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## International Arbitration

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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 2018. Section I addresses significant arbitration developments in U.S. courts while

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Section II highlights developments across the globe, including in Brazil, Mexico, Canada, Argentina, Singapore, Hong Kong, China, Turkey, South Korea, India, Japan, Malaysia, Kuwait, Iraq, Switzerland, the United Kingdom, Germany, the Netherlands, Ukraine, and at the International Centre for Settlement of Investment Disputes (ICSID).

## II. Arbitration Developments in U.S. Courts

### A. LABOR ARBITRATION CONTRACTS

The Supreme Court issued an opinion this year upholding enforcement of arbitration clauses in employment contracts.<sup>1</sup> In *Epic Systems v. Lewis*, the Court held that employers can use arbitration clauses in employment contracts to prohibit workers from engaging in collective action and class action procedures under the Fair Labor Standards Act and state law.<sup>2</sup> This decision resolved a circuit split on arbitration clauses in employment agreements,<sup>3</sup> and may lead to the increased use of such agreements by employers.

Newly-appointed Justice Gorsuch, writing for the majority, found that the savings clause of the Federal Arbitration Act (FAA)—which provides that arbitration agreements are presumptively enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract”—did not give federal courts a basis for refusing to enforce arbitration agreements in which an employee agrees to arbitrate claims against an employer on an individual basis.<sup>4</sup> Relying upon *AT&T Mobility LLC v. Concepcion* and *Kindred Nursing Centers L.P. v. Clark*,<sup>5</sup> Justice Gorsuch reasoned that the employees’ challenge to the individualized nature of arbitration proceedings (as opposed to a claim that the arbitration agreements were unconscionable or otherwise unenforceable) interfered with “one of arbitration’s fundamental attributes.”<sup>6</sup> The decision then rejected the argument that the FAA contradicts the National Labor Relations Act (NLRA), finding that class and collective action procedures do not constitute the “concerted activities” protected by the NLRA.<sup>7</sup>

Justice Ginsburg’s dissent accused the majority of elevating the FAA over employee-protective labor legislation and urged “[c]ongressional correction” of the Court’s decision.<sup>8</sup>

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1. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

2. *Id.*

3. *Compare* *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015), *with* *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151, 1155 (7th Cir. 2016), *rev’d* 138 S. Ct. 1612 (2018).

4. *Epic Sys. Corp.*, 138 S. Ct. at 1622.

5. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1423 (2017).

6. *Epic Sys. Corp.*, 138 S. Ct. at 1622 – 23.

7. *Id.* at 1624 – 26.

8. *Id.* at 1633 (Ginsburg, J., dissenting).

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B. ENFORCEMENT OF ARBITRAL AWARDS

1. *Public Policy Exception*

At the end of 2017 and in 2018, two D.C. courts reached different conclusions on whether to deny enforcement of an arbitral award based on the public policy exception. In *Sharp Corp. v. Hisense USA Corp.*, the district court rejected a challenge to an arbitral award based on an alleged conflict with the First Amendment.<sup>9</sup>

Following an arbitration in Singapore, Hisense received an award against Sharp arising from Sharp's efforts to terminate a licensing agreement that allowed Hisense to produce, advertise, and sell Sharp-branded televisions.<sup>10</sup> The award, in part, enjoined Sharp from disparaging Hisense, issuing press releases about the arbitration, or discussing it with retailers or regulators.<sup>11</sup> In the U.S. court proceeding, Sharp argued that the gag order was unenforceable because it flouted the free speech protections of the First Amendment.<sup>12</sup>

The district court rejected Sharp's argument, stating that a foreign arbitral tribunal was free to restrict the free speech of a private party.<sup>13</sup> It reasoned that the First Amendment only regulates state action and joined courts in other circuits in finding that judicial enforcement of an arbitration award fails to meet that standard.<sup>14</sup> Lastly, referring to the "numerous cases" permitting speech restrictions in private contracts and arbitration agreements, the court found that no "well defined and dominant" public policy exception to the state-action doctrine existed that protected the speech of private parties.<sup>15</sup>

In a separate decision this year, a D.C. court refused to enforce an award on the grounds that it violated U.S. public policy by "severely affront[ing]" a foreign state's sovereignty.<sup>16</sup> In *Hardy Exploration & Production [India] Inc. v. Government of India*, the district court found that the specific-performance portion of an award issued against the Government of India posed sovereignty concerns that took precedence over the United States' public

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9. *Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 163–64 (D.D.C. 2017).

10. *Id.* at 164.

11. *Id.*

12. *Id.* at 164 – 65.

13. *Id.* at 163.

14. *Id.* at 175 (citing *Roberts v. AT&T Mobility LLC*, 2016 WL 1660049, at \*34 (N.D. Cal. Apr. 27, 2016)); *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1192 (11th Cir. 1995) (rejecting the argument that a district court's confirmation of an arbitration award provided the requisite state action for a constitutional claim). The court noted that in one limited instance, the Supreme Court had found that court enforcement of an agreement between private parties can be considered governmental action, but that this holding had been confined to the race-discrimination context. *Id.* at 176 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

15. *Sharp*, 292 F. Supp. at 176.

16. *Hardy Exploration & Production [India] Inc. v. Gov't of India*, 314 F. Supp. 3d 95, 115 (D.D.C. 2018), *appeal docketed*, No. 18-7093 (D.C. Cir. July 6, 2018).

