

# The Year in Review

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Volume 52 *International Legal Developments*  
*Year in Review: 2017*

Article 10

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January 2018

## International Arbitration

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### Recommended Citation

Manuel Liatowitsch et al., *International Arbitration*, 52 ABA/SIL YIR 147 (2018)  
<https://scholar.smu.edu/yearinreview/vol52/iss1/10>

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## International Arbitration

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**THE YEAR IN REVIEW**  
**AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW**

## **International Arbitration**

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### **I. Introduction**

This article surveys developments in International Arbitration in 2017. The first section highlights significant arbitration developments in U.S. courts and the second section highlights developments around the world, including England & Wales, Singapore, Hong Kong, Mainland China, Australia, Austria, Switzerland, Nigeria, Russia, Ukraine, Malaysia, and at the International Centre for Settlement of Investment Disputes (ICSID).

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**II. Arbitration Developments in U.S. Courts****A. ENFORCEMENT OF ARBITRAL AWARDS****1. Enforcement of an Annulled Award**

This year, several courts addressed the issue of whether a party can seek to enforce an arbitral award in a U.S. court that has been nullified by the arbitral panel or by a foreign court. Following a controversial decision issued by the Second Circuit last year in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción (Pemex)*,<sup>1</sup> which applied the public policy exception to enforce a foreign arbitral award that was annulled in the jurisdiction of the arbitral seat, two cases in the Second Circuit and D.C. Circuit suggest a return to being more deferential to foreign courts when applying the standard for enforcement of an annulled award.

In *Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic*, the Second Circuit upheld a district court's vacatur of an arbitration award that was annulled by the Malaysian High Court.<sup>2</sup> Following an arbitration in Malaysia, Thai-Lao Lignite ("TLL") was issued an arbitration award against Laos arising from the termination of contracts granting TLL rights to mine lignite and build a lignite-burning power plant in Laos.<sup>3</sup> After a district court judge in the Southern District of New York issued an enforcement order, the Malaysian High Court annulled the award based on a finding that the arbitral panel had exceeded its jurisdiction by addressing contract disputes outside the scope of the relevant arbitration agreement.<sup>4</sup> As a result, Laos moved under Federal Rule of Civil Procedure 60(b)(5) for relief from the prior order to vacate the award, and the district court granted its motion on the ground that the Malaysian High Court's annulment did not meet the "extraordinary circumstances" standard<sup>5</sup> established by the D.C. Circuit in *TermoRio S.A. E.S.P. v. Electranta S.P.*<sup>6</sup>

On appeal, the Second Circuit reaffirmed its agreement using the *TermoRio* standard for enforcing a nullified award, and noted that *Pemex* recognized a "public policy" exception to the comity principle where enforcement of an annulled award is needed to "vindicate 'fundamental notions of what is decent and just.'"<sup>7</sup> The panel held that in the absence of public policy concerns, "annulment of an award in the primary jurisdiction should weigh heavily" in the Rule 60(b)(5) analysis.<sup>8</sup> Finding that the

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. *Thai-Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172 (2d Cir. 2017).

3. *Id.* at 177-78.

4. *Id.* at 180.

5. *Id.* at 180-81.

6. *See TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007).

7. *Thai-Lao*, *supra* note 2 at 176 (citing *TermoRio*, 487 F.3d at 938).

8. *Id.* at 186.

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Malaysian courts' judgments did not fall within the bounds of the public policy exception, the court determined that the district court had not exceeded the bounds of its discretion in vacating its enforcement order.<sup>9</sup>

The Second Circuit's decision indicates that *Pemex* was an anomaly in arbitral award enforcement jurisprudence, and that an action to enforce an award that has been set aside in the primary jurisdiction on public policy grounds continues to face a high, but not insurmountable, bar. *Getma International v. Republic of Guinea*, a D.C. Circuit decision, reaffirms that this bar remains the approach elsewhere.<sup>10</sup> In *Getma*, the D.C. Circuit affirmed a lower court's refusal to enforce an award that had been annulled by the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa where *Getma*, a French cargo company, failed to show that the award's annulment violated U.S. "notions of morality and justice."<sup>11</sup> Interestingly, the panel refrained from resolving the circuit split on the applicable standard of review for a district court's decision to confirm or vacate a foreign arbitral award, reasoning that it would affirm the district court under either a de novo or abuse of discretion standard.<sup>12</sup>

## 2. *Enforcement of an ICSID Award*

This year, the Second Circuit issued an opinion clarifying the processes required for the enforcement of an ICSID award. In *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, the Second Circuit held that the Foreign Sovereign Immunities Act (FSIA)<sup>13</sup> provides the sole source of jurisdiction for federal courts over actions brought to enforce ICSID awards against foreign sovereigns.<sup>14</sup> As such, actions to enforce ICSID arbitration awards must comply with the personal jurisdiction, service, and venue requirements of the FSIA, which requires plenary proceedings upon notice, rather than the filing of ex parte enforcement suits.<sup>15</sup>

*Mobil Cerro* appears to have been the first circuit court case to consider the competing approaches to enforcing an ICSID award in federal court.<sup>16</sup> While it departed from the approach adopted by several cases from the Southern District of New York,<sup>17</sup> it is consistent with the decisions of other

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9. *Id.* at 187.

