



DATE DOWNLOADED: Wed Nov 8 19:25:37 2023

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Please note: citations are provided as a general guideline. Users should consult their preferred citation format's style manual for proper citation formatting.

Bluebook 21st ed.

Sergey Petrachkov , Dmitry Kuptsov , Saglar Ochirova , Oksana Karel , Daryna Hrebenuik , Robert J. C. Deane , Jeffrey Rosenthal , Katie Gonzalez , Katerina Wright , Caoimhe Clarkin , Marcus Walsh , Bella Chan , Keara A. Bergin , Christopher P. DeNicola , Peter Ashford , Kate Felmingham , Aline Dias , Antonio Canales , Gretel Cannon , Ashley Chandler , Marianne Chao , Mercedes Fernandez , Gustavo A. Galindo , Melissa Stear Gorsline , Benjamin Holloway , Haifeng Huang , Elie Kleiman , Viktoriia Korynevych , Annie Leeks , Fernando F. Pastore , Maria I. Pradilla Picas , Iris Sauvagnac , Jiahui Sheng , Darya Vakulenko , Jose Antonio Vazquez Cobo , Sharon Yiu , Lars Markert , Christina Nitsche , Anthony Lynch & Hector Scaianschi Marquez , International Arbitration, 56 ABA/SIL YIR (n.s.) 171 .

ALWD 7th ed.

Sergey Petrachkov , Dmitry Kuptsov , Saglar Ochirova , Oksana Karel , Daryna Hrebenuik , Robert J. C. Deane , Jeffrey Rosenthal , Katie Gonzalez , Katerina Wright , Caoimhe Clarkin , Marcus Walsh , Bella Chan , Keara A. Bergin , Christopher P. DeNicola , Peter Ashford , Kate Felmingham , Aline Dias , Antonio Canales , Gretel Cannon , Ashley Chandler , Marianne Chao , Mercedes Fernandez , Gustavo A. Galindo , Melissa Stear Gorsline , Benjamin Holloway , Haifeng Huang , Elie Kleiman , Viktoriia Korynevych , Annie Leeks , Fernando F. Pastore , Maria I. Pradilla Picas , Iris Sauvagnac , Jiahui Sheng , Darya Vakulenko , Jose Antonio Vazquez Cobo , Sharon Yiu , Lars Markert , Christina Nitsche , Anthony Lynch & Hector Scaianschi Marquez , International Arbitration, 56 ABA/SIL YIR (n.s.) 171 .

APA 7th ed.

Petrachkov, S., Kuptsov, D., Ochirova, S., Karel, O., Hrebenuik, D., Deane, R. J., Rosenthal, J., Gonzalez, K., Wright, K., Clarkin, C., Walsh, M., Chan, B., Bergin, K. A., DeNicola, C. P., Ashford, P., Felmingham, K., Dias, A., Canales, A., Cannon, G., Chandler, A., Chao, M., Fernandez, M., Galindo, G. A., Gorsline, M., Holloway, B., Huang, H., Kleiman, E., Korynevych, V., Leeks, A., Pastore, F. F., Picas, M., Sauvagnac, I., Sheng, J., Vakulenko, D., Cobo, J., Yiu, S., Markert, L., Nitsche, C., Lynch, A., & Marquez, H. International Arbitration. Year in Review: An Annual Survey of International Legal Developments and Publications of the ABA Section of International Law, 56, 171-192.

Chicago 17th ed.

Sergey Petrachkov; Dmitry Kuptsov; Saglar Ochirova; Oksana Karel; Daryna Hrebenuik; Robert J. C. Deane; Jeffrey Rosenthal; Katie Gonzalez; Katerina Wright; Caoimhe Clarkin; Marcus Walsh; Bella Chan; Keara A. Bergin; Christopher P. DeNicola; Peter Ashford; Kate Felmingham; Aline Dias; Antonio Canales; Gretel Cannon; Ashley Chandler; Marianne Chao; Mercedes Fernandez; Gustavo A. Galindo; Melissa Stear Gorsline; Benjamin Holloway; Haifeng Huang; Elie Kleiman; Viktoriia Korynevych; Annie Leeks; Fernando F. Pastore; Maria I. Pradilla Picas; Iris Sauvagnac; Jiahui Sheng; Darya Vakulenko; Jose Antonio Vazquez Cobo; Sharon Yiu; Lars Markert; Christina Nitsche; Anthony Lynch; Hector Scaianschi Marquez, "International Arbitration," Year in Review: An Annual Survey of International Legal Developments and Publications of

International Arbitration

EDITORS: MARCUS QUINTANILLA AND CARLA GHARIBIAN; AND
AUTHORS: SERGEY PETRACHKOV, DMITRY KUPTSOV, SAGLAR
OCHIROVA, OKSANA KAREL, DARYNA HREBENIUK, ROBERT J. C.
DEANE, JEFFREY ROSENTHAL, KATIE GONZALEZ, KATERINA
WRIGHT, CAOIMHE CLARKIN, MARCUS WALSH, BELLA CHAN, KEARA
A. BERGIN, CHRISTOPHER P. DENICOLA, PETER ASHFORD, KATE
FELMINGHAM, ALINE DIAS, ANTONIO CANALES, GRÉTEL CANNON,
ASHLEY CHANDLER, MARIANNE CHAO, MERCEDES FERNÁNDEZ,
GUSTAVO A. GALINDO, MELISSA STEAR GORSLINE, BENJAMIN
HOLLOWAY, HAIFENG HUANG, ELIE KLEIMAN, VIKTORIIA
KORYNEVYCH, ANNIE LEEKS, FERNANDO F. PASTORE, MARIA I.
PRADILLA PICAS, IRIS SAUVAGNAC, JIAHUI SHENG, DARYA
VAKULENKO, JOSÉ ANTONIO VÁZQUEZ COBO, SHARON YIU, LARS
MARKERT, CHRISTINA NITSCHKE, ANTHONY LYNCH, HÉCTOR
SCAIANSCHI MÁRQUEZ, PREETI BHANGNANI, ERIC LENIER IVES, AND
TOM PEARSON

This article surveys significant legal developments in international arbitration in 2021.

I. North America

A. UNITED STATES

1. *Developments in U.S. Courts*

a. Arbitration Agreements

i. *Delegation of Arbitrability*

In *Henry Schein v. Archer and White Sales, Inc.*, the U.S. Supreme Court granted certiorari on the question of whether a provision in an arbitration agreement exempting certain claims from arbitration negates an otherwise “clear and unmistakable” intent to delegate arbitrability determinations to arbitrators.¹ The U.S. Court of Appeals for the Fifth Circuit had held that

* The editorial team for this article included Marcus Quintanilla and Carla Gharibian of Jones Day. The following firms contributed to this article: ALRUD Law Firm: Sergey Petrachkov (Russia), Dmitry Kuptsov (Russia), Saglar Ochirova (Russia); Arzinger Law Firm: Oksana Karel (Ukraine), Daryna Hrebenuk (Ukraine); Borden Ladner Gervais LLP: Robert J. C. Deane (Canada); Cleary Gottlieb Steen & Hamilton LLP: Jeffrey Rosenthal (United States), Katie Gonzalez (United States), Katerina Wright (United States); DLA Piper: Caoimhe Clarkin

the arbitration agreement, incorporating the American Arbitration Association rules, delegated arbitrability determinations for “some category of cases” but, because there was a partial carve-out, the district court had the authority to determine whether the carve-out applied.² Following oral argument, the Supreme Court dismissed the case, concluding that certiorari had been improvidently granted.³

The Second Circuit in *Beijing Shougang Mining Inv. Co. v. Mongolia* relied not on the language of the parties’ agreement but on their conduct in the arbitration proceedings to determine the parties’ intent to delegate.⁴ Following three Chinese companies’ petition to vacate a bilateral investment treaty (BIT) arbitration award, the Second Circuit found that the arbitration clause in the treaty did “not supply ‘clear and unmistakable’ evidence” to delegate arbitrability concluded that because the parties had “agreed at the outset of the arbitration” to bifurcate the arbitral proceedings into a combined jurisdictional and liability phase followed by a damages phase, the agreement “that the tribunal would hear jurisdictional issues in the first phase” was a question “implicating ‘arbitrability’” that “‘clearly and unmistakably’” evidenced the parties’ intent to delegate the determination to the tribunal.⁵