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policy in favor of the speedy confirmation of arbitral awards.<sup>17</sup> While this is an unusual instance of a U.S. court declining to confirm an arbitration award on public policy grounds, it remains to be seen whether the district court's judgment will be upheld, as the decision has been appealed to the D.C. Circuit.<sup>18</sup>

2. *Forum Non Conveniens*

In *Balkan Energy Ltd. v. Republic of Ghana*, the district court confirmed an arbitral award issued against Ghana by a Hague tribunal.<sup>19</sup> The district court found that Ghana's argument on *forum non conveniens* was "squarely foreclosed" by the D.C. Circuit's decision—in *TMR Energy Lt v. State Prop. Fund of Ukraine*—that *forum non conveniens* does not apply to actions in the United States to enforce arbitral awards against foreign nations.<sup>20</sup> Ghana has since appealed the district court's decision, arguing that *TMR Energy Ltd.* conflicts with D.C. Circuit and U.S. Supreme Court precedent.<sup>21</sup>

When read in conjunction with *Tatneft v. Ukraine*, another decision from the District Court for the District of Columbia (which is also on appeal), it is clear that district courts in D.C. do not embrace *forum non conveniens* arguments in relation to enforcement actions against foreign nations.<sup>22</sup> In *Tatneft*, the court reaffirmed *TMR Energy's* holding that only a U.S. court may attach the commercial property of a foreign nation located in the United States, and that a foreign nation's lack of attachable property in the United States has no bearing on whether that court is an inconvenient forum.<sup>23</sup> Applying this precedent, the court in *Tatneft* found that Ukraine had failed to establish a basis for *forum non conveniens*, both because its lack of attachable property in the U.S. was immaterial and because Tatneft had raised a "credible issue" about its ability to obtain justice in Ukraine.<sup>24</sup> The arbitration award was premised upon the wrongful actions of Ukrainian prosecutors and court officials, thus supporting the claim that Tatneft itself could not expect impartiality in the Ukrainian courts.<sup>25</sup>

C. REJECTION OF "MANIFEST DISREGARD OF THE LAW"

This year, state and federal courts in New York addressed the issue of whether "manifest disregard of the law" is a valid ground for vacatur of arbitral awards.<sup>26</sup> The circuits had split on this issue following the Supreme

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17. *Id.* at 113.

18. *Id.* at 114.

19. *Balkan Energy Ltd. v. Rep. of Ghana*, 302 F. Supp. 3d 144 (D.D.C. 2018).

20. *Id.* at 155.

21. Brief for Appellant at 1 – 4, *Balkan Energy*, 302 F. Supp. 3d 144 (D.C. Cir. 2018) (Nos. 18-7061, 18-7062, 18-7063, 18-7064), 2018 WL 4822652.

22. *Tatneft v. Ukr.*, 301 F. Supp. 3d 175 (D.D.C. 2018).

23. *Id.* at 193 (citing *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296 at 304).

24. *Id.* at 194.

25. *Id.* at 193.

26. *Daesang Corp. v. NutraSweet Co.*, 167 A.D.3d 1 (N.Y. App. Div. Sept. 27, 2018).

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Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, which held that section ten of the FAA provides the exclusive grounds under the statute for vacatur of arbitration awards.<sup>27</sup> In two appellate decisions this year, New York courts rejected an expansive interpretation of the “manifest disregard” doctrine.<sup>28</sup>

Following a controversial and heavily criticized decision issued by a New York state lower court partially annulling an arbitral award on the basis that an International Chamber of Commerce tribunal had manifestly disregarded the law, a unanimous panel of the New York Supreme Court Appellate Division, First Department (First Department), concluded that the lower court had erred in its application of the “manifest disregard” doctrine.<sup>29</sup> In *Daesang Corp. v. NutraSweet Corp.*, the First Department found that the tribunal had not ignored the law, but had made a “good-faith effort” to apply the proffered legal standard to the facts of the case.<sup>30</sup> The First Department concluded that any errors in the tribunal's application of the law did not rise to the level of manifest disregard, because it did not appear that the tribunal ignored or refused to apply the relevant legal principles,<sup>31</sup> nor were any errors in their application of the law “obvious and capable of being readily and instantly perceived by the average person qualified to serve as arbitrator.”<sup>32</sup>

Given the alarm caused by the lower court's decision in an important jurisdiction for arbitration, the First Department's decision in *Daesang* offered reassurance that New York courts will continue to be hospitable to litigants seeking to enforce arbitration awards. A decision by the Second Circuit in *Pfeffer v. Wells Fargo Advisors, LLC*, reaffirmed that federal courts in New York are also wary of efforts to vacate awards on the grounds of manifest disregard.<sup>33</sup> In *Pfeffer*, the Court upheld a district court's decision confirming a FINRA arbitration panel's award, reaffirming that the Second Circuit does not recognize manifest disregard of the evidence as grounds for vacatur of an award.<sup>34</sup>

**D. DELEGATION OF ARBITRABILITY TO ARBITRATOR**

In *Henry Schein v. Archer & White Sales, Inc.*, the Fifth Circuit reaffirmed that courts need not enforce an agreement delegating gateway issues of arbitrability to an arbitrator where an assertion that the relevant claim falls within the scope of the arbitration agreement is “wholly groundless.”<sup>35</sup>

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

28. *See Daesang*, 167 A.D.3d at 17.

29. *Id.*

30. *Id.* at 18.

31. *Id.* at 19.

32. *Id.* (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 – 34 (2d Cir. 1986)).

33. *Pfeffer v. Wells Fargo Advisors, LLC*, 723 Fed. Appx. 45 (2d Cir. 2018).

34. *Id.*

35. *Henry Schein v. Archer & White Sales, Inc.*, 878 F.3d 488, 495 (5th Cir. 2017).

Although courts generally determine the arbitrability of disputes unless the parties “clearly and unmistakably delegate that decision to arbitrators,” this rule has been eroded in recent years by judicial findings that the incorporation of certain bodies’ rules of arbitration into an agreement met the “clear and unmistakable” standard.<sup>36</sup>

*Schein* highlights a circuit split as to whether the “wholly groundless” test is a valid basis for determining whether questions of arbitrability should be decided by an arbitrator even when that issue is delegated.<sup>37</sup> Litigants will likely gain further clarity on this issue in the coming year because the Supreme Court recently granted certiorari in *Schein*.<sup>38</sup>

### III. Arbitration Developments Around the World

#### A. AMERICAS

In Brazil, three court decisions mark key developments in international arbitration. In *Abengoa v. Ometto*, the Superior Tribunal de Justiça (STJ), Brazil’s highest appellate court, denied recognition of an arbitral award in part because the tribunal chair’s law firm did not disclose that it received \$6.5 million in unrelated legal fees from Abengoa Group companies during the course of the arbitration.<sup>39</sup> This conduct, the court ruled, violated the impartiality and independence provisions of the Brazilian Arbitration Act.<sup>40</sup> This ruling heralds an objective approach to the issue of arbitral impartiality in Brazil.