10. *See generally* *Getma Int'l v. Republic of Guinea*, 862 F.3d 45 (D.C. Cir. 2017).

11. *Id.* at 47.

12. *Id.* at 48; *Compare* *Corporación Mexicana*, *supra* note 1 at 100, *with* *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1014-15 (5th Cir. 2015).

13. 28 U.S.C. § 1330, 1391(f), 1441(d), 1602-1611 (West).

14. *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96 (2d Cir. 2017).

15. *Id.* at 107.

16. *See id.* at 105-08.

17. *See* *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015) (permitting ex parte proceedings); *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009) (same).

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district courts outside of the Second Circuit.<sup>18</sup> As a result of *Mobil Cerro*, enforcing ICSID arbitral awards in the Second Circuit will be a more involved and lengthy process, as litigants must now comply with international service conventions.

### 3. *Enforcement of Labor Arbitration Awards*

This year, the Southern District Court of New York again emphasized its “highly deferential” role in reviewing labor arbitration awards under the Labor Management and Relations Act (LMRA).<sup>19</sup> Citing the 2016 Second Circuit decision upholding an arbitral award against Tom Brady,<sup>20</sup> the district court in *National Football League Management Council v. National Football League Players Association* upheld an arbitral award against Dallas Cowboys running back Ezekiel Elliot and denied a motion for a preliminary injunction barring the enforcement of his six-game suspension on similar grounds.<sup>21</sup> The court hesitated to import the Federal Arbitration Act’s (FAA) “fundamental fairness” standard to LMRA arbitration awards, under which an arbitral award can be vacated “only if fundamental fairness is violated,”<sup>22</sup> emphasizing that “courts should not superimpose an extracontractual definition of ‘fairness’ in arbitrations beyond the actual standards and procedures for which the parties bargained.”<sup>23</sup> But the court found that even if the standard applied, the National Football League Players Association had failed to make the necessary showing of unfairness.<sup>24</sup>

## B. CONFLICTS BETWEEN THE FAA AND STATE LAW

The Supreme Court issued an opinion this year reaffirming that the FAA preempts state laws that discriminate against arbitration.<sup>25</sup> In *Kindred Nursing Centers, L.P. v. Clark*, the court refused to enforce the Kentucky Supreme Court’s “clear-statement” rule, finding that it violated the FAA’s equal-treatment principle.<sup>26</sup> The court found that a state-law contract rule

18. See, e.g., *Micula v. Gov’t of Rom.*, 104 F.Supp.3d 42 (D.D.C. 2015); *Cont’l Casualty Co. v. Argentine Republic*, 893 F.Supp.2d 747 (E.D. Va. 2012).

19. *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 17 Civ. 6761 (KPF), 2017 WL 4998198, at \*5 (S.D.N.Y. Oct. 30, 2017), *aff’g* No. 17-3510 (2d Cir. Nov. 9, 2017).

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

21. *Nat’l Football League Mgmt. Council*, 2017 WL 4998198, at \*1. The Second Circuit has since denied Elliot’s appeal for an emergency injunction, finding that he had failed to meet the “requisite standard.” *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, No. 17-3510 (2d Cir. Nov. 9, 2017). Elliot subsequently withdrew his appeal of the district court’s decision. No. 17-3510 (2d Cir. Nov. 27, 2017) (granting motion for voluntary dismissal).

22. *Nat’l Football League Mgmt. Council*, 2017 WL 4998198, at \*6.

23. *Id.* at \*7.

24. *Id.* at \*7-8.

25. *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017).

26. *Id.* at 1423.

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requiring agents with powers of attorney to explicitly authorize arbitration agreements disfavored such agreements by subjecting them to “uncommon barriers.”<sup>27</sup> Citing its decision in *AT&T Mobility LLC v. Concepcion*,<sup>28</sup> the court found that the Kentucky Supreme Court’s rule was in tension with the FAA’s equal-treatment principle, under which a court may not invalidate an arbitration agreement based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>29</sup> The court reasoned that the state rule “hing[es] on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial.”<sup>30</sup> Following *Kindred Nursing Centers L.P.*, the court may be unsympathetic not only to state laws that outright prohibit arbitration, but also those that “covertly” result in the same outcome.<sup>31</sup>

**C. VALIDITY OF “MANIFEST DISREGARD OF THE LAW”**

This year, several courts considered the status of “manifest disregard of the law” as a ground for vacatur of arbitral awards. A circuit split developed on this issue following the Supreme Court’s decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, which held that section 10 of the FAA provides the exclusive grounds under the statute for vacatur of arbitration awards.<sup>32</sup> Two decisions from district courts in the District of Columbia suggest that this issue remains an unsettled one in the D.C. Circuit. In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, a court assumed *arguendo* that the “manifest disregard” doctrine was still good law.<sup>33</sup> But in a footnote, the court noted continued uncertainty as to its application to the enforcement of foreign arbitral awards under the New York Convention.<sup>34</sup> In another District of Columbia decision this year, *Mesa Power Group v. Government of Canada*, a district court assumed, without deciding, that manifest disregard remains a valid ground for vacating an arbitral award in the D.C. Circuit.<sup>35</sup>

**D. DELEGATION OF ARBITRABILITY TO ARBITRATOR**

Two courts this year found that the incorporation of certain bodies’ rules into an arbitration agreement met the standard for clear and unmistakable

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27. *Id.* at 1427.

28. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

29. *Kindred Nursing*, *supra* note 25 at 1426 (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

30. *Id.* at 1427.

31. *See id.* at 1426 (“The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that [oh so coincidentally] have the defining features of arbitration agreements”) (Kagan, J.).

32. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

33. *Crystallex Int’l Corp. v. Bolivarian Republic of Venez.*, 244 F. Supp. 3d 100, 121 (D.D.C. 2017).

34. *Id.* at 123 n.31.

35. *Mesa Power Grp. v. Gov’t of Can.*, 255 F. Supp. 3d 175, 183-84 (D.D.C. 2017).

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evidence of a delegation of gateway issues of arbitrability to an arbitrator. In *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, the Fifth Circuit joined the D.C., Second, and Ninth Circuits in holding that agreements that incorporate the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules “clearly and unmistakably” delegate issues of arbitrability because the rules grant arbitrators the authority to decide their own jurisdiction.<sup>36</sup>

Likewise, in *Portland General Electric Co. v. Liberty Mutual Insurance Co.*, the Ninth Circuit joined the First and Second Circuits in holding that the incorporation of International Chamber of Commerce (ICC) rules into an arbitration agreement delegates gateway issues to the arbitrator.<sup>37</sup> The panel noted that the circuit had previously found such delegation when parties incorporated by reference the American Arbitration Association (AAA) rules, and observed the similarity between the ICC and AAA rules, both of which state that an arbitrator has the power to rule on its own jurisdiction.<sup>38</sup>

### III. Arbitration Developments Around the World

In ENGLAND AND WALES, in 2017, the court rejected an arbitrator challenge under section 24 of the Arbitration Act 1996 on the basis of alleged “over-delegation” of their duties to the tribunal secretary.<sup>39</sup> The tribunal chairman had unwittingly sent an email—which was intended for the tribunal secretary—to the claimant’s legal team asking his “reaction to this latest from [the claimant].”<sup>40</sup> The London Court of International Arbitration (LCIA) dismissed the challenges based on use of the tribunal secretary.<sup>41</sup> In the following court proceedings, Justice Popplewell observed that the court should “be very slow to differ” from the LCIA Court’s decision.<sup>42</sup> He held that a secretary may undertake legal research and draft portions of awards, and also emphasized that “an arbitrator who receives the views of a tribunal secretary does not thereby necessarily lose the ability to exercise full and independent judgement on the issue in question.”<sup>43</sup> A failure to follow best practices is not the same as failing properly to conduct proceedings.<sup>44</sup> Parties should have a wide autonomy with respect to the

36. *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 866 F.3d 709, 714 (5th Cir. 2017); see *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207–08 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2410 (2016); *Oracle Am., Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1073 (9th Cir. 2013); *Schneider v. Kingdom of Thai.*, 688 F.3d 68, 73–74 (2d Cir. 2012).

37. *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981, 985 (9th Cir. 2017); see *Shaw Grp. Inc. v. Triplefine Int’l Corp.*, 322 F.3d 115, 118 (2d Cir. 2003); *Apollo Comput. Inc., v. Berg*, 886 F.2d 469, 473–74 (1st Cir. 1989).

38. See *Portland Gen.*, *supra* note 37 at 985.

39. P v. Q [2017] EWHC 194 (Comm) [¶ 1].

40. *Id.* ¶ 10.

41. *Id.* ¶ 19.

42. *Id.* ¶ 41.

43. *Id.* ¶¶ 63, 67.

44. P v. Q [2017] EWHC 194 (Comm) [¶ 69].

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arbitral process, they are free to agree on the degree of involvement of the secretary, or to prohibit a secretary's use altogether.<sup>45</sup>

The court heard several cases as to the enforceability of an award. It was successfully argued that a foreign arbitral award should be enforceable in England despite allegations made by the respondent buyer that the relevant transaction had been "tainted" by fraud, and was therefore unenforceable on the grounds of public policy.<sup>46</sup> The finality of arbitral awards "clearly and distinctly outweighs any broad objection on the grounds that the transaction was 'tainted' by fraud."<sup>47</sup> In another case the court considered an award that had been set aside by the court at the seat.<sup>48</sup> The court denied an application to enforce an award, which had been set aside by the Russian court based on the arbitrators' non-disclosure of the expert witnesses, and on grounds of public policy.<sup>49</sup> The English court would only enforce an award set aside at the seat if the decision was so extreme and incorrect that the local court could not have been acting in good faith, for which apparent bias is insufficient and actual bias must be shown.<sup>50</sup>

The court also dismissed an application to set aside an award under section 68 of the Arbitration Act 1996.<sup>51</sup> Mid-arbitration, the applicant's appointed arbitrator had e-mailed the applicant's counsel, stating highly negative views about the chairman of the tribunal.<sup>52</sup> The e-mail was headed "HIGHLY CONFIDENTIAL: NOT TO BE USED IN THE ARBITRATION."<sup>53</sup> The applicant challenged the award on various grounds, which were all dismissed.<sup>54</sup> It also asked that the award be set aside, rather than remitted, because internal conflict on the tribunal meant that remission would be inappropriate.<sup>55</sup> In support of that conflict the applicant disclosed the arbitrator's email.<sup>56</sup> The court would have held that it was wholly inappropriate for one arbitrator to contact the party that appointed him without notice to the other members of the tribunal, and the court would have remitted had it upheld the challenge, as the tribunal had apparently continued to function well after the email.<sup>57</sup>

The court dismissed another challenge to an arbitral award, holding that the tribunal's alleged failure to take account of evidence did not amount to a

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45. *See id.* ¶ 50.

