181]

Peru (ICSID Case No. ARB/20/14); Desarrollo Vial de los Andes S.A.C. v. Republic of Peru (ICSID Case No. ARB/20/18); Lupaka Gold Corp. v. Republic of Peru (ICSID Case No. ARB/20/46), and one was registered at the PCA, *see* Bacilio Amorrortu v. Republic of Peru (PCA Case No. 2020-11).

180. Cosmo Sanderson, *Odebrecht Brings Treaty Claim Against Peru*, GLOBAL ARBITRATION REV. (Feb. 5, 2020), https://globalarbitrationreview.com/odebrecht-brings-treaty-claim-against-peru.

181. *Id.*

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