A second case involved a dispute between Petrobras and Brazil’s National Agency of Petroleum (ANP).<sup>41</sup> When the ANP argued that the tribunal lacked jurisdiction, the STJ sided with Petrobras, citing the well-known

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36. See, e.g., *Brittania-U Nigeria, Ltd. v. Chevron USA, Inc.*, 244 F. Supp. 3d 121, n.31 (finding that agreements that incorporate the United Nations Commission on International Trade Law rules clearly and unmistakably delegate issues of arbitrability); *Portland Gen. Elec. Co. v. Liberty Mut. Ins. Co.*, 862 F.3d 981 (9th Cir. 2017) (finding the same with respect to agreements that incorporate the International Chamber of Commerce rules).

37. *Compare* *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 528 – 29 (4th Cir. 2017) (reaffirming the “wholly groundless” test), *with* *Jones v. Waffle House Inc.*, 866 F.3d 1257, 1269 (11th Cir. 2017) (finding that “the wholly groundless exception is in tension with the Supreme Court’s arbitration decisions”); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1286 (10th Cir. 2017).

38. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 138 S. Ct. 2678 (2018). In January 2019, the Supreme Court resolved the issue by holding that the contract delegates the question of the arbitrability of the dispute to an arbitrator, a court may not override the contract, even if the court believes that the argument is wholly groundless. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

39. See S.T.J., Ap. Civ. No. 9.412/US (2013/0278872-5), Relator: Ministro Felix Fischer, 19.04.2017, DIÁRIO DA JUSTIÇA [D.J.], 30.05.2017, 67 (Braz.).

40. *Id.*

41. See S.T.J, Conflito de Competência No. 139.519/RJ (2015/0076635-2), Relator: Ministro Napoleão Nunes Maia Filho, 09.11.2016, DIÁRIO DA JUSTIÇA [D.J.], 30.05.2017, 67 09.11.2016, 1 (Braz.).



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*Kompetenz-Kompetenz* principle that the arbitral tribunal has the power to decide its own jurisdiction.<sup>42</sup>

The third case concerns arbitration clauses in related contracts. Based on a “related contracts” theory, the STJ held that the arbitral tribunal constituted under the main contract had jurisdiction over other collateral agreements, even though these collateral agreements subjected disputes to the jurisdiction of the São Paulo courts.<sup>43</sup>

In Mexico, the Secretary of the Economy signed the ICSID convention on January 11, 2018.<sup>44</sup> This step signals Mexico’s commitment to foreign investment by providing foreign investors a measure of security through ICSID’s enforcement mechanism. Uncertainty abounds, however, following the re-negotiations of NAFTA Chapter 11, which revamped the dispute resolution procedures that NAFTA parties have used since the treaty’s inception.<sup>45</sup>

In Canada, 2018 marked a pro-arbitration year. In *Trade Finance Solutions Inc. v. Equinox Global Limited*, the Ontario Court of Appeal held that the UNCITRAL Model Law applies even where parties have agreed only to subject certain disputes to arbitration, as opposed to all disputes.<sup>46</sup> In *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, the Ontario Court of Appeal affirmed that only the most extreme circumstances will justify setting aside an international commercial arbitration award.<sup>47</sup> In *Heller v. Uber Technologies Inc.*, a class action by drivers for employment benefits, the motion judge referred the matter to arbitration in Netherlands.<sup>48</sup>

In Argentina, the International Commercial Arbitration Law<sup>49</sup> (ICAL) was enacted after a long struggle. ICAL, which is based on the UNCITRAL Model Law,<sup>50</sup> adopts internationally accepted standards, thus updating

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42. *Id.*

43. See S.T.J., Recurso Especial No. 1.639.035 – SP (2015/0257748-2), Relator: Ministro Paulo De Tarso Sanseverino. 12.09.2018 (Braz.) See S.T.J., Recurso Especial No. 1.639.035/SP (2015/0257748-2), Relator: Ministro Paulo De Tarso Sanseverino, 12.09.2018, DIÁRIO DA JUSTIÇA [D.J.], 15.10.2018, 20 (Braz.).

44. *Mexico Signs the ICSID Convention*, ICSID NEWS RELEASE (Jan. 10, 2018), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=267>.

45. Heather Long, *U.S., Canada and Mexico just reached a sweeping new NAFTA deal. Here’s what’s in it*, WASH. POST (Oct. 1, 2018), [https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm\\_term=.16e1f19d70e6](https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm_term=.16e1f19d70e6).

46. *Trade Fin. Sols. Inc. v. Equinox Glob. Ltd.*, [2018] O.N.C.A. 12 (Can. Ont.).

47. *Consol. Contractors Grp. S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, [2017] O.N.C.A. 939 (Can. Ont.).

48. *Heller v. Uber Techs. Inc.*, [2018] O.N.C.A. 1 (Can. Ont.).

49. Law No. 27.449, Aug. 4, 2018, B.O. 697 (Arg.).

50. See María Inés Corrá, *Reinforcing the Arbitration Path in Latin America: Argentina Adopted an International Commercial Arbitration Act*, KLUWER ARB. BLOG (Aug. 24, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/08/24/investment-arbitration-tbc/>.

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Argentine legislation and establishing it as an attractive seat of arbitration for international business operators.