46. *Sinocore Int'l Co. Ltd. v. RBRG Trading (UK) Ltd.* [2017] EWHC 251 (Comm).

47. *Id.* ¶ 47.

48. *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm).

49. *Id.* ¶¶ 14, 71.

50. *Id.* ¶ 2.

51. *Symbion Power LLC v Venco Imtiaz Construction Co.* [2017] EWHC 348 (TCC).

52. *Id.* ¶ 78.

53. *Id.*

54. *Id.* ¶ 30.

55. *Id.* ¶ 81.

56. *Symbion Power LLC v Venco Imtiaz Construction Co.* [2017] EWHC 348, (TCC) [¶ 81].

57. *Id.* ¶ 84.

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serious irregularity under section 68 of the Arbitration Act 1996.<sup>58</sup> The challenge was based on the allegation that there had been an exceptional failure by the tribunal to consider or even address allegedly crucial evidence.<sup>59</sup> Dismissing the challenge, the court held that although an award must contain the reasons for the award, the award need not refer to the counter-arguments or competing evidence.<sup>60</sup> The tribunal's duty is to decide the issues put before it, and to provide reasons in the award.<sup>61</sup> This duty does not require the tribunal to refer to all the relevant evidence.<sup>62</sup> The decision also confirmed that matters that do not individually constitute serious irregularities cannot be aggregated to make up a composite serious irregularity.<sup>63</sup> Furthermore, it was held that the fact that the tribunal consisted of former judges did not mean that the courts expect a "higher" standard of award writing.<sup>64</sup>

SINGAPORE AND HONG KONG traditionally prohibited third party funding as contrary to public policy.<sup>65</sup> The prohibition of third party funding in both jurisdictions arose from fears that it incentivized the perversion of justice.<sup>66</sup> In January and June of 2017, respectively, both Singapore and Hong Kong passed legislation eliminating common law liabilities for third party funding in international arbitration.<sup>67</sup> These developments will strengthen both Singapore and Hong Kong's positions as international arbitration seats in Asia, providing parties with access to more diverse funding arrangements.<sup>68</sup>

Singapore's Civil Law (Amendment) Bill 38/2016, effective March 1, 2017, permits third party funding in international arbitration and related proceedings.<sup>69</sup> Specifically, the law abolishes the common law tort of champerty, the maintenance of an action in return for a share in its proceeds, and maintenance, where a non-interested party provides assistance to a party to proceedings.<sup>70</sup> The law also confirms that third-party funding is not contrary to public policy or illegal where it is (i) provided by eligible parties, and (ii) in prescribed proceedings.<sup>71</sup> The law also provides prescribed conditions to limit third-party funding. First, third-party funding may only

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58. UMS Holding Ltd v. Great Station Properties SA and others [2017] EWHC 2398.

59. *Id.* ¶ 12.

60. *Id.*

61. *Id.* ¶ 132.

62. *Id.* ¶ 139.

63. UMS Holding Ltd v. Great Station Properties SA and others [2017] EWHC 2398 [¶ 129].

64. *Id.* ¶ 35-36.

65. JACLYN MASTERS & JOHNATHAN MACKOJC, *THE RACE IN THE EAST AND ITS CHALLENGES: THIRD PARTY ARBITRATION FUNDING IN SINGAPORE AND HONG KONG* (2017), Corrs Chambers Westgarth, Lawyers.

66. *See id.* ¶ 3.

67. *See generally id.* ¶ 5-9.

68. *Id.* ¶ 15.

69. Civil Law (Amendment) Act 2017, s. 5a-5b (Sing).

70. *Id.* § 5A.

71. *Id.* § 5B.

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be provided by professional funders whose chief business is in funding claims, and second, funders must have sufficient resources both to fund and to meet the cost of the proceedings.<sup>72</sup> Singapore's legal ethics rules were also amended to impose a duty on counsel to disclose the existence of any third-party funding arrangement to all parties to the proceeding.<sup>73</sup> Lawyers may now directly refer or introduce third-party funders to their clients.<sup>74</sup>

Similarly, Hong Kong's arbitration and mediation legislation allows third-party funding of costs and expenses in domestic arbitrations, as well as work done in Hong Kong in association with foreign-seated arbitrations and mediations.<sup>75</sup> Hong Kong's legislation, unlike Singapore's, did not abolish the traditional common law torts of champerty and maintenance, instead creating exceptions that limit their applicability to arbitration and associated proceedings.<sup>76</sup> A funded party is required to provide written notice to each other party to an arbitration of the fact that a funding agreement exists, along with the name of the funder.<sup>77</sup>

