MAYER·BROWN

Global International Arbitration Update

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Firm Updates

28 August 2018: Rachael O'Grady, senior associate in Mayer Brown's International Arbitration practice in London appeared on BBC News to discuss the significance of UK Prime Minister Theresa May's visit to Africa for UK firms' investment in the continent.

30 August 2018: Joseph Otoo, senior associate in Mayer Brown's International Arbitration practice in London appeared on CNBC to discuss the significance of the UK Prime Minister's trip to Africa and the potential for the region.

To watch, click here.

26 September 2018: Mayer Brown launched a London professional network NextGen, which aims to build a community of future leaders enabling them to challenge and explore developing technologies and global shifts that will impact the future of businesses.

To join the NextGen network, click here.

18 October 2018: James Ferguson and Dara Kurlancheek, partners in Mayer Brown's Litigation & Dispute Resolution practice in Chicago and Washington DC, hosted a webinar on "*Resolving Patent License Disputes Through Arbitration (US and International)*".

To watch it, click here.

October 2018: Mayer Brown's International Arbitration team announced the publication of *A Global Guide to International Arbitration*. This is a quick-reference guide to international arbitration globally and it is designed to provide a useful starting point when considering arbitration issues including the seat of the arbitration, enforcement options/risks and the protections which bilateral investment treaties may offer. The guide is divided into the following geographical regions: Americas, Europe, Africa, Asia-Pacific and Middle East.

A copy of the guide can be found on our website.

November 2018: Bill Amos, a partner in our Hong Kong office, was appointed as a Panel Arbitrator of the *China Maritime Arbitration Commission* which will celebrate its 60th anniversary in 2019. The Commission is a permanent arbitration institution, headquartered in Beijing, involved in resolving admiralty, maritime, transport and logistics-related disputes.

November 2018: Mayer Brown sponsored the 16th Annual ICC Miami Conference on International Arbitration. The forum focused on developments in international arbitration in Latin America and involved participants from 40 countries.

December 2018: Partner and Co-head of the firm's International Arbitration Practice, Raid Abu-Manneh, was recognised by *Legal 500 UK* as a leading individual within the field, who is "*experienced, creative and liked by clients*". Senior Associate, Rachael O'Grady, was also listed as part of *Legal 500 UK*'s Next Generation Lawyers and commended for her "*impressive understanding of clients' business*". Mark Stefanini, Kwadwo Sarkodie, Miles Robinson and Joseph Otoo were also recognised. In the Europe, Africa and Middle East edition of *Legal 500*, Dany Khayat was recognised as a Next Generation Lawyer.

December 2018: Mayer Brown was recognised by *Chambers and Partners* and ranked Band 1 in the UK for its Construction Arbitration practice. Raid Abu-Manneh was noted for frequently handling complex, cross-border, Michael Regan was recognised for his "vast wealth of knowledge and years of experience" and Kwadwo Sarkodie was also recognised for his "*great enthusiasm*". In the US edition, Michael Lennon was recommended for his "*expertise and responsiveness*" and B. Ted Howes listed as a Recognised Practitioner. In Europe, Dany Khayat's "*business-oriented approach*" was commended. In the Asia-Pacific region, Tay Yu-Jin was noted for his "*straightforward and practical solutions*".

Legal Updates

CHINESE ARBITRAL PROVIDER OPENS VANCOUVER PRACTICE

August 2018: One of the main Chinese arbitration providers, China International Economic and Trade Arbitration Commission ("**CIETAC**"), opened its first overseas office in Vancouver marking a new chapter in its international development. The Beijing headquartered CIETAC is one of the world's busiest arbitral institutions with its awards enforced in key legal jurisdictions, including Europe and the US. The move follows its initial expansion into Hong Kong which provided it with a foundation in common law disputes. The aim of the expansion is to develop the arbitral provider's international reach and to educate on Chinese practices to contribute to industry development.

The choice of location reflects Vancouver's strong links to China stemming from its position as a shipping hub, combined with its high Chinese demographic. Its location on the west coast of the continent also provides a convenient central location to Asia-North American disputes. The ability to meet half-way may offer an advantage over the continent's other arbitration centre, New York International Arbitration Centre ("**NYIAC**").

Chinese parties are often insistent on the use of Chinese arbitral procedures and their courts have sometimes been reticent in enforcing foreign awards. The Vancouver office enables parties to utilise Chinese arbitration, with the confidence of its recognition in China, together with the geographical and political benefits of Canada.

ICC STATISTICS SHOW SWISS POPULARITY

August 2018: The ICC released its statistical report for 2017. Notable points include:

- International outlook: the report reiterates the ICC's global reach with parties from 142 countries. The institution's opening of a new Sao Paolo office in addition to its existing Hong Kong and New York branches illustrates its continued international outlook. The report confirms its position as the world's preferred institution, with 810 new cases and 512 awards issued.
- Increased diversity: the report illustrates an increase in both gender and geographical diversity of clients, arbitrators and tribunals, demonstrating that efforts in this area are effecting change.
- Swiss focus: the report highlighted the pivotal role that Switzerland plays in international arbitration, being second only to Paris as a seat choice and Swiss law being the forerunner of civil law systems; it is unsurprising with its history of neutrality that the country and its arbitrators are highly sought by disputing parties.

ICSID RELEASES UPDATED STATISTICS

August 2018: The ICSID Secretariat issued updated statistics regarding its existing cases and 50 new cases. Notable statistics include:

- Type of case: the vast majority of new cases (60%) concerned bilateral investment treaties, with 21% of cases concerning oil, gas and mining disputes, followed by 16% concerning electricity or energy - which is not surprising given that 8% of cases involve the Energy Charter Treaty.
- Geographical reach: the statistics paint an interesting geographical picture with Eastern Europe and Asia being the regions with the most sued States, accounting for 40% of cases. In contrast, the most popular region for arbitral appointments was Western Europe with 46%, despite concerted efforts within the industry to increase diversity.
- Outcomes: claim outcomes were varied with 35% being discontinued and 40.5% being upheld by tribunals. Only 8.1% of claims were dismissed, with the remaining percentages accounted for by both parties agreeing to discontinuation or the tribunal declining jurisdiction.

The statistics act as a valuable barometer of the global investor-State dispute picture.

PROPOSED CHANGES TO ICSID RULES

3 August 2018: ICSID released far-reaching proposals to reform its Rules on its 50th birthday which seek to streamline and modernise the institution. It comes at a time when Investor-State Dispute Settlement ("**ISDS**") faces opposition from governments concerned about the scale and cost of potential claims. The proposals seek to avoid controversial measures, such as an appellate procedure. Critically, the changes do not amend the ICSID Convention, and therefore they only require approval from two-thirds of parties. The key changes include:

- Increased transparency: awards to be published unless parties object within 60 days; excerpts to be published where objections are received.
- Third party funding: requirement to disclose third party funding including names for conflicts purposes.
- Arbitrators: expedited process to challenge arbitrators; more rigorous independence; and impartiality statement from arbitrators.
- More dispute resolution mechanisms: development of mediation rules and service; amended conciliation rules to enable greater flexibility; expansion of Additional Facility offering to non-contracting States.
- Efficiency: expedited procedure available; new filing deadlines; limits for length of documents; default use of electronic filing; new time-frame for award (usually 240 days after submissions); and checklist for initiating a claim.
- Security for costs: clear authority to grant security for costs with adverse consequences for failing to comply.

The increased efficiency and flexibility of dispute resolution mechanisms is likely to be welcomed. Nonetheless, States have the opportunity to comment on these proposed modifications so they may yet change. The time and cost benefits of the proposals are likely to be welcomed by those who regard a key merit of arbitration as its ability to outperform courts on these issues. Furthermore, privacy concerns may limit plans for transparency of awards.

BRAZILIAN CHAMBER OF CONCILIATION, MEDIATION AND ARBITRATION INTRODUCES NEW RULES

6 August 2018: The Chamber of Conciliation, Mediation and Arbitration in Brazil introduced new rules in an effort to prevent and more easily resolve disputes arising from complex projects. The Rules on Boards for Prevention and Solution of Controversies ("**Rules**") are aimed at projects including infrastructure and construction.

