



K&L GATES

ARBITRATION WORLD

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## WELCOME TO THE 27TH EDITION OF K&L GATES' ARBITRATION WORLD

### FROM THE EDITORS

Welcome to the 27th edition of Arbitration World, a publication from K&L Gates' International Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution.

In this edition, we include articles specifically relevant to the "MINT" countries of Mexico, Indonesia, Nigeria and Turkey, tipped as the next economic giants by ex-Goldman Sachs economist Jim O'Neill who coined the term "BRIC" countries back in 2001. We look at energy reform in Mexico and its potential impact on commercial and investor-state dispute resolution and a recent decision regarding threshold jurisdictional requirements applicable to bilateral investment treaty (BIT) claims, with particular reference to Indonesia. We review some recent decisions of the Nigerian courts which offer support for arbitration, and current trends and future prospects for arbitration in Turkey.

More generally, we survey the tricky issues that can arise with respect to corruption and bribery in international arbitration. We examine the recent ruling by the Supreme Court of India in the *Enercon India* case and its implications on the drafting of arbitration agreements. We report on a recent case from Texas regarding the implications of allowing the deadline for rendering an arbitration award to pass. We also provide our usual update on developments from around the globe in international arbitration and investment treaty arbitration.

We hope you find this edition of Arbitration World of interest, and we welcome any feedback by email to [ian.meredith@klgates.com](mailto:ian.meredith@klgates.com) or to [peter.morton@klgates.com](mailto:peter.morton@klgates.com).

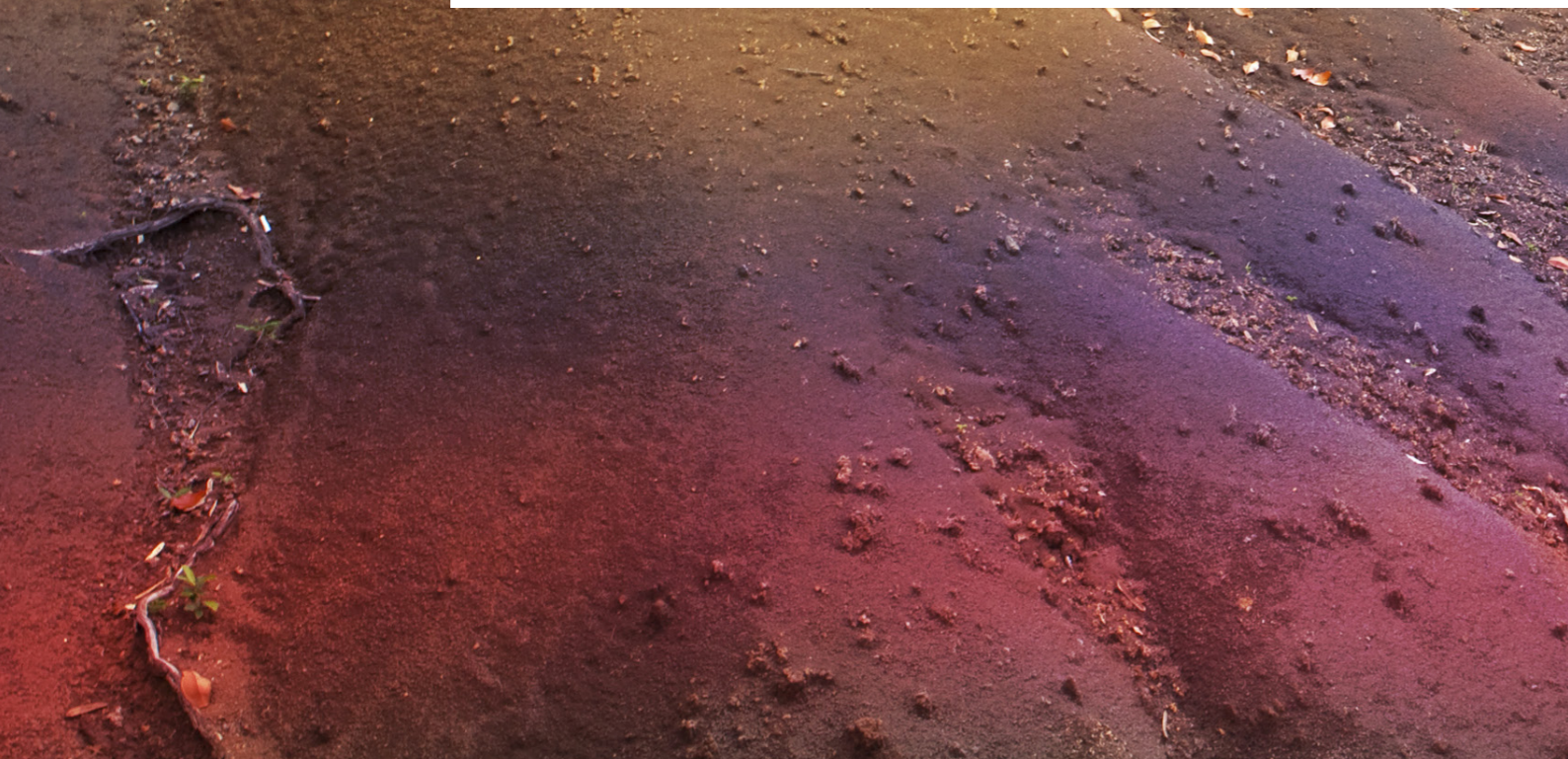
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On 9 May 2014, Burundi became the 151<sup>st</sup> signatory to the New York Convention.



## Arbitration News from Around the World

*Sean Kelsey (London)*

### AFRICA

#### *Burundi*

On 9 May 2014, Burundi became the 151<sup>st</sup> signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”). The East African state was the one remaining member state of the East African Community Common Market not to have signed the Convention. Kenya, Uganda, Tanzania and Rwanda have all signed. It is being reported that Burundi has entered a commerciality reservation limiting application of the Convention to commercial disputes; but that a planned reciprocity reservation, which would have limited its application to arbitral awards rendered in other contracting states, will not now be entered.