II. *Non-Party Signatories*

Whether state law or federal common law determines if a non-signatory may compel arbitration was fiercely contested in two divided circuit court opinions. In *Setty v. Shriniknvas Sugandhalaya LLP*, a split Ninth Circuit panel held that federal common law determines whether the defendant, a non-signatory to an agreement governed by Indian law, can compel the

(Ireland), Marcus Walsh (Ireland), Bella Chan (Ireland); Dewey Pegno & Kramarsky LLP: Keara A. Bergin (ICSID), Christopher P. DeNicola (ICSID); Fox Williams LLP: Peter Ashford (England and Wales), Kate Felmingham (England and Wales); Franco Leutewiler Henriques Advogados: Aline Dias (Brazil); Jones Day: Antonio Canales (Spain), Grätel Cannon (Australia), Ashley Chandler (Australia), Marianne Chao (Taiwan), Mercedes Fernández (Spain), Gustavo A. Galindo (Mexico), Melissa Stear Gorsline (NAFTA/USMCA), Benjamin Holloway (Australia), Haifeng Huang (China/Hong Kong), Elie Kleiman (France, Middle East, and Africa), Viktoriia Korynevych (NAFTA/USMCA), Annie Leeks (Australia), Fernando F. Pastore (Brazil), Maria I. Pradilla Picas (Colombia, Venezuela, Peru, and Ecuador), Iris Sauvagnac (France, Middle East, and Africa), Jiahui Sheng (China/Hong Kong), Darya Vakulenko (Colombia, Venezuela, Peru, and Ecuador), José Antonio Vázquez Cobo (Mexico), Sharon Yiu (China/Hong Kong); Nishimura & Asahi: Lars Markert (Japan); Peters, Schönberger & Partner: Christina Nitsche (Germany, Switzerland, and Sweden); Porzio Ríos García: Anthony Lynch (Chile); Rosa-Scaianschi-Amaya: Héctor Scaianschi Márquez (Argentina, Uruguay, and Paraguay); White & Case LLP: Preeti Bhagnani (United States), Eric Lenier Ives (United States). Tom Pearson (Singapore & ASEAN), Visiting Research Fellow, Future Forum (Cambodia), also contributed to this piece.

2. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 107 (2020) (mem.).

3. *Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 280–82 (5th Cir. 2019).

4. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 141 S. Ct. 656 (2021).

5. *Beijing Shougang Mining Inv. Co. v. Mongolia*, 11 F.4th 144, 154 (2d Cir. 2021).

plaintiffs to arbitrate.⁶ The majority explained that in cases involving the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and arising under federal question jurisdiction, federal substantive law applies.⁷ While “accept[ing] that a nonsignatory could compel arbitration in a New York Convention case,” the majority nonetheless held that, as a factual matter, the defendant’s equitable estoppel claim failed.⁸ The dissent argued that “whether a particular contract is governed by the New York Convention or not, a nonsignatory’s equitable estoppel claim to compel arbitration is brought pursuant to the [Federal Arbitration Act (FAA)], which requires that state contract law (or in the case of a foreign contract, perhaps the foreign state’s contract law, depending on the state’s choice of law rules) govern the issue.”⁹

A similarly split Sixth Circuit panel in *AtriCure, Inc. v. Meng* held that state law, and not federal common law, determines whether non-signatories can compel arbitration in a diversity case.¹⁰ Relying on the Supreme Court decision in *Arthur Andersen v. Carlisle*,¹¹ the majority held that two non-signatories could not compel arbitration by equitable estoppel under Ohio state law but remanded the case for consideration of an agency theory, which required factfinding.¹²

b. Enforcement of Awards

i. *Subject-Matter Jurisdiction*

A circuit split widened over whether the existence of a written agreement to arbitrate under Article II of the New York Convention is a question that goes to jurisdiction or to the merits. In *Al-Qarqani v. Chevron Corp.*, a California district court dismissed a petition to confirm an award of nearly \$18 billion for lack of subject-matter jurisdiction, finding that there was no agreement to arbitrate and noted that “numerous procedural infirmities would independently preclude confirmation.”¹³ On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal on different grounds, holding that the existence of a written agreement to arbitrate goes to the merits, and, therefore, the district court’s disposition should have been a denial of enforcement of the award, not a dismissal for lack of subject-matter jurisdiction.¹⁴ With this holding, the Ninth Circuit took the same position as previously expressed by the Second Circuit,¹⁵ but split from the U.S. Court

6. *Id.* at 152.

7. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1167 (9th Cir. 2021).

8. *Id.* at 1168.

9. *Id.* at 1169.

10. *Id.* at 1173 (Bea, J., dissenting).

11. *AtriCure, Inc. v. Meng*, 12 F.4th 516, 524 (6th Cir. 2021).

12. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009).

13. *AtriCure, Inc.*, 12 F.4th at 534.

14. *Al-Qarqani v. Chevron Corp.*, No. C 18-03297 JSW, 2019 WL 4729467, at *5 (N.D. Cal. Sept. 24, 2019), *aff’d*, 8 F.4th 1018 (9th Cir. 2021).

15. *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1025 (9th Cir. 2021).

of Appeals for the Eleventh Circuit, which has found that courts may not assume jurisdiction until “the agreement-in-writing requirement has been met.”¹⁶

ii. *Pre-Judgment Interest*

In *LLC SPC Stileks v. Republic of Moldova*, Moldova challenged the district court’s decision to award pre-judgment interest on a judgment confirming an arbitral award, and argued that the judgment and any interest should have been denominated in Moldovan lei rather than in U.S. dollars.¹⁷ Joining the U.S. Courts of Appeals for the Second, Ninth, and Eleventh Circuits,¹⁸ the U.S. Court of Appeals for the D.C. Circuit held that the “decision to award prejudgment interest ‘must be exercised in a manner consistent with the underlying arbitration award,’” and even though the award itself was silent on pre-judgment interest, such interest would be considered “part of [plaintiff’s] loss . . . to be reimbursed by [Moldova].”¹⁹ The D.C. Circuit affirmed the award of pre-judgment interest but vacated the order that converted “the award to U.S. dollars without considering Moldova’s settled expectation that the award would be payable in Moldovan lei.”²⁰

c. Preemption

In *CLMS Mgmt. Servs. Ltd. Partnerships v. Amwins Brokerage of Georgia, LLC*, the Ninth Circuit held that the New York Convention was not reverse preempted by a state law barring the enforcement of arbitration clauses in insurance contracts.²¹ The defendant underwriters had argued that the plaintiffs’ claims related to flood damage fell within the policy’s arbitration clause and were governed by the New York Convention, while the plaintiffs argued that Washington state law and the federal McCarran-Ferguson Act operated to reverse preempt the Convention and prohibit arbitration.²² The Ninth Circuit held that Article II, Section 3 of the Convention—which provides that a court “shall . . . refer the parties to arbitration” where there is an agreement to arbitrate—is self-executing, concluding that “it is the Convention itself that requires enforcements of the parties’ arbitration

16. *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n.2 (2d Cir. 2005).

17. *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004).

18. *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 876 (D.C. Cir. 2021).

19. *See Waterside Ocean Nav. Co. v. Int’l Nav. Ltd.*, 737 F.2d 150, 153-54 (2d Cir. 1984) (finding pre-judgment interest available in actions under the New York Convention); *see also* *Ministry of Def. of the Islamic Rep. of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1103 (9th Cir. 2011); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446-47 (11th Cir.1998).

20. *LLC SPC Stileks*, 985 F.3d at 881 (citations omitted).

21. *Id.* at 876.