The Rules offer flexibility with the option to have a board appointed to just one contract or multiple contracts for the same company. The latter would enable the board to deal with different disputes arising under different contracts. Further, they can undertake a supervisory function whereby they are constituted within 30 days of the contract being executed and are regularly updated on issues in order to prevent disputes. Alternatively, boards can be constituted only when necessary to resolve specific problems. As with many arbitral provisions, there is the option of having either a sole member or three members of a board.

The parties can also elect what kind of function they want a board to take. It can be a revision board which makes suggestions to prevent and resolve issues which, in the absence of objections, would be binding. Another form would be an adjudication board, which makes binding determinations to resolve problems. A third type is a hybrid board which will act as a revision board but also function as an adjudication board when necessary.

Importantly, whilst a board's decisions can be used as evidence in any subsequent proceedings, the board members themselves cannot preside over any arbitral or judicial action.

INDIAN ARBITRATION DEVELOPMENTS

10 August 2018: India reached a milestone in its quest to become a hub of international arbitration when the Arbitration and Conciliation (Amendment) Bill 2018 (the "**Bill**") passed through the lower house (Lok Sabha) of the Indian parliament.

Prior to entering the lower house, the Bill aimed to implement the recommendations made by a High Level Review Committee to the Indian government which included: disapplying domestic time limits in international arbitrations; allowing courts to direct arbitral institutions to appoint arbitrators (where parties fail to do so); establishing the Arbitration Council of India; and protecting arbitrators from law suits. This framework of reforms aims to ensure that India has the statutory protections necessary to become a global leader in arbitration.

Upon entering the lower house, the following key amendments were made to the Bill:

- Powers granted by the Supreme Court or High Court to appoint arbitrators (where parties fail to do so) are to lie with authorised arbitral institutions;
- Where parties apply to different arbitral institutions, the first in time rule shall prevail;

- Requiring the statement of claim and defence to be submitted within six months of the appointment of arbitrator(s); and
- Limiting interim measures to arbitrations where the award has yet to be rendered.

The Bill now only needs to pass through the upper house (Rajya Sabha) and receive Presidential assent before coming into force.

HONG KONG SEEKS VIEWS ON CODE OF PRACTICE FOR THIRD PARTY FUNDING IN ARBITRATION

30 August 2018: The Hong Kong Department of Justice issued a revised draft Code of Practice for Third Party Funding of Arbitration and Mediation ("**Revised Code**") for public consultation. Hong Kong enacted legislation in June 2017 ("**TPF Legislation**") to expressly allow third-party funding of arbitration, mediation and court proceedings ("**TPF**"), but delayed bringing into effect key operative provisions to allow time for preparation of the Revised Code. The conclusion of the Revised Code suggests that the operative provisions of the TPF Legislation will soon be brought into effect, formally allowing TPF in Hong Kong.

The Revised Code, subject to comments from the public consultation, will form an integral part of the regulation of TPF, setting out standards for third party funders to follow. The Revised Code is generally more tightly worded than earlier drafts, consistently extends its scope to cover mediation as well as arbitration, and provides a slightly broader scope of application for certain provisions (including broadening the scope of the application of the Revised Code and its confidentiality and privilege provisions which now apply to all laws applicable to the funding agreement, not just Hong Kong law).

The consultation concluded on 30 October 2018.

REVISIONS TO ISDS PROVISIONS IN KOREA-US FTA

3 September 2018: South Korea unveiled revisions to the six year old Korea-US free trade agreement ("**KORUS FTA**"). In exchange for preferential trade treatments with respect to the US automotive sector, South Korea negotiated amendments to the ISDS focusing upon restricting the application of provisions regarding investors' legitimate expectations, and barring parallel proceedings.

The revised clause on legitimate expectations provides that "[t]he mere fact that a party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the article, even if there is loss or damage to the covered investment as a result," and "[t]he relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." Parallel proceedings involving allegations related to the same measures or arising from the same events or circumstances are also prohibited under a separate clause.

The changes to the KORUS FTA come after a series of costly treaty claims against South Korea, and are aimed at preventing the potential abuse of the ISDS provisions by multinational companies and safeguarding the right of the States involved to act in the interest of their public.

HKIAC DETAIL USE OF SECRETARY SERVICE

3 September 2018: The Hong Kong International Arbitration Centre ("**HIAC**") issued its first report setting out how its secretary service has been used in the four years following its inception. HKIAC Secretariat members can be appointed as tribunal secretaries for the arbitrations facilitated at the institution. The report illustrates how the service has saved members costs through the secretary undertaking tasks which would otherwise fall to arbitrators.

The report illustrates the global spectrum of use with Chinese, New York, English and Hong Kong governed arbitrations utilising the service. Whilst only 19 cases have used a HKIAC secretary, eight of these were in 2018, demonstrating its growing popularity. The report clearly aims to draw attention to both the service and its evident cost benefits and consequently the value that HKIAC can offer parties as a chosen arbitral institution.

TANZANIA ALTERS ARBITRATION LAW

12 September 2018: Tanzania moved to restrict Investor-State Dispute Settlement by introducing the Public Private Partnership (Amendment) Bill 2018 which requires foreign investors to resolve disputes solely through Tanzanian courts.

The reforms follow a number of arbitral awards against Tanzania which have resulted in the Attorney General accusing international arbitral institutions of bias.

International arbitral tribunals constituted under existing contracts are unlikely to feel bound by the new Tanzanian law and parties will likely be able to enforce awards outside Tanzania. Nonetheless future investors face the prospect of being contractually barred from international arbitration, which may dissuade investors from the country.

GAMBIA RATIFIES UN CONVENTION ON TRANSPARENCY IN ARBITRATION

28 September: Gambia ratified the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, becoming the fifth state to have done so. It will come into force in Gambia in March 2019. The aim of the Convention is to extend the scope of UNCITRAL Rules to aid transparency in dispute resolution. The Rules are designed to increase the public accessibility and transparency of ISDS in recognition of the public interest in the process. The Convention has been signed by 18 other States who have yet to ratify it, including the US, UK, France and Germany.

NEW NAFTA AMENDS ISDS

30 September 2018: The United-States Mexico Canada Agreement ("**USMCA**") which replaces the North American Free Trade Agreement ("**NAFTA**") was agreed. The new agreement makes significant changes to ISDS mechanisms available to the parties. The salient points are outlined below:

- Canada-US: there are no ISDS mechanisms available for investors between these countries as the US seeks to encourage domestic investment and bring foreign investors under the remit of national courts.
- Canada-Mexico: there are no ISDS mechanisms under the USMCA but both parties can use ISDS provisions under another Agreement, the CPTPP to which they are both party.
- Mexico-US: the USCMA significantly restricts the ISDS options available to investors. It eliminates common bases of investor claims, the "fair and equitable treatment" requirement and indirect expropriation. This illustrates a clear intention to stem the level of suits that arose under NAFTA. Where parties are able to bring a claim there are more onerous requirements to utilise local remedies for 30 months, only after which time investors will have 18 months to commence a claim. There is one category of exception, government energy and infrastructure contracts, which can still benefit from the fair and equitable treatment standard and claim for indirect expropriation. These investors will also not be required to use local remedies but the existing three year time limit will continue to apply.

The USMCA must now be approved at national levels before it can enter into force. This could be problematic in the US, where some industries will be concerned by the continuing binational arbitration mechanism for disputes concerning anti-dumping and countervailing duty measures. Domestic US industries object to this process, preferring to use US courts to protect against aggressive trade strategies.

REPEAL OF ARTICLE 257 OF THE UAE PENAL CODE

October 2018: Article 257 of the UAE Penal Code (the "**Article**") was amended in 2016 to introduce criminal liability for arbitrators should they carry out a number of actions (including issuing a decision, opinion, report) which fail to conform to the requirements of duty of neutrality and integrity. Although the arbitration community in the UAE has developed in recent years, assisted by the new arbitration law passed earlier this year (Federal Law No. 6 of 2018) (which is based on the UNCITRAL Model Law), the Article remains a source of concern.

The Article has caused many arbitrators to refuse arbitration appointments in the UAE and Article 257 could be used as a guerrilla tactic to disrupt proceedings. Article 257 has now been repealed with new wording provided in October 2018. Arbitrators have been carved out with the amended provision only applying to persons acting in the capacity of an expert, translator or investigator appointed by a judicial authority. This is a positive step providing relief for arbitrators and will further cement the UAE's status as an arbitration-friendly jurisdiction within the Middle East and, indeed, around the world.