In MAINLAND CHINA, a year after the *Golden Landmark* decision,<sup>78</sup> the Supreme People's Court issued on December 30, 2016 an opinion setting out, among other things, guidelines for courts handling arbitration-related cases involving pilot free trade zones (the FTZ Opinion).<sup>79</sup> Article 9(1) of the FTZ Opinion states that if two wholly foreign-owned enterprises registered within a pilot free trade zone enter into an agreement to submit disputes to arbitration seated outside Mainland China, such agreement should not be deemed invalid merely on the basis that the dispute concerned is not "foreign-related".<sup>80</sup> Article 9(2) provides that a court will not accept a challenge to the enforcement of a foreign-seated award in such circumstances if the following three criteria are met: (a) one of the parties is a foreign-invested company registered within a pilot free trade zone; (b) the parties entered into a foreign-seated arbitration agreement; and (c) the opposing party was the claimant who initiated the foreign-seated arbitration, or the opposing party was the respondent who participated in the foreign-seated arbitration without challenging the validity of the arbitration clause.<sup>81</sup>

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72. *Id.*

73. LEGAL PROFESSION ACT, (G.N. No. S 156/1998), 161 § 71 (2016) (Sing.).

74. *Id.*

75. Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill, (2016) Cap. 10A, § 98E-W (H.K.).

76. *Id.* §§ 98K, 98L.

77. *Id.* § 98T.

78. See *Siemens Int'l Trading (Shanghai) Co., Ltd. v. Shanghai Golden Landmark Co., Ltd.*, 2013 Min Ren (Wai Zhong) Zi No. 2 (Shanghai Interm. People's Ct. Nov. 27, 2015); see also Manual Liatowitsch et al., *International Arbitration*, 51 THE YEAR IN REV.: AN ANN. PUB. OF THE A.B.A./SEC. OF INT'L L. 109, 121-22(2017).

79. *China Extends Access to Offshore Arbitration*, HERBERT SMITH FREEHILLS: ARBITRATION NOTES (Jan. 13, 2017, 10:13 AM), <https://hsfnotes.com/arbitration/2017/01/13/china-extends-access-to-offshore-arbitration/>.

80. *Id.*

81. *Id.*

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The FTZ Opinion has slightly widened Chinese foreign invested companies' access to offshore arbitration, although its impact is limited to the handful of free trade zones.<sup>82</sup>

Two notable decisions concerning the enforcement of foreign-seated awards have been rendered. In December 2016, a Chinese court enforced a China International Economic and Trade Arbitration Commission (CIETAC) Hong Kong arbitration award.<sup>83</sup> This is the first time a CIETAC Hong Kong award has been enforced in Mainland China since CIETAC established a Hong Kong arbitration center in 2012. In July 2017, a court in Beijing enforced a Hong Kong-seated award less than a year after the award was issued.<sup>84</sup>

Conversely, a Shanghai court refused to enforce a Singapore International Arbitration Centre (SIAC) award under Article V(1)(d) of the New York Convention on the basis that the award failed to comply with the parties' agreement for a three-member tribunal.<sup>85</sup> Against the objection of the respondent, a sole arbitrator was appointed pursuant to the claimant's request for an expedited procedure under the 2013 SIAC Arbitration Rules.<sup>86</sup> SIAC later amended its Rules to provide that by agreeing to arbitration under the SIAC Rules, the parties are deemed to have agreed that the rules and procedures of SIAC's Expedited Procedure will supersede any contrary terms in the arbitration agreement.<sup>87</sup>

In AUSTRALIA, this year's decisions such as *Laboud v Democratic Republic of Congo (Laboud)*,<sup>88</sup> *Hui v Esposito Holdings Pty Ltd*,<sup>89</sup> and *Hui v Esposito Holdings Pty Ltd (No 2) (Hui)*<sup>90</sup> confirm that Australia is an arbitration-friendly jurisdiction and that courts only interfere with the process where absolutely necessary in accordance with the *International Arbitration Act 1974* (Cth) (the Act).<sup>91</sup>

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82. See *id.*

83. See Kwok Kit Cheung, *CIETAC Hong Kong Arbitral Award Enforced by PRC Court for the First Time!*, DEACONS (Sept. 12, 2017), <http://www.deacons.com.hk/news-and-insights/publications/cietac-hong-kong-arbitral-award-enforced-by-prc-court-for-the-first-time.html>.

84. See *PRC Court Enforces HKIAC Arbitration Award in Favour of Australian Gold Mining Company*, HERBERT SMITH FREEHILLS: ARBITRATION NOTES (Aug. 18, 2017), <https://hsfnotes.com/arbitration/2017/08/18/prc-court-enforces-hkiac-arbitration-award-in-favour-of-australian-gold-mining-company/>.

85. See *PRC Court Refuses to Enforce SIAC Arbitral Award Made by One Arbitrator Under Expedited Arbitration Procedures When Arbitration Agreement Provided for Three Arbitrators*, HOGAN LOVELLS (Aug. 2017), <https://www.hoganlovells.com/en/publications/prc-court-refuses-to-enforce-siac-arbitral-award-arising-out-of-the-expedited-procedure-where-arbitration-agreement-provided-for-three-arbitrators>.

86. Under Rule 5.2(b) of the 2013 SIAC Rules, a case referred to SIAC's Expedited Procedure would be subject to a sole arbitrator, unless the President of the Court of Arbitration of SIAC determined otherwise.

87. See SIAC, Arbitration Rules, Rule 5.3.

88. *Laboud v The Democratic Republic of Congo* [2017] FCA 982 (Austl.).