**B. ASIA**

In Singapore, both the PCA and ICC opened offices in 2018.<sup>51</sup> In addition, the Singapore International Arbitration Centre signed MOUs with various counterparts in China such as the Shenzhen Court of International Arbitration, the Xi'an Arbitration Commission, the China International Economic and Trade Arbitration Commission, and Peking University Law School, establishing mutual cooperation agreements involving the sharing of knowledge and resources.<sup>52</sup>

Case law developments were also significant. In dicta, the Singapore Court of Appeal stated that, where one party to a contract containing an arbitration clause initiates court proceedings, this is likely prima facie evidence of breach of contract by repudiation of the arbitration agreement.<sup>53</sup> The court stated that such evidence may be rebutted or confirmed with reference to the facts.<sup>54</sup> The court's approach marks a departure from English authorities that require a specific finding of repudiatory intent before repudiatory breach can be established.<sup>55</sup> Also relevant is a Singapore High Court holding that it has the power to grant permanent anti-suit injunctions on foreign court proceedings in support of arbitration.<sup>56</sup>

In Hong Kong, the revised Hong Kong International Arbitration Center (HKIAC) Administered Arbitration Rules (2018 Rules) became effective on November 1.<sup>57</sup> The new rules made noteworthy amendments to the 2013 version,<sup>58</sup> including: (1) addressing third-party funding issues;<sup>59</sup> (2) encouraging effective use of technology;<sup>60</sup> (3) allowing parties to commence a single arbitration under multiple arbitration agreements<sup>61</sup> and allowing tribunals to run multiple arbitrations concurrently if a common question of

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51. See *Singapore Office*, PERMANENT CT. OF ARB., <https://pca-cpa.org/en/about/structure/singapore-office/> (last visited Apr. 11, 2019); *ICC Court case management team begins operations in Singapore*, INT'L CHAMBER OF COMM., <https://iccwbo.org/media-wall/news-speeches/icc-court-case-management-team-begins-operations-singapore/> (last visited Mar. 12, 2019).

52. *Home*, SING. INT'L ARB. CTR., <http://www.siac.org.sg/> (last visited Apr. 11, 2019).

53. *Marty Ltd. v. Hualon Corporation (Malay.)*, [2018] SGCA 63.

54. *Id.*

55. *Id.*

56. *Hilton Int'l Manage (Maldives) Pvt. Ltd. v. Sun Travels & Tours Pvt. Ltd.*, [2018] SGHC 56.

57. *2018 Administered Arbitration Rules*, H.K. INT'L ARB. CTR., available at [http://hkiac.org/sites/default/files/ck\\_filebrowser/PDF/arbitration/HKIAC%20Rules%20-26%20Sept%202018.pdf](http://hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/HKIAC%20Rules%20-26%20Sept%202018.pdf) [hereinafter 2018 Arbitration Rules].

58. *2013 Administered Arbitration Rules*, H.K. INT'L ARB. CTR., available at [http://www.hkiac.org/sites/default/files/ck\\_filebrowser/PDF/arbitration/2013\\_hkiac\\_rules.pdf](http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf) [hereinafter 2013 Arbitration Rules].

59. *2018 Arbitration Rules*, *supra* note 57, arts. 34.4, 44 – 45.

60. *Id.* art. 3.1.

61. *Id.* art. 29.

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law or fact exists;<sup>62</sup> (4) introducing an early determination procedure;<sup>63</sup> (5) allowing parties to request suspension to pursue alternative dispute resolution after the arbitration commences;<sup>64</sup> (6) extending the timing of application for emergency relief, shortening time limits under the emergency arbitrator procedure, and capping emergency arbitrator fees;<sup>65</sup> and (7) requiring that tribunals notify the parties and HKIAC of the anticipated date of award delivery, which should be within three months after the closure of the proceedings.<sup>66</sup>

In China, two Chinese Supreme People's Court (SPC) interpretations on judicial review of arbitration matters became effective in January.<sup>67</sup> The interpretations clarified the scope of judicial review of arbitrations and addressed various related procedural issues. In particular, the interpretations extended applicability of the "prior reporting system," which requires lower Chinese courts to obtain approval by the SPC prior to adopting decisions to set aside or not enforce arbitral awards.<sup>68</sup> While this requirement was formerly limited to foreign or foreign-related arbitral awards, the system now also applies to domestic awards.<sup>69</sup>

In March, a third SPC interpretation on arbitral award enforcement came into force.<sup>70</sup> This interpretation, among other things, provides additional guidance on criteria for determining whether to refuse enforcement of an award.<sup>71</sup> Collectively, these three interpretations demonstrate the increasingly pro-arbitration stance of the Chinese SPC.

A final significant development is the establishment of two Chinese International Commercial Courts (CICC) in Xi'an and Shenzhen.<sup>72</sup> The CICCs are designed to attract more international disputes to resolution in China by working alongside mediation and arbitration institutions to offer a

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62. *Id.* art. 30.

63. *Id.* art. 43.

64. *Id.* art. 13.8.

65. *See 2018 Arbitration Rules*, *supra* note 57, art. 23.1, sch. 4.

66. *Id.* art. 31.2.

67. *SPC Interpretations on Arbitral Judicial Review Cases*, BUREN, <https://www.burenlegal.com/en/news/spc-interpretations-arbitral-judicial-review-cases> (last visited Apr. 11, 2019); *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases*, CHINA JUSTICE OBSERVER, <https://www.chinajusticeobserver.com/provisions-of-the-spc-on-several-issues-concerning-the-trial-of-judicial-review-of-arbitration-cases> (last visited Apr. 11, 2019).

68. *Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Judicial Review of Arbitration Cases*, CHINA JUSTICE OBSERVER, <https://www.chinajusticeobserver.com/provisions-of-the-spc-on-several-issues-concerning-the-trial-of-judicial-review-of-arbitration-cases> (last visited Apr. 11, 2019).

69. *Id.*

70. Falk Lichtenstein, *New provisions of the Supreme People's Court concerning enforcement of arbitration awards*, LEXOLOGY (Apr. 20, 2018), <https://www.lexology.com/library/detail.aspx?g=923afc10-f695-4d00-aea2-c06261ccfb2d>.

71. *Id.*

72. *About China International Commercial Court*, CHINA INT'L COMM. CT., <http://cicc.court.gov.cn/html/1/219/193/195/index.html> (last updated June 28, 2018).

