

# The Year in Review

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Volume 51 *International Legal Developments*  
*Year in Review: 2016*

Article 8

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January 2017

## International Arbitration

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### Recommended Citation

Manuel Liatowitsch et al., *International Arbitration*, 51 ABA/SIL YIR 109 (2017)  
<https://scholar.smu.edu/yearinreview/vol51/iss1/8>

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## International Arbitration

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## International Arbitration

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### I. Introduction

This article surveys developments in International Arbitration in 2015–2016. The first section highlights significant arbitration developments in U.S. courts, and the second section highlights developments around the

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world, including England and Wales, Singapore, Hong Kong, Switzerland, Netherlands, Austria, Russia, Brazil, Germany, Nigeria, South Korea, Australia, Sweden, Turkey, China, India, Italy, and Spain, and at the ICC and ICSID.

## II. Arbitration Developments in United States Courts

### A. ENFORCEMENT OF ARBITRAL AWARDS

#### 1. *Enforcement of an Annulled Award*

Several courts addressed the issue of whether a party can seek to enforce an arbitral award in a U.S. Court when that award has been nullified by the arbitral panel or by a foreign court.

Most significantly, in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*,<sup>1</sup> the United States Court of Appeals for the Second Circuit upheld the confirmation of a Mexican arbitration award that was annulled by a Mexican court.<sup>2</sup> The arbitration concerned a contract dispute between *Corporación Mexicana De Mantenimiento Integral (COMMISA)*, a Mexican subsidiary of a U.S. construction company, and *Pemex-Exploración Y Producción (PEP)*, a state-owned Mexican oil and gas company, regarding a series of offshore oil platforms. COMMISA filed an arbitration demand with the International Chamber of Commerce (ICC) and was awarded approximately \$300 million in damages, which was subsequently affirmed by the United States District Court for the Southern District of New York. Thereafter, Mexico's Eleventh Collegiate Court for the Federal District annulled the arbitration award in a nearly 500-page opinion. As a result, PEP moved to vacate the district courts's judgment confirming the arbitration award. The United States Court of Appeals for the Second Circuit remanded the case to the district judge to consider the effect of the Mexican annulment. The district judge again affirmed the award on the ground that annulment "violated basic notions of justice in that it applied a law that was not in existence at the time the parties' contract was formed."<sup>3</sup> PEP again appealed to the Second Circuit.

On appeal, the Second Circuit acknowledged that "a final judgment obtained through sound procedures in a foreign country is generally conclusive . . . unless . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought."<sup>4</sup> However, the court declared that concerns for international comity were overcome by its

1. *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016).

2. *Id.* at 107. This decision is seemingly at odds with the D.C. Circuit's leading opinion in *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

3. *Id.* at 100 (quoting *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción*, 962 F. Supp. 2d 642, 644 (S.D.N.Y. 2013)).

4. *Id.* at 106.

view that the Mexican annulment was “repugnant to fundamental notions of what is decent and just” in the United States and that not affirming the award would “undermine public confidence in laws and diminish rights of personal liberty and property.”<sup>5</sup> Despite the support of the governments of both the United States and Mexico, PEP’s request for en banc review was denied.<sup>6</sup>

Among other controversial aspects of this decision, the Second Circuit rejected the legitimacy of the Eleventh Collegiate Court’s decision, *inter alia*, on the basis that the Mexican Court relied upon “repugnan[t] retroactive legislation that disrupts contractual expectations;”<sup>7</sup> when, in fact, the voluminous and detailed Mexican opinion concluded that the recent legislation did not change existing law.

In contrast, other U.S. courts reaffirmed the importance of international comity in cases such as *In re Arbitration of Certain Controversies Between Getma Int’l and Republic of Guinea*,<sup>8</sup> where the United States District Court for the District of Columbia refused to enforce an award annulled by the Common Court of Justice and Arbitration (CCJA)<sup>9</sup> on the ground that the annulment was not against public policy and did not violate basic notions of justice.<sup>10</sup> The district court reasoned that while the New York Convention allowed courts to enforce annulled awards, that discretion is not so broad as to allow courts to second guess the judgment of a foreign court of competent jurisdiction<sup>11</sup> and would undermine a tenet that “an arbitration award does not exist to be enforced in . . . [this Court] if it has been lawfully ‘set aside’ by a competent authority in the [foreign] State in which the award was made.”<sup>12</sup>

Encountering a slightly different issue in *Hulley Enterprises Ltd. v. Russian Federation*,<sup>13</sup> the United States District Court for the District of Columbia granted a stay of proceedings in the long-standing Yukos arbitration pending the resolution of an appeal of an annulment decision in the Netherlands.<sup>14</sup>

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5. *Id.* at 111.

6. The Second Circuit also rejected PEP’s venue and jurisdictional challenges on the basis that PEP effectively forfeited these challenges by allegedly seeking affirmative relief from the Southern District of New York and the Second Circuit, *id.* at 100-04, and found that the jurisdictional protections of the Due Process Clause did not apply to PEP because it is owned by a foreign sovereign. *Id.* at 102-03.

7. *Id.* at 107-09.

8. *In re Arbitration of Certain Controversies Between Getma Int’l & Republic of Guinea*, 191 F.Supp.3d 43 (D.D.C. 2016) [hereinafter *Getma International*].

9. The CCJA was established by the OHADA Treaty, which was signed by certain West and Central African states, including Guinea, to create a uniform system of commercial dispute resolution.

10. *Id.* at 55.

11. *Id.* at 49.

12. *Id.* at 55 (quoting *TermoRio*, 487 F.3d at 936).

13. *Hulley Enters. Ltd. v. Russian Fed’n*, No. 14-1996, 2016 WL 5675348 (D.D.C. Sept. 30, 2016).

