MAYER·BROWN

Global International Arbitration Update

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Firm Updates

9 March 2018: The 2018 edition of *Chambers Global* ranked or listed Mayer Brown in 72 practice categories and recognized 86 Mayer Brown lawyers. In total, Mayer Brown lawyers were ranked or listed 126 times across 75 practice categories. In addition, the new guide recognized 15 Tauil & Chequer lawyers, the Brazilian firm with which Mayer Brown is associated, with 21 total rankings across 11 practice categories.

In particular, *Chambers Global* recognized Dany Khayat and Alejandro Lopez Ortiz (partners, Paris), for their international arbitration expertise. Mark Hilgard (partner, Frankfurt) was noted as one of the most in-demand arbitrators in Germany. Yu-Jin Tay (partner, Singapore), Michael Lennon Jr. (partner, Houston) and Gustavo Fernandes (partner, Rio de Janeiro) were also noted for their expertise in international arbitration.

April 2018: The IP/TMT team in Hong Kong successfully represented a pro bono client, 21st Century Leaders Ltd, in arbitration proceedings under HKIAC rules against a mainland Chinese licensee. 21st Century Leaders Ltd operates the "Whatever It Takes" Celebrity Artwork Licensing Programme, a world-renowned charity campaign launched to raise funds to support key global development causes including poverty alleviation, environmental conservation and the protection of children. The dispute involved a default in payment of royalties due under the licence agreement between 21st Century Leaders Ltd and the licensee.

31 May 2018: Mayer Brown announced that the firm has signed a cooperation arrangement with a well-established Saudi Arabian law firm, The Law Office of Montaser Al-Mohammed, known as Al-Yaqoub Attorneys & Legal Advisers (**"Al-Yaqoub"**). The cooperation with Al-Yaqoub provides Mayer Brown access to well-regarded, on-the-ground resources and the ability to strengthen relationships with clients and potential clients within the Kingdom of Saudi Arabia. The agreement will significantly enhance Mayer Brown's capabilities in serving multinational clients with their transactions, investments, investigations and disputes in the Kingdom.

7 June 2018: Mike Lennon (partner, Houston) was named a 2018 "Alternative Dispute Resolution Champion" by *The National Law Journal*. The list recognizes those who have shown a deep passion and perseverance in the practice of ADR, "*having achieved remarkable successes along the way.*"

12 June 2018: *Benchmark Litigation Asia Pacific* has ranked six practitioners at Mayer Brown as "Dispute Resolution Stars" in its 2018 rankings, with Yu-Jin Tay (partner, Singapore) being noted as a star in International Arbitration. *Benchmark Litigation Asia Pacific* is a publication that focuses exclusively on the region's litigation and dispute market, providing rankings of firms and litigators considered to be of an elite status.

Legal Updates

HONG KONG INTERNATIONAL ARBITRATION CENTRE RELEASES COSTS AND DURATION DATA

January 2018: The Hong Kong International Arbitration Centre (**"HKIAC"**) has released its latest report on the average cost and duration of a HKIAC arbitration. The data covers 62 arbitrations administered by HKIAC in which a final award was issued between 1 November 2013 and 21 December 2017.

The updated report found:

- The average duration of a HKIAC arbitration is now 14.3 months, whereas in the previous report the average length was 12.2 months. The average total cost of a HKIAC arbitration is US$62,537.
- The report noted that an expedited arbitration will last on average 8.1 months, which is an increase from 2016 where the average length was 6.55 months. Interestingly, whilst the length of expedited proceedings has increased, the average total cost has decreased to US$19,065.

VIENNA INTERNATIONAL ARBITRAL CENTRE UPDATES ARBITRATION AND MEDIATION RULES

1 January 2018: The Vienna International Arbitral Centre (**"VIAC"**) amended *Rules of Arbitration and Mediation* came into force. The rules apply to all arbitrations commenced pursuant to the VIAC Rules after 31 December 2017, whether foreign or domestic.

Amendments of note include the following:

- Article 44(7) allows an arbitrator's conduct to be taken into account in determining their fee. The fee may be reduced by a maximum of 40%. Equally, the fee may increase by a maximum of 40% by reference to the schedule of fees, where the case is particularly complex or for particularly efficient conduct of the proceedings.
- Article 38(2) allows the tribunal to take into account the conduct of the parties including their representatives, with regard to their contribution to ensuring cost-effective and efficient proceedings, when determining the allocation of costs.
- Article 44(11) states that if administrative fees have been paid in respect of mediation proceedings, then these fees will be deducted from any administrative fees in any subsequent arbitration proceedings and vice versa. This is of course subject to both proceedings involving the same parties and the same subject matter.

SINGAPORE INTERNATIONAL COMMERCIAL COURT TO HEAR LITIGATION STEMMING FROM INTERNATIONAL ARBITRATION

9 January 2018: Singapore's Parliament passed amendments to the Supreme Court of Judicature Act to clarify that the Singapore International Commercial Court (**"SICC"**) – which permits registered international lawyers to appear before an international bench of local and international judges – can hear litigation arising out of international arbitrations.

Singapore established the SICC in 2015 as a division of the Singapore High Court to offer a hybrid model of internationalised local litigation for "international and commercial" disputes – combining elements from international arbitration and Singapore litigation, with promises of greater certainty of procedural expedition and controlled costs.

This development is globally significant because it means that Singapore is now one of the only jurisdictions in the world that effectively permits international judges (and possibly, in future, registered international lawyers) to participate in the development of Singapore law as it relates to international arbitration. The SICC is now relevant to all international arbitration-related litigation, including in connection with applications for interim relief, jurisdictional appeals, setting aside and enforcement of awards.

MEXICO SIGNS THE ICSID CONVENTION

11 January 2018: In a landmark moment, Mexico, the second largest economy in Latin America, has signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**"ICSID Convention"**). This brings the number of States that have signed the ICSID Convention to 162.

The ICSID Convention will come into force 30 days after Mexico ratifies the convention. This process may not happen instantaneously, as out of the 162 signatories, only 153 States have ratified the convention to date. Nevertheless, this is seen as an important first step for Mexico, and its signature comes at an interesting time, with the broader system of investment dispute settlement being questioned by certain actors, such as the European Commission. In this sense, Mexico's signature provides a much needed show of confidence in the system.

LCIA ISSUES NOTE ON THE ROLE OF EXPERTS IN INTERNATIONAL ARBITRATION

17 January 2018: The London Court of International Arbitration (**"LCIA"**) published a note on "*Experts in International Arbitration*". The note details the key ways in which experts are currently involved in arbitrations, the challenges associated with each type of involvement and the steps that could be taken to optimise the use of experts in arbitration. The LCIA recognises the increased complexity of cross-border disputes and therefore the increased need for expert opinions.

The note also calls on lawyers and arbitrators to develop their familiarity and comfort when dealing with the issues on which experts are often asked to contribute, particularly quantum, which is significant in the vast majority of cases. The LCIA note also asks experts to ensure that if asked to co-operate, they are flexible enough to facilitate a discussion with the tribunal and with the other experts.

ICSID CASELOAD STATISTICS SHOW RECORD-BREAKING AMOUNT OF NEW CASES

February 2018: The ICSID Secretariat has published a new issue of its caseload statistics. In 2017, a record 53 new cases were registered at ICSID, with 49 brought under the ICSID Convention and 4 under the ICSID Additional Facility Rules. This represents a slight increase from 2016, in which 48 cases were registered. Out of the 53 new cases registered, 15% related to the finance sector, closely followed by the oil, gas & mining sector with 13% of cases.