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one-stop dispute resolution mechanism.<sup>73</sup> The CICC will refer interested parties to arbitral institutions and also provide mechanisms for obtaining interim protective measures and enforcement or setting aside of final awards.<sup>74</sup>

In Turkey, the Omnibus Bill (Code No. 7101)<sup>75</sup> introduced significant changes to, inter alia, the Turkish Enforcement and Bankruptcy Code (TEBC), the Turkish Code of Civil Procedure (TCCP), the Turkish Commercial Code (TCC), and the Turkish International Arbitration Law (TIAL). The amendments brought about four noteworthy changes affecting international arbitrations.

First, in cases where Expedited Trial (Basit Yargilama) procedures apply, the TCCP is amended to limit expert witness opinion submissions to a two-month window with an option of a two-month extension at the court's approval.<sup>76</sup> The shortening of the total period from six months to four months is an effort to ensure the timeliness of legal proceedings.<sup>77</sup>

Next, by amendment to the TIAL (No. 4686), the Regional Courts of Appeal (RCAs) will now be the competent courts for annulment proceedings, assuming the jurisdiction once held by local District Courts.<sup>78</sup> The High Court of Appeal in Ankara (Yargitay) is now the final appellate venue for RCA decisions.<sup>79</sup>

Third, depending on the subject of a dispute, the civil or commercial courts of first instance in the seat of the arbitration will be the competent courts to undertake court actions during the course of the arbitration and before the final arbitral award is issued.<sup>80</sup> The Regional Courts of Appeal had previously held this jurisdiction.<sup>81</sup>

And finally, where courts set aside arbitral awards for failure to abide by mandatory arbitration periods, TCCP amendments enable the

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73. *Id.*

74. Helen Tang et al., *Supreme People's Court Issues Rules of Procedure for the China International Commercial Courts*, HERBERT, SMITH, FREEHILLS (Dec. 7, 2018), <https://hsfnotes.com/arbitration/2018/12/07/supreme-peoples-court-issues-rules-of-procedure-for-the-china-international-commercial-courts/>.

75. Kanun No. 7101, RESMÎ GAZETE NO. 30361, Mar. 15, 2018, <http://www.resmigazete.gov.tr/eskiler/2018/03/20180315.pdf>.

76. *Id.*

77. *Id.*

78. *Turkey International Arbitration 2018*, INT'L COMP. LEGAL GUIDES, § 10.4 (July 25, 2018) <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/turkey#chapter-content10>.

79. *Id.*

80. *Id.* § 6.7.

81. Pelin Baysal & Baril Y. Sapan, *Litigation & Dispute Resolution 2018 in Turkey*, GUN & PARTNERS (Feb. 21, 2018), <https://gun.av.tr/litigation-dispute-resolution-2018-in-turkey/>.

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redetermination of choice and appointment of arbitrations and arbitration periods unless the parties have agreed otherwise.<sup>82</sup>

In South Korea, the Korean Commercial Arbitration Board (KCAB) opened a specialized maritime arbitration center in Busan.<sup>83</sup> By 2022, the new Asia-Pacific Maritime Arbitration Center is anticipated to handle as many as 100 cases annually.<sup>84</sup> The center is currently drafting its set of arbitration rules, specifically tailored for maritime disputes.<sup>85</sup> The KCAB also launched KCAB International, its new international division, to more efficiently handle cross-border disputes and better promote Seoul as a seat for international arbitration.<sup>86</sup> Also noteworthy is the merger and expansion of the Seoul International Dispute Resolution Center's facilities with KCAB's facilities in a new Gangnam location.<sup>87</sup>

In India, the Supreme Court of India held in *Union of India v. Hardy Exploration and Production (India) Inc.*<sup>88</sup> that (1) the “venue” of an international commercial arbitration cannot be automatically considered its “seat,”<sup>89</sup> and (2) that if the term “place” is used, it becomes the “seat” unless it is accompanied by any condition, in which case it becomes the “seat” upon satisfaction of that condition.<sup>90</sup>

In Japan, the Japan International Dispute Resolution Center (Center) opened in Osaka. The Center provides services for business disputes, investor-state disputes, as well as other types of cases, including sports cases.<sup>91</sup> It can be used for ad-hoc arbitration hearings, as well as institutional arbitrations by various arbitral institutions, and has capability for simultaneous interpretation in four languages.<sup>92</sup> Center services began in May and are managed by an association of Osaka-based lawyers and

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82. See Ziya Akinci & Selin E. Onur, *Amendments to Turkish Code of Civil Procedure governing domestic arbitration*, THOMPSON REUTERS PRAC. L. (Nov. 1, 2012), [https://uk.practicallaw.thomsonreuters.com/2-522-1806?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/2-522-1806?transitionType=Default&contextData=(sc.Default)).

83. *South Korea Opens Arbitration Center for Maritime Disputes in Busan*, YONHAP NEWS AG. (Apr. 5, 2018; 2:50 PM), <https://en.yna.co.kr/view/MYH20180405011400345>.

84. Tae-Jun Kang, *Busan to open maritime arbitration centre*, LLOYD'S LIST (Mar. 15, 2018), <https://lloydslist.maritimeintelligence.informa.com/LL1121843/Busan-to-open-maritime-arbitration-centre?vid=Maritime>.

85. Paul Yoon, *SMAA to be launched 1st half next year*, MARITIME PRESS (Nov. 15, 2017), <http://eng.maritimepress.com/news/articleView.html?idxno=3324>.

86. *About KCAB International*, KCAB INT'L, [http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0402&CURRENT\\_MENU\\_CODE=MENU0020&TOP\\_MENU\\_CODE=MENU0018](http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0402&CURRENT_MENU_CODE=MENU0020&TOP_MENU_CODE=MENU0018) (last visited Apr. 11, 2019).

87. *Facilities*, KCAB INT'L, <http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub0106> (last visited Apr. 11, 2019).

88. *Union of India v. Hardy Exploration and Production (India) Inc.*, (2018) 7 SCC 374 (India).

89. *Id.* at 403.

90. *Id.* at 402.