#### *Mauritius*

London-seated LCIA arbitrations between parties to a joint venture for development of property in India resulted in three final awards in favour of one party, Cruz City. The unsuccessful parties, collectively “Unitech”, challenged two of the three awards on jurisdictional grounds before the English Commercial Court, which set aside one award, and confirmed the other, rejecting the jurisdictional argument.

By its judgment dated 28 March 2014, the Mauritius Supreme Court (the “Supreme Court”) dismissed Unitech’s attempt to resist enforcement of the two surviving awards Cruz City had then brought to Mauritius. Unitech sought to rely on an alleged incompatibility of the New York Convention with Mauritius’ constitution, and the Convention’s public policy and jurisdiction exceptions. Rejecting the

constitutionality argument, the Supreme Court referred to a decision of the Federal Court of Australia in the TCL Air Conditioner case on which we have previously **reported**. In dismissing the public policy argument, the Supreme Court held that, in such a case, “Essentially, the respondent has to show with precision and clarity in what way and to what extent enforcement of the award would have an adverse bearing on a particular international public policy of this country.” Alleged breach of Indian law, as argued by Unitech, would not fulfil that requirement. On the jurisdiction argument, the Supreme Court confirmed that, when hearing an argument which failed at the set-aside stage before the courts of the arbitral seat, it would require exceptional circumstances to persuade a court in Mauritius to uphold that argument.

The decision illustrates what some have hailed as a clear commitment to the integrity of the international arbitration process in Mauritius.

### **Nigeria**

As we report **further** by its judgment dated 25 February 2014, the Nigerian Court of Appeal has discharged an injunction to restrain proceedings under an arbitration agreement contained in an oil production sharing contract. The judgment has been welcomed as reinforcing the 2013 decision on which we previously **reported** in the case of *Statoil (Nigeria) Limited and Texaco Nigeria Outer Shelf Limited v Nigerian National Petroleum Corporation & Others*, another case in which an injunction was sought in restraint of arbitration on constitutional grounds going beyond section 34 of the Nigerian Arbitration and Conciliation Act 1990.

## **CARIBBEAN**

### **British Virgin Islands**

In its judgment dated 13 May 2014, The Judicial Committee of the Privy Council (the “Privy Council”) has upheld the right of a Dutch telecoms company, Sonera, to enforce an ICC award in the British Virgin Islands (the “BVI”). Sonera, a subsidiary of TeliaSonera, entered into a Swiss-law agreement in 2005 with Çukorova Holding, a Turkish company (“Çukorova”), for the sale to Sonera of a majority stake in Turkcell Holding, which controls Turkey’s largest mobile phone operator. The sale aborted and a dispute arose. In 2011, Sonera obtained an award of US\$932 million in a Geneva-seated arbitration. Sonera sought to enforce the award against shares in Turkcell Holdings owned by Çukorova’s BVI subsidiary. Permission to enforce was granted by the BVI High Court, and that decision was upheld by the Eastern Caribbean Court of Appeal. Çukorova appealed to the Privy Council, which is the BVI’s highest court of appeal, challenging the tribunal’s jurisdiction on grounds that the arbitration was brought under a 2005 letter agreement (the “Agreement”), but relief had been sought by reference to a prospective share purchase agreement (the “PSPA”). Following Swiss-law evidence that the two agreements were part of a single economic transaction, the Privy Council held that Swiss law did not prevent Sonera from having the whole dispute dealt with under the Agreement, and that “commercial sense” did not require that Sonera commence a separate arbitration for breach of the PSPA.

The Privy Council also dismissed a complaint that Çukorova had been denied a proper hearing, for reasons including alleged refusal

to hear oral testimony of one of its key witnesses. The Privy Council found that the individual in question had been unable to attend hearings on medical grounds, Çukorova had not objected to those hearings going ahead anyway, and had not subsequently sought to introduce his evidence.

## EUROPE

### England

Supplier of blood plasma, Diag Human Se (“Diag”), entered into an agreement with the government of the Czech Republic to modernise blood transfusion services in that country. An *ad hoc* arbitration agreement provided for a process of review of an arbitral award within a certain time period – a procedure permissible under Czech law, and in particular the Czech Arbitration Act 1994 (the “Act”). The agreement provided that an award would not become binding on the parties until conclusion of any review process to which that award was subject. A dispute arose, and a final award was rendered in Diag’s favour (the “Award”). Both parties sought review of the Award. Diag subsequently disputed the authority by which the Czech Republic sought its review, whilst for its own part purported to withdraw its own review request, though the parties disputed whether or not Diag’s request had been withdrawn (the “Review Disputes”). The Czech Republic asserted that pending resolution of the Review Disputes, the Award was not binding as a matter of Czech law.

When Diag sought to enforce the Award in Austria, the Austrian Supreme Court found that an arbitral award subject to appeal did not become “formally legally effective” until determination of such



Parties should consider very carefully where and how they seek to enforce awards.



appeal (the “Austrian Judgment”). Proceedings were issued in the English Commercial Court, where Diag applied without notice for permission to enforce the Award. The Judge, Burton J, granted permission (the “Order”). The Czech Republic sought to set aside the Order, claiming that the Austrian Judgment created an issue estoppel, or alternatively, the Award was not binding under section 103(2)(f) of the Arbitration Act 1996, which provides (in reflection of the New York Convention) that recognition or enforcement of an award may be refused where it is proved that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which it was made. Diag argued that decisions in other states on enforcement under the New York Convention are not relevant to decisions in England, such that no issue estoppel could arise; and that, due to the Review Disputes, there was no valid review of the Award on foot.

The Order was set aside. The learned Judge (Eder J) held that where a foreign court decides that an award is not binding (as in the case of the Austrian Judgment) there was no reason, in principle, why that decision should not give rise to an issue estoppel between the parties, provided the foreign court was a court of competent jurisdiction, its judgment was final and conclusive on the merits, and there is identity of parties and subject matter (in other words, as long as the well-known conditions in *The Good Challenger* [2004] 1 Lloyd’s Reps 67 are met). Eder J further held that, if he was wrong on the issue estoppel point, the award was not binding for the purposes of section 103(2)(f)—a court in the Czech Republic having already held that only the review tribunal itself could determine the

Review Disputes, pending the decision of that tribunal the Awards were not binding under section 103(2)(f).