14. *Id.* at \*1.

Plaintiffs, shareholders of Yukos, a Russian privatized oil company, alleged that the Russian Federation attempted to bankrupt the company and appropriate its assets. Plaintiffs initiated arbitration proceedings pursuant to the Energy Charter Treaty's arbitration provision and were awarded more than \$50 billion USD in damages.<sup>15</sup>

Around the same time that the shareholders initiated confirmation proceedings in the District Court for the District of Columbia pursuant to the Federal Arbitration Act (FAA),<sup>16</sup> the Russian Federation moved the District Court of The Hague (the situs of the arbitration) to annul the awards. The Hague Court found that the Tribunal lacked jurisdiction to issue the awards because the Russian Federation had never agreed to arbitrate under the Energy Charter Treaty (the Hague Judgment).<sup>17</sup> The shareholders sought a stay of the D.C. District Court proceeding while appealing the Hague Judgment, which was granted on the grounds that the Hague Court's determination as to the existence of an agreement to arbitrate was relevant to the determination of whether the awards fell within the scope of the Foreign Sovereign Immunities Act and the New York Convention.<sup>18</sup>

## 2. Interpretation of the "Evident Partiality" Standard

Several United States courts examined the "evident partiality" standard under section 10 of the FAA,<sup>19</sup> which provides grounds for vacatur of an arbitration decision and award "where there was evident partiality or corruption in the arbitrators."<sup>20</sup> In a widely publicized lawsuit, the Second Circuit reviewed the arbitration decision issued in connection with the "Deflategate" scandal in *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*.<sup>21</sup> The dispute arose out of the National Football League's (NFL) suspension of New England Patriots's quarterback, Tom Brady, for his involvement in a scheme to deflate footballs leading up to the Super Bowl. The NFL Commissioner, acting as arbitrator pursuant to his authority in the league's collective bargaining agreement (CBA), affirmed Brady's suspension<sup>22</sup> and the parties sought judicial review in the United

15. *Id.* at \*2.

16. *Id.*

17. *Id.*

18. *Id.* at \*9–12.

19. See *Republic of Argentina v. AWG Grp. Ltd.*, No. 15-1057, 2016 WL 5928464 (D.C.C. Sept. 30, 2016), *appeal docketed*, No. 16-7134 (D.C.C. Oct. 31, 2016) (adopting the reasonable person standard used by the First, Second, and Sixth Circuits and denying vacatur based on lack of evidence of bias by the challenged arbitrator); *Nat'l Indemnity Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457 (S.D.N.Y. 2016) (holding that concurrent arbitral assignments were not sufficient to meet the reasonable person standard of partiality and that arbitrators have no duty of timely disclosure).

20. 9 U.S.C. § 10 (2002).

21. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2016).

22. *Id.* at 533-35.

States District Court for the Southern District of New York. The district court denied the NFL's motion to affirm the suspension under the Labor Management Relations Act (LMRA)<sup>23</sup> and granted the NFL Players Association's (NFLPA) motion to vacate the award, finding that Brady lacked notice of a possible suspension and was deprived of fundamental fairness based on the manner in which the arbitration was conducted.<sup>24</sup> On appeal, the Second Circuit reversed this decision and remanded the case to the district court with instructions to affirm the award.

Recognizing the limited scope of appellate review of an arbitral award under the LMRA, the Second Circuit noted that its "obligation is limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the [LMRA]."<sup>25</sup> The Court considered, *inter alia*, the NFLPA's claim that the Commissioner was "evidently partial" because he adjudicated the propriety of his own conduct with respect to disciplining Brady. The Court explained that "arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen."<sup>26</sup> Critical to the Court's determination was its finding that the CBA made clear that the Commissioner was allowed to sit as the arbitrator, and the parties could have, but did not, limit the Commissioner's authority by agreement.<sup>27</sup> The Court concluded that "[i]f the arbitrator acts within the scope of this authority, the remedy for a dissatisfied party 'is not judicial intervention.'"<sup>28</sup>

## B. EXAMINATION OF THE VADEN "LOOK THROUGH" APPROACH TO FEDERAL JURISDICTION

This year, the Second and Third Circuits both examined the Supreme Court's decision in *Vaden v. Discover Bank*,<sup>29</sup> which held that a federal court may "look through" to the underlying substance of an arbitration "to determine whether it is predicated on an action that 'arises under' federal law," and thus merits federal-question jurisdiction, when a petition seeks to compel arbitration under section 4 of the Federal Arbitration Act (FAA).<sup>30</sup> The Second Circuit in *Doscher v. Sea Port Group Securities*<sup>31</sup> held that federal courts may take the *Vaden* "look through" approach to determine if federal subject matter jurisdiction exists over a petition to vacate an award under

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23. 29 U.S.C. § 141 (2002). While the FAA does not apply to arbitrations under the LMRA, federal courts have often looked to the FAA for guidance in cases such as this. See *Nat'l Football League Mgmt. Council*, 820 F.3d at 545, n.13.

24. *Nat'l Football League Mgmt. Council*, 820 F.3d at 538–47.

25. *Id.* at 532.

26. *Id.* at 548.

27. *Id.*

28. *Id.* at 537.

29. *Vaden v. Discover Bank*, 556 U.S. 49 (2009).

30. *Id.* at 61.

31. *Doscher v. Sea Port Grp. Sec.*, 832 F.3d 372 (2d Cir. 2016).

section 10 of the FAA.<sup>32</sup> The Court interpreted *Vaden* broadly to conclude that the “look through” approach may be taken across the board under Chapter 1 of the FAA, and is not limited to section 4 petitions to compel.<sup>33</sup> In doing so, the Court overruled prior Second Circuit precedent, *Greenberg v. Bear, Stearns & Co.*,<sup>34</sup> which held that a district court may exercise federal question jurisdiction over an FAA petition to vacate *only* if the petition states a substantial federal question on its face.