In terms of geographic distribution, 36% of cases were brought against countries within Eastern Europe and Central Asia; 15% against Middle Eastern & North African countries; 15% against Sub-Saharan African countries and 13% against South American countries. This spread is in stark contrast to the geographic distribution of arbitrators appointed to hear these disputes, as 47% came from Western Europe, 14% from South & East Asia & the Pacific and 14% from North America. Diversity remains a key issue in investment arbitration, as demonstrated by these statistics.

IRAQ AGREES TO RATIFY THE NEW YORK CONVENTION

6 February 2018: The Iraqi cabinet officially agreed to endorse the ratification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **"New York Convention"**). The ratification of the New York Convention coupled with the World Bank's support of plans to heavily invest in the reconstruction of the region should provide investors with reassurance that Iraq is a safe and investor friendly State.

ASIAN INTERNATIONAL ARBITRATION CENTRE REGISTERS FIRST INTERNATIONAL CASES

7 February 2018: The Kuala Lumpur Regional Centre for Arbitration, which has been officially renamed the Asian International Arbitration Centre (**"AIAC"**), has published its Annual Report for 2017.

Some of the key findings include:

- The AIAC administered a total of 932 cases. 86% of registered cases were domestic, while 14% of new cases registered were international, a 100% increase from 2016. Notably, 73% of arbitration cases related to the construction sector.
- In terms of diversity, the AIAC had 2,069 panellist members from an impressive 76 countries. However, of the 1,156 arbitrators that were appointed, only 129 were women.
- The average amount claimed in domestic proceedings was approximately US$14 million, whereas for international matters the sum in dispute dropped to US$5 million.
- The AIAC launched revised arbitration rules in 2017, with new multi-party and emergency arbitrator provisions, as well as new fast track rules. These changes were again highlighted in the annual report.

It is clear that the AIAC remains a prominent centre for domestic arbitration, but that it also has serious aspirations for international growth.

LCIA RELEASES NEW BATCH OF ANONYMISED CHALLENGE DECISIONS

12 February 2018: In a bid to increase transparency, the LCIA is making 32 challenge decisions available from between 2010 and 2017. This follows on from the LCIA's previous publication in 2011 of 28 challenge decisions between 1996 and 2010. This latest batch of decisions has been released by way of an easily accessible online database, which will be updated periodically going forward. Each entry in the database provides a summary of the challenge, the background to the dispute and an anonymised excerpt of the relevant decision.

Between 2010 and 2017, over 1,600 cases were registered and challenges were heard in less than 2% of those cases. Out of that 2%, only 20% of challenges were successful. It is hoped that this new database will help clarify what constitutes a reasonable ground to bring a challenge in LCIA proceedings and will help make the system clearer for all users.

GERMAN INSTITUTION OF ARBITRATION RELEASES ITS 2017 STATISTICS

26 February 2018: The German Institution of Arbitration (**"DIS"**), published its statistics for the year 2017. The statistics showed a slight drop in the number of proceedings initiated, with 160 cases registered in 2017 compared to 172 in 2016. Interestingly, there was an increase in sports arbitration cases, with 27 proceedings initiated in 2017 compared to 19 in 2016.

In terms of the value of claims brought, the lowest value dispute was for EUR5,000 and the highest was for EUR270 million. An interesting observation that can be made from the latest statistics is that 44% of the proceedings initiated in 2017 involved foreign parties, whilst almost all of the proceedings that were commenced were seated in German cities, with only 3 sets of proceedings initiated in 2017 having a foreign seat.

The statistics show a gradual increase in international users and English language arbitrations. This trend is likely to accelerate in light of the new DIS Rules, which entered into force on 1 March 2018. The new DIS Rules embrace recent developments in international arbitration, making them attractive for international users.

THIRD-PARTY FUNDING IN SINGAPORE: THE FIRST YEAR IN REVIEW

1 March 2018: Singapore had its first anniversary since becoming the first Asian jurisdiction to enact legislation – the Civil Law (Amendment) Act 2017 and the Civil Law (Third-Party Funding) Regulations 2017 – expressly permitting third-party funding in international arbitration and related proceedings.

Legislative reform in this area has further enhanced Singapore's position as a leading seat for international arbitration, with an internationally competitive costs infrastructure in line with other major jurisdictions.

In the year since Singapore opened the door to third party funding, several leading funds including Burford Capital, Woodsford Litigation, IMF Bentham and Harbour Litigation have opened dedicated local offices in Singapore. Two funders publicly reported their first concluded funding agreements for Singapore-seated arbitration within months of the legislative liberalization. Most funders are offering to the Asian market the full suite of financing products that are available in the more established markets in Europe, North America and Australia, such as single case financing, portfolio financing and purchasing of awards.

ICC ARBITRATIONS ENCOMPASS MORE COUNTRIES THAN EVER BEFORE

7 March 2018: The ICC published its latest statistics revealing that 810 new cases were registered in 2017 involving 2,316 parties from a record 142 countries.

Further interesting statistics for 2017 include:

- The average value in dispute for newly registered cases was US$45 million and newly registered cases represented an aggregate value of over US$30.85 billion in 2017.
- The ICC saw continued growth of its geographical footprint in Latin America, Central and West Asia, Oceania, Europe and Sub Saharan Africa, in terms of origin of the parties and arbitrators, as well as in terms of cases filed. Sub-Saharan Africa reached record highs with 87 cases filed and 153 parties.
- In an interesting development, the number of states and state entities that were parties to arbitral proceedings rose to over 15% from 11% in 2016 and four new cases were filed on the basis of a bilateral investment treaty.

- In terms of diversity, 249 (16.7%) female arbitrators were nominated or appointed, an increase from 209 (14.8%) in 2016. The court appointed a higher percentage of women (45%) than the parties themselves (41%) and the co-arbitrators (13.7%).

INDIA ISSUES REVISED ARBITRATION ACT

7 March 2018: The Indian Cabinet approved the Arbitration and Conciliation (Amendment) Bill 2018 (the **"Bill"**) in an effort to refine and clarify the amendments to India's Arbitration and Conciliation Act 1996 (Act) implemented in 2015 (the **"2015 Amendments"**).

The 2015 Amendments proved unpopular and controversial, as they imposed a statutory time limit for tribunals to issue their final award. Under the 2015 Amendments, section 29A of the Act required tribunals to issue their awards within 12 months of constitution, which was capable of being extended by a maximum of up to 6 months by agreement of the parties. Failing such extensions, the tribunal's mandate would be extinguished, subject only to an extension or re-institution of the mandate by the Indian courts for "*sufficient cause*". This proved to be a controversial fetter on arbitration and so the new Bill sought to address this issue, as well as attempting to improve other areas.

The most salient features of the new Bill are:

- *Time limit for issuing award*: Significantly, the 12-month deadline no longer applies to international commercial arbitrations and, for domestic arbitrations, will be calculated from completion of the pleadings rather than the Tribunal's constitution.
- *Appointment of arbitrators by arbitral institutions*: Indian courts can designate certain arbitral institutions to appoint arbitrators for the parties, which expedites the process and reduces the strain on the judicial system.
- *Arbitrators' immunity from suit*: Arbitrators are now protected from legal proceedings instituted against them for any act or omission done in good faith during the course of proceedings.
- *Application of the 2015 Amendments*: Unless parties agree otherwise, the 2015 Amendments shall not apply to arbitral proceedings which commenced before the 2015 Amendments came into force and related proceedings.
- *Establishment of the Arbitration Council of India*: This independent body would be responsible for grading arbitral institutions and promoting and encouraging arbitration and other alternative dispute resolution mechanisms in India.