The learned Judge also held that a decision on arbitrability or public policy grounds in a foreign country will not ordinarily give rise to an issue estoppel in England. However, the finding that issue estoppel can arise from decisions in other states on enforcement reminds parties to consider very carefully where and how they seek to enforce awards before risking an unfavourable judgment in one jurisdiction which might come back to haunt them when attempting to enforce in another.

In unrelated news, the English Commercial Court has refused an application under section 9 of the Arbitration Act 1996 to stay proceedings in favour of an agreement that provided that, in the event of a dispute, the parties “will endeavour to first resolve the matter through Swiss arbitration”, before then going on to state that “Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction.” In a judgment dated 12 June 2014 in the case of *Christian Kruppa v Alessandro Benedetti and Bertrand des Pallieres*, it was held that there was no agreement to arbitrate, only an agreement to “endeavour” to arbitrate, and that all the parties had agreed was to attempt to agree on a form of Swiss-seated arbitration, failing which, the Claimant had been entitled to commence proceedings in the English court. The case is a reminder of the importance of exercising care in the drafting of agreements intended to provide for binding arbitration of disputes.

**EU**

Article 3(1) of Council Directive 93/13/EEC on unfair terms in consumer contracts provides that a contractual term, not individually negotiated, is unfair if it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. A reference by a Hungarian court to the Court of Justice of the EU (the "ECJ") has elicited guidelines on the application of Article 3(1) to arbitration agreements in consumer contracts.

The case concerned a Hungarian national, Ms Sebestyén, who had taken out two mortgages with a bank. When a dispute arose, Ms Sebestyén sought a declaration of the Hungarian court that arbitration agreements under the mortgages were void for unfairness. The bank argued that, before entering into the mortgage agreements, Ms Sebestyén had been given information about differences between arbitration and litigation, including the fact that there was no appeal from arbitration proceedings. The Hungarian court referred the matter to the ECJ.

This is not the first time such a case has been referred to the ECJ. In this instance, the ECJ referred to its previous judgment in Case C-415/11, *Aziz v Catalunyacaixa*, to the effect that, whilst the ECJ can offer guidance, national courts must themselves determine if a particular contract term is actually unfair taking that guidance into account. On this occasion, by its judgment dated 3 April 2014, in Case C-342/13, *Sebestyén v Zsolt Csaba Kővári and others*, the ECJ commented that, in such cases, the national court should verify whether the arbitration agreement excluded or hindered the consumer's right to take legal action or exercise any other legal remedy; and pre-contractual communications with a consumer about the differences between arbitration and litigation do not, on their own, preclude the possible unfairness of the clause.

**Netherlands**

Draft amendments to the Dutch arbitration law were unanimously approved by the Senate of the Dutch Parliament on 27 May 2014. The draft amendments included provisions relating to consolidation of arbitrations, shortening of the procedure for seeking to have an award set aside (with such applications to be made direct to the Court of Appeal, rather than the relevant District Court), measures for the Dutch courts to provide assistance in aid of international arbitrations, and electronic filings, amongst other things.

The Dutch government will in due course determine the date on which the new law comes into effect, currently understood to be likely 1 January 2015.

**Switzerland**

An ad hoc arbitration seated in Geneva was commenced in 2010 between a French party (F) and a Swiss party (S). A single arbitrator was appointed, and a target set for delivery of a final award in April 2011. When no award had been rendered by September 2013, the parties and the arbitrator agreed a deadline for its delivery, failing which the arbitrator would be taken to have resigned. The arbitrator rendered the award a day or so after passing of the deadline, awarding F substantial damages, but holding it liable for two-thirds of the costs of the arbitration (the "Award"). F sought annulment of the Award, under Article 190(2)(a) of the Swiss Private International Law Act; on grounds that it had been rendered after the arbitrator's resignation.

In its Decision 4A\_490/2013, made public on 14 March 2014, the Swiss Supreme Court granted F's petition, giving effect to the



tripartite agreement setting a final deadline for the arbitrator's decision, on an application of the principle that *pacta sunt servanda*. In granting an extremely rare annulment, the Supreme Court held that the Award had been rendered after the arbitrator's mission had come to an end.

## **NORTH AMERICA**

### **USA**

On 24 March 2014, the U.S. Supreme Court upheld the 3rd Circuit Court of Appeals decision striking down the Delaware Business Arbitration Program (the "Program") as a violation of the First Amendment to the U.S. Constitution. The Program was established in 2009 for disputes involving Delaware companies and amounts in dispute of at least US\$1 million, and provided for confidential arbitration of such disputes by Delaware judges. Critics voiced concerns that corporate disputes that would previously have been submitted for judicial determination by civil trial in open court, would now be determined in exactly the same way, but behind closed doors. The dispute resolution process under the Program was challenged on grounds that it was in effect a state-sponsored private trial. The Program will remain on foot, but without the cloak of confidentiality.



## INSTITUTIONS

### *ICDR*

Revisions to the International Dispute Resolution Procedures of the International Centre for Dispute Resolution (ICDR) took effect on 1 May 2014. The revisions introduce a variety of procedures aimed at expediting resolution of lower-value disputes, such as decisions on paper only in claims worth less than US\$100,000, one-day limits on certain oral hearings, and a 30-day deadline for the final award; a deadline of 60 days from the conclusion of proceedings for a final award in other matters; new provisions for joinder of parties; and a requirement that failure to disclose promptly any circumstances that may raise doubts about an arbitrator's neutrality constitute a party's waiver of the right to challenge an arbitrator on those grounds.

### *Saudi Centre for Commercial Arbitration*

On 14 April 2014, the Saudi Arabian Council of Ministers approved formation of the country's first commercial arbitration centre, the Saudi Centre for Commercial Arbitration ("SCCA"), which will be based in Riyadh. Operating under the auspices of the Council of Saudi Chambers ("CSC"), a federation of chambers of commerce, the new centre is expected to handle domestic and international commercial arbitrations, and is said to plan opening branches outside Saudi Arabia. On 15 July 2014, the CSC announced formation of the SCCA under the leadership of a board of nine directors. Practitioners hope that the development will assist in fostering a more arbitration-friendly environment in the Kingdom.