In contrast, the Third Circuit in *Goldman v. Citigroup Global Markets*<sup>35</sup> held that a district court may not “look through” to the underlying subject matter of a section 10 motion to vacate to establish federal-question jurisdiction and limited the *Vaden* “look through” approach to section 4 motions to compel arbitration.<sup>36</sup> The Third Circuit distinguished the Supreme Court’s holding in *Vaden* as premised upon and limited to the specific language of section 4, which permits a court to “assume the absence of the arbitration agreement” to determine if it would have jurisdiction without it.<sup>37</sup> The Third Circuit found that a section 10 petition to vacate, on the other hand, must satisfy the well-pleaded complaint rule and raise on its face a federal issue in order to establish federal jurisdiction.<sup>38</sup> In reaching this conclusion, the Court reasoned that the FAA does not create federal jurisdiction and expressed concerns about usurping the role of state courts as enforcers of arbitration agreements.<sup>39</sup>

### III. Arbitration Developments around the World

In ENGLAND & WALES, punitive damages are generally not awarded under English law for breach of contract. Despite the general unenforceability of penalty clauses, it was held that the English rule against enforcing penalty clauses was not a sufficient reason to refuse enforcement of an award under the New York Convention.<sup>40</sup>

In 2016, the English High Court interpreted several provision of the Arbitration Act 1996. In a landmark decision the English High Court refused a challenge under section 68(2)(b) of the Arbitration Act 1996 and held that an arbitrator did not exceed his powers in allowing a party to recover its third-party litigation funding costs as “other costs” under section 59(1)(c) of the Arbitration Act 1996.<sup>41</sup> The Court accepted that the terms of

32. *Id.* at 388-89.

33. *Id.* at 381-89.

34. *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22 (2d Cir. 2000), *overruled by* *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372 (2d Cir. 2016).

35. *Goldman v. Citigroup Glob. Mkts, Inc.*, 834 F.3d 242 (3d Cir. 2016).

36. *Id.* at 252-55.

37. *Id.* at 253 (quoting *Vaden*, 556 U.S. at 62).

38. *Id.* at 254-55.

39. *Id.* at 249-50, 257.

40. *Pencil Hill Ltd. v. US Citta di Palermo SpA*, [2016] EWHC 71 (QB) [32].

41. *Essar Oilfields Servs. Ltd. v. Norscot Rig Mgmt. PVT Ltd.*, [2016] EWHC 2361 (Comm) [77].

section 59(1)(c), referring to “legal and other costs,” was wide enough to permit the recovery of third-party funding costs and that the correct test is to consider what other costs were incurred in bringing or defending a claim.

Section 44 of the Arbitration Act 1996 gives the court powers to make orders in support of arbitral proceedings, including the granting of an interim injunction, if or to the extent that, the arbitral tribunal has no power or is unable for the time being to act effectively. The Court ruled that the emergency arbitrator provisions in the London Court of International Arbitration (LCIA) Rules have the effect of limiting the scope of the court’s jurisdiction to grant interim injunctions in support of arbitration under section 44, such that where the powers of the court and the LCIA emergency arbitrator overlap, the court is not entitled to intervene.<sup>42</sup>

The Arbitration Act of 1996 does not require the disclosure of potential conflicts. Nevertheless, the IBA Guidelines on Conflicts of Interest are frequently referred to in English arbitration. In one case, an arbitrator was removed after failing to disclose that eighteen percent of his appointments and twenty-five percent of his income were in some way related to one party’s representative.<sup>43</sup> In another, the court commended the objective of the IBA Guidelines, but explained why some of the provisions dealing with non-waiver of certain conflict of interest situations were weak and could not be given judicial approval.<sup>44</sup>

In SINGAPORE, on August 1, 2016, the new Arbitration Rules for the Singapore International Arbitration Centre (SIAC) came into effect.<sup>45</sup> In November, Singapore’s Ministry of Law submitted a bill to permit third-party funding in arbitration.<sup>46</sup>

During 2016, the Singapore High Court heard cases regarding both the validity of award and arbitrability. The Singapore High Court set aside an award that was made based on an argument that the winning party had never raised at any point during the case.<sup>47</sup> The High Court also upheld the validity of an arbitration clause that granted one of the parties the right to elect whether to arbitrate a dispute.<sup>48</sup> Finally, the Singapore Court of Appeal upheld a High Court decision that found that a claim arising out of promissory notes issued under a supply agreement did not fall within the scope of the supply agreement’s arbitration clause.<sup>49</sup>

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42. *Gerald Metals SA v. Trs. of the Timis Trust*, [2016] EWHC 2327 (Ch) [67].

43. *Cofely Ltd. v. Bingham*, [2016] EWHC 240 (Comm) [118].

44. *W Ltd. v. M SDN BHD* [2016] EWHC 422 (Comm) [33]-[45].

45. SINGAPORE INT’L ARBITRATION CENTRE RULES (2016).

46. See *Singapore Endorses Third-Party Litigation Finance*, SINGAPORE LAW WATCH (Nov. 18, 2016), [http://www.singaporelawwatch.sg/slwc/component/blog\\_calendar/16/11.html](http://www.singaporelawwatch.sg/slwc/component/blog_calendar/16/11.html).

47. *JVL Agro Indus. Ltd. v. Agritrade Int’l Pte Ltd.* [2016] SGCH 126 [228].

48. *Dyna-Jet v. Wilson Taylor Asia Pacific Pte Ltd.* [2016] SGHC 238 [174].

49. *Rals International Pte Ltd. v. Cassa di Risparmio di Parma e Piacenza SpA* [2016] SGCA 53 [56].