22. *CLMS Mgmt. Servs. Ltd. P’ship v. Amwins Brokerage of Georgia, LLC*, 8 F.4th 1007, 1015 (9th Cir. 2021).

agreement.”²³ Because reverse preemption under the McCarran-Ferguson Act applies to “Act[s] of Congress”—i.e., domestic legislation—the Convention, as a multilateral treaty, did not fall within its purview.²⁴ The Ninth Circuit affirmed the district court’s grant of the motion to compel arbitration, but plaintiffs have filed a motion to stay pending their certiorari petition to the Supreme Court.²⁵

d. Foreign Sovereign Immunities Act (FSIA)

In *Gater Assets Ltd. v. AO Moldovagaz*, the Second Circuit considered the contours of the FSIA’s “arbitration exception” to sovereign immunity.²⁶ A New York district court found jurisdiction over Moldova, a non-party to the underlying arbitration agreement, under the arbitration exception, relying on a “direct benefits estoppel theory.”²⁷ The Second Circuit reversed, finding no jurisdiction. While the Second Circuit stopped short of “conclusively decid[ing] whether direct-benefits estoppel can abrogate a foreign state’s immunity under the FSIA,”²⁸ it ultimately found that the doctrine was inapplicable because the plaintiff failed to show that the agreement “‘expressly provide[d] [Moldova] with a benefit’” or that Moldova “‘actually invoke[d] the contract to obtain its benefit.’”²⁹

In *Ballantine v. Dominican Republic*, the D.C. Circuit reinforced the application of specific FSIA provisions governing service of process in the context of a petition to vacate an arbitral award.³⁰ The court explained that because service on a non-resident party must be made “in like manner as other process of the court” under the FAA,³¹ petitioners were required to serve the Dominican Republic in conformity with Section 1608(a) of the FSIA which “‘sets forth the exclusive procedures for service’” on a foreign state. They had failed to do so.³²

2. 28 U.S.C. § 1782

As of December 10, 2021, the Supreme Court of the United States was poised to resolve a circuit split regarding the availability of discovery for use

23. *Id.* at 1010 (the McCarran-Ferguson Act provides a “clear-statement rule” that Congress cannot interfere with a state’s right to regulate the insurance business); see also 15 U.S.C. §§ 1011–15.

24. *CLMS Mgmt. Servs. Ltd. P’ship*, 8 F.4th at 1015.

25. *Id.* at 1017–18.

26. Appellants’ Motion to Stay the Mandate, *CLMS Mgmt. Servs. Ltd. P’ship*, No. 20-35428 (9th Cir. Sept. 1, 2021), Dkt. Entry 51.

27. 28 U.S.C. § 1605(a)(6).

28. *Gater Assets Ltd. v. AO Gazsnabtranzit*, 413 F. Supp. 3d 304, 326–28 (S.D.N.Y. 2019), *aff’d in part, vacated in part, remanded sub nom*; *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42 (2d Cir. 2021).

29. *Gater Assets*, 2 F.4th at 68.

30. *Id.* at 54 (citations omitted).

31. *Ballantine v. Dominican Republic*, No. 20-7086, 2021 WL 5262555 (D.C. Cir. Oct. 22, 2021).

32. 9 U.S.C. § 12.

in private international commercial arbitration under 28 U.S.C. § 1782, having granted certiorari in two cases that will be heard together in 2022.³³ The Supreme Court took up the question for a second time, after the parties in another case raising the same question abandoned their appeal earlier this year.³⁴

ZF Automotive US, Inc. v. Luxshare, Ltd. arises from a district court's grant of a § 1782 petition in aid of an international commercial arbitration between a German company and a Hong Kong company under the German Arbitration Institute Rules.³⁵ The case presents a question of whether 28 U.S.C. § 1782 encompasses private commercial arbitral tribunals.³⁶

In re Fund for Protection of Investor Rights in Foreign States v. AlixPartners, LLP arises from a Second Circuit decision granting discovery under § 1782 for use in an investor-state arbitration between Russian investors and Lithuania under a BIT.³⁷ The case presents an opportunity for the Supreme Court to address for the first time the availability of § 1782 discovery in investor-state.³⁸

B. MEXICO

The 11th Collegiate Tribunal of the First Circuit held that an arbitrator has standing to challenge a court order disqualifying him from an arbitration. The Tribunal rejected arguments that arbitrator-disqualification rulings interest only the parties and that by challenging such a ruling the arbitrator exceeded his duties and created doubts about his impartiality. Reversing the lower court's ruling, the Tribunal held that the arbitrator had standing because, even after the arbitration is concluded, the disqualification ruling may affect the arbitrator's moral and economic position.³⁹

C. CANADA

The UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") continued to present issues, which

33. *Ballantine*, 2021 WL 5262555 at *1-*2 (citations omitted).

34. Order Granting Certiorari, *ZF Automotive US, Inc. v. Luxshare, Ltd.* (December 10, 2021) (No. 21-401); Order Granting Certiorari, *AlixPartners, LLP v. Fund for Protection of Investor Rights in Foreign States* (December 10, 2021) (No. 21-518).

35. Letter of Petitioner, *Servotronics, Inc. v. Rolls-Royce PLC and The Boeing Company* (September 8, 2021) (No. 20-794); Joint Stipulation to Dismiss Pursuant to Rule 46.1, *Servotronics, Inc. v. Rolls-Royce PLC and The Boeing Company* (September 24, 2021) (No. 20-794).

36. Brief for Petitioner, *ZF Automotive US, Inc. v. Luxshare, Ltd.* (September 10, 2021) (No. 21-401) at 6.

37. *Id.*

38. Brief for Petitioner, *AlixPartners, LLP v. Fund for Protection of Investor Rights in Foreign States* (October 5, 2021) (No. 21-518); *see also In re Fund for Prot. of Inv't Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir. 2021) (applying the functionalist approach established in *Hanwei Guo v. Deutsche Bank Sec.*, 965 F.3d 96 (2d Cir. 2020)).

39. Brief for Petitioner, *AlixPartners, LLP*, *supra* note 37, at I.

Canadian courts have sought to resolve consistently with international trends.⁴⁰ In *lululemon athletica Canada Inc. v. Industrial Color Productions Inc.*,⁴¹ the Court of Appeal for British Columbia confirmed that on an application to set aside an international commercial arbitration award on jurisdictional grounds under Article 34(2)(a)(iii) of the UNCITRAL Model Law, as well as applications to set aside preliminary jurisdictional rulings of a tribunal under Article 16(3), the reviewing court must apply a correctness standard and will not defer to the tribunal. This decision confirmed that the approach of the Court of Appeal for Ontario in *United Mexican States v. Cargill, Inc.*⁴² is of broader application in Canada.

In *United Mexican States v. Burr*,⁴³ the Court of Appeal for Ontario confirmed that when a tribunal's preliminary jurisdictional determination is challenged under Article 16(3) of the UNCITRAL Model Law, the reviewing court's determination is final and not subject to further appeal.

D. NAFTA/USMCA

The United States-Mexico-Canada Agreement (USMCA) entered into force on July 1, 2020.⁴⁴ To date, only three disputes have been initiated under USMCA,⁴⁵ and all are "legacy" claims under USMCA's three-year extension of the North American Free Trade Agreement (NAFTA).⁴⁶

On December 17, 2020, the International Centre for the Settlement of Investment Disputes (ICSID) registered the first USMCA/NAFTA legacy dispute in *Koch Industries v. Canada*.⁴⁷ The U.S. conglomerate brought a \$30 million claim over the cancellation of a program designed to reduce carbon emissions.⁴⁸

40. Thesis [A.]: I.11o.C.154 C, T.C.C., Weekly Federal Judicial Bulletin and its Gazette, Eleven Judicial Era. Digital Registry 2023673.

41. See *The Russian Federation v. Luxtona Limited*, 2021 ONSC 4604 ¶ 10.

42. 2021 BCCA 428 ¶¶ 34–47.

43. 2011 ONCA 622 ¶¶ 31–51.

44. 2021 ONCA 64 ¶¶ 8–12.

45. Press Release, Michael R. Pompeo, Sec'y 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>.

46. See *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25; *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14; *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52.

47. *Id.*

48. *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No. ARB/20/52, Case Details, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/20/52>.