### *SHIAC*

The China (Shanghai) Pilot Free Trade Zone Arbitration Rules (the "Rules") became effective on 1 May 2014. The Rules govern arbitrations brought under the auspices of the Shanghai International Economic and Trade Arbitration Commission (otherwise known as the Shanghai International Arbitration Center, or "SHIAC"), formerly the Shanghai commission of CIETAC. Separately, on 4 May 2014, the Shanghai No. 2 Intermediate People's Court issued guidelines relating to court proceedings concerning arbitrations governed by the Rules, including enforcement of awards and challenges to arbitral proceedings. Practitioners no doubt will watch with interest to see whether these developments assist in resolving existing uncertainties surrounding aspects of institutional arbitration in China.

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A large container ship is shown from a low angle, sailing on the ocean. The ship is white with a blue hull and is carrying many colorful shipping containers. The sky is a mix of blue and orange, suggesting sunset or sunrise. The water is dark with white foam from the ship's wake.

A fifth round of EU-U.S. negotiations concerning the text of the Transatlantic Trade and Investment Partnership agreement (TTIP) has taken place.

## World Investment Treaty Arbitration Update

*Wojciech Sadowski (Warsaw)*

In each edition of *Arbitration World*, members of K&L Gates' Investment Treaty practice provide updates concerning recent, significant investment treaty arbitration news items. This edition features the developments in the EU-U.S. talks over the Transatlantic Trade and Investment Protection agreement, and a recent decision revealing important limitations in the concept of an investment.

### EU-U.S. TALKS OVER TTIP CONTINUE, BUT TREATY ARBITRATION DIVIDES EUROPE

A fifth round of EU-U.S. negotiations concerning the text of the Transatlantic Trade and Investment Partnership agreement (TTIP) has taken place in Arlington, Virginia from 19 to 23 May 2014.

The agenda of the round included trade in goods and services, regulatory issues, sanitary and phytosanitary measures, government procurement, intellectual property rights, electronic commerce and telecommunications, environment, labour, small and medium-sized enterprises, and energy and raw materials. The agenda also included investments, although not the protection of investment and investment treaty arbitration.

The question of inclusion into the TTIP of provisions relating to investor-state dispute settlement (ISDS) is dividing Europe. The European Commission is proposing to include provisions on investment protection and ISDS into the TTIP on the condition, however, of adding certain limitations which the Commission sees as safeguards against potential attacks against legitimate regulatory powers of the EU and the Member States, as well as abuses of the ISDS system.

Within Europe, the proposed inclusion of ISDS into the TTIP has stirred emotions and protests from numerous non-governmental organizations, and has polarized the views of the political class. Remarkably, in March 2014, the German government officially declared it would oppose the inclusion of ISDS provisions in the Transatlantic agreement. This position was taken despite the fact that most existing German BITs with other countries, as well as the Energy Charter Treaty, include provisions on ISDS, which have been used in the past to initiate arbitration proceedings both by German investors and against Germany.

Other stakeholders have taken more balanced views, including a recent report from the EU Committee of the House of Lords in the United Kingdom, which seems to support the inclusion of ISDS in the TTIP.

In response to the developments, the European Commission has launched public consultations within Europe, seeking to obtain broader feedback on the proposed inclusion of investment protection and ISDS provisions in the TTIP. The consultation process will close in July 2014.

At present, only nine member states of the EU have bilateral investment treaties with the United States, all of which joined the European Union in 2004 or thereafter. These treaties have been used in more than 12 cases, initiated exclusively by U.S. investors in those states.

## NO EXPROPRIATION AFTER RIGHTS EXPIRE

A recent award of 16 April 2014, in the case of *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, brings to light potentially important limitations of investment protection. The award followed the Decision on Respondent's

Objections under ICSID Arbitration Rule 41(5) dated 11 March 2013, where the Tribunal found that under the applicable treaties, it lacked jurisdiction to adjudicate the non-expropriation claims.

The dispute arose in relation to broadcasting rights of two Hungarian radio stations, including Sláger Rádió Műsorszolgáltató Zrt ("Sláger"). Sláger operated on the basis of a license, which expired in 2009, and a broadcasting agreement from 1997. In 2009, Sláger lost the bid for the extension of the license term. Its shareholders claimed that the failure was caused for political reasons and constituted an act of expropriation.

The Tribunal held that the only rights which are capable of being protected from expropriation are proprietary rights. The Claimants attempted to argue expropriation in respect to the following rights: (1) the broadcasting right; (2) the right to an incumbent advantage; (3) the right to a properly established tender procedure; (4) the right to a timely tender; and (5) the right to a fair and objective tender evaluation in accordance with transparent scoring criteria. Yet, the Tribunal found that the only right capable of meeting the requirements of an investment, which the Claimants had, was the broadcasting right, and it expired in November 2009.

The ruling may be important to disputes based on such treaties, which limit the scope of the Tribunal's jurisdiction to claims of expropriation. It implies that in order to qualify for protection against an expropriation, the investor must have acquired certain rights, which are measurable in financial terms. This may limit the ability of unsuccessful bidders to attempt to overturn the results of public tenders by way of initiation of an investment treaty arbitration.

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Turkey has gone to great lengths to attract foreign investment and to provide a reliable environment for foreign investors.

## Arbitration in Turkey: Current Trends and Future Prospects

*Mike Stewart and Camilla de Moraes (London)*

Turkey's unique position between East and West has always made it a country of strategic importance. The Turkish economy has boomed over the past decade, in particular during the global financial crisis. Despite the recent slowing of such growth, the level of foreign direct investment in Turkey remains high. Turkish construction companies are also globally important, capitalising upon (among other things) the cultural synergies they have with many diverse parts of the world, their strong technical skill sets and their energy and ambition.