SIAC PROMOTES ARBITRATION ALONG CHINA'S SILK ROAD

12 October 2018: The Singapore International Arbitration Centre ("**SIAC**") entered into a Memorandum of Understanding with the China International Economic and Trade Arbitration Commission ("**CIETAC**") designed to promote arbitration as the primary method of dispute resolution. It aims to achieve this through cross-institutional consolidation. The duo will organise activities including conferences, workshops and seminars to promote arbitration. There will also be cooperation between the two institutions for training and the appointment of arbitrators.

This is one of a number of memoranda that SIAC has entered into in the region, having also concluded them with the Shenzhen Court of International Arbitration and Xi'an Arbitration Commission in its efforts to ensure that arbitration is the go to dispute resolution mechanism for investors capitalising on China's Belt and Road initiative. The regional investment provides corresponding opportunities for the growth of arbitration as it is unlikely States will alter their existing investment treaties. SIAC is seeking to ensure that it is best placed to assist on the variety of disputes that will inevitably arise.

ICC REJECTS AGE CHALLENGE

15 October 2018: The ICC took the unusual step of issuing a reasoned opinion to a challenge based on an arbitrator's age. The challenge, to the appointment of 76 year old, Sigvard Jarvin, was brought on the basis that due to his age there was a risk that he would not finish the case and that the costs of insuring against this were prohibitively high.

Given the importance of the issue, the ICC issued a reasoned decision rejecting the challenge on the basis that there are no insurance requirements in appointing arbitrators. The ICC Court also highlighted the contradictory nature of the party's assertion that Sigvard Jarvin should be replaced by a retired High Court judge (or senior Queen's Counsel) as the High Court retirement age is 70 thus they would face the same issues. This position suggests that the party's challenge may have been rooted in their wish to change the arbitrator rather than related to genuine concerns about age.

In light of the current discourse regarding the importance of diversity, particularly with regards to younger arbitrators, this case serves as a poignant reminder that age discrimination will also not be tolerated.

ABU DHABI OPENS STATE OF THE ART ARBITRATION CENTRE

17 October 2018: The Abu Dhabi Commercial Conciliation & Arbitration Centre ("**Centre**")opened its new facility. The Centre sits in the financial free trade zone and aims to capitalise on its global position to cater to a diverse range of clients. The Centre entered into an agreement with the ICC to use the Centre as their Middle Eastern office but the facilities are available for use in any arbitration. The modern facilities integrate technology in both the preparation and hearing of evidence to provide a fully digitalised service.

As the name suggests, the Centre caters to a variety of dispute resolution mechanisms including conciliation and mediation. The Centre's framework is based on UNCITRAL Model Law. This pro-arbitration approach highlights Abu Dhabi's ambition to become the leading arbitration centre in the region.

SWITZERLAND ISSUES DRAFT REFORMS TO ARBITRATION LAW

24 October 2018: The Swiss Federal Council issued the draft bill and accompanying report for an update to Switzerland's arbitration law. It must first pass through the Swiss parliament before it can come into force as chapter 12 of the Swiss Private International Law Act. The draft bill codified a number of Supreme Court decisions to ensure consistency, including the duty to object immediately to procedural irregularity. The draft bill also clarifies that where the details of a Swiss arbitration are not stated in the agreement, the court which first deals with the matter will be competent to appoint the arbitrators. Parties will also have 30 days following an award to apply for interpretation, variation or additional awards for unresolved issues.

Additionally, under the changes non-Swiss seated arbitrations will have access to a Swiss support judge to support the tribunal. Parties will also be permitted to file set-aside applications to the Supreme Court in English which would increase accessibility. This language proposal illustrates the tension that exists between accommodating the diverse, international spectrum of cases that Switzerland faces in a competitive arbitral environment and the desire to protect the country's own legal character.

The draft bill also runs contrary to the Supreme Court's decision regarding the time when the international character of a dispute is relevant, specifying that it is the nature at the time the arbitration agreement is entered into, that is relevant, rather than as the Supreme Court held, the time of arbitration. A notable issue absent from the reform agenda is the self-assessment of jurisdiction that arbitral tribunals undertake which limits the subsequent scope of assessment of national courts.

The aim of these reforms is to maintain Switzerland's status as a pro-arbitration and accessible arbitral venue. The limited extent of reforms reiterates the recognised success of Switzerland as an international arbitral centre.

ICJ JUDGES CEASE ARBITRATION OF INVESTOR-STATE DISPUTES

25 October 2018: The President of the International Court of Justice ("**ICJ**") announced that following an increase in workload ICJ judges will no longer accept positions as arbitrators in investor-State disputes. Further, they will only act as arbitrators in disputes between States in exceptional circumstances and

subject to the court's authorisation procedure. They will also not arbitrate any dispute involving a party to a current ICJ case, even if unrelated, to ensure impartiality.

The decision removes a group of arbitrators of the highest calibre from the global arbitration community, nonetheless in doing so it reinforces the impartiality of their position. In light of discussions around the potential conflicts of interests arbitrators face this move will reinforce the neutrality of the ICJ, whilst providing a further discussion point for the current discourse on ensuring the unprejudiced position of arbitrators.

HKIAC RULES CAME INTO FORCE

1 November 2018: The 2018 HKIAC Rules entered into force, governing arbitrations commenced on or after 1 November 2018. The Rules involve a variety of changes. Technology is to be utilised more effectively, with document delivery via a secure online platform. There are also increased powers for the tribunal to manage multiple parties and proceedings, enabling it to hear parallel proceedings back to back or stay one until determination of the other. The HKIAC Rules also allow third parties to be joined to proceedings despite not being bound by HKIAC arbitration where all parties consent.

Tribunals must now notify parties of the anticipated timeframe for the award; the HKIAC Rules stipulate a three month deadline, which can be extended by the institution or party agreement. Additionally, the tribunal is now empowered to decide a point summarily.

Under the new Rules, parties are required to notify all parties, including the tribunal and institution, if a third-party funder is used. The Rules allow parties to disclose arbitration material to the funder but the tribunal may also take into account the arrangement when awarding costs.

The updated Rules reflect both technological and funding changes and aid tribunals in catering to the myriad of cases they are presented with.

WATERSHED MOMENT REACHED IN REFORM OF INVESTOR-STATE DISPUTE SETTLEMENT

2 November 2018: UNCITRAL concluded the second part of a three stage plan to reform the current international approach to investor-State dispute settlement. The first phase identified key areas of concern which included the variation in outcomes, the use of arbitrators as adjudicators, time, cost and third party funding. The second phase determined the areas which should be the focus of reform, which will pave the way for the final phase, the reforms themselves. These will be discussed at the next session in Spring 2019.

Working Group III which is considering the reforms has a different dynamic to Working Group II who have traditionally considered arbitration issues. This is rooted in the use of government representatives over arbitrators themselves to consider reform. The membership of Working Group III reflects concerns regarding the self-interest of arbitrators, but there is an inherent danger that the self-interest of States may also create a road block. The topic of reform has proved politically controversial with many countries dealing with backlash following unfavourable ISDS decisions. This opposition has been seen through developments within the EU and in the limitation of ISDS clauses in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("**CPTPP**") , discussed further below.

The hardest part is yet to come; building a consensus on not only the need for reform but the particulars of how to effect it is the real challenge facing ISDS. Nonetheless this progress marks a pivotal moment on the road to reform.

PRAGUE RULES

December 2018: The final version of the Prague Rules were approved. The rules offer an alternative to the International Bar Association ("**IBA**") Rules which have been criticised for their adversarial approach reflective of roots in common law.

The Prague Rules aim to counteract many of the hindrances to international arbitration including, the onerous use of document production, experts, witnesses and cross-examination. In contrast to the discovery available under the IBA Rules, the Prague Rules limit document requests to those which can be specifically identified. The Prague Rules empower the arbitrator to take an inquisitorial role, enabling them to both limit the number of witnesses but also to suggest which witnesses' testimony may aid the resolution of issues. Similarly, the arbitrator is able to investigate legal issues of their own volition, in contrast to the IBA rules requiring parties to prove the legal foundation of their claims.