*First Majestic Silver Corp. v. Mexico*⁴⁹ was registered by ICSID on March 31, 2021. The Canadian mining investor filed a \$500 million claim over retrospective tax liabilities imposed by Mexico.⁵⁰

On May 12, 2021, ICSID registered *Finley Resources v. Mexico*,⁵¹ in which several U.S. oil and gas investors asserted claims against Mexico for alleged violation of their investment contracts with national petroleum company Pemex.⁵²

Two additional USMCA/NAFTA notices of dispute were also served. A Canadian investor, TC Energy, put the United States on notice of its “legacy” claim over the cancellation of the Keystone XL pipeline worth over \$15 billion.⁵³ Further, a U.S. investor, Talos Energy, threatened Mexico with a “legacy” claim after Pemex was designated as the operator of its offshore oilfield.⁵⁴

II. ICSID

On September 20, 2021, an ICSID tribunal issued an award in *Lion Mexico Consolidated LP v. United Mexican States*, holding that Mexico had denied procedural justice to Lion Mexico Consolidated LP (“Lion”), a subsidiary of a real estate investment company with investments in Mexico, in violation of NAFTA—the first such finding in NAFTA’s history.⁵⁵

The basis for Lion’s claim was that when it sought to foreclose on a mortgage on a property in Mexico, it learned that a Mexican court had already cancelled the mortgage at the debtor’s request in a proceeding of which Lion had received no notice.⁵⁶

After determining that the debtor had engaged in a “sophisticated fraud,” the tribunal found that Lion was denied procedural justice in three ways: (1)

49. See *Investment Dispute Settlement Navigator: Koch v. Canada*, INV. POL’Y HUB (2020), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1074/koch-v-canada>.

50. *First Majestic Silver Corp. v. United Mexican States*, ICSID Case No. ARB/21/14, Case Details, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/14>.

51. See Jack Ballantyne, *Canadian Silver Miner Launches NAFTA Claim Against Mexico*, GLOB. ARB. REV. (Mar. 3, 2021), <https://globalarbitrationreview.com/canadian-silver-miner-launches-nafta-claim-against-mexico>.

52. *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Case Details, <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/25>.

53. See Cosmo Sanderson, *US Oil and Gas Investors Bring Claim Against Mexico Cosmo Sanderson*, GLOB. ARB. REV. (May 13, 2021), <https://globalarbitrationreview.com/us-oil-and-gas-investors-bring-claim-against-mexico>.

54. See Cosmo Sanderson, *Keystone XL Investor Threatens New Claim Against US*, GLOB. ARB. REV. (July 5, 2021), <https://globalarbitrationreview.com/keystone-xl-investor-threatens-new-claim-against-us>.

55. See Jack Ballantyne, *Mexico Threatened with Treaty Claim Over Oilfield*, GLOB. ARB. REV. (Sept. 6, 2021), <https://globalarbitrationreview.com/mexico-threatened-treaty-claim-over-oilfield>.

56. *Lion Mexico Consolidated LP v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, ¶¶ 56–57, 371.

Lion was denied access to justice because, “without its fault,” it was “never given the opportunity to defend itself” in the cancellation proceeding; (2) Lion was denied the right to appeal the judgement cancelling the mortgage because the trial court subsequently issued a decision giving *res judicata* effect to the judgment; and (3) Lion was denied the right to allege in a subsequent procedural challenge that a forged settlement agreement had in fact been forged and to present evidence proving that claim.⁵⁷ The tribunal ordered Mexico to pay \$47 million to Lion in damages.⁵⁸

III. Europe

A. ENGLAND & WALES

The Supreme Court decision in *Kabab-Ji SAL v Kout Food Group*,⁵⁹ concerning whether a parent company had become the operative party, applied and confirmed the principles in *Enka v Chubb*, which held that the law of an arbitration agreement, if not expressly chosen, will be that of the underlying agreement.⁶⁰ It also confirmed that (1) the same principles apply before the award and during enforcement, and (2) a contractual provision that all variations to the agreement must be in writing was an insuperable obstacle to succession by the parent.

In *RAV Bahamas v Therapy Beach Club*,⁶¹ the Privy Council concluded that in a provision identical to Arbitration Act § 68 (challenging an award for serious irregularity causing substantial injustice) the focus was on due process, not the correctness of the arbitrator’s decision. There would be substantial injustice if, without the irregularity, the outcome of the arbitration might have been different.

In *Sierra Leone v. SL Mining*⁶² and *NWA & Anor v. NVF & Ors*,⁶³ the Commercial Court confirmed that where a party fails to mediate before referring the dispute to arbitration under a tiered dispute-resolution clause, it is an issue of admissibility, rather than jurisdiction.

B. IRELAND

A recent Irish High Court decision reinforces the Irish courts’ support for arbitration and demonstrates the high threshold for a party to resist arbitration by reason of overriding public policy. *Charwin Limited T/A Charlie’s Bar v Zavarovalnica Sava Insurance Company D.D* [2021] IEHC 489 concerned a claim by an Irish pub for business interruption coverage for

57. *Id.* ¶¶ 300–17.

58. *Id.* ¶¶ 366, 371.

59. *Id.* ¶¶ 850–51.

60. [2021] UKSC 48.

61. *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 (UK).

62. [2021] UKPC 8.

63. [2021] EWHC 929 (Comm).

closure during the pandemic.⁶⁴ The claimant initiated court proceedings, but the insurer sought a stay pursuant to Article 8(1) of the UNCITRAL Model Law (incorporated into Irish law under the Arbitration Act 2010) on the ground that the policy was subject to arbitration. The claimant argued that the case was not arbitrable because it implicated fundamental issues of public policy (i.e., the COVID-19 pandemic, the Central Bank of Ireland's framework for COVID-19 and business interruption insurance, and the fact that the decision might affect several hundred other pub owners with similar claims).

The Irish High Court ruled that the pandemic did not trigger sufficient public policy considerations to require a dispute to be determined in court as opposed to arbitration. “[T]he test is a demanding one and the conclusion that public policy considerations render a dispute non-arbitrable should be a conclusion of last resort.”⁶⁵

C. FRANCE

The revised Rules of Arbitration of the International Chamber of Commerce (ICC) entered into force on January 1, 2021, and will apply to all arbitrations registered at the ICC after that date.⁶⁶

On January 13, 2021, the Court of Cassation upheld the enforcement of an award that was set aside in Cairo a decade ago on the grounds that the agreement to arbitrate breached Egyptian law.⁶⁷ This decision accords with the longstanding French view that the setting aside of an award at the place of arbitration does not preclude its enforcement, and it illustrates the commitment of French courts to examine the validity of arbitration agreements through substantive rules as opposed to a choice-of-law approach.⁶⁸

In May 2021, the Court of Cassation ruled for the first time that third parties are entitled to challenge orders granting enforcement of foreign arbitral awards on grounds that such a challenge targets a court decision rather than the arbitral award itself.⁶⁹

In June 2021, two Russian companies filed an UNCITRAL claim against France under the Russia-France BIT after the French government refused

64. [2021] EWHC 2666 (Comm).

65. *Charwin Limited T/A Charlie's Bar v Zavarovalnica Sava Insurance Company D.D* [2021] IEHC 489, <https://www.bailii.org/ie/cases/IEHC/2021/2021IEHC489.html>.

66. *See Charwin Limited T/A Charlie's Bar v Zavarovalnica Sava Insurance Company D.D* [2021] IEHC 489, ¶ 99, <https://www.bailii.org/ie/cases/IEHC/2021/2021IEHC489.html>.

67. *See* 2021 Arbitration Rules, INT'L CHAMBER OF COM. <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> (last visited Nov. 18, 2021).

68. French Court of Cassation, First Civil Section (13 January 2021), No. 19-22.938 (Fr.), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000043045890>.