In HONG KONG, on October 12, 2016, the Law Reform Commission recommended that third-party funding for arbitrations be permitted.<sup>50</sup> Courts in Hong Kong also ruled on the validity of arbitration awards. The Hong Kong Court of First Instance set aside an award issued against a respondent who had been imprisoned throughout the duration of an arbitration commenced against him without his knowledge because he did not have proper notice and was not able to present his case.<sup>51</sup> The Taizhou Intermediate People's Court invoked a public policy exception and refused to enforce an ICC award rendered after the court had already held that the arbitration clause relied on was invalid since it failed to designate a seat or governing law.<sup>52</sup>

In SWITZERLAND, the Swiss Supreme Court rendered forty-seven decisions regarding motions to set aside arbitral awards issued by international arbitral tribunals seated in Switzerland. Among the most important decisions are the following three:

The court affirmed a sole arbitrator's jurisdiction arising from an arbitration clause contained in a draft contract.<sup>53</sup> While the main contract containing the arbitration clause was ultimately not signed, the arbitrator had found that the parties had entered into an arbitration agreement during their negotiations of the main contract. The court upheld this decision, finding that this was a proper application of the separability doctrine under the circumstances.

The court also overturned an arbitral tribunal's jurisdictional award. According to the award, the contractually agreed pre-arbitral dispute resolution tier had been complied with.<sup>54</sup> The court found that the claimant had launched the arbitration prematurely, and then proceeded to decide the long-open question of the consequence for failure to comply with mandatory pre-tier to arbitration. It found that such failure results in the stay of the arbitral proceedings until the pre-arbitral tier has been conducted. The modalities of the stay should be set by the arbitral tribunal.

Finally, the court reviewed whether the subsequent discovery of grounds for recusal could serve as a basis for the revision of an arbitral award.<sup>55</sup> It gave strong indications that it believed that the discovery of circumstances that might raise doubts as to the independence and impartiality of an

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50. H.K. LAW REFORM COMM'N, THIRD PARTY FUNDING FOR ARBITRATION SUBCOMM., CONSULTATION PAPER, THIRD PARTY FUNDING FOR ARBITRATION (Oct. 2015).

51. Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd., [2016] HKEC 2128 (C.F.I.).

52. See Poon, Anthony, *Failure to Specify Arbitral Seat in the Arbitration Clause May Result in Unenforceable Award*, GLOBAL ARBITRATION NEWS (Sept. 21, 2016), <https://globalarbitrationnews.com/failure-specify-arbitral-seat-arbitration-clause-may-result-unenforceable-award/>.

53. Bundesgericht [BGer] [Federal Supreme Court] Feb. 18, 2016 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 142 III 239.

54. Bundesgericht [BGer] [Federal Supreme Court] Mar. 16, 2016 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 142 III 296.

55. Bundesgericht [BGer] [Federal Supreme Court] Sept. 7, 2016 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] 142 III 521.

arbitrator could constitute grounds for a revision. However, rather than ruling on the issue, it chose to take the rather unorthodox step of referring the matter to Parliament to be dealt with in the forthcoming revision of the Swiss law on international arbitration.

In the NETHERLANDS, 2016 was the first full year that the New Dutch Arbitration Act<sup>56</sup> and the New Arbitration Rules of the Netherlands Arbitration Institute<sup>57</sup> were put in practice. Both the Act and the Institute entered into force in 2015.<sup>58</sup> The new Act contains improvements for Netherlands as a venue for international arbitration, including consolidation of arbitral proceedings, emergency arbitration, introduction of e-Arbitration, exclusive jurisdiction of arbitration institutes to decide challenges of arbitrators' confidentiality of arbitration and the non-liability of arbitrators.<sup>59</sup> The Dutch legislature also worked to limit Dutch courts' involvement in arbitrations and streamline the process; this objective was strongly confirmed by case law in 2016.<sup>60</sup>

In AUSTRIA, since 2014, the Austrian Supreme Court has been the first and last instance in proceedings to challenge an arbitral award. This new function of the court resulted in rich case law in 2016. In a landmark decision, the court clarified that only a violation of the right to be heard, which would also amount to an annulment ground of court judgments, could lead to a successful challenge of an arbitral award.<sup>61</sup> In another decision, the court held that where an arbitral tribunal does not decide on the whole matter in dispute (decision *infra petita*), the arbitral award can only be amended but not successfully challenged.<sup>62</sup>

In RUSSIA, 2016 was the year of global reform in arbitration law. The new Russian Law on Arbitration<sup>63</sup> and the satellite Law No. 409-FZ<sup>64</sup> were signed on December 29, 2015 and became effective on September 1, 2016. The laws reflect the most progressive arbitration trends and are intended to improve the quality of arbitration in Russia and to promote it as a place for arbitration.

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56. Netherlands Arbitration Act (2014).

57. NETHERLANDS ARBITRATION INSTITUTE, ARBITRATION RULES (2015).

58. *Id.*

59. *Id.*

60. *Id.*

61. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 23, 2016, 18 OCg 3/15p, ENTSCHIEDUNGEN DES ÖSTERREICHISCHEN OBERSTEN RICHTSHOFES IN ZIVILSACHEN [SZ].

62. Oberster Gerichtshof [OGH] [Supreme Court] Sept. 28, 2016, 18 OCg 3/16i, ENTSCHIEDUNGEN DES ÖSTERREICHISCHEN OBERSTEN RICHTSHOFES IN ZIVILSACHEN [SZ].

63. Federal'niy Zakon RF Ob Arbitrazhe (Treteyskom Razbiratelstve) v Rossiyskoy Federatsii [Federal Law of the Russian Federation on Arbitration in the Russian Federation], ROSSIISKAJA GAZETA [ROS. GAZ.] Dec. 31, 2015, No. 382-FZ.