This growth has propagated a related growth in arbitration connected to Turkey. Within this article, we explore recent arbitral trends in Turkey with respect to international arbitration and investment treaty arbitration. We also look at the case of *Tulip Real Estate and Development Netherlands v. Turkey* (ICSID Case No. ARB/11/28), an interesting benchmark in terms of the safety and security of doing business in Turkey or with Turkish counterparties.

### INVESTMENT TREATY PROTECTION—TURKEY

Turkey has gone to great lengths to attract foreign investment and to provide a reliable environment for foreign investors. In 2003, it enacted domestic legislation, in the form of the Direct Foreign Investment Law (Law No. 4875), which reduced the levels of bureaucracy that foreign investors must encounter. Perhaps more importantly, it provided that foreign and domestic investments should be treated equally. In addition, Turkey has concluded several multilateral investment treaties, including the Energy Charter Treaty, as well as many bilateral agreements. Almost 30 of the Turkish

bilateral investment treaties (“**BITs**”) currently in force were signed in the last 10 years, which may be a key factor in the high levels of foreign investment currently enjoyed in Turkey.

Importantly, Turkey has indicated a strong intention to be bound by the international obligations to which it has committed. Turkey has been the respondent in eight ICSID investment treaty arbitrations, mainly arising in the energy, mobile communications, and construction sectors. In most cases, Turkey has successfully defended the claimant's claims, which in some cases were found to be frivolous or fraudulent. In the few cases where sums have been awarded by the arbitral tribunals to the claimant, Turkey has complied with such an award rendered against it (as reported in *Getting the Deal Through, Investment Treaty Arbitration 2014, Turkey*).

### TULIP REAL ESTATE AND DEVELOPMENT *NETHERLANDS* BV V. *TURKEY*

One recent example of where Turkey has successfully defended an ICSID claim is in respect of a claim brought by Tulip Real Estate and Development Netherlands BV (“**Tulip**”) under the Netherlands-Turkey BIT.

Tulip, a real estate company incorporated in the Netherlands, invested in construction projects in Turkey in partnership with a company named Emlak (a real estate investment trust), owned by Turkey's Housing Development Administration (TOKI).

Four years into the project, Emlak terminated the contract with Tulip for delays in the project and soon after seized control of the construction site. Tulip argued that Emlak ended the contract as a pretext to seize its assets and complained that Emlak was responsible for the delays.

Disputes arose between the parties and in October 2011, Tulip filed a Request for Arbitration with ICSID, claiming that Turkey had breached the terms of the BIT. In particular, Tulip complained that actions taken by Turkey had deprived it of the entire value of its real estate development projects.

One of the key issues for the tribunal to decide was whether Emlak was a state entity such that Turkey was responsible for its actions, and whether the claim was, thereby, within the tribunal's jurisdiction. The tribunal held by a majority that Emlak was separate from the state, that majority ownership of an entity by a state did not give rise to a presumption that the entity was a state organ, and that there was nothing to indicate that Emlak exercised government authority.

In any event, all the tribunal members agreed that Emlak's actions did not amount to treaty violations.

## TURKEY ARBITRATION POLICY GENERALLY

Where the seat of an arbitration is Turkey and the arbitration contains a foreign element, the proceedings will be governed by Turkey's Arbitration Law (based on the UNCITRAL Model Law) which has been in force since 2001. Domestic arbitrations in Turkey, where the dispute does not contain an international element, are governed by the Turkish Code of Civil Procedure (also based on the UNCITRAL Model Law).

There has been a recent increase in the use of arbitration as the dispute resolution method of choice for Turkish parties. The number of disputes referred to the ICC Court of Arbitration in 2010 that had at least one Turkish party was 76, constituting nearly 10 per cent of the total number of 793 claims referred to the ICC that year. In 2011, this ratio was slightly less, with 46 parties from Turkey out of a total of 796 cases.

Given the increase in the use of arbitration by Turkish parties, the Turkish courts are also becoming more familiar with the concept of arbitration. This is particularly so in the context of the growing number of enforcement cases, although they have not always adopted an entirely consistent approach when interpreting requirements for enforcement. Foreign and domestic arbitration awards are subject to different enforcement regimes under Turkish law. Domestic awards (conducted under the Turkish Arbitration Law or the Code of Civil Procedure) are directly enforceable as if they were a judgment of a Turkish national court.

Foreign arbitral awards must be enforced in Turkey in accordance with the International Private Procedure Law ("**IPPL**") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") to which Turkey is a signatory. However, Turkey's obligations under the New York Convention are subject to two reservations, namely that the award will only be recognised and enforced if (i) the award was rendered in another signatory state, and (ii) the relevant dispute is defined as commercial under the Turkish Commercial Code.

There have been several Turkish court decisions in recent years where international arbitration awards have been set aside or where the particular dispute in question was found to be non-arbitrable. The grounds on which the enforcement of an award may be resisted under both the IPPL and the New York Convention are similar and are limited. The most frequently invoked ground is the public policy or public order exception.

In February 2012, the Turkish Court of Appeals held that matters relating to tax law are matters of public policy. As such, if an arbitral award is seen to contravene national tax legislation, the merits of the case may be examined by the Court and the enforcement may

be denied. The Court of Appeals, therefore, placing emphasis on the fact that a foreign arbitral award must conform to Turkish public order, overturned a decision by a court of first-instance that had enforced an arbitral award relating to a tax law dispute (decision of the General Assembly of the Court of Appeals dated 8 February 2012, numbered 2011/13-568 E., 2012/47 K).

Also in February 2012, the Joint Chambers of the Court of Appeals in Turkey held that the lack of a detailed written justification given in foreign court decisions is not a matter of public order and, therefore, is not a ground on which to open up the merits of the case or otherwise avoid enforcement. Although the decision relates to judgments of foreign courts, it is considered to be an important indication of the narrowing of Turkish courts' stance on the meaning of public order and the extent to which it can be used as an exception to enforcement of foreign arbitral awards.