69. *See* Professor Emmanuel Gaillard's comments on this decision: Sebastian Perry, *Annulled Cairo Award Gets All-Clear in France*, GLOB. ARB. REV. (Jan. 26, 2021), <https://globalarbitrationreview.com/annulled-cairo-award-gets-all-clear-in-france>.

to renew their subsidiary's mining license over a gold deposit located in French Guiana amidst environmental concerns.⁷⁰

D. SPAIN

Spain's Constitutional Court rendered two judgments⁷¹ in 2021 confirming a previous pronouncement,⁷² which together, with the creation of the Madrid International Arbitration Center, confirmed Spain as a potentially attractive venue for international arbitration. Spanish law regarding annulment proceedings for breach of public order holds that the process of external control does not allow for courts to review the merits of an award. Annulment proceedings must be limited to an analysis of the legality of the arbitration agreement, the arbitrability of the subject matter, and the procedural regularity of the arbitral proceedings.

E. GERMANY

The ongoing effects of the COVID-19 pandemic shifted and challenged German arbitration practice into with hybrid and remote hearing formats. The Federal Supreme Court of Justice (BGH) ruled on the principle of procedural equality of arms at a virtual oral hearing, confirming that the arbitral tribunal has a duty to ensure fair proceedings, *inter alia*, when examining witnesses.⁷³

With respect to investor-state disputes, an arbitral tribunal dismissed the Vattenfall arbitration⁷⁴ on November 1, 2021, after nearly a decade.⁷⁵ Vattenfall based its ICSID claim against Germany on the accelerated nuclear phase-out passed by the German legislature in the Thirteenth Act Amending the Atomic Energy Act of July 31, 2011. The parties' settlement in March 2021 required payment of EUR 2.43 billion by the German government—the highest compensation yet paid for the economic consequences of the early nuclear phase-out.

70. French Court of Cassation, First Civil Section (26 May 2021), No. 19-23.996 (Fr.), https://www.legifrance.gouv.fr/juri/id/JURITEXT000043617946?init=true&page=1&query=19-23.996+&searchField=ALL&tab_selection=all.

71. Cosmo Sanderson, *Russian Investors Bring Mining Claim Against France*, GLOB. ARB. REV. (Oct. 18, 2021), <https://globalarbitrationreview.com/russian-investors-bring-mining-claim-against-france>.

72. Judgments no. 17/2021, February 15, and no. 55/2021, March 15, Constitutional Court (Spain).

73. Judgment no. 46/2020, June 15, Constitutional Court (Spain).

74. BGH I ZB 88/19, *SchiedsVZ 2021*, 46 (Ger.).

75. Swedish Vattenfall AB and others as claimant, and the Federal Republic of Germany as defendant.

F. SWITZERLAND

The Swiss Chambers' Arbitration Institution (SCAI) became the Swiss Arbitration Centre on May 19, 2021,⁷⁶ and the Swiss Rules of International Arbitration (Swiss Rules) were revised on June 1, 2021.⁷⁷ The revision focuses on efficiency and adaption to technical trends: new rules for cross-claims, joinder, and intervention (Article 6); streamlining of proceedings (Article 19); and the introduction of a new model clause.⁷⁸ Triggered by the COVID-19 pandemic, the Swiss Rules also allow for paperless filings (Articles 3.1 and 4.1) and for hearings to be held “remotely by videoconference or other appropriate means” (Article 27.2).

G. SWEDEN

The Stockholm Chamber of Commerce (SCC) implemented the “SCC Express,”⁷⁹ a dispute-resolution tool providing parties with legal assessment and resolution of their dispute in twenty-one days with predictable costs and without full-length arbitration. The proceedings are conducted by a neutral legal expert appointed by the SCC. This mechanism appears to focus on cases with limited complexity and scope.

H. RUSSIA

In 2021, the ICC and the Singapore International Arbitration Centre (SIAC) received the status of permanent arbitration institutions in Russia pursuant to its 2016 arbitration reform, which requires that any arbitration institution obtain permission to administer cases in Russia.

On December 2, 2021, the Russian Supreme Court rendered its decision in *Uraltransmash v. PESA Bydgoszcz*.⁸⁰ The case concerned Russian legislation from 2020 providing for “barriers to access to justice” for a sanctioned entity as grounds for the unenforceability of a jurisdictional or arbitration agreement in favor of a foreign court or with a seat of arbitration outside of Russia. The central issue addressed by the Supreme Court was the definition of “barriers,” namely, whether a party must prove exactly how the sanctions affected its ability to access justice. Reversing the decisions of the lower courts, the Supreme Court dismissed Uraltransmash’s claim in order to continue arbitration before the SCC. The Supreme Court’s

76. See *Termination of the Vattenfall Arbitration*, FED. MINISTRY OF ECON. AND CLIMATE PROT. (Feb. 11, 2021), <https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2021/11/20211102-beendigung-des-vattenfall-schiedsverfahrens.html>.

77. See *Overview*, SWISS ARB. (2021), <https://www.swissarbitration.org/centre/>.

78. See *Swiss Rules 2021*, SWISS ARB. (2021), <https://www.swissarbitration.org/centre/arbitration/arbitration-rules/>.

79. See *Model Clause*, SWISS ARB. (2021), <https://www.swissarbitration.org/centre/arbitration/arbitration-clauses/> (Arbitration clauses referring to the former SCAI remain valid).

80. See ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., GUIDELINES TO THE SCC RULES FOR EXPRESS DISPUTE ASSESSMENT 2 (2021), https://sccinstitute.com/media/1800128/scc-express-guidelines_2021.pdf.

rationale has not been published yet, so the reasoning underlying the decision is currently unclear.⁸¹ But the Supreme Court's decision may significantly influence the enforceability of jurisdictional and arbitration clauses with sanctioned Russian entities moving forward.

I. UKRAINE

In 2021, Ukraine faced two renewable energy investment claims concerning reform in the energy market.⁸²

The Ukrainian Supreme Court denied Russian state-owned Vnesheconombank's application for enforcement of an SCC emergency award in a case brought under the Russia-Ukraine BIT. The court denied enforcement on public policy grounds, stating, *inter alia*, that enforcement would conflict with prior rulings permitting investors in *Everest Estate LLC, et al v. Russia* to enforce against the bank's assets in Ukraine.⁸³

In late 2021/early 2022, the Supreme Court will decide whether it is possible to bring a separate claim for invalidation of an arbitration agreement before the Ukrainian courts. Previously, practitioners brought such claims in parallel to arbitration proceedings, as a means to obstruct them.⁸⁴

IV. Pacific Rim

A. AUSTRALIA

The 2021 Arbitration Rules for the Australian Centre for International Commercial Arbitration (the "2021 ACICA Arbitration Rules") crystallized some of the virtual arbitration practices that have been adopted throughout the pandemic.⁸⁵ The 2021 ACICA Arbitration Rules also introduced an obligation on parties to disclose any third-party funding arrangements and extended the scope for consolidation and multi-contract arbitrations.⁸⁶

In March 2021, the Federal Court ruled on the validity of a California-seated arbitration agreement, stating that it was practical, efficient, and just

81. Uraltransmash JSC v RTS PESA Bydgoszcz JSC, Case: ?60-36897/2020, Ruling, (Sept. 21, 2021), p. 6, https://kad.arbitr.ru/Document/Pdf/99ce7aa2-7f06-4615-baa5-94473b980771/695de30a-add8-4269-91b7-421b2347e302/A60-36897-2020_20210921_Opredelenie.pdf?isAddStamp=true (Russ.).

82. *See id.*

83. Modus Energy International B.V. v. Ukraine (SCC Case), <https://www.energycharter-treaty.org/details/article/modus-energy-international-bv-v-ukraine-scc/>; *see also* REW N.V. v. Ukraine (ICSID Case No. ARB/21/52), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/52>.

84. Vnesheconombank v. Ukraine, Resolution of the Supreme Court, Case No. 824/178/19 (14 January 2021), <https://reyestr.court.gov.ua/Review/94328414> (Ukr.).

85. State Enterprise "Administration of seaports of Ukraine" v. China Harbour Engineering Company Ltd., Ruling of the Supreme Court, Case No. 910/9841/20 (29 April 2021), <https://reyestr.court.gov.ua/Review/96668830> (Ukr.).