91. *Japan's first international arbitration center debuts in Osaka*, JAPAN TIMES (July 31, 2018), <https://www.japantimes.co.jp/news/2018/07/31/business/japans-first-international-arbitration-center-debuts-osaka/#.W-Rl2NVKguU>.

92. *Id.*

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arbitration experts.<sup>93</sup> The Center hopes to make arbitration in Japan more efficient and less costly and is funded by annual membership fees paid by corporations and individuals.<sup>94</sup>

In Malaysia, the Arbitration Act 2005 (Act) was amended<sup>95</sup> to more closely conform to other UNCITRAL Model Law jurisdictions.<sup>96</sup> It strengthened arbitral awards by repealing section forty-two, thus preventing parties from bringing questions of law before the High Court after an award is issued.<sup>97</sup> Section thirty-seven now provides the only remaining recourse for parties seeking to set aside an award.<sup>98</sup> The Act also rebranded the Kuala Lumpur Regional Centre for Arbitration as the Asian International Arbitration Centre.<sup>99</sup>

In Kuwait, a recent Court of Appeals decision underscored the country's need for a modern approach to international arbitration. For years, international arbitrations in Kuwait have been frustrated by Articles 199 and 200 of the Civil and Commercial Procedures law number thirty-eight of 1980 (CCPL), which provide, inter alia, that foreign arbitral awards may not contradict judgments issued by Kuwaiti courts.<sup>100</sup> Although Kuwait did ratify the New York Convention (Convention),<sup>101</sup> the condition subsequently imposed by Articles 199 and 200 have allowed litigants to manipulate the system and defeat enforcement procedures.

A recent matter raised before Kuwaiti courts highlighted this problem. There, a litigant was issued an arbitral award in a foreign jurisdiction after the opposing party defendant refrained from participating in the arbitral proceedings. The defendant subsequently obtained judgement from Kuwaiti courts declaring the arbitration agreement null and void. The claimant, meanwhile, sought to have the arbitral award enforced in Kuwait pursuant to the Convention; Kuwaiti courts, however, rejected the enforcement action on the ground that a contradictory judgment was previously issued by a Kuwaiti Court.<sup>102</sup> This deviation from the

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93. *Id.*

94. *About the Japan International Dispute Resolution Center*, JAPAN INT'L DISP. RES. CTR., [http://www.idrc.jp/index\\_en.html](http://www.idrc.jp/index_en.html) (last visited Apr. 11, 2019).

95. Law of Malaysia, Act A1469 Arb. (Amend.) (No. 2) 2018, [http://www.federalgazette.agc.gov.my/outputaktap/20180504\\_A1569\\_BI\\_Act%20A1569.pdf](http://www.federalgazette.agc.gov.my/outputaktap/20180504_A1569_BI_Act%20A1569.pdf).

96. See Kuala Lumpur, *Amendments to the Arbitration Act 2005 (Act 646) — News*, ASIAN INT'L ARB. CTR. (May 8, 2018), <https://www.aiac.world/news/253%20KLRCA>.

97. Law of Malaysia, *supra* note 95.

98. U. N. Comm'n Int'l Trade Law, UNCITRAL Model Law on Int'l Comm. Arb., U.N. Doc. A/40/17, annex 1, art. 34 (1994).

99. Kuala Lumpur, *supra* note 96.

100. Saad Badah, *The Enforcement of Foreign Arbitral Awards in the GCC Countries: Focus on Kuwait*, 3 INT'L L. RES. 24, 24 – 37 (2014).

101. *Id.* at 32.

102. See Court of Appeals, 12 June 2018 (this source contains confidential information, thus no further details can be disclosed at this time).

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Convention's enforcement requirements falls in line with other Kuwaiti court judgments contradicting globally recognized arbitration principles.<sup>103</sup>

In Iraq, the first step has been taken to accede to the New York Convention. The Iraqi cabinet voted for the accession on February 6, with a reservation mandating non-retroactivity.<sup>104</sup> The next step to finalize the ratification will be the vote of the Iraqi Parliament.

C. EUROPE

In Switzerland, the Swiss Federal Supreme Court denied requests from the Russian Federation to set aside two UNCITRAL Awards.<sup>105</sup> The two awards upheld the arbitral tribunal's jurisdiction over treaty claims brought by Ukrainian investors under the 1998 Russia-Ukraine BIT involving property seized in Crimea in the wake of the 2014 annexation.<sup>106</sup> The Court held that the tribunal in both arbitrations was correct in holding that Ukrainian investments originally made in Ukrainian Crimea became protected investments in Russia-controlled Crimea.<sup>107</sup> All five justices agreed that the BIT's territorial scope changed to reflect the de facto change in the contracting states' territories.<sup>108</sup> Only one of the five justices accepted the Russian Federation's argument that the BIT required investments to be cross-border at the time they were made in order to be protected.<sup>109</sup> This decision is of critical importance to at least six other investment arbitrations against the Russian Federation arising out of its expropriation of Ukrainian owned property on the peninsula. Notably, in May, one tribunal seated in the Netherlands awarded \$150 million to Ukrainian investors for expropriations of their Crimean real estate holdings.<sup>110</sup>

In the United Kingdom, the English Court of Appeal considered apparent bias in an appeal of an application to remove an arbitrator.<sup>111</sup> Dismissing the

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103. See Cassation Court 2, No. 568 of 23 January 2000; Salah Abdulwahab Al Jassem Directory.

104. See Sami Tannous & Amr Omran, *The Middle Eastern and African Arbitration Review 2018*, GLOBAL ARB. REV. (May 11, 2018), <https://globalarbitrationreview.com/benchmarking/the-middle-eastern-and-african-arbitration-review-2018/1169358/middle-east>; see *The Cabinet approves Iraq's accession to the N.Y. Convention on int'l arb.*, GOV'T OF IRAQ (Apr. 25, 2018), <https://gds.gov.iq/cabinet-approves-iraqs-accession-new-york-convention-international-arbitration/>.

105. Nathalie Voser, *Swiss Supreme Court dismisses challenges to interim awards on jurisdiction rendered in investor-state arbitrations*, LEXOLOGY (Nov. 28, 2018), <https://www.lexology.com/library/detail.aspx?g=ec2605a4-a097-4509-b3fd-a197b7570076>.