In 2013, the Court of Appeals reversed another first-instance court decision which had rejected a request to enforce an award. In that particular case, the arbitral tribunal had dismissed the claimant's claims but had ordered the respondent to pay the claimant's costs and expenses. When the claimant came to enforce the award, the court of first-instance held that it was contrary to Turkish law, which stipulates that the losing party should bear the costs and expenses of court proceedings (decision of the 11th Civil Chamber of the Court of Appeals, 16 July 2013, E 2012/16024, K 2013/14728). The Court of Appeal rejected the court of first-instance's reasoning and held that the successful party being required to pay the costs of the arbitration was not contrary to public policy and, therefore, the award should be enforced. These more recent examples may indicate a trend towards greater recognition and enforcement of foreign arbitral awards and, thereby, offer greater comfort to foreign investors.

## THE FUTURE OF ARBITRATION IN TURKEY

The year 2014 should see the establishment of a new, independent, and autonomous Arbitration Centre in Istanbul, in line with the overall strategy to ensure Istanbul is a global financial centre. A draft law of the Istanbul Arbitration Center, which is currently being reviewed by Parliament, envisages that the new centre will have two arbitration courts (one local and one international).

Assuming that the draft law comes into force shortly, Turkey has, at least in principle, a framework that is consistent with its aim to be seen as an international financial and arbitration centre. Commentators are also cautiously optimistic that the Turkish courts will be sufficiently supportive of international arbitration, such that foreign investors are not deterred from being active in Turkey and are comfortable with arbitrations being seated in Turkey.

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The Energy Reform Bill will create substantial investment opportunities for a wide range of domestic and foreign businesses and open new areas to oil and gas exploration.

## Mexico's Energy Reformation and its Anticipated Impact on Dispute Resolution Involving Foreign Stakeholders

*John F. Sullivan III, Edward William Duffy, and Allyson Pait (Houston)*

The momentum of Mexico's energy reform is far from fading. Mexico has already approved constitutional changes that would end the 75 year oil and gas exploration and production monopoly of Mexico City-based Petroleos Mexicanos (PEMEX) and allow for international oil and gas bidding in 2015. Mexico's energy ministry expects the reform to generate an additional \$30 billion annually in private investment. The newest proposed legislation, submitted by President Nieto to Congress on 29 April 2014 outlines the framework for restructuring Petroleos Mexicanos (PEMEX) and the Comisión Federal de Electricidad (CFE) and also provides details for modifying the Mexican energy industry so that private companies and foreign investors can play a significant role. Congress called a special session in late June 2014 to debate details of the legislation, and President Nieto's Administration expects those laws to be passed before the regularly scheduled congressional sessions begin in September 2014.

### OVERVIEW OF MEXICO ENERGY REFORM

The Energy Reform Bill (the "Bill") sprang to life in December 2013 with the signing of a series of constitutional amendments. The Bill will create substantial investment opportunities for a wide range of domestic and foreign businesses and open new areas to oil and gas exploration, including offshore and shale plays where PEMEX has not had significant involvement.



PEMEX will continue to maintain a large role in the development of Mexico's oil and gas reserves and has requested that the Ministry of Energy permit it to maintain 31 per cent of Mexico's prospective reserves and 83 per cent of all proven and probable (2P) oil reserves. To maintain its rights to these resources, however, PEMEX must demonstrate that it has the expertise to develop the reserves efficiently. Agency officials have until September 17, 2014 to determine which resources PEMEX will be permitted to retain based upon the technical, financial, and procurement capacity needed to successfully develop the requested fields. Private companies will then have the opportunity to propose ways to partner with PEMEX before full formal bidding begins. Already, several of the largest oil and gas producers in the world are in talks with PEMEX and at least one has entered into a technical collaboration agreement with PEMEX.

The Bill allows the government to promulgate four types of contracts for exploration and production by investors, including service contracts, profit-sharing contracts, production-sharing contracts, and licenses (which are similar to concessions).

The Mexican Energy Reform is certain to substantially increase foreign direct investment in Mexico's energy resources and spur new types of contractual relationships between a wide range of private and public entities. Investors necessarily must consider risks associated with these investments and potential disputes, which can be broken into two general categories: (1) investor-state disputes with the Mexican government, and (2) general commercial disputes between contracting parties (which may include both public and private entities).

## INVESTOR-STATE DISPUTE RESOLUTION—MEXICO

Investment treaties commonly offer protections for prospective investors in the event of expropriation, unequal treatment, or other adverse actions that might be taken by the national government. Mexico is not a party to the ICSID Convention, and, therefore, foreign investors are not automatically entitled to avail themselves of the favorable investor-state arbitration rules available under the convention. Investors must assess how this affects their dispute resolution options, which will then be determined by the nationalities of the investors and whether their home countries have bilateral investment treaties (BITs) with Mexico. Mexico has BITs with 30 countries (nearly all of which are parties to the ICSID Convention) and is also a member of NAFTA (the North American Free Trade Agreement). NAFTA and the BITs outline the substantive protections available to investors, which often vary significantly.

Through these BITs, Mexico typically consents to dispute resolution under ICSID Additional Facility rules for disputes brought by investors from the other BIT party. NAFTA affords similar treatment to American and Canadian investors under NAFTA Chapter 11, specifically stating that an "investor may submit the claim to arbitration under...the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention ." NAFTA Art. 1120.

The primary difference between ICSID Additional Facility rules and the ICSID Convention lies in the enforceability of arbitration awards. Awards from arbitrations conducted pursuant to the ICSID Convention are automatically enforceable, as if they were final judgments in the court of the country against whom the

award was entered. By contrast, awards from ICSID Additional Facility arbitrations must be enforced as provided by the New York Convention or the Panama Convention. Though the grounds for nullifying or avoiding awards under the New York and Panama Conventions are narrow, they are sufficiently broad to trigger investors' concerns, especially in light of Mexican courts' apparent willingness to set aside arbitration awards on public policy grounds.

## COMMERCIAL ARBITRATION—MEXICO

Most commercial disputes will be resolved in accordance with the parties' contracts. Although model contracts are still being developed, the proposed legislation outlines some important statutory changes that will establish the parameters that govern contracts involving PEMEX and the Mexican government.