86. *See* 2021 ACICA Arbitration Rules, rr. 10, 25.3 to 23.5, 27.2, 35.5, 36.5.

for it to do so.⁸⁷ The Federal Court also demonstrated its pro-enforcement stance by upholding a 2020 decision enforcing an ICSID award against Spain, despite the country's claim of state immunity, and rejecting the European Commission's application to intervene in the enforcement proceedings.⁸⁸

Simultaneously, the Federal Court showed a willingness to refuse enforcement of awards on procedural fairness grounds. In arguably the most significant decision of the year, the Full Court of the Federal Court refused enforcement of an award against an Australian company on the basis that the tribunal had been appointed under Qatari law and not in accordance with the parties' arbitration agreement.⁸⁹

B. JAPAN

In early 2021, an advisory body to Japan's Ministry of Justice published proposed amendments to Japan's 2003 Arbitration Act, which aim to bring it in line with the UNCITRAL Model Law.⁹⁰ It remains to be seen whether other features designed to make Japan a more attractive arbitral destination (e.g., relaxing translation requirements in ancillary Japanese court proceedings) will be adopted as well.

In July 2021, amendments to the Japan Commercial Arbitration Association (JCAA) Arbitration Rules came into effect, expanding the scope of application for expedited arbitration procedures (now up to JPY 300 million), lowering administrative fees for smaller disputes, and introducing the JCAA Appointing Authority Rules.⁹¹

C. CHINA AND HONG KONG

China issued the "Draft Amendment of Chinese Arbitration Law (Published for Comments)" (the "Draft Amendment") on July 30, 2021.⁹² The Draft Amendment represents a potential milestone in the internationalization of Chinese arbitration. It formally approves and provides detailed procedural requirements for ad hoc arbitration in China, and it adopts the principle of competence-competence. The Draft Amendment also eliminates an earlier requirement that parties specify an arbitration institution in their arbitration clause. If the parties fail to specify an arbitral institution, they now can choose an institution by signing a

87. See 2021 ACICA Arbitration Rules, rr. 16, 18, 54.

88. *Freedom Foods Pty Ltd v Blue Diamond Growers* [2021] FCA 172.

89. *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. (No 3)* [2021] FCAFC 112 (Spain).

90. *Hub Street v Energy City Qatar Holding* [2021] FCAFC 110 (Spain).

91. See generally Summary of Interim Proposal for Revision of Arbitration Law, MINISTRY OF JUST. (2021), https://www.moj.go.jp/shingi1/shingi04900001_00056.html (Japan).

92. See *Amendment to and Enactment of the JCAA Arbitration Rules (July 1, 2021)*, JAPAN COM. ARB. ASS'N, <https://www.jcaa.or.jp/en/news/index.php?mode=show&seq=202> (last visited May 1, 2022).

supplemental agreement or by submitting the dispute to an arbitration institution located in the common domicile of both parties.

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, amending the arrangement entered into in 2000.⁹³ This amendment was fully implemented when the Arbitration (Amendment) Ordinance 2021 came into effect on May 19, 2021. That ordinance extends the definition of "Mainland award" to cover arbitral awards made in the Mainland in accordance with the Arbitration Law of the People's Republic of China, whether or not made by a recognized Mainland arbitral authority, and allows parallel application to enforce an arbitral award in Hong Kong and in the Mainland to expedite enforcement proceedings in either jurisdiction.

A recent Hong Kong case held that the determination of compliance with a dispute-resolution clause involving a pre-arbitration condition (e.g., a requirement to engage in negotiations before resorting to arbitration) is a matter of admissibility of the claim rather than the jurisdiction of the arbitral tribunal. An arbitral tribunal therefore has the power to decide whether a pre-arbitration condition has been fulfilled.⁹⁴

D. TAIWAN

On October 25, 2021, the Chinese Arbitration Association (CAA) launched the CAA Court of Arbitration to oversee case management; provide parties with impartial, professional, and efficient services; and to assist arbitral tribunals in rendering enforceable awards.⁹⁵ An independent agency of the CAA, the Court of Arbitration will decide matters in accordance with Taiwan's arbitration law and the CAA Arbitration Rules, and (with the parties' agreement) the Court may decide specific procedural disputes.⁹⁶ The Court's responsibilities include making preliminary decisions on CAA's competence to administer arbitrations, arbitrator appointments and challenges, amounts in dispute, arbitrators' fees and ethics, and the interpretation of the CAA's arbitration rules.

93. *Draft Amendment of Chinese Arbitration Law (Published for Comments)*, MINISTRY OF JUST. OF THE PEOPLE'S REPUBLIC OF CHINA (July 30, 2021), http://www.moj.gov.cn/pub/sfbgw/zlk/202107/t20210730_432958.html.

94. *Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region*, DEPT. OF JUST. (Nov. 27, 2020), https://www.doj.gov.hk/en/mainland_and_macao/pdf/supplemental_arrangementtr_e.pdf (H.K.).

95. *C v D* [2021] HKCFI 1474.

96. *Chinese Court of Arbitration*, CHINESE ARB. ASS'N, <http://www.arbitration.org.tw/caa07.php> (last visited May 1, 2022).

E. SINGAPORE & ASEAN

The Singapore International Commercial Court (SICC), upon a motion to set aside, ruled in an investor-state case⁹⁷ that there is a duty for arbitral tribunals to consider evidence of corruption, bribery, or illegality, even if the parties have agreed that no new evidence may be submitted.⁹⁸ Singapore also expanded the use of third-party funding⁹⁹ to include domestic arbitrations, some SICC cases, and certain mediation proceedings.¹⁰⁰

Cambodia faces its second investor-state proceeding¹⁰¹ and the first to be brought under an investment treaty.¹⁰² Though the future of dispute resolution remains uncertain after February's coup, Myanmar's Supreme Court issued Notification No. 42/2021 in January laying out the legal requirements for obtaining authenticated copies of awards issued in Myanmar for purposes of enforcement in other jurisdictions.¹⁰³

Several ASEAN arbitration centers released new rules in 2021, namely the National Commercial Arbitration Centre (NCAC)¹⁰⁴ in Cambodia;¹⁰⁵ Badan Arbitrase Nasional Indonesia (BANI) in Indonesia;¹⁰⁶ and the Asian International Arbitration Centre (AIAC) in Malaysia.¹⁰⁷

97. *Id.*

98. Lao Holdings NV v. The Government of the Lao People's Democratic Republic, Case: [2021] SGHC(I) 10, Judgement, (Sept. 9, 2021), https://www.elitigation.sg/gd/sic/2021_SGHC1_10.

99. Ben Giaretta, *When Arbitrators Can Override the Parties' Agreement*, LEXOLOGY (Oct. 7, 2021), <https://www.lexology.com/library/detail.aspx?g=5414506b-8cae-4bf1-94a1-5c11f25bea82>.

100. See Press Release, Singapore Ministry of Law, Third-Party Funding to be Permitted for More Categories of Legal Proceedings in Singapore (June 21, 2021), <https://www.mlaw.gov.sg/news/press-releases/2021-06-21-third-party-funding-framework-permitted-for-more-categories-of-legal-proceedings-in-singapore>.

101. See Civil Law (Third-Party Funding) (Amendment) Regulations 2021 (Effective June 28, 2021) (Singapore), [LAW 32/006/070; AG/LEGIS/SL/43/2020/1 Vol. 1], <https://sso.agc.gov.sg/SL-Supp/S384-2021/Published/20210621?DocDate=20210621>.

102. Qiong Ye and Jianping Yang v. Kingdom of Cambodia (ICSID Case No. ARB/21/42), <http://icsiddev.prod.acquia-sites.com/cases/case-database/case-detail?CaseNo=ARB/21/42>.

103. Sangeetha Amarthalingam, *Will Policy Reforms, New Laws Expose Cambodia to More Treaty-Based Suits??*, THE PHNOM PENH POST (Nov. 11, 2021), <https://www.phnompenhpost.com/special-reports/will-policy-reforms-new-laws-expose-cambodia-more-treaty-based-suits>.

104. See Min Thein and Lester Chua, *Five Years On: The Development of Arbitration Laws and Institutions in Myanmar*, LEXOLOGY (July 30, 2021), <https://www.lexology.com/library/detail.aspx?g=79a13f0b-909a-45d9-98de-b8ff716115d1>.