64. Federal'niy Zakon RF O Vnesenii Izmeneniy v. Otdel'niye Zakonodatel'niye Akti Rossiysoy Federatsii [Federal Law on Amendments to Certain Legislative Acts of the Russian Federation], ROSSIISKAJA GAZETA [ROS. GAZ.] Dec. 31 2015, No. 409-FZ.

The main goals of the reforms include reducing the number of arbitration institutions (which currently number around 2,500) and combatting so-called “pocket” arbitration institutions. Arbitral institutions now need a permit from the government. Foreign arbitration institutions must also have the status of a permanent arbitration institution in Russia, otherwise their awards will be considered ad hoc awards.

Corporate disputes are now recognized as arbitrable (with certain exceptions) and are subject to proceedings under special rules in permanent arbitration institutions. A list of non-arbitrable disputes includes insolvency cases, public procurement, certain IP disputes, class actions, and disputes on privatization of state or municipal property.<sup>65</sup>

The laws contain detailed provisions on assistance and supervision by the state courts. The parties may agree to exclude the state courts’ authority regarding the appointment and termination of arbitrators and arbitral jurisdiction; and also their authority to set aside a final award rendered in the Russian Federation.<sup>66</sup>

In BRAZIL, in 2016, the New Code of Civil Procedure entered into force, which has improved the relationship between the arbitral tribunal and the courts. This also established an obligation to take precedents into consideration,<sup>67</sup> which could also extend to arbitrators applying Brazilian Law.

In a recent decision, the Superior Court of Justice (STJ) held that all franchise agreements should be considered “adhesion contracts” by definition,<sup>68</sup> therefore requiring a special form of consent for the arbitration clause.<sup>69</sup> It also held that courts have the competence to rule on an arbitration clause that appears prima facie to be pathological, notwithstanding the negative effect of competence-competence.<sup>70</sup> It also recognized the validity of arbitration clauses by reference in documents that were not signed.<sup>71</sup>

In GERMANY, the German Federal Supreme Court (BGH)<sup>72</sup> overruled a decision of the Court of Appeals regarding the German skater, Claudia Pechstein, and thereby safeguarded an award by the Court of Arbitration for Sport (CAS) in Lausanne that confirmed a decision by the International Skating Union (ISU) to ban Pechstein for two years from skating

65. Federal Law Nos. 382-FZ, 409-FZ, *supra* note 63, 64.

66. *Id.*

67. See CÓDIGO DE PROCESSO CIVIL [C.P.C.] art. 489.

68. S.T.J., No. 1.602.076 – SP (2016/0134010-1), Relator: Ministra Nancy Andrighi, 15.9.2016, SUPERIOR TRIBUNAL DE JUSTIÇA JURISPRUDÊNCIA [S.T.J.J.].

69. In adhesion contracts, arbitration clauses shall be in bold and with a special signature or in a separate document with a special signature. Lei No. 9.307/96 de 26 de Maio 2015, art. 4/2.

70. S.T.J., Recurso Especial No. 1602696/PI, Relator: Min. Moura Ribeiro, 23.09.2016, Diário da Justiça Eletrônico [D.J.e.], 16.08.2016.

71. S.T.J., Recurso Especial No. 1569422/RJ, Relator: Min. Marco Aurelio Belizze, 26.04.2016, Diário da Justiça Eletrônico [D.J.e.], 20.05.2016.

72. Bundesgerichtshof [BGH] [Federal Court of Justice] June 7, 2016, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (2016).

competitions for doping. The BGH held that the arbitration agreement was valid and that the ISU did not abuse its dominant position by requiring athletes to sign an arbitration agreement. It further held that the CAS is a true arbitral tribunal, in the sense of German procedural law, even though the arbitrators must be chosen from a list drawn up by the CAS, in which Olympic committees have a dominant position.

In other noteworthy decisions, the Court of Appeals of Brandenburg held that in enforcement proceedings a court does not need to review the validity of the arbitration agreement if a foreign state court has already done so and allowed the enforcement.<sup>73</sup> The BGH, however, annulled a decision of the Court of Appeals on the ground that it had failed to properly address submissions regarding core issues of the arbitration.<sup>74</sup>

In NIGERIA, government and private organizations have increasingly advocated for the use of arbitration. The reasons for this support include the comparative effectiveness of arbitration compared to litigation in Nigeria, as well as the role that effective dispute resolution mechanisms can play in a country when seeking to attract foreign and local investments.<sup>75</sup>

As part of the “Arbitration in Lagos Project,” the Lagos Chamber of Commerce and Industry launched an international arbitration center (LACIAC).<sup>76</sup> It is part of the project’s overall mission “to put Lagos on the map as a reliable, efficient, and transparent hub for international arbitration.”<sup>77</sup>

In SOUTH KOREA, the amended Korean Arbitration Act has taken effect as of November 30, 2016. It introduces changes that closely follow the 2006 UNCITRAL Model Law.<sup>78</sup> Key amendments include: (1) broader scope of arbitrability; (2) alleviation of the “in writing” requirement for arbitration agreements; (3) expansion of the scope of interim measures; (4) new provisions ensuring more effective investigation of evidence; and (5) simplified procedures for recognition and enforcement of arbitral awards.<sup>79</sup>

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73. Oberlandesgericht [OLG] [Brandenburg Higher Regional Court] July 24, 2015, RECHTSPRECHUNG DER OBERLANDESGERICHTE IN ZIVILSACHEN [OLGZ] (2015).

74. Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 31, 2016, ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (2016).

75. *Foreign Investments: NICA Advocates Out-of-Court Settlements*, THE GUARDIAN (Nov. 18, 2016), <http://guardian.ng/business-services/foreign-investments-nica-advocates-out-of-court-settlements/>.