89. *Hui v Esposito Holdings Pty Ltd* [2017] FCA 648 (9 June 2017) (Austl.).

90. *Hui v Esposito Holdings Pty Ltd (No 2)* [2017] FCA 728 (26 June 2017) (Austl.).

91. *International Arbitration Act 1974* (Cth) s 1-3 (Austl.).

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In *Laboud*, the federal court considered an application seeking leave to enforce an ICSID award against the Democratic Republic of Congo, and the subsequent decision of an ad hoc annulment committee refusing to annul that award.<sup>92</sup> The court held that as a matter of construction, the power to enforce an “award” under the Act includes a decision refusing to annul an award.<sup>93</sup> This decision confirms that Australian courts will recognise and enforce arbitral awards in appropriate cases, even if the particular award is made against a foreign state.

On the other hand, *Hui* demonstrates that Australian courts are prepared to set aside awards and remove arbitrators in circumstances where the limited pre-conditions contemplated by the Act are met.<sup>94</sup> *Hui* concerned partial awards issued by an arbitrator following a preliminary hearing.<sup>95</sup> The court found that the arbitrator’s decision went beyond the scope regarding the parties’ agreement on the preliminary phase.<sup>96</sup> Justice Beach ultimately determined that because of this unfairness, it was necessary to set aside parts of the preliminary award and terminate the arbitrator’s mandate.<sup>97</sup>

In AUSTRIA, since 2014, the Austrian Supreme Court is the first and last instance for most matters related to arbitration, specifically challenges to arbitral awards and substitute appointments of and challenges to arbitrators. This procedure has led to swift and predictable decisions. In 2017, the Austrian Supreme Court, *inter alia*, confirmed the judicature of the European Court of Justice that violations against fundamental provisions of EU law constitute a violation of the *ordre public*.<sup>98</sup> On this basis, the Austrian Supreme Court held ineffective a contractual arbitral clause that would have led to the non-applicability of EU law regarding the mandatory compensation for commercial agents by providing for a New York arbitral seat and New York law.<sup>99</sup> In another interesting decision, the Austrian Supreme Court reversed a decision by the court of appeal of Vienna, and upheld the setting aside of an arbitral award by the Commercial Court of Vienna, although the Commercial Court had no jurisdiction to rule on the challenge of the award.<sup>100</sup> The Supreme Court deemed the commercial court’s lack of jurisdiction was rectified by the fact that neither the plaintiff, nor the defendant, nor the commercial court itself had become aware of the lack of jurisdiction until after the decision.<sup>101</sup>

In SWITZERLAND, 2017 was another busy year for the arbitration-related case docket of the Swiss Supreme Court. To date, the Court has rendered

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92. [2017] FCA 982 .

93. *Id.* ¶ 29.

94. *See* [2017] FCA 648.

95. *Id.* ¶ 2.

96. *Id.*

97. *Id.* ¶ 259.

98. Oberster Gerichtshof [OGH] [Supreme Court] March 1, 2017, 5Ob 72/16y (Austria).

99. *Id.*

100. Oberster Gerichtshof [OGH] [Supreme Court] May 30, 2017, 4 Ob 92/17b (Austria).

101. *Id.*

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forty-nine 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:

First, in a decision concerning a challenge of an award on jurisdiction in an investor-state arbitration based on a bilateral investment treaty (BIT), the Swiss Supreme Court analyzed the standards for interpreting the “investment” requirement in BITs.<sup>102</sup> The Supreme Court thereby deviated from the prevailing opinion in legal commentary, which advocates for a globalised notion of investment with a view to fostering uniformity and, thus, predictability in international law. The Supreme Court rather adopted an “individual” approach and focused only on the interpretation of the BIT in question.<sup>103</sup> The Supreme Court held that any interpretation of the term “investment” must be based on the applicable BIT in a particular case and on the concrete intentions and expectations of the contracting parties.<sup>104</sup> From the perspective of states as parties to an investment treaty, the individual approach taken by the Swiss Supreme Court is likely to be welcomed, as it safeguards the intentions and expectations of states that have concluded their investment treaty. Notably, and contrary to its usual practice in commercial arbitration cases, the Supreme Court strongly relied in this case on the expertise of the arbitrators in investment treaty arbitration matters, in particular with regard to the notion of investment, and showed some general reluctance to deviate from their own expert opinion.<sup>105</sup>

Second, in a decision regarding the notorious dispute between Yukos Capital and the Russian Federation, in which the former is bringing claims against the latter under the Energy Charter Treaty (ECT), the Swiss Supreme Court had to decide for the first time whether a “partial” interim decision on jurisdiction can, and therefore (according to Swiss law on international arbitration) must be, challenged immediately.<sup>106</sup> It found that this was not the case, as according to the relevant provision of the Swiss Private International Law Act, a party may only challenge a decision by which the arbitral tribunal “*wrongly accepted or declined jurisdiction*,” which implies that the decision must be final on the issue of jurisdiction.<sup>107</sup> The solution adopted by the Supreme Court is in line with the wording of that provision, and makes sense from a practical perspective. An immediate challenge against a preliminary award on jurisdiction is only truly warranted if it allows the issue to be decided once and for all.<sup>108</sup>

Finally, the Supreme Court issued a procedural order on a long-disputed question concerning security for costs associated with proceedings before

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102. Nathalie Voser & Philip Wimalasena, *Swiss Supreme Court Rules on the Notion of “Investment” in Bilateral Investment Treaties*, SCHELLENBERG WITTMER (Oct. 25, 2016).