SIAC HAS A RECORD-BREAKING YEAR

7 March 2018: The Singapore International Arbitration Centre (**"SIAC"**) published its annual report for 2017 providing a summary of the institution's key developments and revealing record caseload statistics for the year. In particular, SIAC noted that 452 new cases were filed in 2017. This represents a 32% increase from 2016 where 343 cases were registered and a 67% increase from 2015 where 271 cases were initiated. Other records were also broken, as the total sum in dispute for all new SIAC case filings amounted to US$4.07 billion, which was the highest ever total sum in dispute.

Other noteworthy statistics include:

- In terms of foreign users, out of the 452 new cases, SIAC attracted 176 cases involving Indian parties. Parties from China accounted for 77 cases and Switzerland constituted 72 users.
- SIAC made a total of 145 individual appointments of arbitrators with 43 women appointed. This represented 29.7% of appointments which was an increase from 22.8% in 2016.
- SIAC granted 55 of the 107 applications received for an expedited procedure and granted all 19 requests to appoint an emergency arbitrator.

The annual report also highlights key developments in 2017, including SIAC's proposal on cross-institution cooperation for the consolidation of international arbitral proceedings. It will be interesting to see how this proposal is received by other institutions.

EU RELEASES NEGOTIATING DIRECTIVES FOR A CONVENTION ON THE ESTABLISHMENT OF A MULTILATERAL INVESTMENT COURT

20 March 2018: The Council of the European Union adopted and, for the first time, published, its negotiating directives for a convention on the establishment of a multilateral investment court (**"MIC"**). This follows on from the European Commission's authorisation for such negotiations in September 2017. The MIC aims to replace the investor-State dispute settlement mechanisms in existing bilateral investment treaties to which EU member states are party.

The directives for negotiating the convention establishing the MIC include the following particularly noteworthy points:

- The European Union should be party to the convention and the convention should allow members states and third countries to bring within the MIC's jurisdiction agreements to which they are, or will become parties. Interestingly, this is said to exclude intra-EU BITs as well as the intra-EU application of the Energy Charter Treaty.
- The MIC will comprise a court of appeal as well as a court of first instance which will be able to review decisions on the grounds of error of law or manifest error in the appreciation of the facts.
- Procedures should be transparent allowing for third party submissions, decisions should benefit from an international enforcement regime and the court should operate effectively in terms of cost and length of proceedings.
- Small and medium-sized enterprises as well as individuals should have access to the court through the use of reduced costs. Whether as part of the negotiations or as a separate initiative, the EU should strive to ensure that developing countries are supported in their operation in the investment dispute settlement regime.

SCC HAS THE THIRD HIGHEST CASELOAD SINCE THE INSTITUTION'S INCEPTION

27 March 2018: The Arbitration Institute of the Stockholm Chamber of Commerce (**"SCC"**) published its caseload statistics for 2017. 200 new cases were registered in 2017, marking the third highest caseload since the institution was founded in 1917.

Other notable statistics include:

- International disputes accounted for 96 of the new cases, with parties from 40 countries represented. Other than Sweden, the most frequently represented countries were Russia, Ukraine, USA, Germany and Azerbaijan.
- Eight new investment treaty arbitration cases were registered, bringing the total amount of investment cases administered to 98.
- Three applications for the appointment of emergency arbitrators were registered in 2017, a decrease from 13 in 2016. Impressively, arbitrators were appointed within 24 hours in all three cases and an award was rendered in an average time of six and a half days.
- 44% of the awards rendered under the SCC's arbitration rules were decided between six months and one year of being registered, 28% were decided in under six months and 28% of cases took longer than 18 months to decide.

WORKING GROUP ATTEMPTS TO TACKLE CYBERSECURITY ISSUES IN INTERNATIONAL ARBITRATION

April 2018: The ICCA/New York City Bar Association/CPR Institute Working Group on Cybersecurity in International Arbitration has released a draft Cybersecurity Protocol for International Arbitration for consultation. The consultation period is open until 31 December 2018.

The aim is to encourage participants in international arbitration to become more aware of cybersecurity risks and to provide guidance as to how best to alleviate any cybersecurity concerns. At present, the draft protocol does not advocate any specific cybersecurity measures. Instead, it suggests a procedural framework for developing specific cybersecurity measures within the context of individual cases.

The draft provides that the protocol will not apply in an arbitration unless the parties specifically agree to adopt it or alternatively if the tribunal deems it appropriate to apply. As currently drafted, the protocol will also not supersede any applicable laws or regulations, which require specific cybersecurity measures to be implemented.

LCIA CASELOAD STATISTICS: A DECREASE IN NEW CASES, BUT AN INCREASE IN THE VALUE OF CLAIMS

10 April 2018: In the latest set of caseload statistics published by the LCIA, it was revealed that in 2017 the LCIA received a total of 285 referrals, representing a slight decrease from 303 in 2016.

Other noteworthy findings include the following:

- The LCIA continues to have a diverse caseload with more than 80% of parties originating from outside the UK.
- Women were appointed as an arbitrator in approximately a quarter of cases. This continues the gradual increase from 21% in 2016 and 16% in 2015. The LCIA Court appointed 57% of female arbitrators, while the parties appointed 17%.

- Significant numbers of disputes received were from the banking and finance sector (24%), the energy and natural resources sector (24%) and the transport and commodities sector (11%).
- 31% of claims were for amounts over US$20 million, up from 28% in 2016 and 18% in 2015.

PRAGUE RULES AIM TO RIVAL THE IBA RULES ON EVIDENCE

11 April 2018: A draft of the Rules on Conduct of the Taking of Evidence in International Arbitration has been released for comment. It is hoped that the rules will be signed in due course in Prague, resulting in the draft being referred to colloquially as the "Prague Rules".

The working group behind the draft noted that the IBA Rules on the Taking of Evidence in International Arbitration (the **"IBA Rules"**) successfully bridged a gap between the common law and civil law traditions of taking evidence. In this regard, the IBA Rules were useful in developing a nearly standardized procedure for the taking of evidence in international arbitration. However, the working group assert that the IBA Rules remain more closely aligned with common law traditions, as they follow a more adversarial approach with document production, fact witnesses and party appointed experts.

The working group question the widespread use of these methods, suggesting that many of these procedural features are not known or used to the same extent in non-common law jurisdictions. Accordingly, the drafters of the Prague Rules believe that there is a need to develop alternate rules on the taking of evidence, which are based on the inquisitorial model of procedure. They argue that these alternate rules would contribute to increasing efficiency in international arbitration, by reducing time and costs.

It will be interesting to see how appealing these rules will be to parties, particularly in arbitrations where both parties originate from a civil law background.

ICCA-QUEEN MARY TASKFORCE ON THIRD-PARTY FUNDING RELEASES MUCH ANTICIPATED REPORT

16 April 2018: After a period of consultation, the ICCA-Queen Mary Taskforce on Third-Party Funding released their much anticipated report on third-party funding practices in international arbitration. The taskforce was set up with the aim of helping to educate stakeholders in international arbitration about what third party funding is, as well as helping those stakeholders to make more informed decisions when addressing third-party funding issues.

The report is intended to be used primarily as a reference manual and each chapter tackles a different topic. With that in mind the report can be read in its entirety or each chapter can be read in isolation.

Notable topics covered include disclosure and conflicts of interest, privilege and professional secrecy, costs and security for costs, best practices in third-party funding rrangements and third-party funding in investment arbitration.

QUEEN MARY 2018 INTERNATIONAL ARBITRATION SURVEY CONFIRMS INTERNATIONAL ARBITRATION REMAINS THE PREFERRED METHOD FOR RESOLVING CROSS-BORDER DISPUTES

May 2018: The School of International Arbitration at Queen Mary, University of London has published the results of their 2018 International Arbitration Survey entitled "*The Evolution of International Arbitration*". The survey has become an essential barometer for gauging the opinions of stakeholders on key trends and issues. The aim of this particular survey was to undertake an empirical assessment of the evolution of international arbitration and to identify the main areas of recent and future development.