The Prague Rules reflect a civil law approach which may prove popular with parties in civil law jurisdictions. This would be advantageous as it would ensure that arbitration in these countries more closely mirrors the legal norms which would otherwise regulate the parties. In this respect, the standards of arbitration may more closely match civil law parties' expectations. Nonetheless, it is far from clear that the

claimed benefits of time and monetary savings would materialise under the Prague Rules. The probative approach could increase the time and costs and there is a danger of injustice where only specifiable documents can be requested.

The greatest benefit of the Prague Rules is that they mean that the arbitral world mirrors the major legal systems, providing increased flexibility for parties to arbitrate in a familiar manner that is harmonised to judicial principles which complement the laws the parties have chosen to apply. They also offer increased choice to parties who are best placed to understand their arbitral requirements.

COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP ENTERS INTO FORCE

30 December 2018: The CPTPP came into force following Australia's ratification of it in October.

The agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam was finalised in January 2018 despite the US's withdrawal. The CPTPP creates one of the largest free trade zones in the world. However, the agreement adopts a narrower approach to investor-State dispute resolution following State concerns about unwarranted claims. In particular, investors who enter into government contracts will not be able to use ISDS clauses to resolve the dispute. Further, New Zealand has entered into bilateral agreements with five countries to the agreement which further restrict or eliminate the applicability of ISDS clauses, disapplying the provisions not applying at all between New Zealand and Australia.

The practical implications of the CPTPP on disputes remains to be seen. Nonetheless, the parties' restrictive approach to ISDS highlights a need for investors to be cautious in the structure of their investments and ensure that they have a comprehensive understanding of the remedies available to them when a dispute arises. Additionally, the clarity provided ensures that investments can be made with certainty.

15 January 2019: Following *Achmea* and the European Commission's July statement of its applicability to the Energy Charter Treaty ("**ECT**"), 22 EU Members have signed a declaration that they will seek to terminate their intra-EU bi-lateral investment treaties ("**BIT**") within the year. The States have also pledged to seek to use their position to notify Tribunals of the intra-EU of BITs and the ECT in disputes between EU investors and EU States, as well as to request that any such awards be set aside.

Highlighting the controversial nature of the *Achmea* decision there were two additional declarations which vary the pledges, particularly with regard to the ECT's applicability. Further the European Commission issued a statement welcoming the move whilst expressing regret as to the deviations on the ECT which suggests that it is firmly within the Commission's plans to eliminate intra-EU ECT arbitration. It remains to be seen how this development will impact existing awards. In particular it remains to be seen whether the limitation of arbitration will impact on intra-EU investment.

Case Law Updates

THE UK BALANCES ITS INTERNATIONAL AND EU TREATY OBLIGATIONS

1 August 2018: In *Viorel Micula and others v Romania and European Commission (Intervener)* [2018] EWCA Civ 1801, the English Court of Appeal sought to balance its obligations under both the ICSID Convention and EU law. The Court upheld a stay of enforcement of an ICSID award in the claimant's favour on the basis of a 2015 decision by the European Commission which determined that the award would violate EU law (article 107(1) TFEU) because it would constitute state aid. However, the Court of Appeal reversed previous refusals to grant security by ordering Romania to pay £150 million as security for the stay.

Both parties to the dispute have applied to the General Court of the European Union, who will ultimately decide whether Romania will be required to pay compensation. The case is another example of the unsatisfactory tension that currently exists between EU law and investment treaty obligations regarding intra-EU investment. The variation in reasoning of the judges in reaching their conclusion, highlights the difficulties that national courts face in meeting their dual obligations.

AMBIGUITY DEFEATS ARBITRATION AGREEMENT IN AUSTRALIA

10 August 2018: In *Hurdsman and others v Ekactrm Solutions Pty Ltd* [2018] SASC 112, the Supreme Court of South Australia held that any uncertainty in the language used in an arbitration clause will defeat it. The case involved an attempt by the applicant to stay court proceedings brought by the respondent on the basis of a binding arbitration agreement. The

arbitration clause incorporated into the contract had the term "mediator" in place of "arbitrator" whilst referring to the Singapore International Arbitration Centre ("**SIAC**"). The applicant argued that it was self-evident that the term arbitrator should have been used as SIAC does not engage in mediation. The rest of the agreement and the pre-contract negotiations also referred to a binding arbitration clause and a previous contract between the parties had used the term arbitrator.

However, the Supreme Court held that the clause was defeated by the lack of certainty regarding the parties' intent, enabling the respondent to continue with court proceedings. The case serves as a poignant reminder of the importance of clarity in arbitration clauses, their critical role in any commercial contract and the high cost of getting it wrong.

ROMANIA FACES CYPRIOT CLAIMS

22 August 2018: In *Bladon Enterprises Ltd and Germen Properties Ltd v Romania* (ICSID Case No. ARB/18/30), Romania faces claims under the Cypriot-Romania bilateral investment treaty in relation to a dispute relating to a project to build a shopping centre and buildings in Bucharest. The Cypriot companies, Bladon Enterprises and Germen Properties, allege that the State sequestered land on which they planned to develop their project, through the National Anti-Corruption Directorate and that the Ministry of Public Finance also attempted to take the title to the land.

The government alleged that the claimants and the university who provided the land colluded in a plan to sell the property for less than its market value. The property was transferred in exchange for a 49.88% share in the joint venture behind the $2 billion project, plus annual income of hundreds of thousands of dollars.

Notably, none of the claimants were ever charged with offences despite the criminal proceedings. Consequently the project went ahead without a large proportion of the land, which limited its value.

This case is the latest in a series of ICSID claims against the country relating to its anti-corruption drive, which some have alleged ultimately acted as a pretext for politically motivated actions and disregard of due process.

US DISCOVERY ADMISSIBLE IN LONDON SEATED ARBITRATION

24 August 2018: In *Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH & Anor* [2018] EWHC 2267 (Comm), the English High Court held that the fruit of a US discovery order obtained by Swiss and Russian companies could be used in the London seated arbitration against Dreymoor Fertilisers Overseas Pte. Ltd. EuroChem Trading GmbH and its Russian company, JSC MCC. EuroChem obtained the discovery order to assist in bringing proceedings in different jurisdictions, including the British Virgin Islands and Cyprus. They allege that the contracts between the companies were obtained through bribery. The court found that it was not unconscionable to permit the discovery into evidence.

This case serves as a reminder of the potential for evidentiary crossover where there are proceedings ongoing in multiple jurisdictions and the potential risk that investments may be tainted and thus unprotected in politically challenging regions.

PETROBRAS DUTCH ASSETS FROZEN

27 August 2018: In *Vantage Deepwater Company et al. v. Petrobras America Inc et al.*, case number 4:18-cv-02246, Petrobras' Dutch assets were frozen by the Amsterdam District Court as part of Vantage's attempt to secure an arbitral award of (US) $622 million. The award was issued by a Houston tribunal made up of William W Park, Charles N Brower and James Gaitis, which found that Petrobras had wrongful terminated the lease for a deep-water drilling ship early.

Petrobras had attempted to argue that the contracts were void as a result of being procured through corruption. However, the tribunal held that Petrobras' subsequent novation and alterations to the contract after the bribery allegations came to light undermined its claim.

SUCCESS FEES PERMISSIBLE IN SWISS ARBITRATION

29 August 2018: In *4A_125/2018*, the Swiss Supreme Court considered whether the use of a success fee by the lawyers undertaking an arbitration case was contrary to public policy.

The case concerned two engagement letters that B. AG (a Zurich law firm) and A. SA (a Portuguese company) entered into regarding two ICC arbitrations. The agreements included a success fee as a percentage of the claim, with the firm entitled to differing amounts depending on whether the client settled the arbitration or succeeded in the arbitration.

Following the settlement of the ICC claims, the client disputed the success fees through arbitration. The arbitrator noted the Supreme Court's previous ruling 4A_240/2016 dated 13 June 2017 (BGE 143 III 600) which held that lawyers' use of success fees were at odds with public policy, but deviated from it.

This 2017 decision had been criticised as limiting Swiss arbitrators, in contrast to their international colleagues, who could incorporate success fees. The client appealed the arbitrator's decision to the Supreme Court on the basis that it violated Swiss public policy as the fee would have impeded the independence of the lawyer as it could motivate the lawyer to encourage settlement for their own gain.