103. *Id.*

104. *Id.*

105. *Id.*

106. Bundesgericht (BGer) (Federal Supreme Court) July 22, 2017, 143 III 462 (Switz.).

107. *Id.*

108. *Id.*

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the Supreme Court.<sup>109</sup> In setting-aside proceedings brought by a state against an award on jurisdiction in an investment arbitration, the investor requested that the state be ordered to furnish security for costs.<sup>110</sup> The Supreme Court had to decide whether states may invoke Article 17 of the Hague Convention on Civil Procedure, which exempts nationals of one of the contracting states who appear before the courts of another contracting state from security for costs by reason of their foreign nationality or lack of domicile or residence in the country.<sup>111</sup> The Supreme Court held that, even though the convention merely speaks of “nationals of contracting states,” the contracting states themselves may also rely upon the exemptions provided for in the Hague Convention.<sup>112</sup> On this basis, it dismissed the request for security for costs against the state.<sup>113</sup>

In NIGERIA, in June 2017, the Nigerian National Assembly held a public hearing on a new Arbitration and Conciliation Amendment bill.<sup>114</sup> The bill is based on the 2006 UNCITRAL model law and 2010 UNCITRAL arbitration rules.<sup>115</sup> The aim of the new act would be to ensure that Nigeria has a modern arbitration law aimed at attracting international investors and setting it apart as a favored place for arbitration in Africa.<sup>116</sup>

The Nigerian branch of the Chartered Institute of Arbitrators has launched a Micro, Small, and Medium Enterprises scheme at the International Centre for Arbitration and ADR in Lagos.<sup>117</sup> The goal of the scheme is to provide expedited alternate dispute resolution for small businesses and corporate organizations in Nigeria.<sup>118</sup>

In line with global trends, the Lagos State government has resolved to establish more arbitration centers to expand alternative dispute resolution opportunities available in Nigeria.<sup>119</sup> During the Chartered Institute of Arbitrators’ (Nigeria Branch) annual conference, the governor of Lagos State shared that in the past two years, 26,994 cases have been resolved by

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109. Tribunal federal (TF) Nov. 23, 2017, 4A\_396/2017 (Switz.).

110. *Id.* ¶ 1A.

111. *Id.* ¶ 2.1.

112. *Id.* ¶ 2.2.

113. *Id.* ¶ 2.2.1.3.

114. Adedoyin Rhodes-Vivour, ‘*African Disputes Should be Arbitrated in Africa*’, THIS DAY, (Nov. 7, 2017), <https://www.thisdaylive.com/index.php/2017/11/07/african-disputes-should-be-arbitrated-in-africa/>.

115. Joseph Omyekwere, *Institute Expresses Optimism Over Passage of Arbitration Law*, THE GUARDIAN, (Nov. 7, 2017, 1:49 AM), <https://guardian.ng/features/law/institute-expresses-optimism-over-passage-of-arbitration-law/>.

116. *See id.*; *see also* Rhodes-Vivour, *supra* note 114.

117. *Institute of Arbitrators to Launch MSME Scheme*, THE GUARDIAN, (Jul. 2, 2017, 2:15 AM), <https://guardian.ng/business-services/institute-of-arbitrators-to-launch-msme-scheme/>.

118. *Id.*

119. *See* Bayo Akomolafe, “*Ambode: ADR resolved 26,994 Cases in 2 Years*,” NEW TELEGRAPH, (Nov. 20, 2017), <https://newtelegraphonline.com/2017/11/ambode-adr-resolved-26994-cases-2-years/>.

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alternate dispute resolution in Lagos State. During this period, debt-related matters valued at over N1 billion were successfully settled.<sup>120</sup>

In RUSSIA, 2017 was the first year of application of the new Russian laws on domestic and international arbitration.<sup>121</sup> The reaction of the Russian arbitration community to the new laws was divisive, but in general the main objective of the legislation—to reduce the number of arbitration institutions—was reached. As of November 1, 2017, only four national arbitration institutions (ICAC<sup>122</sup>, MAC<sup>123</sup>, AC at the IMA,<sup>124</sup> and AC at the RUIE<sup>125</sup>) held the status of a permanent arbitration institution and are able to consider certain categories of disputes (e.g., corporate disputes) and apply for the assistance of the state courts.<sup>126</sup>

Also in 2017, the Commercial Court for the Moscow Circuit considered the *Tatneft v Ukraine*<sup>127</sup> case, in which Tatneft sought to enforce in Russia an *ad hoc* arbitral award against Ukraine rendered under the Russia-Ukraine BIT. The court held that the waiver of jurisdictional immunity through the signing of an arbitration agreement and participation of the state in commercial arbitration applies not only to the resolution of the dispute on the merits, but also to the recognition and enforcement of an arbitral award.<sup>128</sup>

In UKRAINE, 2017 brought a deep reform of arbitration-related legislation through adoption of new procedural codes. The Civil and Commercial Procedure Codes were substantially amended on October 3, 2017 to incorporate major arbitration-related changes.<sup>129</sup>

With the amendments, domestic courts are empowered to impose security measures in support of arbitration.<sup>130</sup> Further, the mechanisms of court assistance to international commercial arbitration were introduced in the form of judicial support in fact finding, witness questioning, and other tribunal processes.<sup>131</sup>

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120. *Id.*

121. See Russian Federation Law on Int'l Commercial Arbitration, 2015, No. 5338-1.

122. The Int'l Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, <http://mkas.tpprf.ru/en/>.

123. Maritime Arbitration Comm'n at the Chamber of Commerce and Industry of the Russian Federation, <http://mac.tpprf.ru/en/>.