A few particularly important findings are noted below:

- 97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with some other alternative dispute resolution method (49%).
- An overwhelming 99% of respondents would recommend international arbitration to resolve cross-border disputes in the future.
- Arbitration's most valued characteristic continues to be the enforceability of an award. This is closely followed by neutrality of forum, procedural flexibility and the ability to select arbitrators.
- The key concern regarding international arbitration remains excessive costs, followed by a perceived lack of effective sanctions during the arbitral process and the length of proceedings.
- The five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva. Interestingly, more than half of respondents believe that Brexit will have no impact on the use of London as a seat.

- In terms of diversity, approximately half of respondents agreed that progress had been made in respect of gender diversity. However, less than a third of respondents believe the same level of progress has been made in respect of geographic, age, cultural and ethnic diversity.
- With regards to greater transparency, 80% of respondents would like to be able to provide an assessment of arbitrators at the end of a dispute. Nearly 90% would do so by reporting to an arbitral institution.
- 61% of respondents believe that increased efficiency is the factor that is most likely to have a significant impact on the future evolution of international arbitration. As part of this, an overwhelming majority of respondents favour the greater use of hearing room technologies, cloud-based storage, videoconferencing and virtual hearing rooms.

UAE UPDATES ITS DOMESTIC ARBITRATION FRAMEWORK

3 May 2018: President His Highness Sheikh Khalifa bin Zayed Al Nahyan signed Federal Law No. 6 of 2018, providing the UAE with a modern, internationally regarded domestic legal framework for arbitration. The law will come into force 30 days after it is published in the Official Gazette and demonstrates the UAE's continued efforts to open its doors to modern-day international arbitration and welcome new businesses and users to the region.

The new law governs all aspects of arbitration in the UAE and applies to both domestic and international arbitration. The Federal Arbitration Law is largely based on the UNCITRAL Model Law, which is a positive step for the UAE, as states that adopt the UNCITRAL Model Law are largely perceived as arbitration friendly jurisdictions. Interestingly, the law notes that it will apply to ongoing proceedings even if the arbitration agreement was concluded before the law came into effect.

NETHERLANDS PUBLISHES NEW DRAFT MODEL BIT

16 May 2018: The Netherlands has published a new draft model bilateral investment treaty (**"BIT"**), which incorporates several striking and radical changes. The amendments included in this draft model BIT may provide a useful indication as to the future direction of possible investment protections afforded to investors by states.

Key features of the draft include the following:

- As is common practice, the draft provides for arbitration of investment disputes under the ICSID Arbitration or Additional Facility Rules, or the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration. However, what is interesting is that the investor-state dispute settlement (**"ISDS"**) provisions in the draft will cease to apply if the contracting parties enter into an agreement providing for a multilateral investment court.
- The draft provides for the whole tribunal to be appointed by the relevant appointing authority, with no party appointment.
- There is also a prohibition on "double-hatting", where arbitrators also act as legal counsel. The draft states that arbitrators must not act, or have acted, as legal counsel in investment disputes in the last five years.
- The draft also attempts to narrow the scope of certain key investment provisions. For example, there is now an exhaustive list of measures that would constitute a breach of the fair and equitable treatment standard. The draft also includes a narrow most favoured nation clause and a restricted definition of investor, which excludes shell and mailbox companies.
- It is proposed that the tribunal should issue awards within 24 months of the date the claim is submitted.

Some of the proposed changes will be welcomed by the arbitral community, whilst others may be seen as more controversial. What is clear is that a lot of these amendments are in direct response to many of the recent criticisms levied at investment arbitration.

UNCTAD RELEASES 2018 WORLD INVESTMENT REPORT

6 June 2018: The United Nations Conference on Trade and Development (**"UNCTAD"**) has released the *2018 World Investment Report* and notes an exponential decline in global foreign direct investment in 2017. This is described as a negative trend that endangers sustainable industrial development in developing countries. It is suggested that further reform to the global investment and ISDS framework is required to stimulate foreign direct investment.

The report notes that the number of ISDS claims remains high, with 65 new cases against 48 countries registered in 2017, bringing the total number of known ISDS cases to 855 as at 1 January 2018. The report notes that most jurisdictional decisions were issued in favour of states, whereas most decisions on the merits were issued in favour of investors.

Other points of particular interest include the following:

- Intra-EU disputes accounted for 20% of global ISDS cases. The report mentions the *Achmea* decision, noting that this may have a significant impact on intra-EU bilateral investment treaties and on future intra-EU disputes. This case will be discussed in the next section.
- 13 of the 500 arbitrators appointed in investment arbitrations have received 30 appointments, only one of whom is not European or North American. Out of that 13, 11 are men, but the 2 women are amongst the three most appointed arbitrators.

Case Law Updates

PARIS COURT OF APPEAL SETS ASIDE ICC AWARD ON THE GROUNDS OF PUBLIC POLICY

16 January 2018: In *Société MK Group c/ S.A.R.L. Onix et Société Financial Initiative, Cour d'appel de Paris, No. 15/21703*, the Paris Court of Appeal set aside an ICC award on the grounds that its enforcement would be contrary to public policy, as the investment was fraudulently made.

In 2003, MK Group, a Russian company, and Lao Geo Consultant, a Laotian company, incorporated a company called Dao Lao in Laos. MK Group held 70% of the share capital and Lao Geo Consultant held the remaining 30%. Dao Lao was set up to explore and operate gold mines under a contract entered into with the Lao government on 9 June 2003. In 2010, MK Group agreed to sell a 60% stake in Dao Lao to a Ukrainian company called Onix, which subsequently led to several parties entering into a memorandum of understanding. This memorandum stated that the share transfer was approved subject to Onix paying US$12.5 million into the project.

In 2014, MK Group initiated ICC arbitration in accordance with the arbitration clause included in the shareholders' agreement with Onix, requesting the tribunal to declare that the 60% stake in Dao Lao had not been transferred to Onix, as Onix had not invested the money required under the memorandum of understanding. In an award dated 13 October 2015, the Tribunal by way of majority held that the shares had validly been transferred and that Onix was the rightful owner of the shares.

MK Group sought to set aside the award at the Paris Court of Appeal on two grounds. First, that the Tribunal had not provided reasoning for parts of its award and had failed to correctly apply Lao law. Second, that the award violated public policy, as the tribunal had reached its decision on the basis of forged documents, namely a memorandum of understanding excluding the requirement to pay US$12.5 million.

The Court found that there was no falsification of documents, as one copy in English included the condition and one copy in Lao did not include the condition. The Court found that this was meant to present the opposite position to the Laotian authorities, in order to convince them that the investment was a substantial condition. Accordingly, the Court set aside the arbitral award, as it provided protection to an investment made through fraudulent means. This was therefore a manifest violation of public policy.

RUSSIAN COURT RULES THAT AN ARBITRATION CLAUSE IS INVALID WHEN NO ARBITRAL INSTITUTION IS SPECIFIED

9 February 2018: In *Case No. A40-130828/16, Ninth Commercial Court of Appeal No. 09AII-48750/2017*, the Russian Ninth Commercial Court of Appeal reasoned that an arbitration agreement providing for arbitration under the UNCITRAL Rules in London was invalid.

Sira Industries S.p.A., an Italian company, brought a claim in the Russian Courts against a Russian company called LLC GL Termo (the **"Respondent"**) for an alleged breach of a supply agreement. The Respondent refused to attend the initial hearing and after an unfavourable judgment was rendered, they decided to appeal the decision. The basis of this appeal was that they disputed the jurisdiction of the Russian courts, as there was an arbitration agreement at clause 13.4 of the supply agreement, which provided for arbitration under the UNCITRAL Rules in London.