106. *Id.*

107. *Id.* This publication was submitted before the Swiss Federal Tribunal released a transcript of its public deliberation. This article is based on the eyewitness report of co-author J. Boykin.

108. *Id.*

109. *Id.*

110. Mykhaylo Soldatenko, *Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context*, KLUWER ARB. BLOG (Nov. 5, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/11/05/territorial-challenges-expected-in-crimea-cases-putting-everest-v-russia-in-context/>.

111. *Halliburton Co. v. Chubb Bermuda Ins. Ltd. & Ors.* [2018] 1 W.L.R. 3361.

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appeal, the Court clarified that arbitrators may accept appointments in multiple references concerning overlapping or identical subject matters with only one common party without inevitably giving rise to an appearance of bias.<sup>112</sup> The Court reiterated that the applicable test is whether, after consideration of the facts, a fair-minded and informed observer would conclude that there was a real possibility of bias.<sup>113</sup> Recognizing that many arbitral rules impose stricter subjective tests, the Court ruled that under English law the “more certain” objective observer standard applies.<sup>114</sup> The Court also held that although non-disclosure is a relevant factor, it cannot justify an inference of apparent bias unless it gives rise to justifiable doubts regarding an arbitrator’s impartiality.<sup>115</sup> In other words, “something more” than non-disclosure is required.<sup>116</sup> Arbitrators do not have a “duty of inquiry”<sup>117</sup> but must disclose facts or circumstances that “would or might” lead an informed observer to conclude that there was a real possibility of bias, which could include repeat appointments.<sup>118</sup>

The English Court also elaborated on the time limits for challenging arbitration awards in cases where parties have previously sought clarifications or corrections. In *Daewoo Shipbuilding & Marine Engineering Company Ltd. v. Songa Offshore Endurance Ltd.*,<sup>119</sup> the Court held that applying for an “immaterial” correction does not extend the start date for the running of time. But “material” corrections, or ones which must necessarily be sought in order to bring the challenge, are treated differently.<sup>120</sup> Time begins running from the date a material clarification is made.<sup>121</sup>

A long-standing policy on arbitrations was also confirmed by the English courts this year. The holding in *RBRG Trading (UK) Ltd. v. Sinocore International Co. Ltd.*<sup>122</sup> demonstrated the strong pro-enforcement bias towards New York Convention awards, even where a party has behaved fraudulently. Sinocore, despite having attempted to extract payment through forged bills of lading, prevailed in a CIETAC arbitration addressing RBRG’s breach of contract.<sup>123</sup> When Sinocore sought enforcement from English courts, RBRG contended that the recognition and enforcement of the Award would be contrary to public policy.<sup>124</sup> RBRG’s application was

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112. *Id.* at [53].

113. *Id.* at [39].

114. *Id.* at [67 – 68].

115. *Id.* at [67].

116. *Id.* at [77].

117. *Halliburton Co.* [2018] 1 W.L.R. at [69].

118. *Id.* at [71].

119. *Daewoo Shipbuilding & Marine Engineering Co. Ltd. v. Songa Offshore Equinox Ltd.* [2018] EWHC (Comm) 538 [51].

120. *Id.* at [62].

121. *Id.* at [43].

122. *RBRG Trading (UK) Ltd. v. Sinocore Int’l Co. Ltd.* [2018] EWCA (Civ) 838 [25].

123. *Id.* at [13].

124. *Id.* at [3].



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dismissed on the basis that the breach predated the forgery and RBRG had not been deceived by the fraud.<sup>125</sup>

In Germany, the German Arbitration Institute (Deutsche Institution für Schiedgerichtsbarkeit DIS) has revised its arbitration rules for the first time in twenty years.<sup>126</sup> The new DIS rules came into effect on March 1, 2018 (DIS Rules)<sup>127</sup> and reflect developments in international arbitration practice, with a strong focus on efficiency and transparency. The DIS Rules provide for numerous changes that align them with international arbitration standards shared by leading arbitration institutions, while maintaining established procedures manifested in civil law.

Key changes include accelerating the process by which parties communicate and by which an arbitral tribunal is constituted.<sup>128</sup> Responses to a request for arbitration, for example, must now be filed with the DIS within forty-five days of receipt.<sup>129</sup> Previously, the time limit for filing a response had been set by the tribunal.<sup>130</sup> More stringent time constraints have been imposed upon several other steps of the arbitral process, including for the nomination of arbitrators and presidents,<sup>131</sup> and the parties are now required to hold case management conferences.<sup>132</sup> On the other hand, the DIS considers the efficiency of case management by the arbitral tribunal when determining the tribunal fees.<sup>133</sup>

In the Netherlands, it was a milestone year in international investment arbitration due to a European Court of Justice (ECJ) decision in a dispute between the Slovak Republic and Achmea BV. The ECJ found that an arbitration clause in an international investment agreement between two European Union member states is incompatible with EU law.<sup>134</sup> Consequently, the Netherlands was the first EU member to announce its intention to terminate its intra-EU BITs.<sup>135</sup> Non-European parts of the Kingdom of the Netherlands, however, are not bound by the decision of the

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125. *Id.* at [31].

126. See *DIS-Arbitration Rules 98*, GERMAN ARB. INST. (DIS), <http://www.disarb.org/en/16/rules/dis-arbitration-rules-98-id10> (last visited Apr. 11, 2019). The former rules were adopted on 1 January 1998.

127. 2018 DIS Arbitration Rules, GERMAN ARB. INST. (DIS), available at [http://www.disarb.org/upload/varia/180119\\_DIS\\_NewRules\\_EN.pdf](http://www.disarb.org/upload/varia/180119_DIS_NewRules_EN.pdf).

128. *Id.* arts. 4, 13.4.

129. *Id.* art. 7.2. The time limit may be extended by twenty days upon request to be filed with the DIS.

130. *DIS-Arbitration Rules 98*, *supra* note 126, § 9.