124. About the Center, ARBITRATION CENTER, <https://centerarbitr.ru/en/advantages/>.

125. List of Arbitration Recommendations, <https://arbitration-rspp.ru>.

126. See Steven Finizio, COMMERCIAL DISPUTE RESOLUTION (Aug. 31, 2017), [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/2017-08-31-post-reform-institutional-arbitration-in-russia.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2017-08-31-post-reform-institutional-arbitration-in-russia.pdf).

127. *Tatneft Failed to Recognise and Enforce in Russia the Arbitral Award Against Ukraine*, KK&P (July 5, 2017), <http://kkplaw.ru/en/tatneft-failed-to-recognise-and-enforce-in-russia-the-arbitral-award-against-ukraine/>.

128. *Id.*

129. Dentons, NEW LITIGATION RULES IN UKRAINIAN COURTS AS OF 15 DECEMBER 2017 (Jan. 15, 2018), <https://www.dentons.com/en/insights/alerts/2018/january/15/new-litigation-rules-in-ukrainian-courts-as-of-15-december-2017>.

130. *Id.*

131. *Id.*

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In terms of recognition and enforcement, the number of grounds for court intervention shrank from potentially four to just two.<sup>132</sup> Under the new procedure, the set-aside and recognition proceedings may be joined, allowing faster and more efficient enforcement of final awards of Kyiv seated arbitrations.<sup>133</sup>

Also in 2017, the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry published its new rules to enter into force on January 1, 2018.<sup>134</sup> The main changes include the introduction of the expedited arbitral proceedings (final award rendered within two months) and the admissibility of electronic evidence.<sup>135</sup>

In MALAYSIA, the Kuala Lumpur Regional Centre for Arbitration (KLRCA) has revised its Islamic Arbitration Rules, formally called *i-Arbitration Rules 2017*.<sup>136</sup> They took effect on June 9, 2017 and cover the settlement of disputes arising from or related to Islamic business transactions, domestic or international.<sup>137</sup> The seat of the arbitration is Kuala Lumpur by default, unless the parties or the arbitrators decide otherwise.<sup>138</sup> Under the Rules, the arbitrators need not be Muslims by faith.<sup>139</sup> But if they want to make an opinion on the Islamic law(s) relevant to the matter in dispute, they must refer it to the concerned individual expert or body, such as the Shari'ah Advisory Council in Malaysia.<sup>140</sup> While nominated by the parties, the arbitrators are officially appointed by the KLRCA Director.<sup>141</sup>

At the INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID), on March 3, 2017, an *ad hoc* committee issued a decision in *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela* annulling the bulk of a \$1.6 billion award issued to a group of ExxonMobil affiliates.<sup>142</sup> This arbitration arose from Venezuela's expropriation of the claimants' investments in two projects, the Cerro Negro Project and the La Ceiba Project.<sup>143</sup> Venezuela did not dispute that it had expropriated these investments; instead, the sole issue was the amount of

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132. *Id.*

133. *Id.*

134. Rules of the Int'l Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, effective as of 1 January 2018.

135. *Id.*

136. ARBITRATION RULES, Kuala Lumpur Regional Centre for Arbitration (Regional Resolution Global Solution).

137. *Id.* at 1.

138. *Id.*

139. *Id.* at art. 29.

140. *Id.*

141. ARBITRATION RULES, Kuala Lumpur Regional Centre for Arbitration (Regional Resolution Global Solution), at Rule 4.5.a.

142. *Venezuelan Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (Mar. 9, 2017).

143. *Id.* ¶ 1.1.

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compensation due.<sup>144</sup> After an evidentiary hearing, the tribunal issued a total award to the claimants of \$1.6 billion, which Venezuela then sought to annul. In its decision on Venezuela’s annulment request, the *ad hoc* committee upheld Venezuela’s request as to the portion of the award concerning the Cerro Negro Project, holding that the tribunal had failed to consider a contractual limitation on liability.<sup>145</sup> Specifically, the tribunal’s failure to take into account a contractual “price cap” on compensation for governmental action—which might have impacted the “market value” of the investment or “the intentions and calculations of the hypothetical willing buyer”—was “seriously deficient”.<sup>146</sup> As a result, the *ad hoc* committee annulled this portion of the award.<sup>147</sup>

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144. *Id.* ¶ II.1.

145. *Id.* ¶ 149.

146. *Id.* ¶ 184.

147. Shortly after this decision, the claimants filed an *ex parte* petition in the Southern District of New York seeking to confirm the surviving portion of the tribunal’s award, which the court granted. The Second Circuit subsequently reversed, however, holding that award-creditors must comply with the procedural and venue requirements of the Foreign Sovereign Immunities Act. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017).

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