The Court ruled that the arbitration agreement was invalid, because it did not specify a particular arbitral institution. The Court analysed that the references to London could have meant any one of several bodies. Regardless of this analysis, the Court also noted that the Respondent's address differed to the one referenced in the supply agreement and so even if proceedings were initiated, it would not have been

possible to notify the Respondent, in accordance with clause 3 of the UNCITRAL Arbitration Rules. However, it should be noted that this same fact oddly did not prevent the Respondent from being notified of the court proceedings.

This case serves as a poignant reminder of the importance of clarity and precision when drafting an arbitration agreement.

ENGLISH COMMERCIAL COURT SETS ASIDE SCC AWARD ON JURISDICTION

2 March 2018: In *GPF GP Sarl v Poland [2018] EWHC 409*, the English Commercial Court set aside an investment treaty award on jurisdictional grounds, by way of s.67 of the Arbitration Act 1996.

GPF Gp S.á.r.l (**"GPF"**) brought an action under s.67 of the Arbitration Act 1996 challenging an award on jurisdiction rendered by a tribunal in a Stockholm Chamber of Commerce (**"SCC"**) arbitration dated 15 February 2017 (the **"Award"**). The seat of the arbitration was London and the arbitration was brought under a bilateral investment treaty between Poland, Belgium and Luxembourg (the **"BIT"**).

The original dispute centred on the termination of a contract to develop a property in Warsaw by the Warsaw Regional Court. This led to the applicant bringing a claim for the alleged violation of the fair and equitable treatment standard (the **"FET Standard"**) in the BIT for terminating the contract in bad faith. The SCC tribunal found that it had jurisdiction to rule on whether the Warsaw Court's judgment amounted to an expropriation or similar act. However, the tribunal reasoned that its jurisdiction did not extend to the claim for breach of the FET Standard or its claim for creeping expropriation. GPF sought to set aside this award.

The English Court reiterated the position established in *Dallah Real Estate v Pakistan [2010] UKSC 46* that a challenge to the jurisdiction of arbitrators proceeds by way of a complete re-hearing of the merits. In light of this scope, the English Court set aside the award, holding that on a proper interpretation of the BIT, a tribunal had jurisdiction to determine claims brought by an investor in relation to the FET Standard, as well as the creeping expropriation of assets. The English Court reasoned that it was possible to have a creeping expropriation by reference to a progression of events in which each individual act might not by itself amount to an expropriation, but the combined effect of which was expropriatory.

EUROPEAN COURT OF JUSTICE DECLARES INTRA-EU BITS INVALID

6 March 2018: In *Slovak Republic v Achmea BV, C-284/16, ECLI:EU:C:2018:158*, the Court of Justice of the European Union (**"CJEU"**) dealt with the interpretation of a bilateral investment treaty, concluded in 1991, between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic (the "**BIT**") in accordance with certain provisions of the Treaty on the Functioning of the European Union. Achmea B.V., a Dutch insurer, set up a subsidiary in Slovakia through which it offered private health insurance services on the Slovak market. In 2006, Slovakia reversed certain favourable policies, which impacted the health insurance market. In 2008, Achmea brought UNCITRAL arbitration proceedings, seated in Germany, against Slovakia under Article 8 of the BIT on the grounds of violation of substantive treaty standards. The tribunal found that Slovakia had violated the BIT and rendered an award ordering Slovakia to pay approximately EUR22.1 million of damages to Achmea.

Slovakia brought an action to set aside the arbitral award on jurisdictional grounds before the German courts. The case eventually went to the German Federal Court of Justice, who referred the questions on compatibility with EU law of the BIT's arbitration clause to the CJEU for a preliminary ruling. In his opinion of 19 September 2017, Advocate General Wathelet submitted that EU law did not preclude the application of an investor-state dispute settlement mechanism established by way of a BIT between two EU Member States. The CJEU declined to follow the Advocate General's opinion. Instead, the CJEU concluded that the jurisdiction of the tribunal referred to in Article 8 of the BIT may relate to the interpretation of EU law and that EU law interpretation was outside the remit of a tribunal. Accordingly, tribunal established under intra-EU bilateral investment treaties, such as in the present case, would have an adverse effect on the autonomy of EU law and should not have jurisdiction over matters of EU law.

This ruling has sent shockwaves throughout the arbitration community, as intra-EU disputes accounted for approximately 20% of investor-state dispute settlement cases. It is currently unclear to what extent this ruling will impact intra-EU cases brought before an ICSID Tribunal.

UNITED STATES DISTRICT COURT AFFIRMS ADVANTAGE OF CONSENT AWARDS

12 March 2018: In *Transocean Offshore Gulf of Guinea VII Ltd., et al. v. Erin Energy Corp. 4:17-cv-02623*, the United States District Court for the Southern District of Texas held that consent awards are subject to the New York Convention and are therefore enforceable as arbitration awards. In doing so, the Court followed a 2017 decision issued by the United States District Court for the Southern District of New York, which it cited. Taken together, the decisions reflect a significant advantage of reducing a settlement agreement to a consent award, particularly if a party's compliance with a settlement agreement is in question: a consent award can be confirmed under the New York Convention and thereby converted into an enforceable court judgment.

In *Transocean Offshore*, the parties had consented to the publication of an arbitral award under which respondent Erin Energy would pay the petitioners a specified sum. The Tribunal then issued a second award on the parties' legal costs. When Erin Energy failed to pay the petitioners, they petitioned to confirm both awards under the New York Convention. Erin Energy moved to dismiss the petition, arguing that the New York Convention does not apply to consent awards. The Court disagreed, reasoning that the tribunal had issued an award within its power, and that it was not required to make its own factual findings or reach its own conclusions of law separate from those contained in the parties' agreement. Accordingly, the Court confirmed both the consent award and the legal costs award under the convention and as a court judgment.

THE SUPREME COURT OF INDIA ALLOWS FOREIGN LAWYERS TO REPRESENT CLIENTS IN INTERNATIONAL ARBITRATION PROCEEDINGS

13 March 2018: In *Bar Council of India v A.K. Balaji and others,* the Supreme Court of India ruled that foreign lawyers are allowed to 'fly in and fly out' to represent clients in international arbitration proceedings on a casual, irregular basis.

The issue of foreign lawyers representing clients within India has been a longstanding point of contention, stemming back to the passing of the Advocates Act in 1961. The Act restricts legal representation of clients solely to Indian lawyers and is noted by some commentators as being in opposition to the globalisation of the wider legal marketplace. The Supreme Court, whilst respecting the confines of the Act, ruled that it was possible for foreign lawyers to come to India and represent clients in international arbitration proceedings. However, the Supreme Court warned that this must not be on a permanent basis and noted that the concession limited foreign lawyers to infrequent, casual visits.

This judgment is seen as an important milestone in the gradual liberalisation of the Indian legal services sector.

THE DIFFICULTIES IN DEFINING AN 'INVESTMENT': PARIS COURT OF CASSATION OVERTURNS COURT OF APPEAL'S DECISION TO SET ASIDE ECT AWARD

28 March 2018: In *Cass. civ. 1, République de Moldavie c/ société Komstroy, n° 16-16.568*, a dispute arose out of a series of contracts governing the supply of electricity to the Moldovan electricity network.

In 2010, Energoalians, the electricity supplier, initiated ad hoc UNCITRAL arbitration proceedings against the Republic of Moldova, seated in Paris. Energoalians alleged that certain decisions taken by the Moldovan government had affected Energoalians' right to receive payments due to it by Moldtranselectro, the public company operating the Moldovan electricity network. Energoalians alleged that these actions violated Moldova's obligations under the Energy Charter Treaty (**"ECT"**). In 2013, the tribunal ruled in favour of Energoalians and ordered Moldova to pay US$49 million.