Under current law, PEMEX is authorized to enter into arbitration agreements with private companies, whether domestic or foreign, but PEMEX cannot legally agree to arbitrate “administrative rescission”—a process through which PEMEX and governmental agencies can seek to rescind contracts if certain conditions occur. Administrative rescission proceedings must be brought before a particular Mexican court and cannot be arbitrated. The laws governing PEMEX require that arbitrations be conducted pursuant to Mexican substantive law, but the proposed legislation would allow PEMEX to agree to resolve disputes in accordance with another country's law for contracts involving projects in multiple countries. Additionally, though it is not statutorily required, PEMEX generally insists upon arbitration that is seated in Mexico and conducted in Spanish. PEMEX and the other contracting parties generally agree to adopt the ICC Arbitration Rules.

The proposed secondary legislation would establish a similar set of parameters for contracts between Comisión Nacional de Hidrocarburos (CNH—the agency tasked with supporting the Ministry of Energy in the implementation and regulation of Mexico's upstream oil sector) and private parties, with some important differences. As proposed, the legislation would require that arbitration be conducted in Spanish and that Mexican substantive law apply. It would also prohibit parties from arbitrating “administrative rescission.” The proposed legislation also states that arbitration awards will be strictly respected and are obligatory for all parties (“El laudo será dictado en estricto derecho y será obligatorio y firme para las partes.”). Though not entirely clear, this provision would appear to narrow the grounds for nullifying or avoiding enforcement of arbitration awards, if enacted.

## THE PROBLEMS OF ADMINISTRATIVE RESCISSION AND POTENTIAL NULLIFICATION

Undoubtedly, international investors are going to want reassurance on enforceability of arbitration awards. This is especially the case after the Mexican courts recently nullified an award that an arbitration panel had entered in favor of an American company's subsidiary against PEMEX. See *Corporación Mexicana de Mantenimiento Integral, S. De R.L de C.V. (“Commisa”) v. Pemex-Exploración y Producción*, 2013 WL 4517225, (S.D.N.Y. Aug. 27, 2013). The Mexican courts nullified the award because subsequent legislation prohibited PEMEX from arbitrating the “administrative rescission” of contracts even though this legislation became effective well after Commisa initiated arbitration. The U.S. District Court for the Southern District of New York refused to defer to the Mexican

courts' nullification decision, noting that it ran contrary to basic notions of justice to deprive Commisa of its right to arbitration and to leave it without a remedy.

The ability of CNH and (potentially) PEMEX to seek administrative rescission of contracts through the Mexican court system is likely to concern investors. The grounds for administrative rescission are fairly broad and somewhat undefined, leaving Mexican courts with significant discretion to authorize administrative rescission. Additionally, the history of the Commisa case may concern investors that Mexican courts will nullify arbitration awards on grounds that are more liberal than in most countries.



### FURTHER DEVELOPMENTS TO WATCH

Investors and other persons interested in participating in the development of Mexico's energy resources should carefully monitor the treatment of administrative rescission in the secondary legislation and consider the associated risks. They should also be aware of the legal uncertainties inherent in offshore oil and gas exploration and production and shale development. Such activities must be carried out in compliance with an extensive and evolving regulatory framework and may require tribunals to confront questions of first impression on a wide range of legal issues. Disputes involving offshore exploration and production and shale development often entail unusual legal issues, including choice of law, property, contract, and tort issues—all of which create significant uncertainties to would-be stakeholders in Mexico's emerging oil and gas industry.

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Nigeria's principal national law on arbitration is the Arbitration and Conciliation Act 1988 which is based on the UNCITRAL model law.



## Recent Arbitration Developments in Nigeria

*Tim Fox (London)*

### OVERVIEW OF ARBITRATION IN NIGERIA

Nigeria became a signatory to the New York convention in 1970. Its principal national law on arbitration is the Arbitration and Conciliation Act 1988 which is based on the UNCITRAL model law. In addition, some states within Nigeria have their own arbitration laws, including the Lagos State Arbitration Laws.

Several Nigerian arbitral institutions have also been involved in administering arbitrations, including the Lagos Regional Centre for International Commercial Arbitration; the Maritime Arbitrators Association of Nigeria; the Chartered Institute of Arbitrators, UK (Nigeria branch); and the recently created Lagos Court of Arbitration, an international ADR centre based in Lagos.

Subject to the principles outlined in the case law referred to below, local courts are authorised to support the arbitral process in the following instances: the appointment of an arbitrator where the contractual mechanism has failed; the grant of a stay of court proceedings pending arbitration; compelling the attendance of a witness before an arbitrator; and, removal of arbitrators and enforcement of awards.

At common law, some of the High Court remedies are also available to arbitral tribunals. These include awards for the payment of money; specific performance; injunctions; declaratory relief and interest.

The principle of kompetenz-kompetenz is recognised by Nigerian law and tribunals may rule on their own jurisdiction either as a preliminary issue or in an award on the merits.

## RECENT ARBITRATION CASE LAW IN NIGERIA

There have been some recent encouraging signs about the Nigerian courts' approach to arbitration.

### *Mutual Life & General Insurance Ltd v Kodi Iheme*

The Nigerian Court of Appeal in *Mutual Life & General Insurance Ltd v Kodi Iheme* (2013) approved the prevailing policy of not scrutinising the merits of arbitrators' decisions. The case concerned an employment dispute. The arbitration had been dealt with by a sole arbitrator, as provided in the Respondent's employment contract. The arbitrator found in the Respondent's favour and the Respondent obtained an order from the lower court to enforce the award. The employer appealed.

The Court of Appeal held that an award made pursuant to arbitration proceeding constituted a final judgment on all matters referred to the arbitrator and had a binding effect. The court found that it was not open to the Appellant to challenge the findings of fact made by the arbitrator. Further, the Appellant was not entitled to complain that the arbitrator had made mistakes as to the law. The court reasoned that in order to set aside an order for the enforcement of an arbitration award in Nigeria, there would have to be some error of law on the face of the award because, it stated, "the law is well settled that parties take their Arbitrator for better or for worse both as to decision of fact and decision of law." The court refused to go behind the face of the award but indicated that it would intervene if there was an error on the face of the award.