76. Segun Adebowale, *LCCI Creates Alternative Dispute Resolution Centre*, THE EAGLE ONLINE (Nov. 15, 2016), <http://theeagleonline.com.ng/lcci-creates-alternative-dispute-resolution-centre/>; PUNCH, *ADR Campaign Thrives as Ailing Court System Defies Solutions* (Nov. 24, 2016), <http://punchng.com/adr-campaign-thrives-ailing-court-system-defies-solutions/>.

77. LAGOS CHAMBER OF COMMERCE, INT’L ARBITRATION CENTRE, *Vision and Mission* (Dec. 6, 2016), <http://www.laciac.org/vision/>.

78. See generally Sae Youn Kim and Harald Sippel, *Korea’s Arbitration Act is Revised for a New World*, THE LAWYER, (Yulchon LLC, Seoul) June 27, 2016.

79. KCAB INT’L ARBITRATION RULES (2016); see generally Harald Sippel & Marieke Minkinen, *The New KCAB Rules*, 34 ASA BULLETIN 569 (2016).

The Korean Commercial Arbitration Board (the KCAB) also revised its International Arbitration Rules. The revised rules are more in line with other international arbitration rules such as those of the ICC, SIAC, and LCIA. Key revisions include: (1) ease of the requirements for expedited procedure; (2) new provisions on joinder and consolidation of claims; (3) introduction of emergency arbitrator proceedings; and (4) change in the selection of arbitrators to ensure the quality, impartiality and independence of the arbitral tribunal.<sup>80</sup>

In AUSTRALIA, in *Ye v. Zeng*, the Federal Court of Australia considered whether there should be a default rule providing that indemnity costs be awarded against a party that unsuccessfully seeks to set aside or resist enforcement of an arbitral award, as is currently the case, for example, in Hong Kong.<sup>81</sup>

The court in *Ye v. Zeng* noted *obiter* the “powerful considerations” underlying the Hong Kong approach in the context of distinguishing between “conduct that reflects no more than an attempt to delay or impede payment and the reasonable invocation of the proper protections” built into the New York Convention and Australian arbitration legislation.<sup>82</sup> The court declined to follow the Hong Kong approach. However, it did award indemnity costs against the party seeking to resist enforcement, ostensibly on the basis that, in seeking to resist enforcement, the respondents had never attempted to “agitate any legitimate ground” but had “acted in their own perceived commercial interests and without merit and should pay the commercial price of doing so.”<sup>83</sup>

In *Gutnick & Anor v. Indian Farmers Fertiliser Cooperative Ltd. & Anor*,<sup>84</sup> the applicants sought to resist the enforcement of an arbitral award on public policy grounds, as contemplated in Australian arbitration legislation incorporating the NYC and the UNCITRAL Model Law. The applicants alleged that enforcing the award would lead to double recovery. In dismissing the challenge, the Victorian Supreme Court of Appeal affirmed that the public policy exception should be construed narrowly as referring to the most basic, fundamental principles of morality and justice.<sup>85</sup> The court also noted that an award that did, in fact, permit double recovery would be contrary to public policy.<sup>86</sup> However, in this case the Court found that the award did not permit double recovery.

In SWEDEN, in January 2016, the Svea Court of Appeal ruled that an arbitral tribunal lacked jurisdiction to decide an investment treaty claim brought by Spanish investors against the Russian Federation.<sup>87</sup> The dispute

80. KCAB INT’L RULES, *supra* note 79; see generally Sippel, *supra* note 79.

81. *Ye v. Zeng* (No. 5) [2016] FCA 850.

82. *Id.* at para. 23.

83. *Id.* at para. 19.

84. *Gutnick & Anor v Indian Farmers Fertiliser Coop. Ltd. & Anor* [2016] VSCA 5.

85. *Id.* at paras. 17, 19.

86. *Id.* at para. 29.

87. Svea Högret [HovR] [Court of Appeals] 2016-01-18 no. T 9128-14.

arose out of the Russian Federation's alleged expropriation of Yukos investments held by a group of holders of American Depositary Receipts. Following a 2012 award against Russia, it sought negative declaratory relief before the Swedish courts to the effect that the tribunal lacked jurisdiction pursuant to the Spain-USSR bilateral investment treaty (BIT).

Setting aside the award, the Court of Appeal ruled that the Spain-USSR BIT did not entitle the investors to pursue expropriation claims against Russia. The court held that the treaty's diagonal dispute resolution clause did not permit the tribunal to consider whether an investment had been expropriated. Rather, applying Article 31 of the Vienna Convention on the Law of Treaties, the court found that the clause only vested an arbitral tribunal with jurisdiction over disputes relating to the amount or method of payment of compensation due when an expropriation was already established. Similarly, the court found against the investors' additional arguments that, by virtue of more expansive diagonal dispute resolution clauses in other Russian BITs, this treaty's most-favored-nation clause gave the tribunal jurisdiction over questions of expropriation. The Swedish Supreme Court declined to hear an appeal on the decision.

In TURKEY, a new regime was established for decisions on interim measures issued by Courts of First Instance. Under Article 6 of the Turkish International Arbitration Law (TIAL) No. 4686, parties may request an interlocutory injunction or an interim attachment decision from the court before or during the arbitration proceedings.<sup>88</sup> If the court issues interim relief before the commencement of the arbitration, the requesting party must initiate arbitration within thirty days from the order, otherwise it will be lifted automatically.<sup>89</sup> If the Court rejects the request the requesting party may file an appeal before the Regional Court of Appeal, whose decision is final and binding.<sup>90</sup>

In MAINLAND CHINA, in November 2015, in deciding to enforce a SIAC award, the Shanghai Intermediate People's Court found that a case was foreign-related even though it was between two Chinese parties.<sup>91</sup> In reaching its decision, the court relied on the "catch-all provision" under People's Republic of China (PRC) law that there are other circumstances that may be deemed foreign-related.<sup>92</sup> Specifically, the court referred to the facts that (1) both parties to that dispute were wholly-owned foreign invested enterprises registered in the Shanghai Free Trade Zone and thus their capitals, profits and management operations were closely related to their

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88. TURKISH INT'L ARBITRATION LAW [TIAL] June 21, 2001, No. 4686, art. 6.