Moldova brought proceedings before the Paris Court of Appeal to set aside the award on the basis that the tribunal lacked jurisdiction, as a debt acquired under an energy supply agreement did not amount to an investment under the ECT. The Court of Appeal agreed with the Republic of Moldova and set aside the award. In turn, Komstroy, the successor of Energoalians, lodged an appeal before the Court of Cassation.

On 28 March 2018, the Court of Cassation overturned the Paris Court of Appeal's decision, reasoning that the ECT only provided a non-exhaustive list of assets that may constitute an investment and accordingly the Court of Appeal's decision lacked merit.

This case is another example of the difficulties in establishing what constitutes an investment and demonstrates how easily divergent interpretations can occur.

ENGLISH COURT OF APPEAL IMPOSES DUTY ON ARBITRATORS TO DISCLOSE FACTS WHERE THERE IS A POSSIBILITY OF BIAS

19 April 2018: In *Halliburton Company v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817*, it was held that an arbitrator's acceptance of multiple appointments concerning the same or similar facts with only one common party does not justify an inference of apparent bias.

By way of background, both Transocean (**"T"**) and Halliburton (**"H"**) purchased similar liability insurance from Chubb (**"C"**). An arbitrator was appointed in arbitration proceedings between H and C. When H discovered that C had asked the arbitrator to sit in two other arbitration proceedings with T, arising out of the same incident and the same policy, it applied for the arbitrator's removal under s.24(1)(a) of the Arbitration Act 1996, which contains the test for apparent bias.

The Court held that the mere fact that an arbitrator accepted appointments in multiple references concerning overlapping subject matter involving a common party did not justify an inference of bias. The Court attested that as a matter of good practice in international commercial arbitration and as a matter of law, the arbitrator ought to have disclosed these facts to H at the time of his appointments. However, in this instance, the court reasoned that the non-disclosure did not give rise to justifiable doubts as to the arbitrator's impartiality.

This judgment is significant because it suggests that arbitrators have an *obligation* under English law to disclose circumstances and facts where there are issues of apparent bias or partiality. This appears to raise the bar from the previously accepted standard set by the IBA Guidelines. It remains to be seen how this duty will be received by the arbitral community and to what extent it will give rise to further arbitrator challenges in the future.

ENGLISH COURT OF APPEAL CONFIRMS ENFORCEMENT OF A CHINESE ARBITRAL AWARD

23 April 2018: In *RBRG Trading (UK) Ltd v Sinocore International Co Ltd [2018] EWCA Civ 838*, a dispute arose out of a contract for the sale of steel coils. The steel coils were to be shipped from China to Mexico. The Claimant was required to pay for the shipment by way of a letter of credit, which was payable subject to the coils being shipped by 31 July 2010. The Claimant then unilaterally changed the letter of credit without Sinocore's consent. Sinocore proceeded to ship the steel coils, as was originally agreed, and when it was unable to claim remuneration by way of the letter of credit, Sinocore submitted forged bills of lading with the amended date, in order to acquire the money. After the Claimant acquired an injunction preventing Sinocore from activating the letter of credit, Sinocore sold to another buyer at a lower price.

In a CIETAC arbitration, seated in Beijing, the tribunal awarded Sinocore the difference in value between the original contract price and the market price it managed to obtain. The tribunal reasoned that Sinocore's presentation of the forged bills of lading after that breach did not prevent Sinocore from claiming damages for its losses resulting from the breach. The tribunal held that the Claimant had not been subject to actual fraud, as Sinocore notified the Claimant of the actual date of the shipment. As we reported in August 2017, Sinocore subsequently obtained an order for the recognition and enforcement of the award in England, which RBRG then sought to set aside.

The Court of Appeal held that there was no public policy ground which merited the refusal to enforce the award, despite a failed attempt to submit fraudulent documents. Crucially, this fraudulent activity did not impact RBRG's failure to pay and so RBRG could not rely on a public policy exception to set aside enforcement of the award. This case demonstrates the narrow lens through which English courts analyse enforcement cases and reaffirms the English Court's pro-enforcement stance towards foreign arbitral awards.

SINGAPORE HIGH COURT SUPPORTS THE VALIDITY OF 'ATTORNEY EYES ONLY' DISCLOSURE PROCESS IN SPECIAL CIRCUMSTANCES

26 April 2018: In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another [2018] SGHC 101,* the Singapore High Court rejected an application to set aside an arbitral award on the basis that there had been a breach of natural justice.

A dispute arose in respect of a contract for the construction of a power generation plant located in Guatemala. The contract provided for ICC arbitration in Singapore. Jaguar commenced arbitration proceedings in 2014, claiming that CMNEC had breached the contract, entitling Jaguar to validly terminate the contract and seek liquidated damages for delay and costs incurred. CMNEC refuted these claims arguing that they were entitled to extensions of time.

As part of the arbitration, the tribunal issued a procedural order allowing the parties to produce documents with sensitive information, as long as they were only seen by the respective attorneys. CMNEC had to apply to the tribunal if they wanted a particular employee to see any of these restricted documents.

CMNEC argued that the imposition of the 'attorney eyes only' regime amounted to a breach of its right to natural justice, because the order had the effect of denying CMNEC adequate notice and opportunity to know the evidence against it and to meet that evidence. Jaguar disagreed and noted that CMNEC had the opportunity to request disclosure of certain documents to particular employees, but never exercised this right.

The Singapore High Court rejected CMNEC's arguments and refused to set aside the award. The judgment is significant, as it demonstrates the high threshold for setting aside an award. The judgment also provides a useful analysis on when an 'attorney eyes only' procedural order may be appropriate in international arbitration.

ENGLISH COMMERCIAL COURT RULES ON BINDING NATURE OF SETTLEMENT AGREEMENT BY WAY OF "WITHOUT PREJUDICE" CORRESPONDENCE

3 May 2018: In *Goodwood Investments Holdings Inc. v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056 (Comm),* the Claimant was the purchaser and the Defendant the builder of a luxury superyacht. The Claimant applied under s.45 Arbitration Act 1996 for determination of a question of law arising in the arbitration, namely whether the arbitration claim had been settled in without prejudice correspondence.

The Court held that the Defendant's settlement offer was not capable of acceptance giving rise to an immediately binding contract; the offer was subject to both approval of the Defendant's board and execution by both parties of a formal settlement agreement. Similarly, the Claimant's response, regarded as a counter-offer due to the introduction of additional terms, acknowledged that acceptance was subject to the Defendant's conditions, and therefore was not a counter-offer capable of acceptance. As such, the parties' agreement to adjourn was not an acceptance of a counter-offer giving rise to a binding settlement agreement. Instead, the terms of the adjournment, which included reference to the arbitration resuming and arbitrators maintaining their availability, indicated that a binding agreement had not been reached. Lastly, the Defendant was not subject to an interim obligation to seek board approval, because there was nothing in the Defendant's offer about whether approval would be given, regardless of a reasonable assumption that it would be, and the parties' agreement to adjourn was not a reason to imply this obligation.

The judgment provides a noteworthy example of how s.45 applications can be used to the benefit of international arbitration, as in this case it helped maintain the separate nature of the settlement issue with the broader, underlying dispute. Accordingly, the tribunal's reasoning was not clouded or influenced by this separate point.

ENGLISH HIGH COURT GRANTS ANTI-SUIT INJUNCTION TO PROTECT THE CHOICE OF SEAT

4 May 2018: In *Atlas Power v National Transmission and Despatch Company Ltd* [2018] EWHC 1052, the Claimants entered into Pakistani-law governed agreements for the supply of energy to the Defendant, a national grid company in Pakistan. Each agreement provided for the parties to go to arbitration under the rules of the LCIA in Lahore, London or another agreed location. The Claimants commenced arbitration in London and obtained a partial award to the effect that the seat of the arbitration was in London. The Court held that the Claimants were entitled to an anti-suit injunction restraining the Defendant from challenging the award in proceedings in Pakistan.