The Supreme Court analysed the role of success fees, the percentages and caps involved against previous cases, holding that the fee did not violate public policy. In its review capacity the Supreme Court did not consider the permissibility under domestic law but in principle success fees in engagement for international arbitration will not be contrary to public policy. Consequently, success fees will be valid provided there is a reasonable ratio between them and the hourly rate or substantive amount charged regardless of outcome.

This is an important decision for Swiss arbitrators and arbitration in Switzerland as it ensures that professionals have the economic tools necessary to offer flexible pricing to clients in order to maintain its position as a key centre for international arbitration.

ACHMEA DOES NOT APPLY TO ENERGY CHARTER TREATY

31 August 2018: In V*attenfall AB and others v Federal Republic of Germany* (ICSID Case No. ARB/12/12 following the uncertainty arising from the *Slovak Republic v. Achmea B.V.* (Case C-284/16) ("**Achmea**") case, an ICSID tribunal affirmed the validity of arbitration clauses under the multilateral ECT. Following a request for guidance by the German Federal Court of Justice held that the arbitration clause in the Netherlands-Slovenia BIT to be incompatible with EU law. This was on the basis that the seat of arbitration, Germany, had no mechanism to review an arbitral award despite the tribunal potentially interpreting and applying EU law. The ECJ held this to be contrary to article 8, raising concerns about protection available to investors in investor-state disputes within the EU.

Germany had argued that *Achmea* must apply to invalidate the arbitration clause in the ECT. Whilst avoiding criticism of *Achmea*, the tribunal applied article 16 of the ECT which prevents other investment treaties undermining rights favourable to the investor under the ECT. The decision sits in tension with the European Commission's July communication that the *Achmea* judgement was intended to apply to the ECT. The case follows other ICSID tribunals holding that Achmea does not prevent them hearing intra-EU cases.

As the case is governed by the ICSID rules no national court is required to review the award, thus they will not be able to comment on the tribunal's reasoning and application. What is clear is that the conflict that *Achmea* created between EU law and investment treaties will persist.

BRAZILIAN COURT RULES ON CONSENT TO ARBITRATION AND PIERCING THE CORPORATE VEIL

September 2018: In *REsp. no. 1.639.035 – SP*, the Brazilian Court of Justice ruled that third parties could tacitly consent to arbitration where their actions as part of a group of companies are aimed at depriving a party of its entitlement.

The case concerned an alleged breach of contract for which the claimant intended to commence arbitration. Prior to this the claimant applied for an interim order to freeze the respondent's and its group's assets to prevent them from being transferred in an attempt to frustrate the claim. The matter was referred to the arbitral tribunal at CAM-CCBC to determine. The tribunal held that as arbitration is based on parties' consent, it could not issue interim measures against the third parties in the respondent's group as they had not consented to the arbitration.

A lower court subsequently instituted the measures and this decision was appealed by the respondent to the Superior Court of Justice. The Court found that the claimant had failed to commence arbitral proceedings within the 30 day time limit of the interim order thus the order would cease. Nonetheless, the court considered the position taken by the arbitral tribunal, holding that the arbitral tribunal was capable on deciding whether the circumstances warranted piercing the respondent's corporate veil based on the group's implicit consent, in order to protect the assets. The court determined that, where third parties utilise their corporate structure to deprive others of their contractual rights, their consent to the contract's arbitration provision can be implied from these actions.

The decision expands the potential remit of arbitral tribunals to non-parties and empowers them to go beyond parties legal presentation where necessary to prevent parties from deliberately frustrating the arbitral process. In reaching this conclusion the court recognises the equivalence of arbitration in the resolution of disputes.

FIRST EMERGENCY ARBITRATOR AWARD ISSUED IN MAINLAND CHINA ENFORCED IN HONG KONG

1 September 2018: In an unpublished decision referred to as the *GKML case*, an emergency arbitrator from the Beijing Arbitration Commission issued its first emergency award which was subsequently enforced in Hong Kong.

In September 2017, the first emergency arbitrator award was issued in Mainland China and then swiftly enforced in Hong Kong. Neither the award nor the judgment are publicly available, and could not be discussed until the conclusion of the arbitration in August 2018. Details of the case come to light from articles written by the emergency arbitrator Sun Wai of Zhong Lun Law Firm and Baker McKenzie, counsel to the claimants.

The disputes arose from two investment contracts between the investor claimants (two Hong Kong companies), the respondent company (a Cayman Islands registered company) ("**Company**") in which the investors had invested, and the respondent controlling shareholder of the Company. The claimants sought to repurchase their shares in the Company when agreed profit levels had not been achieved. The investment contracts included an arbitration clause stipulating arbitration at the Beijing Arbitration Commission ("**BAC**") under Chinese Law.

Concerned that the respondents would dispose of the assets in the Company, the claimants applied to an emergency arbitrator under the BAC rules seeking interim relief in the form of: (a) disclosure of information about the respondents' assets; (b) restraint on disposal of assets; (c) anti-suit injunctions against resisting enforcement of the emergency arbitrator's award; and (d) an order restraining the respondents from procuring third parties from taking actions prohibited by the other emergency arbitrator orders. The claimants also provided security, by way of an insurance policy, of 30% of the value of assets being sought to be restrained.

The emergency arbitrator granted the claimants relief for (b) and (d) above, but declined to order (a) and (c). As the BAC rules do not provide criteria for emergency arbitrators ordering interim measures, the emergency arbitrator reached his decision after considering the approach of other international arbitral institutions and employing the following criteria: (i) did the applicants have a reasonable chance of success in the arbitration; (ii) balance of convenience and urgency; (iii) was the relief sought reasonable and enforceable? The emergency arbitrator found that the relief sought in (a) was not urgent, and in (c) may not be enforceable in Hong Kong and would impose an undue burden on the respondents.

The process took 11 days from appointment of the emergency arbitrator to the rendering of the award, which was immediately enforced in Hong Kong under the Hong Kong Arbitration Ordinance section 22B, taking effect 14 days later. The success of the procedure sets a precedent for similar measures to be sought and enforced in future.

COSTA RICA SUCCESSFULLY DEFENDS ITS ENVIRONMENTAL PROTECTIONS AGAINST INVESTOR CLAIM

18 September 2018: In *David Aven and others v Republic of Costa Rica*, Case No. UNCT/15/3, a London seated UNCITRAL tribunal held that Costa Rica had fairly applied its environmental laws, dismissing claims brought by investors.

The case considered a number of interesting issues, including how dual nationals are treated (who are not nationals of the host state). In this case the investor's connections to the US significantly outweighed his connections to Italy, thus despite representing himself as Italian, he could rely on the Dominican Republic–Central America Free Trade Agreement ("**DR-CAFTA**"). The tribunal also considered: (i) what would qualify as an investment; and (ii) whether it was necessary to own the investment, finding that the mechanism through which the investments were structured (legally owned by a Venezuelan national) did not defeat the claim. The tribunal was particularly scathing of the investor's failure to notify the tribunal of assets which had been subsequently liquidated thus could not form part of the claim.

The tribunal ultimately held that Costa Rica had fairly applied its environmental laws to protected the internationally regarded wetlands and forest, whilst the investor used fragmented applications to avoid being caught by regulations.

Both parties had claims rejected for being out of time. The claimant was barred from bringing a claim for breach of full protection and security standard as this

was only alleged after the closing of the hearing. Similarly, Costa Rica's counterclaim was not particularised in time so also failed. The case serves as a reminder of the importance of not only filing but also detailing claims in time or risk losing them altogether.

UKRAINE REFUSES EMERGENCY SCC AWARD ON PUBLIC POLICY GROUNDS

19 September 2018: In *JKX Oil & Gas PLC and another v Ukraine* Case No 757/5777/15-U the Ukrainian Supreme Court recognised an emergency award issued by the Stockholm Chamber of Commerce ("**SCC**") but refused to enforce it. The claimant had sought to halt Ukraine charging its operational companies in the country over 28% in royalties whilst its complaint was heard by the SCC. The dispute related to changes to the country's tax code which the claimant argued made it impossible to operate there. However the Supreme Court refused enforcement on the principle basis that national courts were not empowered to make changes to laws enacted by legislators.