131. 2018 *DIS Arbitration Rules*, *supra* note 57, arts. 7.1, 12.2.

132. *Id.* art. 27.2.

133. *Id.* art. 34.4.

134. Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, 2018 E.C.J. 158 ¶ 57.

135. Marie Davoise & Markus Burgstaller, *Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?*, KLUWER ARB. BLOG (Aug. 11, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/08/11/another-one-bit-dust-netherlands-termination-intra-eu-treaties-latest-symp tom-backlash-investor-state-arbitration/>.

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European court and have decided to keep their BITs intact.<sup>136</sup> Consequently, investors looking to restructure their investments may still do so under the non-European jurisdictions.

A first draft of a Netherlands Model BIT was also published for public consultation in May of 2018.<sup>137</sup> Its main features are stricter definitions of “investor” and “investment” and the introduction of a closed list of breaches of the fair and equitable treatment standard.<sup>138</sup>

And finally, the infamous investment-related arbitration involving Chevron and the government of Ecuador was resolved after more than two decades. The subject of the arbitration was the validity of a 9.5 billion dollar judgment rendered against Chevron by an Ecuadorian judge.<sup>139</sup> The arbitral tribunal, administered by the Permanent Court of Arbitration in the Hague, granted Chevron’s claims against Ecuador based on denial of justice principles.<sup>140</sup>

In Ukraine, 2018 marked the first year of the judicial reforms to the Civil and Commercial Procedure Codes.<sup>141</sup> Arbitration-related developments included broadening the spheres of arbitrability to include certain commercial real estate disputes and shareholder agreements,<sup>142</sup> introducing court assistance with the arbitral process,<sup>143</sup> and expediting court procedures for setting aside,<sup>144</sup> recognizing, and enforcing arbitral rulings.<sup>145</sup>

Probably the most widely requested arbitration related tool in Ukraine in 2018 was interim relief. When considering applications for injunction in support of arbitration, Ukrainian courts have set a very high standard of proof, requesting on multiple occasions that actual dissemination of assets has taken place as a precondition for interim relief. When a foreign party

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136. See *Kingdom of the Netherlands: One Kingdom – Four Countries; European and Caribbean*, MINISTRY OF FOREIGN AFF. (Apr. 6, 2015), available at <https://www.government.nl/documents/leaflets/2015/06/05/kingdom-of-the-netherlands-one-kingdom-four-countries-european-and-caribbean>.

137. See *Neth. draft model BIT*, GLOBAL ARB. REV., available at [https://globalarbitrationreview.com/digital\\_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf](https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf).

138. *Id.*

139. Press Release, *International Tribunal Rules for Chevron in Ecuador Case*, CHEVRON (Sept. 7, 2018), <https://www.chevron.com/stories/international-tribunal-rules-for-chevron-in-ecuador-case>.

140. *Id.*

141. Law of Ukr. No. 2147-VIII, *On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Justice of Ukraine and other legislative acts*, LEGIS. OF UKR., (Dec. 15, 2017), <http://zakon.rada.gov.ua/laws/show/2147-19#n2972>.

142. Econ. Proc. Code of Ukr. No. 1798-XII, art. 22 (Aug. 28, 2018), LEGIS. OF UKR., <http://zakon.rada.gov.ua/laws/show/1798-12>.

143. Civ. Proc. Code of Ukr. No. 1618-IV, arts. 84.11, 94, 116.7 – 8, 149.3 (Apr. 11, 2018), LEGIS. OF UKR., <http://zakon.rada.gov.ua/laws/show/1618-15>.

144. *Id.* § VII.

145. *Id.* § IX, ch. 3.

entity has requested interim relief in Ukraine, the courts have required the moving party to post security.<sup>146</sup>

#### D. ICSID

On May 16, 2018, a tribunal of the International Centre for the Settlement of Investment Disputes issued an award in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, holding that Spain breached the fair and equitable treatment (FET) standard under Article 10(1) of the Energy Charter Treaty.<sup>147</sup> The claimant, Masdar Solar & Wind Cooperatief U.A. (Masdar), is an investor in renewable energy projects.<sup>148</sup> Masdar asserted that Spain breached the applicable FET standard by upending the regulatory regime in place when Masdar invested in three solar plants in 2008 and 2009, thereby causing it significant damages.<sup>149</sup> In particular, Masdar asserted that its investment decisions were based on Spain's guarantee of the stability of certain benefits—including feed-in tariffs and priority of dispatch to the grid—which Spain had offered to attract investment in the capital-intensive renewable sector by Royal Decree No. 661/2007 (RD661/2007).<sup>150</sup> During 2012 and 2014, however, Spain passed a series of measures that substantially modified RD661/2007 and effectively eliminated those benefits.<sup>151</sup>

A key issue was whether Masdar had a legitimate expectation of stability in the framework established by RD661/2007.<sup>152</sup> The tribunal concluded that Masdar did have such a legitimate expectation, because Spain had made a unilateral offer to guarantee the stability of those benefits as long as Masdar fulfilled certain conditions, and subsequently issued a specific resolution for each of the three plants stating that the applicable compensation “consists of the tariffs established in Royal Decree 661/2007.”<sup>153</sup> Consequently, the ICSID tribunal held that Spain breached its FET obligations to Masdar when it modified RD661/2007.<sup>154</sup>

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146. Olena Perepelynska, *Arbitration Reform in Ukraine: New Possibilities for Arbitration Users*, CIS ARB. FORUM (Feb. 8, 2018), <http://www.cisarbitration.com/2018/02/08/arbitration-reform-in-ukraine-new-possibilities-for-arbitration-users/>.

147. *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case. No. ARB/14/1, Award (May 16, 2018).

148. *Id.* ¶ 82.

149. *Id.* ¶ 5.

150. *Id.* ¶¶ 348 – 50.

151. *Id.* ¶¶ 521 – 22.

152. *Id.* ¶¶ 489 – 90.

153. *Masdar Solar*, *supra* note 147, ¶¶ 512 – 20.

154. *Id.* ¶¶ 521 – 22.

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