Under s.2 of the Arbitration Act 1996, an agreement designating London as the seat of the arbitration meant that the English courts necessarily had exclusive supervisory jurisdiction. Furthermore, pursuant to s.3 of the Arbitration Act 1996, the parties had designated the seat as London and the arbitrator had made an award to that effect. Having failed to challenge the award, the Defendant was bound by it, and was therefore precluded from asserting that if there could be only one supervisory jurisdiction, being exclusively that of the courts of the jurisdiction where the seat of the arbitration was located, the seat had to be Lahore.

This case demonstrates that the English Courts will actively protect a choice of seat where it is established that such a choice is valid and binding upon the parties. The case also provides a timely reminder to parties to carefully draft their dispute resolution clauses to ensure that their needs and expectations are met.

UNITED STATES DISTRICT COURT ENFORCES ARBITRATION CLAUSE AGAINST NON-SIGNATORIES

7 May 2018: In *Caporicci U.S.A. Corp., v. Prada S.p.A. 1:18-cv-20859*, the United States District Court for the Southern District of Florida enforced an arbitration agreement against non-signatories, clarifying the law on when arbitration agreements may be enforced against third-parties.

The Claimant asserted various claims against three Defendants in connection with a purchase agreement for "alligator hatchlings and eggs" that was between the Claimant and only one of the Defendants, Prada S.p.A. The purchase agreement contained an arbitration clause, and the three Defendants moved to compel arbitration. The Claimant opposed the motion on grounds that two Defendants were not parties to the arbitration agreement, and therefore its claims were not subject to arbitration.

The court compelled arbitration, concluding that "each of these defendants – whether or not a signatory to the [agreement] – can invoke the arbitration clause in ... light of their close relationship to the parties to the agreement." It reasoned that the Claimant's "claims against the non-signatories 'factually relate to the interpretation and performance of the [agreement],' and are inextricably intertwined with its claims against Prada".

ENGLISH HIGH COURT RULES THAT PROCEEDINGS TO ENFORCE ARBITRAL AWARD AGAINST REPUBLIC OF KAZAKHSTAN MAY NOT BE DISCONTINUED

11 May 2018: In *Stati and others v. The Republic of Kazakhstan [2018] EWHC 1130 (Comm)*, the English High Court set aside the Claimants' notice to discontinue proceedings brought to enforce a US$500 million award arising out of an international investment arbitration seated in Sweden.

The Claimants had initially applied successfully for an order for enforcement in England, amongst other jurisdictions, achieving attachment orders to the value of approximately US$28 billion of Republic of Kazakhstan (the "**State**") assets worldwide. The State, in turn, applied to set aside the enforcement order, on the basis that the award had been obtained by fraud. The English Court was satisfied that there had been prima facie evidence of fraud such that the alleged fraud (if established) would have made a difference to the award, and that the fraud had not been reasonably discoverable by the State prior to the award. The matter was therefore directed to proceed to trial in England in October 2018 as to whether the award had been obtained by fraud.

Shortly before disclosure was due to be made by the parties, the Claimants filed a Notice of Discontinuance, which the State applied to set aside on the basis that the allegations of fraud should be determined in England in order to assist it in resisting enforcement proceedings elsewhere. The Court found that, contrary to the explanations provided by the Claimants, the real reason why the Claimants had applied to discontinue in England was that they did not wish to take the risk that the trial might lead to adverse findings of fraud that would affect enforcement proceedings on foot in other jurisdictions.

The Court ruled that the Notice of Discontinuance should be set aside, and the matter should proceed to trial in October 2018, on the basis that the State had a legitimate interest in seeking to set aside the order of enforcement on the merits. In reaching this decision, the Court had found it relevant to note that the parties were virtually ready to provide disclosure and were already heavily invested in the proceedings, and that the State's allegations were far from speculative; all factors indicating that progression to trial would not be disproportionate in the circumstances. Remarking on the unusual nature of a decision effectively to force a now unwilling Claimant to proceed to trial, the Court acknowledged that "*if this is an exceptional conclusion, this is an exceptional case*".

ICSID TRIBUNAL DISMISSES APPLICABILITY OF ACHMEA DECISION

16 May 2018: In *Masdar Solar and Wind Cooperatief UA v Kingdom of Spain (ICSID Case No. ARB/14/1)*, an ICSID tribunal dismissed Spain's objections to jurisdiction and found that Spain had breached the Energy Charter Treaty (**"ECT"**). Interestingly, in the process of rendering its decision, the tribunal reasoned that the European Court of Justice's decision in the *Achmea* case (summarised above at page 10) does not apply to multilateral treaties like the ECT.

The dispute arose out of the Claimant investing in three solar energy plants in 2008 and 2009, based upon the assumption of receiving the benefit of a domestic regulation. Spain subsequently modified its regulatory framework for renewable energy and this allegedly caused damage to the Claimant. The Claimant argued that Spain had effectively abolished the regime in which it had invested and as a consequence had breached Article 10(1) of the ECT, which contains the fair and equitable treatment standard. Spain objected to jurisdiction on multiple grounds, arguing that the Claimant was not an

investor for the purposes of the ECT and that there was no investment, as defined under Article 1(6) of the ECT. Spain also argued that tax measures are excluded from the ECT and that intra-EU disputes did not fall within the scope of the ECT.

The tribunal rejected Spain's jurisdictional objections and in particular dismissed Spain's attempt to re-open the proceedings in light of the judgment reached in *Achmea*. The tribunal reasoned that the *Achmea* judgment related to investor-state dispute settlement provisions in bilateral investment treaties between EU Member States. Accordingly, the tribunal stated that the scope of the *Achmea* judgment was limited and did not take into consideration multilateral treaties to which the European Union itself is a party, such as the ECT. This decision is sure to further stoke the flames of debate surrounding the applicability of the *Achmea* decision.

SVEA COURT OF APPEAL SETS ASIDE MINORITY SHAREHOLDERS YUKOS AWARD

7 June 2018: In *Case No. T 9294-12,* the Svea Court of Appeal set aside a Stockholm Chamber of Commerce award rendered in favour of Spanish investors, who were minority shareholders in Yukos Oil Company, which was allegedly expropriated by the Russian Federation.

The arbitrations arising from investments in Yukos Oil Company will forever be entrenched in the history of international arbitration, because the proceedings commenced by the majority shareholders became arguably the most famous arbitration case in history with a US$50 billion award rendered against the Russian Federation.

The present arbitration, *Quasar de Valores SICAV S.A., et al. v. The Russian Federation,* relates to some of the minority shareholders in Yukos Oil Company, who were awarded US$2 million in 2012. Following on from this, the Svea Court of Appeal ruled on January 2016 that the Tribunal had no jurisdiction to hear the claim raised by the Spanish investors. The Court of Appeal's judgment became final after the Supreme Court decided on 14 December 2016 not to grant leave to appeal.

In the present case, the Russian Federation moved for the award to be set aside in full. The Svea Court of Appeal agreed and decided to set aside the award, ordering the Spanish investors to pay the Russian Federation's litigation costs. This case is significant, as it signifies the end of one part of the famous Yukos arbitrations.