The case marks a positive development in the recognition of emergency awards which have been troubled by their lack of finality, a requirement under the New York Convention. However, as with final arbitral awards, States can always refuse to enforce an award where it would be contrary to public policy, here violating constitutional powers. The case illustrates the importance of evaluating enforcement mechanisms when seeking interim measures and awards, as any order can only be effective if there is the ability to enact it.

HONG KONG COURT REJECTED A PUBLIC POLICY CHALLENGE TO A NEW YORK CONVENTION AWARD RENDERED BY A TRIBUNAL IN JAPAN

26 September 2018: In *Paloma Co. Ltd. v. Capxon Electronic Industrial Co. Ltd* [2018] HKCFI 1147, the Hong Kong Court of First Instance rejected a public policy challenge to a New York Convention Award rendered by a tribunal in Japan.

A dispute arose between the respondent, Capxon Electronic Industrial Co. Ltd., a Taiwanese parts maker and the applicant, Japanese company Paloma Co. Ltd., regarding certain defective electrolytic capacitors supplied by the respondent. A three-member arbitral tribunal formed with the aid of the Japan Commercial Arbitration Centre rendered an award in favour of the Applicant. The applicant successfully obtained leave to enforce the award in Hong Kong.

The respondent applied for the enforcement order to be set aside, on the grounds that the award was contrary to public policy. The respondent argued that the tribunal: (i) had unfairly applied a presumption that certain defects in the electrolytic capacitors were attributable to the respondent, reversing the burden of proof to the prejudice of the respondent; and (ii) ignored any evidence illustrating that the defective capacitors were the result of Paloma's manufacturing process, further demonstrating that the tribunal was biased.

The Court found that there was no evidence of bias on the part of the tribunal, nor any error or matter which would warrant setting aside the award. The Court reiterated that, in order to refuse enforcement of an award under the New York Convention, the award must be so fundamentally offensive to the jurisdiction's notions of morality and justice that this could not reasonably be overlooked. In the absence of such conflict, the Court would not look into the merits, nor review any alleged errors or reasoning of the tribunal. This decision underlines the pro-arbitration stance taken by the Hong Kong courts, supporting the independence of the arbitral process and the finality of international arbitration awards.

NUTRASWEET $100 MILLION AWARD REINSTATED

27 September 2018: In *Matter of Daesang Corp. v NutraSweet Co.* [2018] NY Slip Op 06331, the New York Supreme Court Appellate Division reversed a highly criticised first instance decision of the same court to partially vacate a (US) $100 million arbitral award issued against Daesang. The decision reinforces New York's pro-arbitration stance in a decision that will have been a relief to the New York City Bar Association.

The saga relates to NutraSweet's 2003 purchase of Daesang's artificial sweetener. The transaction allowed for rescission in the event of antitrust litigation within five years of the deal. Subsequently a class action suit was brought in Pennsylvania. NutraSweet evidenced statements by Daesang that there had been a concerted practice of maintaining prices and hindering competition through corroboration with competitors prior to the transaction.

Daesang applied in New York to enforce partial and final arbitral awards totalling more than (US) $100 million against NutraSweet, but the Supreme Court at first instance vacated the awards on the basis that they violated public policy as the arbitrators had "manifestly disregarded" the law.

This decision caused consternation and concern that the refusal to enforce an arbitral award would diminish New York's attractiveness as a global arbitration centre. The New York City Bar Association's alarm motivated it to write a brief warning about the potential business impact if courts were to readily set aside arbitral decisions.

Reversing the Supreme Court's first instance decision, the Appellate Division reiterated that where there is "even a barely colorable [sic] justification", the arbitral award must be upheld. The Court affirmed that the threshold to succeeding on the manifest disregard ground is high, in particular it would have to be shown that:

- the arbitrators knew of the governing law but ignored or refused to apply it; and
- the law alleged to be ignored was defined, explicit and clearly applicable to the case.

The New York Supreme Court Appellate Division's decision affirms that there is a high standard that must be met, to use the manifest disregard of the law basis found in the Federal Arbitration Act ("FAA") to set aside an arbitral decision.

The length of the decision is notable in what is a clear attempt to deter courts from erroneously vacating arbitral awards in future. Thus, both the decision and its clearly articulated rationale are a relief for those who rely on New York as an arbitral centre.

APPLICABILITY OF US ARBITRATION EXEMPTION

3 October 2018: In *New Prime Inc. v. Oliveira* 138 S. Ct. 1164 (2018), the US Supreme Court heard oral arguments on an exemption in the Federal Arbitration Act which states that the Act does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The Court will decide: (i) whether the applicability of the exemption is an issue that must be resolved in arbitration; and (ii) whether the exemption applies to independent contractor agreements. In the US Court of Appeals for the First Circuit it was held that the respondent, an independent contractor, truck driver, could bring his claim against the petitioner, a trucking company, in court.

KENYA HIGH COURT ENFORCES ICSID AWARD

5 October 2018: In *Kenya Airports Authority v World Duty Free Company Limited*, Miscellaneous Application 67 of 2013, a Kenyan court affirmed its pro-recognition approach towards ICSID awards in a case that reinforces investor confidence in the country and continues anti-corruption efforts in the region.

The Kenyan High Court reversed a lower court decision which undermined an ICSID award. The dispute related to an alleged breach of contract between the claimant and the respondent. An ICSID tribunal held that the contract could not be relied on as it had been obtained through corruption via a $2 million donation paid by World Duty Free Company Limited ("**WDF**") to a previous Kenyan president.

WDF subsequently commenced a domestic arbitration regarding leases that had been entered into under the contract with the arbitrator making a $50 million award in WDF's favour. Kenya Airport Authority ("**KAA**") appealed to the High Court on the basis that the contract was void and that the ICSID tribunal's decision should have been final and binding.

The High Court sided with KAA, affirming that ICSID awards must be recognised to have "superior hierarchical status" and reiterating that it would go against public policy to enforce a contract procured by corruption.

ACHMEA NOT APPLICABLE TO ICSID ARBITRATION

9 October 2018: In *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35 as the fallout from the Achmea judgment continued, another ICSID tribunal has held that Achmea did not inhibit it from considering the case before it regarding the France-Hungary BIT.

In reaching its conclusion the tribunal rationalised that Achmea did not comment on the consent that BIT parties provided under Article 25 of the ICSID Convention, further nothing in EU law had been declared as incompatible with the ICSID Convention, and that the EU was not a party to the BIT thus did not have jurisdiction over it. They also reasoned that even if the ICSID consent could be terminated by new EU law, it could not retroactively apply to the case, thus the ICSID tribunal would have authority to determine the case regardless.

The case provides a valuable shelter to investors from the effects of the Achmea judgment but will only be useful to parties where ICSID arbitration is an option under the BIT. Nonetheless, where parties have a choice of arbitral options, ICSID provides a safe-harbour for those wishing to rely on arbitration clauses, at least for now.

HONG KONG COURTS REMIT AWARD FOR SERIOUS IRREGULARITY

9 October 2018: In *PvM* [2018] HKCFI 2280, the Hong Kong Court of First Instance remitted an interim award to the arbitrator for reconsideration, holding that it had been issued on a basis that neither party had advanced during arbitration, constituting a serious irregularity resulting in substantial injustice.

P, the applicant in the court case, had engaged M as main contractor under a contract for construction work ("**Contract**") which provided for domestic arbitration under the HKIAC rules in Hong Kong. Disputes under the Contract arose, and the resulting arbitrations were consolidated into a single arbitration ("**Arbitration**"). The arbitrator issued an interim award in favour of M for approximately (HK) $6 million. P paid the full HK$6m

into court, but disputed (HK) $4 million of the interim award on the basis that the arbitrator had awarded this amount on a basis not raised by either party. The arbitrator had held that a certain letter constituted notification of claims under the contract which entitled M to claim such sums, despite neither party stating that such notice had been given or relying on such a submission.

The Court held that, because M had not raised this argument in its pleadings, P had been entitled to conclude that M would not rely on the letter and was therefore denied a fair opportunity to make submissions to the arbitrator on this point. Such submissions may have led the arbitrator to make a different decision. The Court stated that while it would only intervene in "an extreme case", it was satisfied in this case that there had been a serious error that had affected due process and the "structural integrity" of the arbitration.