89. *Id.* at art. 10/A.

90. *Id.*

91. See *Siemens Int'l Trading (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Co., Ltd.*, 2013 Min Ren (Wai Zhong) Zi No. 2 (Shanghai Intern. People's Ct. Nov. 27, 2015) [hereinafter *Golden Landmark*].

92. See Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the "Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations" (I), 2012, Art. 1 (P.R.C.).

foreign investors; and (2) the subject matter of the contract had to be imported from abroad to the Shanghai Free Trade Zone and go through customs clearance procedures, which is more akin to international sales of goods than domestic sales.<sup>93</sup>

Chinese courts have traditionally taken a strict approach in applying the criteria for foreign-related disputes and have been reluctant to apply the “catch-all” provision. The judgment was therefore welcomed by arbitration practitioners in China, who hope that the decision will encourage other courts to adopt a more liberal approach when interpreting the “foreign-related” issue. However, as it is an intermediate court judgment, it does not have a binding effect on other Chinese courts. Therefore, it remains to be seen how much impact this decision would have on the development of arbitration practice in China.

On June 2, 2016, the Intermediate People’s Court of Taizhou denied the recognition and enforcement of an ICC award seated in Hong Kong on the basis of the public policy exception under article 7 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between Mainland and the Hong Kong SAR.<sup>94</sup> In reaching its decision, the Taizhou Court underscored that nineteen months prior to the award being rendered, another state court—the Jiangsu High Court—found that the arbitration agreement was invalid under Chinese Law for failing to specify an arbitration institution.<sup>95</sup> Under the Arbitration Law of China and its Judicial Interpretation, parties must specify the arbitration institution to have an effective arbitration agreement.<sup>96</sup> In the present case, the parties had only agreed to arbitrate under the ICC Rules, and according to the ICC Rules applicable at that time, it could not be inferred that the parties had chosen a specific and particular arbitration institution.

Following the opening of the Hong Kong International Arbitration Centre (HKIAC)’s representative office in mainland China in November 2015,<sup>97</sup> two other international arbitration institutions followed suit: the ICC<sup>98</sup> and SIAC<sup>99</sup> each opened a representative office in the Shanghai Free Trade Zone. While the newly opened offices do not currently administer foreign-related disputes seated in mainland China, the establishment of on-

93. See *Golden Landmark*.

94. See *Taizhou Haopu Inv. Co., Ltd. v. Wicor Holding AG*, 2015 Tai Zhong Shang Zhong Shen Zi, No. 0004 (Taizhou Interm. People’s Ct., June 2, 2016).

95. See *Su Shang Wai Xia Zhong Zi*, 2012, No. 0012 (Jiangsu High Ct., Dec. 11, 2012).

96. See Arbitration Law (adopted by Standing Comm. of Nat’l People’s Cong., promulgated by Order No. 31 of the President, Aug. 31, 1994, effective Sept. 1, 1995), art. 18.

97. See Press Release, Hong Kong Gov’t (Nov. 19, 2015), available at <http://www.info.gov.hk/gia/general/201511/19/P201511190763.htm>.

98. See *New Shanghai Office Lays Groundwork for ICC Asia Developments*, ICC (Feb. 24, 2016), <https://iccwbo.org/media-wall/news-speeches/new-shanghai-office-lays-groundwork-for-icc-asia-developments/>.

99. See Press Release, Singapore International Arbitration Centre, Opening of SIAC Office in Shanghai, (Jan. 25, 2016), available at <http://www.siac.org.sg/113-resources/press-releases/press-release-2016/467-opening-of-siac-office-in-shanghai>.

the-ground presences in mainland China are encouraging signs to help promote international best practices in mainland China and to facilitate the development of PRC arbitration law.

On October 26, 2016, the Shenzhen Court of International Arbitration (SCIA), formerly known as Shenzhen sub-commission of China International Economic and Trade Arbitration Commission (CIETAC), published its new arbitration rules which took effect on December 1, 2016.<sup>100</sup> SCIA is the first domestic arbitration institution to revise its arbitration rules to cater for the administration of investor-state arbitrations under UNCITRAL rules.

In INDIA, in an effort to encourage domestic arbitration and attract international arbitrations to venues in India, the Government adopted the Arbitration and Conciliation (Amendment) Act, 2015<sup>101</sup> in March 2016. Implementation of the Act by the courts has been consistent with the intention of improving the administration of arbitrations in India. The limitations on the applicability of the Act have been narrowly construed to apply only to arbitrations conducted before its implementation date, but not court challenges subsequently filed.<sup>102</sup> In one noted case, the court quashed the appointment of an arbitrator appointed by a state entity because the arbitrator was an employee of the state.<sup>103</sup> Courts have also recognized the limited scope of interference in both domestic<sup>104</sup> and international<sup>105</sup> awards, and observed that the grounds for interference into foreign awards previously cited in *Renusagar*<sup>106</sup> and *Shri Lal Mahal*<sup>107</sup> are no longer available.

In ITALY, the Italian Supreme Court, the Corte di Cassazione, in a ruling on August 2, 2016<sup>108</sup> confirmed the clear position it took in 2013—that arbitration in Italian law has a jurisdictional nature with various consequences.<sup>109</sup> It also held that a judgment on the jurisdiction of an arbitral tribunal can directly be challenged before the Corte di Cassazione.