Mayer Brown Key Events

XI SEMINAR ON ARBITRATION AND MEDIATION

8 August 2018. Gustavo Fernandes (partner in Tauil & Chequer Advogados and Mayer Brown's International Arbitration practice in Rio de Janeiro) will be speaking at the conference XI Seminar on Arbitration and Mediation, organized by the National Council of Mediation and Arbitration Institutions (CONIMA) in São Paulo. He will be speaking in a panel entitled "*Arbitration and corruption. How should the arbitrators proceed?*"

2018 BIENNIAL CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION

21 August 2018: Fernando Pérez Lozada (paralegal in Mayer Brown's International Arbitration practice in Paris) will be speaking at the 2018 Biennial Conference of the International Law Association – Developing International Law in Challenging Times in Sydney, Australia. He will be speaking about "*International Arbitration in Latin America : A peculiar blend of Pro-State and Pro-Investor policies?*"

INTERNATIONAL ARBITRATION WORKSHOP BY THE HARVARD INTERNATIONAL ARBITRATION LAW STUDENT ASSOCIATION

2 October 2017: Jawad Ahmad (associate in Mayer Brown's International Arbitration practice in London) will moderate a panel on evidence in International Arbitration at the International Arbitration Workshop, which is being run by the Harvard International Arbitration Law Student Association.

WEBINAR ON STRATEGIC QUESTIONS THAT SHOULD BE ASKED IN INTERNATIONAL ARBITRATION

11 October 2018: B. Ted Howes (partner in Mayer Brown's International Arbitration practice in New York and leader of the firm's US International Arbitration practice) and Sarah E. Reynolds (partner in Mayer Brown's Litigation and Dispute Resolution practice in Chicago and Palo Alto) will be hosting a webinar on "*Strategic questions that should be asked in International Arbitration*". To register for this webinar, please email Sue Ely at sely@mayerbrown.com.

Mayer Brown Publications

REFLECTING ON ARBITRATION INSTITUTIONS FOR AFRICA – THE GREAT DEBATE

5 April 2018: Kwadwo Sarkodie and Joseph Otoo (partner and senior associate in Mayer Brown's International Arbitration practice in London) published an article in African Law & Business on the rise of arbitration in Africa.

To read the full article, click here.

ARBITRATION FOR LAWYERS AND THEIR CLIENTS

19 April 2018: Bill Amos (partner in Mayer Brown's International Arbitration practice in Hong Kong) published a legal update on the enforceability of an arbitration clause in a retainer agreement between a law firm and their client.

To read the full article, click here.

CONSTRUCTION ARBITRATION A WINNER UNDER NEW ICC RULES

May 2018: Raid Abu-Manneh (partner and head of Mayer Brown's International Arbitration practice in London and global co-head of the International Arbitration group), Rachael O'Grady (senior associate in Mayer Brown's International Arbitration practice in London) and Juliana Castillo (legal consultant in Mayer Brown's International Arbitration practice in Paris) published an article in Construction Law discussing the new ICC arbitration rules.

To read the full article, click here.

M&A ARBITRATION AND EXPEDITED PROCEDURES: A NEED FOR SPEED?

May 2018: Alejandro López Ortiz (partner in Mayer Brown's International Arbitration practice in Paris) published an article in the New York Dispute Resolution Lawyer journal discussing the merits of expedited arbitration procedures in the Mergers & Acquisition sector.

To read the full article, click here.

THE ARBITRAL PROCESS: PROCEDURAL ISSUES IN CASES ALLEGING CORRUPTION

May 2018: Sol O'Donnell (partner in Mayer Brown's Litigation & Dispute Resolution practice in Chicago) was invited to contribute a chapter for a book titled, "*40 under 40 in International Arbitration*." The book brings together forty authors who are among the most promising rising stars in international arbitration around the world, below 40 years of age. Sol authored a chapter on "*The Arbitral Process: Procedural Issues in Cases Alleging Corruption*."

UAE FEDERAL LAW ON ARBITRATION IN COMMERCIAL DISPUTES - WORTH THE WAIT

18 May 2018: Raid Abu-Manneh (partner and head of Mayer Brown's International Arbitration practice in London and global co-head of the International Arbitration group), Dany Khayat (head of Mayer Brown's International Arbitration practice in Paris), Tom Thraya and Fred Haroun (partner-in-charge and associate in Mayer Brown's Global Corporate & Securities practice in Dubai) and Ali Auda (associate in Mayer Brown's International Arbitration practice in London) published a legal update on the UAE's new Federal Law on Arbitration

To read the full article, click here.

THE TRIAL MUST GO ON – UK HIGH COURT MAKES "EXCEPTIONAL" RULING THAT CLAIMANTS CANNOT DISCONTINUE CLAIM IN ANATOLIE STATI AND OTHERS V. THE REPUBLIC OF KAZAKHSTAN [2018] EWHC 1130 (COMM)

25 May 2018: Mark Stefanini and Stephen Moi (partner and senior associate in Mayer Brown's International Arbitration practice in London) published a legal update discussing in what circumstances a Claimant might not be permitted to discontinue its claim.

To read the full article, click here.

THREE STEPS TO STRENGTHEN HONG KONG MARITIME ARBITRATION

June 2018: Bill Amos (partner in Mayer Brown's International Arbitration practice in Hong Kong) published a bylined article in the Hong Kong Lawyer on three steps to enhance Hong Kong as a center for maritime arbitration.

To read the full article, click here.

ACHMEA: A BREXIT BONUS?

1 June 2018: Raid Abu-Manneh (partner and head of Mayer Brown's International Arbitration practice in London and global co-head of the International Arbitration group), Ali Auda (associate in Mayer Brown's International Arbitration practice in London) and Jonathan Clarke (trainee solicitor in Mayer Brown's International Arbitration practice in London) published an article in Commercial Litigation Journal discussing the conflation of the *Achmea* decision and Brexit and the opportunities it may hold for the UK legal sector.

To read the full article, click here.

FROM THE TWO-HEADED NIGHTINGALE TO THE FIFTEEN-HEADED HYDRA: THE MANY FOLLIES OF THE PROPOSED INTERNATIONAL INVESTMENT COURT

July 2018: Jawad Ahmad (associate in Mayer Brown's International Arbitration practice in London) published an article with Judge Charles N. Brower in the Fordham International Law Journal on the EU's proposed international investment court.

To read the full article, click here.

THE STATE'S CORRUPTION DEFENCE, PROSECUTORIAL EFFORTS AND ANTI-CORRUPTION NORMS IN INVESTMENT TREATY ARBITRATION

5 July 2018: Jawad Ahmad (associate in Mayer Brown's International Arbitration practice in London) co-authored a book chapter titled "*The State's Corruption Defence, Prosecutorial Efforts and Anti-Corruption Norms in Investment Treaty Arbitration*" with Judge Charles N. Brower in *Arbitration Under International Investment Agreements – A Guide to the Key Issues (2nd Edition).*

SECOND CIRCUIT LIMITS USE OF SECTION 1782 DISCOVERY AGAINST LAW FIRMS

13 July 2018: Steven Wolowitz and Christopher J. Houpt (partners in Mayer Brown's Litigation and Dispute Resolution practice in New York), Alex C. Lakatos (partner in Mayer Brown's Litigation and Dispute Resolution practice in Washington DC) and Noah Liben (senior associate in Mayer Brown's Litigation and Dispute Resolution practice in New York) published a legal update on a recent judgment limiting the scope of s.1782 discovery orders.

To read the full article, click here.

NEW CALIFORNIA LAW WOULD DRAW INTERNATIONAL ARBITRATIONS TO STATE

19 July 2018: Sarah E. Reynolds and Soledad G. O'Donnell (partners in Mayer Brown's Litigation and Dispute Resolution practice in Chicago), Hannah C. Banks and Allison M. Stowell (associates in Mayer Brown's Litigation and Dispute Resolution practice in New York) published a legal update on a new law clarifying that lawyers who are not members of the California bar may appear in international arbitrations seated in the state without local counsel.

To read the full article, click here.

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