The judgment illustrates the narrow range of circumstances in which courts in England or Wales or in Hong Kong are prepared to find that a serious irregularity giving rise to substantial injustice has occurred. It reinforces the consistent attitude of the Hong Kong courts in favour of the finality of arbitration, while making clear that the fundamental rights of parties to arbitration proceedings in Hong Kong to impartiality, equality and procedural fairness must be adequately protected.

TO QUALIFY FOR ICSID PROTECTION INVESTMENTS MUST BE LAWFUL

22 October 2018: In *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v the Republic of Kenya* (ICSID Case No. ARB/15/29), the tribunal upheld the anti-corruption efforts in Kenya, holding that an investment must be legal to benefit from protection. The case concerned the granting of a mining licence, which was subsequently revoked following a change in government. The claimants complained that their investment was then unfairly nationalised.

The ICSID tribunal considered the validity of the licence as an investment, finding that whilst the previous government had granted the claimants the licence, it did not comply with the requirements set out in the Kenyan Mining Act. Consequently the investment was held to be unlawful and incapable of protection.

Critically, the case highlights the importance of ensuring that investments are legally valid under the country's laws at the time when they are made and the danger of relying on assurances and authorisations from officials. In politically volatile regions, local advice should be sought to ensure the protected status of the investment, despite political fluctuations.

COMMERCIAL COURT SETS ASIDE ARBITRAL AWARD FOR SERIOUS IRREGULARITIES

26 October 2018: In *RJ and another v HB* [2018] EWHC 2833 (Comm), the Commercial Court took the exceptional step of setting aside an arbitral decision and reverted the case back to the arbitrator for reconsideration. In a rare use of section 68 of the Arbitration Act a US $75 million ICC award was set aside due to a serious irregularity in the decision of the arbitrator. The judgment of the court is anonymised but the arbitrator is highly respected for his international commercial arbitration work.

The underlying dispute related to the merger of two banks, following which the respondent was to acquire just under 25% of the shares in one of the banks. The share transfer required regulatory approval and it was the claimant's contention that the respondent had deliberately not sought the necessary authorisations in order to frustrate the agreement.

The arbitrator took the abnormal step of issuing his findings of fact and preliminary conclusions, prior to giving the parties time to attempt to resolve the situation. However, following the lapse of this time period he made a final award without giving the parties the opportunity to make further submissions. The final award held the respondent to be the beneficial owner of shares, an outcome which neither party had sought.

The consequences for the respondent were significant as he could face regulatory fines without an easy means of remedying the situation. The court held that determining the claim without affording the parties the opportunity to make representations on the issue was unfair and unjust.

The court commented that the arbitrator had been determined to conclude the proceedings which was the foundation of the injustice. Nonetheless, the Commercial Court refused to remove the arbitrator reiterating that there was nothing to suggest that he could not be trusted and thus should be afforded another opportunity to re-evaluate the case. Though there is clearly potential for the arbitrator's highlighted failings to influence his future decision making.

The case demonstrates the exceptional difficulty in removing an arbitrator, and the high threshold to have an arbitral award set aside by the generally

pro-arbitration English courts. It also illustrates the importance of selecting an arbitrator with ample capacity to hear and properly consider a dispute.

CLASS ACTION ARBITRATION AUTHORISATION

29 October 2018: In *Lamps Plus Inc. v. Varela, Supreme Court of the United States*, No. 17-988 (2018), the US Supreme Court heard oral arguments to address an open question regarding class action arbitration in the US—specifically, whether the FFA precludes an interpretation of arbitration agreements under State law that authorises class arbitration based solely on general language common to arbitration agreements. The US Court of Appeals for the Ninth Circuit had held that a class action was authorised by an arbitration agreement under California law because the language of the agreement was ambiguous on that point. The claimant argued that federal law demands clearer language before a party can be required to arbitrate aggregated claims.

ACHMEA AWARD SET ASIDE

31 October 2018: In *Docket No. I ZB 2/15*, the German Federal Court of Justice set aside Dutch insurance group, Achmea's €22 million award against Slovakia, in what is expected to be the concluding chapter of this case. This move follows the German court's request for guidance from the ECJ regarding whether BITs between EU member states are compatible with EU law.

In March 2018, the ECJ made a surprising ruling in Slovak Republic v. Achmea B.V. (Case C-284/16), holding the BIT's arbitration clause to be incompatible with EU law. It did so on the basis that an arbitral tribunal could potentially be required to interpret or apply EU law without the review mechanisms which apply to court decisions. This is because the German legal system (as the seat of the arbitration) lacks the ability to review arbitral awards which would hinder the uniform application of EU law. Some have speculated that the ECJ's finding on validity of BIT arbitral clauses may vary by seat.

Achmea had brought the action following the 2011 nationalisation by Slovenia of its private health insurance operations in the country which it alleges caused it financial loss. Whilst only applying to investor-State disputes, the ruling raises concerns about protections available to investors within the economic community, particularly for existing investments. More broadly the distinction drawn between commercial and investor-State arbitrations has drawn scepticism.

Whilst this appears to be the end of Achmea's arbitral proceedings against Slovakia, it remains to be seen whether the company will resort to domestic judicial proceedings to find a remedy. Furthermore given the unsettled issues concerning intra-EU BIT arbitration clauses, this is unlikely to be the last heard on the matter.

TIME TO COMMENCE ARBITRATION CAN BE EXTENDED DESPITE UNILATERAL MISTAKE

8 November 2018: In *Haven Insurance Company Ltd v EUI Ltd (t/a Elephant Insurance) [2018] EWCA Civ 2494*, the English Court of Appeal upheld a decision to extend the time for a claimant to commence arbitration. The parties were bound by the Motor Insurers Bureau's articles of association which required arbitration. The article allowed an arbitrator's decision to be appealed within 30 days of notification of the decision.

The decision to allow an appeal of the arbitrator's decision was challenged as being out of time, but the Court held that although the appeal was out of time, section 12(3)(a) of the Act 1996 (the "**Act**") allowed the Court to extend the applicable time.

The Court of Appeal held that although the Act framed this provision on the basis of mutual mistake there was nothing to prohibit the extension where there had been a unilateral mistake and under the circumstances it was just to extend the time. Therefore the courts can grant time extensions where the error is one sided, though it is unusual. The Court also clarified that there is no absolute prohibition on granting an extension where the party has made a negligent omission though it would be a rare for it to do so.

VATTENFALL TRIBUNAL FACES DISQUALIFICATION

12 November 2018: In *Vattenfall AB and others v Federal Republic of Germany* (ICSID Case No. ARB/12/12), following on from the Tribunal's decision in September that Achmea does not apply to the ECT, Germany is now seeking to disqualify the ICSID tribunal on the basis of questions it posed to parties. This is the latest episode in an ongoing dispute regarding Germany's decision to move away from nuclear power which Vattenfall argues has unfairly harmed its investments in the country.

The case adds to investors' concerns following the Achmea decision regarding the protections afforded to intra-EU investments, with tension between the EU and ICSID perspectives on the extent to which EU law should impact ICSID arbitration. It is far from clear whether Achmea's judgment on the arbitration clause is unique to Germany's legal system or applies more broadly to disputes within the EU. As ICSID decisions

are not reviewable by national courts, parallel approaches depending on whether UNCITRAL or ICSID arbitration has been chosen, will continue.

The case follows the Swedish Court of Appeal's decision in May to suspend an award under the ECT in Novenergia v. Kingdom of Spain, SCC Case No. 063/2015. It remains to be seen whether the guidance requested by Spain will be sought from the ECJ on the validity of existing awards.

Observant investors are likely to be concerned about their existing intra-EU investments as well as how to structure their future investments to avoid *Achmea's* reach. The situation also poses questions about the EU's approach to arbitration against states generally. Whilst the *Achmea* judgement distinguished between commercial and state arbitrations, the latter often provide investors an avenue of recourse where domestic biases may impinge the fairness of commercial arbitration, for example in the enforcement of awards.