105. National Commercial Arbitration Centre Rules (Effective June 28, 2021), <https://ncac.org.kh/wp-content/uploads/2021/10/NCAC-ARBITRATION-RULES-EN-Final.pdf>.

106. See Mealy Khieu, *Commercial Arbitration in Cambodia: The New NCAC Rules 2021 Are Out Now*, SOK SIPHANA & ASSOC. ALERT (June 8, 2021), <https://www.soksiphana.com/resources/alerts/commercial-arbitration-in-cambodia-the-new-ncac-rules-2021-are-out-now/>.

107. See Rizki Karim, *Updates on the New BANI Arbitration Rules 2021*, KARIMSYAH NEWSL. (Oct. 19, 2021), <https://www.karimsyah.com/newsletter/new-bani-rules-2021>.

V. Middle East

A. UNITED ARAB EMIRATES

On September 14, 2021, Dubai issued Decree No. 34 abolishing the Dubai International Financial Centre (DIFC) Arbitration Institute, which had an operating agreement with the London Court of International Arbitration (LCIA) to administer arbitrations under an adjusted version of the LCIA rules known as the DIFC-LCIA rules.¹⁰⁸ Cases referred to DIFC-LCIA Arbitration Centre after that date will be administrated by the Dubai International Arbitration Centre (DIAC) in accordance with the DIAC rules, unless the parties agree otherwise.¹⁰⁹

B. IRAQ

In November 2021, Iraq ratified the New York Convention.¹¹⁰

VI. Africa

A. ANGOLA

In September 2021, Angola's National Assembly approved Angola's accession to the ICSID Convention.¹¹¹ The same month, the Amsterdam District Court issued a bankruptcy order against Exem Energy, a Dutch company beneficially owned by Isabel dos Santos, the daughter of the former Angolan president.¹¹² This decision follows an arbitral tribunal's award ordering that Exem return the shares it had acquired in 2006 from Angola's state-owned oil and gas company, Sonangol, after finding the acquisition "tainted by illegality" and that the "nature and size of Exem's

108. See, e.g., Asian International Arbitration Centre Arbitration Rules (Effective Aug. 1, 2021), https://admin.aiac.world/uploads/ckupload/ckupload_20210801103608_18.pdf; see also Asian International Arbitration Centre Centre I-Arbitration Rules (Effective Nov. 1, 2021) (2021) https://admin.aiac.world/uploads/ckupload/ckupload_20211101035047_27.pdf; Kang Mei Yee, *AIAC Arbitration Rules 2021*, GAN PARTNERSHIP, Aug. 9, 2021, <https://www.ganlaw.my/aiac-arbitration-rules-2021/>; *Malaysia Launches i-Arbitration Rules 2021*; *First Shariah Guided Dispute Resolutions of AIAC*, ISLAMICMARKETS INSIGHTS (Nov. 3, 2021), <https://islamicmarkets.com/articles/malaysia-launches-i-arbitration-rules-2021-first-shariah-guided-dispute-resolutions>.

109. Habib al Mulla & Karen Seif, *Arbitration in Dubai After Decree 34 of 2021: It Has Wings, But Will it Fly?*, KLUWER ARB. BLOG (Nov. 14, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/11/14/arbitration-in-dubai-after-decree-34-of-2021-it-has-wings-but-will-it-fly/>.

110. London Court of International Arbitration, Update: DIFC-LCIA (Oct. 7, 2021), <https://www.lcia.org/News/update-difc-lcia.aspx>.

111. See List of Contracting States, N.Y. ARB. CONVENTION (2021), <https://www.newyorkconvention.org/countries>.

112. *Accession of Angola to the Washington Convention (ICSID Convention)*, THE LEGAL 500 (Oct. 26, 2021), <https://www.legal500.com/developments/thought-leadership/accession-of-angola-to-the-washington-convention-icsid-convention/>. Angola's effective accession to the ICSID Convention remains subject to the Angolan President's ratification of the same. See Article 121(c) of Angola's Constitution dated 2010.

part” in the transaction “cannot be explained but for grand corruption by the daughter of a head of state and her husband.”¹¹³

B. BENIN

In July 2021, Benin ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration.¹¹⁴

C. MALAWI

In March 2021, Malawi ratified the New York Convention.¹¹⁵

D. THE REPUBLIC OF THE CONGO

In 2021, the Republic of the Congo faced multiple claims, including an ICC claim valued at \$27 billion, following its decision to revoke the licenses of three mining companies and to reallocate the licenses to an operator said to have no previous experience in mining in Congo.¹¹⁶ On November 15, 2021, a UK mining company and its subsidiary filed an additional request for arbitration under the UK-Congo BIT following Congo’s revocation of their iron-ore permit in June 2021.¹¹⁷

VII. South America

A. ARGENTINA

In 2021, Argentina’s government announced its intention to review its BITs in an attempt to restrict investors’ access to international arbitration fora.¹¹⁸ To date, no further steps have been taken.

113. Dominic Lawson, *Dos Santos Company Enters Bankruptcy After Dutch Award*, GLOB. ARB. REV. (Sept. 23, 2021), <https://globalarbitrationreview.com/dos-santos-company-enters-bankruptcy-after-dutch-award>.

114. *Exem Energy B.V. v. Sociedade Nacional de Combustíveis de Angola, - Sonangol E.P. (I)*, NAI Case No. 4687, ¶¶ 8.3, 8.18, https://jusmundi.com/en/document/decision/en-exem-energy-v-sonangol-i-award-tuesday-27th-july-2021#decision_17254.

115. *See Status: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)*, UNITED NATIONS COMM’N ON INT’L TRADE L., <https://uncitral.un.org/en/texts/arbitration/conventions/transparency/status> (last visited May 1, 2022).

116. *See* List of Contracting States, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries> (last visited May 12, 2022).

117. Cosmo Sanderson, *Mourre Takes Charge of Mammoth Congo Claim*, GLOB. ARB. REV. (Nov. 8, 2021), <https://globalarbitrationreview.com/mourre-takes-charge-of-mammoth-congo-claim>.

118. Jack Ballantine, *Onslaught of Claims Against Congo Continues*, GLOB. ARB. REV. (Nov. 16, 2021), <https://globalarbitrationreview.com/onslaught-of-claims-against-congo-continues>. *See also* Midus Holdings and Congo Mining v. The Republic of the Congo, Documents of the Case, JUS MUNDI, https://jusmundi.com/en/document/other/en-midus-holdings-and-congo-mining-v-the-republic-of-the-congo-request-for-arbitration-monday-15th-november-2021#other_document_21650.

B. URUGUAY

On May 25, 2021, Uruguay's Supreme Court of Justice¹¹⁹ upheld a decision rendered by the Civil Court of Appeal of the 2d Term¹²⁰ dismissing a demand for disclosure of information regarding an ICSID arbitration. The demand was made under Law 18.381¹²¹ (regarding access to public information) and requested the Uruguayan government to disclose all documents and briefs submitted in the proceeding. The Court of Appeals rejected the request because the matter was subject to arbitration, and the arbitral tribunal had rendered a confidentiality order covering all documents in the record; to ignore the order would unlawfully undermine the powers and jurisdiction of the arbitral tribunal.

Uruguay continues to experience difficulties with its dualist arbitration regime in which a system modeled on the UNCITRAL Model Law exists together with an archaic legal framework for domestic arbitration. But the recent judgment No. 2450/2021 of the Civil Court of First Instance of the 16th Term reaffirmed the courts' flexible approach to the scope of international arbitration to reinforce respect for foreign awards, the terms of the New York Convention, and party autonomy.

C. PARAGUAY

On October 25, 2021, the Paraguayan Arbitration and Mediation Center launched its new Arbitration Rules.¹²² The new rules include provisions regarding initial hearings to prepare the first procedural order, emergency arbitrators, and the use of technology, with a protocol on digital proceedings.