SPAIN has become the poster child for Energy Charter Treaty arbitration, finding itself on the receiving end of nearly three dozen claims.<sup>110</sup> The vast majority of these claims have been filed with ICSID, but a handful (as

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100. [Shenzhen Court of International Arbitration Rules], (effective Dec. 1, 2016), (P.R.C.), available at [http://www.sccietac.org/web/doc/view\\_rules/861.html](http://www.sccietac.org/web/doc/view_rules/861.html).

101. Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Act of Parliament, 2016.

102. See *ICI-SOMA JV v. Simplex Infrastructures Ltd.*, 2016 I.A. 11337.

103. See *Alternative for India Development v. The State of Jharkhand* (2016), available at <http://jhr.nic.in/hcjudge/data/61-1-2016-15072016.pdf>.

104. *Rail Land Dev. Auth. v. Bhagwati Rail Infra Pvt. Ltd.*, 2016 I.A. 9484.

105. *XSTRATA Coal Marketing AG v. Dalmia Bharat*, 2016 Delhi H.C. 257.

106. See *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) S.C.C. 644.

107. See *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2014) 2 S.C.C. 433.

108. Cass., sez. un., 2 agosto 2016, n. 16058, Giur. it. 2016, 12, 270.

109. Cass., sez. un., 10 ottobre 2013, n. 24153, available at [http://www.tedioli.com/Cass\\_sez\\_un\\_ord\\_24153\\_2013.pdf](http://www.tedioli.com/Cass_sez_un_ord_24153_2013.pdf).

110. See generally Clifford J. Hendel, *The Energy Charter Treaty and the Spanish Renewable Energy Awards*, in *INVESTMENT TREATY ARBITRATION REVIEW* (Barton Legum ed., Apr. 2016).

permitted by the Energy Charter) have been brought before the Arbitration Institute of the Stockholm Chamber of Commerce or under the UNCITRAL Rules.

The jurisprudence that will flow from these cases is likely to provide important guidance on some key issues of ECT law and practice, particularly involving the scope of the protection against indirect expropriation and the borderline between legitimate expectations and host state regulatory power.

In 2016, the ICC made a number of changes to its policies and amended the ICC Rules of Arbitration in an effort to increase the efficiency and transparency of arbitrations.

Beginning in January 2016, the ICC started publishing on its website the names of sitting arbitrators, their nationality, and whether their appointment was made by the ICC or by the parties.<sup>111</sup> The ICC also began penalizing arbitrators who do not meet the three-month deadline to submit draft arbitration awards by reducing their compensation (by five to ten percent, or if the delay is seven to ten months by ten to twenty percent, and by twenty percent or more if it exceeds ten months).

On November 6, 2016, the ICC published new rules aimed at promoting the efficiency of the proceedings.<sup>112</sup> The amendment to the ICC Rules of Arbitration, which becomes effective on March 1, 2017, provides expedited procedure for arbitrations where the amount in dispute is less than \$2 million USD. Parties may, by agreement, opt-in and arbitrate cases with more than \$2 million USD in dispute under the expedited procedure. In cases decided under the expedited procedure rules, the arbitration award must generally be made within six months of the case management conference. In addition, the ICC will only appoint a sole arbitrator, regardless of any contrary terms in the arbitration agreement. The tribunal will have the discretion to decide the arbitration based on documents only—without a hearing, requests for production of documents, and examination of witnesses. Arbitration fees will be significantly less for cases decided through the expedited process. Parties may by agreement opt out of the expedited procedure. Also, upon request of a party and on a case-by-case basis, the ICC may determine that expedited procedure is inappropriate.<sup>113</sup>

On July 8, 2016, a tribunal of the International Centre for the Settlement of Investment Disputes (ICSID) issued an award in *Philip Morris Brands SARL v. Oriental Republic of Uruguay* dismissing claims brought by investors concerning tobacco regulations.<sup>114</sup> The claimants alleged that Uruguay's

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111. *ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency*, ICC (Jan. 5, 2016), <http://www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>.

112. *ICC Court Amends its Rules to Enhance Transparency and Efficiency*, ICC (Apr. 11, 2016), <http://www.iccwbo.org/News/Articles/2016/ICC-Court-amends-its-Rules-to-enhance-transparency-and-efficiency/>.

113. ICC, *Arbitration Rules*, art. 30.

114. *Phillip Morris Brands et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 18, 2016).

adoption of two tobacco regulations, including a ban on selling different variants of the same brand of cigarettes (e.g., “light,” “mild,” “menthol”) and a requirement that graphic health warnings on cigarette packages increase from fifty percent to eighty percent, violated the applicable bilateral investment treaty and caused their investments to lose value. In response, Uruguay argued that the regulations were a reasonable and good faith exercise of its sovereign power to protect public health. Following a merits hearing, the tribunal held that Uruguay had adopted the regulations in good faith and in a non-discriminatory manner that was proportionate to a legitimate public health concern and dismissed all claims.<sup>115</sup> The claimants do not intend to challenge the tribunal’s decision.<sup>116</sup>

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115. This award comes on the heels of an earlier case brought before the Permanent Court of Arbitration regarding tobacco regulations adopted by Australia, in which the tribunal issued an award dismissing all claims on jurisdictional grounds. *Phillip Morris Asia Ltd. v. The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015).

116. Malena Castaldi & Anthony Esposito, *Philip Morris Loses Tough-on-Tobacco Lawsuit in Uruguay*, REUTERS July 8, 2016, <http://www.reuters.com/article/us-pmi-uruguay-lawsuit-idUSKCN0ZO2LZ>.