US SUPREME COURT AFFIRMS THAT ONLY ARBITRATORS SHOULD DETERMINE THE ISSUE OF ARBITRABILITY

8 January 2019: In *Henry Schein, Inc. v. Archer and White Sales, Inc., Supreme Court of the United States*, No. 17-1272, the US Supreme Court reached an unanimous ruling that arbitrators should determine the question of arbitrability, even where a court believes the demand for arbitration to be "wholly groundless". The case concerned a distribution contract which expressly incorporated the rules of American Arbitration Association providing that only arbitrators may resolve arbitrability questions. The Supreme Court found even in cases of "wholly groundless" requests for arbitration, it may not "override" a contact which delegates the question of arbitrability to the arbitrators. It therefore vacated the judgment of the Court of Appeals for the Fifth Circuit in determining that the "wholly groundless" exception to the arbitrators' power to decide arbitrability issues was contrary to the FAA.

The judgment demonstrates the Supreme Court's pro-arbitration stance and helpfully, puts to bed the "wholly groundless" exception developed in certain Circuit's jurisprudence. It reinforces the rule under the FAA and the Court's precedent, that provided there is "clea[r] and unmistakabl[e]" evidence that the parties agreed to arbitrate arbitrability, the court should refer that issue to the arbitral tribunal.

APPLICABILITY OF US ARBITRATION EXEMPTION

15 January 2019: In *New Prime Inc. v. Oliveira, Supreme Court of the United States*, No. 17-340, the US Supreme Court held that a court, and not an arbitrator, must decide whether the FAA applies to a case. The Supreme Court also held that an exemption in the FAA which states that the Act does not apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" was applicable to the parties, a trucking company and independent contractor truck driver. The Supreme Court upheld the US Court of Appeals for the First Circuit decision that the FAA does not apply because under the exemption "contracts of employment" means agreements to perform work regardless of whether the performer is an employee or independent contractor.

Mayer Brown Key Events

15 January 2019: The Palo Alto office will host a program for the SVAMC International Task Force featuring the Secretary General of the Hong Kong International Arbitration Centre who will discuss technology arbitration in China.

24-25 January 2019: Mayer Brown is sponsoring a dinner at the 6th ITA-IEL-ICC Joint Conference on International Arbitration Energy Arbitration in Houston, Texas.

14 March 2019: Joseph Otoo will be lecturing on Economic loss and construction claims as part of the MSc Construction Law & Dispute Resolution at King's College, London

April 2019: The Paris office will organise a conference during the Paris Arbitration Week 2019.

9 May 2019: Raid Abu-Manneh will be speaking during London International Disputes Week on "London as an International Arbitration Hub".

27 May 2019: Dany Khayat will speak at the Annual Conference of AMCHAM Brazil Arbitration and Mediation Centre in São Paulo, Brazil.

We are currently in the process of planning a number of events to take place throughout 2019. Once details have been confirmed we will email you an invitation with further details. Alternatively, please check our website which will be updated regularly.

Publications

ARBITRABILITY OF COMPANY DISSOLUTION DUE TO PARTNER'S DEATH AND ARBITRATION CLAUSE IMPLICATIONS

22 August 2018: Gustavo Fernandes de Andrade and Luciana Celidonio (partners in Mayer Brown's International Arbitration practice in Rio de Janeiro and São Paulo offices) published an article on an arbitral tribunal's jurisdiction following the dissolution of a partnership due to a partner's death.

To read the full article, click here.

EXTENSIVE REVISIONS TO ICSID'S RULES AMID CHALLENGES TO INVESTOR-STATE ARBITRATION

23 August 2018: Sarah E. Reynolds, Soledad G. O'Donnell and James T. Coleman (partners and senior associate respectively in Mayer Brown's Litigation & Dispute Resolution practice in Chicago, Houston and Palo Alto) published an article on the proposed changes to the ICSID Rules.

To read the full article, click here.

FINTECH: A BITTERSWEET INEVITABILITY

4 September 2018: Rachael O'Grady (senior associate in Mayer Brown's International Arbitration Practice in London) authored an article on the potential for a rise in disputes as a result of the fintech boom in Africa.

To read the full article, click here.

WHY THE "DEMOLITION DERBY" THAT SEEKS TO DESTROY INVESTOR-STATE ARBITRATION?

September 2018: Jawad Ahmad (associate in Mayer Brown's International Arbitration practice in London) published an article with Judge Charles N. Brower in the Southern California Law Review on anti-ISDS activity.

To read the full article, click here.

A GLOBAL GUIDE TO INTERNATIONAL ARBITRATION

October 2018: Raid Abu-Manneh (partner, head of Mayer Brown's International Arbitration practice in London and Co-head of Mayer Brown's International Arbitration practice), Menachem Hasofer (partner, head of Mayer Brown's International Arbitration practice in Hong Kong and Co-head of Mayer Brown's International Arbitration practice) and B. Ted Howes (partner and leader of Mayer Brown's International Arbitration practice in the US) published a quick-reference guide to international arbitration globally. The guide is divided into the following geographical regions: Americas, Europe, Africa, Asia-Pacific and Middle East.

To read the full guide, click here.

AVAILABILITY OF ANTI-SUIT INJUNCTIONS IN SUPPORT OF ARBITRATION CLAUSES FOLLOWING RECAST BRUSSELS I REGULATION

5 October 2018: Miles Robinson and Daniel Hart (partner and counsel respectively in Mayer Brown's Litigation & Dispute Resolution Practice in London) published an article considering the availability of anti-suit injunctions to restrain proceedings in breach of an arbitration clause.

To read the full article, click here.

THE "NEW NAFTA" AND ITS REVISED DISPUTE RESOLUTION MECHANISMS

8 October 2018: Sarah Reynolds, Soledad O'Donnell, Timothy Keeler and James Coleman (partners and associate respectively in Mayer Brown's Litigation & Dispute Resolution practice in Chicago, Houston, Palo Alto and Washington DC) published an article on the changes that the United States Mexico Canada Agreement bring to ISDS.

To read the full article, click here.

NEW YORK APPELLATE COURT RULING AFFIRMS STATE'S POLICY OF NON-INTERFERENCE WITH INTERNATIONAL ARBITRATION AWARDS

16 October 2018: B. Ted Howes and Allison M. Stowell (partner and associate respectively in Mayer Brown's International Arbitration Practice in New York) published an article on a recent case which affirmed New York's pro-arbitration stance.

To read the full article, click here.

STJ CONFIRMS POSSIBILITY OF EXTENDING THE EFFECTS OF AN ARBITRATION CLAUSE CONTAINED IN A CREDIT FACILITY AGREEMENT TO ITS RELATED SWAP AGREEMENTS, DESPITE THE LATTER PROVIDING THAT LOCAL COURTS WOULD HAVE JURISDICTION TO HEAR DISPUTES ARISING THERE

26 October 2018: Gustavo Fernandes de Andrade, Luciana Celdonio and Leonardo Morato (partners in Mayer Brown's International Arbitration practice in Rio de Janeiro and São Paulo) published an article on the effects of extending an arbitration clause in a credit facility agreement to the related swap clauses governed by local law.

To read the full article, click here.

KILLING ME SOFTLY WITH EU LAW: WHAT TO DO AFTER THE CJEU JUDGMENT IN *ACHMEA*?

November 2018: Rachael O'Grady (senior associate in Mayer Brown's International Arbitration Practice in London) authored an article reflecting on a recent ICC Young Arbitrators Forum breakfast seminar on the CJEU's ruling in *Achmea*.

To read the full article, click here.

SINGAPORE INFRASTRUCTURE DISPUTE-MANAGEMENT PROTOCOL

13 November 2018: Yu-Jin Tay and Divyesh Menon (partner and associate respectively in Mayer Brown's International Arbitration practice in Singapore) published an article on the Singapore Ministry of Law's launch of the Singapore Infrastructure Dispute-Management Protocol.

To read the full article, click here.

IF AFRICA REMAINS THE TARGET OF MONUMENTAL SCALE PROJECTS, ONLY THOSE PERFECTLY CALIBRATED LEAD TO FINANCIAL CLOSING

18 November 2018: Dany Khayat (head of Mayer Brown's International Arbitration practice in Paris), Olivier Mélédo and Alban Dorin (partners in Mayer Brown's International Arbitration practice in Paris) published an article on energy, project finance practices and arbitration matters in Africa.

To read the full article, click here.

CHANGING POWER DYNAMICS BETWEEN AFRICAN STATES AND INVESTORS

January 2019: Joseph Otoo (senior associate in Mayer Brown's International Arbitration Practice in London) authored an article discussing the shifting balance of power between African states and investors.

To read the full article, click here.

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