The Paraguayan Supreme Court of Justice also rendered its judgment in the case "*R. R. D. L. c/ M. L. y otros s/ regulación de honorarios profesionales*" clarifying that fees for lawyers who participate in an arbitration cannot be regarded as a cost of the proceeding unless expressly agreed by the parties.¹²³

119. See *Argentina Quiere Revisar los Acuerdos de Inversión Para Evitar Arbitrajes* [Argentina Wants to Review Investment Agreements to Avoid Arbitrations], CIAR GLOB., <https://ciarglobal.com/argentina-quiere-revisar-los-acuerdos-de-inversion-para-evitar-arbitrajes/> (last visited May 12, 2022).

120. Case: Salle, Gustavo y otro c/ Estado – Poder Ejecutivo - Acción judicial de acceso a la información pública - Ley 18.381 - Casación, File: 2-55051/2018, Judgment of the Supreme Court of Justice, No 112/2021 of May 25, 2021, <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=202501> (Uru.).

121. Case: Salles c. Estado -Acceso a la información pública, File: 2-55051/2018, Judgment of the Civil Court of Appeal of the 2nd Term, No 21/2019 of February 26, 2019, <http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=231048> (Uru.).

122. Law No 18,381, Ley sobre el derecho de acceso a la información pública, Oct. 17, 2008 (Uru.).

123. See *El CAMP innova su reglamento con el fin de instalar el arbitraje en Paraguay a la vanguardia* [The CAMP Innovates Its Regulations in Order to Install Arbitration in Paraguay at the Forefront], CENTRO DE ARBITRAJE Y MEDIACION PARAGUAY, <https://www.campparaguay.uy>.

D. BRAZIL

In October 2021, Brazil's Superior Court of Justice decided that government-owned Petrobras' statutory arbitration clause could not bind the Federal Government (as the controlling shareholder), on the grounds that: (1) there was no law or statute authorizing the Federal Government to arbitrate shareholder disputes; and (2) the dispute involved extra-contractual civil-liability claims, which were not arbitrable.¹²⁴

The São Paulo Court of Appeal also rendered two important decisions. First, in March 2021, an arbitral award was annulled on the grounds that ruling in equity does not relieve a tribunal of its obligation to properly set out its reasoning for determining damages.¹²⁵ And second, in July 2021, an arbitral award was suspended based on an allegation that one of the arbitrators shared office space with the law firm that represented one of the parties.¹²⁶

E. CHILE

In 2021, Chile's Supreme Court held, in two decisions, that the purpose of procedures for the recognition of foreign arbitral awards is to verify compliance with minimum legal requirements.¹²⁷ In both cases,¹²⁸ the Court refrained from revisiting the merits of the awards and held that the only grounds to oppose recognition are those provided in Chile's International Commercial Arbitration Act.¹²⁹

Two ICSID claims were also brought against Chile: one by a Colombian power company concerning the construction of an electricity transmission

com/es/novedades/noticias/el-camp-innova-su-reglamento-con-el-fin-de-instalar-el-arbitraje-en-paraguay-a-la-vanguardia.

124. Recurso de queja por recurso denegado en los autos Roberto Ruiz Diaz Labrano c/ Maximino Lazzarotto y otros s/ Regulación de honorarios extrajudiciales, Judgment of the Supreme Court of Justice, No 6, Mar. 8, 2021 (Para.).

125. S.T.J.J., C.C. No. 177.436-DF, Relator: Min. Nancy Andrighi, 18.10.2021, Diário do Judiciário Eletrônico [d.j.e.], 20.10.2021, https://processo.stj.jus.br/processo/dj/documento/mediado/?tipo_documento=Documento&componente=MON&sequencial=135176379&num_registro=202100353086&data=20211020 (Braz.).

126. T.J.S.P., Ap. Civ. No. 1048961-82.2019.8.26.0100, Relator Azuma Nishi, 10.03.2021, Diário da Justiça [D.J.E.S.P.], <https://esaj.tjsp.jus.br/cjsj/getArquivo.do?cdAcordao=14440160&cdForo=0> (Braz.).

127. T.J.S.P., Ag. Inst. No. 2168253-82.2021.8.26.0000, Relator Araldo Telles, 30.07.2021, Diário da Justiça [D.J.E.S.P.], <https://esaj.tjsp.jus.br/cjsj/getArquivo.do?cdAcordao=14868696&cdForo=0> (Braz.).

128. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 1 de febrero de 2021, "Intergate AG Inversiones y Asesorías Jeremy Richert Limitada," Rol de la causa: 16.745-2019 (Chile), <https://www.diarioconstitucional.cl/wp-content/uploads/2021/02/16.745-2019EXEQUATUR-SUIZA-EMPRESAS.pdf>, and Corte Suprema de Justicia [C.S.J.] [Supreme Court], 19 de julio 2021, "I. Schroeder KG GMBH Co.," Rol de la causa: 104.262-2020 (Chile), <https://www.diarioconstitucional.cl/wp-content/uploads/2021/07/LASTINAJASEXEQUATUR104.262-2020.pdf>.

129. *Id.* ¶¶ 1 and 8, respectively.

line¹³⁰ and the other by two French companies over the concession for an airport.¹³¹ These are the first ICSID claims filed against Chile since 2017.¹³²

F. COLOMBIA

In September 2021, following a 2019 judgment from Colombia's Constitutional Court requiring clarification on international investment treaties,¹³³ Colombia renegotiated and signed a new BIT with Spain.¹³⁴ This more restrictive treaty specifies that substantive obligations from other treaties cannot be imported through the most-favored nation provision, limits the fair and equitable treatment (FET) obligation to five enumerated circumstances, and specifies that a breach of another international provision or national law does not imply a breach of FET.

G. VENEZUELA

In January 2021, the U.S. District Court for the District of Columbia revealed that Juan Guaidó's government agreed to pay \$110 million to satisfy an ICSID award won by British company Vestey.¹³⁵ That same month, the Guaidó government announced an agreement with Vestey to delay the first payment until July 2022.¹³⁶

H. PERU

In July 2021, the Arbitration Centre of the American Chamber of Commerce of Peru (AmCham) issued new arbitration rules which permit the AmCham Court to review and make recommendations on the substance of

130. Law No. 19.971, Sobre Arbitraje Comercial Internacional, 10 de septiembre 2004 (Chile) (closely based on the 1985 UNCITRAL Model Law).

131. *Interconexión Eléctrica S.A. E.S.P. v. Republic of Chile* (ICSID Case No. ARB/21/27).

132. *ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile* (ICSID Case No. ARB/21/40).

133. See generally INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (last visited May 1, 2022), <https://icsid.worldbank.org/cases/case-database>.

134. See Eduardo Zuleta & María Camila Rincón, *Colombia's Constitutional Court Conditions Ratification of the Colombia–France BIT to the Interpretation of Several Provisions of the Treaty*, KLUWER ARB. BLOG (July 4, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/07/04/colombias-constitutional-court-conditions-ratification-of-the-colombia-france-bit-to-the-interpretation-of-several-provisions-of-the-treaty/>.

135. See *Spain and Colombia Sign New BIT*, INT'L INST. FOR SUSTAINABLE DEV. (Oct. 7, 2021), <https://www.iisd.org/itm/en/2021/10/07/spain-and-colombia-sign-new-bit/>.

136. Cosmo Sanderson, *Venezuela Settles Beef with Cattle Farmers*, GLOB. ARB. REV. (Jan. 20, 2021).

all awards,¹³⁷ allow multi-contract arbitration, and require a tribunal to issue its final award within ten months.¹³⁸

I. ECUADOR

After denouncing the ICSID Convention in 2009, Ecuador once again ratified it on September 3, 2021.¹³⁹

137. Procuraduría Especial de la República (Jan. 27, 2021), <https://presidenciave.com/internacional/comunicado-de-la-procuraduria-especial-de-la-republica-sobre-negociacion-judicial-con-la-empresa-vestey1/>.

138. Ricardo Carrillo, Diego Martínez & Christian Wong, *Peru*, GLOBAL REV. (Aug. 12, 2021); La Cámara de Comercio Americana del Perú (AmCham), Centro Internacional de Arbitraje, Reglamento de Arbitraje (July 2021), <https://amcham.org.pe/wp-content/uploads/2021/05/Reglamento-2021.pdf>.

139. Section 40(1) of AmCham 2021 Rules.