### *Nigerian National Petroleum Corporation v Statoil (Nigeria) Limited*

In a further example of strong judicial support for arbitration in Nigeria, the Court of Appeal in *Nigerian National Petroleum Corporation v Statoil (Nigeria) Limited* (2013) nullified an anti-arbitration injunction on the grounds that there is no provision in the Arbitration and Conciliation Act 1988 that enables the court to restrain arbitration proceedings by way of interim relief. In that case, the Federal High Court had sought to prevent an international oil company (Statoil) from bringing arbitral proceedings against the NNPC in respect of an oil producing agreement with the NNPC and Texaco. This attempt to hinder international oil companies from pursuing arbitrations against the NNPC is part of a trend in the lower Nigerian courts. NNPC had objected to the arbitral tribunal's jurisdiction on the grounds that the subject of the arbitration fell within the exclusive jurisdiction of the Tax Appeal Tribunal. The Federal High Court granted an injunction in favour of NNPC restraining further proceedings.

However, the Court of Appeal, in its decision that the lower court had erred on the law, relied upon section 34 of the Arbitration and Conciliation Act 1988, which provides that courts may not intervene in any matter governed by the Act except where expressly provided in the Act. The Act provides that the courts can intervene by, for example, staying court proceedings brought in breach of an arbitration agreement, setting aside an award or removing an arbitrator for misconduct, but it does not provide any power to grant injunctive relief to restrain an arbitration. Section 34 is modelled on Article V of the UNCITRAL Model Law. NNPC had unsuccessfully argued that the Nigerian constitution regarded the Federal High Court as a superior court with supervisory powers over the arbitral tribunal, which would be considered an inferior court.

The above decisions are consistent with the Nigerian courts' increasing willingness to bind parties to arbitration agreements and assist arbitration generally. They are part of a trend that is consistent with the Court of Appeal's approach in *Onward Enterprises Ltd v MV "Matrix" & Ors* (2011) in which the court stayed proceedings pending a foreign arbitration.

The decisions are consistent with the Nigerian courts' increased willingness to bind parties to arbitration agreements and assist arbitration.

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## Investment Treaty Arbitration with Indonesia—Is Written Consent Required?

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In *Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Cases No. ARB/12/14 and 12/40) arbitrators appointed in an International Centre for Settlement of Investment Disputes (“ICSID”) arbitration issued two awards which dealt with the question of the Tribunal’s jurisdiction and whether consent was required to be provided by the Indonesian government before arbitrations could be commenced with respect to the UK-Indonesia bilateral investment treaty (“UK-Indonesia BIT”) and the Australia-Indonesia bilateral investment treaty (“Australia-Indonesia BIT”) (collectively, the “Treaties”).

Churchill Mining Plc (“Churchill”), a British company, and Planet Mining Pty Ltd (“Planet Mining”), an Australian company, invested in a number of affiliated Indonesian companies (“Ridlatama companies”) that held potentially lucrative Indonesian coal mining licences on the island of East Kalimantan. Shortly after the commencement of the project, it was disclosed that the site contained a significant amount of thermal coal. The licences awarded to the Ridlatama companies were then subsequently revoked by the Regent of East Kutai for various reasons.

Consequently, a dispute arose and proceeded through the Indonesian courts, where an annulment of the revocation was sought, with additional cross-claims made between the parties. Those proceedings were not fruitful, and so, Planet Mining and Churchill both brought ICSID claims against Indonesia seeking USD 2 billion.

## TRIBUNAL’S FINDINGS ON JURISDICTION

Indonesia objected to, amongst other matters, the jurisdiction of the Tribunal to hear the claims on the basis that it had not given its consent in writing to submit the disputes set out in the requests for arbitration, a condition which it argued was required under the Treaties. The Tribunal made the preliminary observation that its jurisdiction was contingent upon both the Convention on the Settlement of Investment Disputes (“ICSID Convention”) and the Treaties. Article 25(1) of the ICSID Convention states:

*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, **which the parties to the dispute consent in writing to submit to the Centre.** ... (emphasis added)*

Under Article 25, four requirements need to be met before jurisdiction can be established: there must be (i) a dispute between a Contracting State and a national of another Contracting State, (ii) of a legal nature, (iii) arising directly from an investment, and (iv) the parties must have consented in writing to arbitration. The relevant issue in dispute between the parties related to whether or not the parties had consented in writing to submit the dispute to the ICSID. The Tribunal focused on paragraphs (2) and (4) of Article XI of the Australia-Indonesia BIT which state:

*“In the event that such a dispute cannot be settled through consultations and negotiations, the investor in question **may submit the dispute**, for settlement...to the International Centre for the Settlement of Investment Disputes (“the Centre”)...*

...

*Where a dispute is referred to the Centre pursuant to paragraph 2(b) ... where that action is taken by an investor of one Party, the other Party **shall consent** in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor.” (emphasis added)*

Indonesia argued that it had not consented to ICSID jurisdiction under the Australia-Indonesia BIT and that it must perform a further act (i.e. “consent in writing”) following the submission of a request by a claimant. Indonesia put forward six arguments in support of this contention. First, the ordinary meaning of the terms contained in Article XI(4) was clear – the terms require an additional act of consent to be submitted within 45 days of the filing of the request for arbitration. Second, the structure of the Australia-Indonesia BIT confirmed the ordinary meaning of “shall consent in writing”. Third, the object and purpose of a treaty cannot defeat its plain language. Fourth, particular attention must be paid to the principle of contemporaneity. Fifth, doctrinal writings supported Indonesia’s understanding of Article XI. Sixth, third-party treaties concluded by Australia confirmed Indonesia’s position.

On the other hand, Planet Mining argued that Indonesia had consented to the ICSID arbitration under the Australia-Indonesia BIT. It argued that the language of Article XI(2) of the treaty was *“consistently construed as providing the investor ‘a legally enforceable right’ to initiate arbitration.”* Planet Mining viewed paragraph (4) as not being concerned with obtaining Indonesia’s consent as *“it falls outside the four corners of the operative dispute*

*settlement arrangements”* of paragraph (2). Further, paragraph (4) merely dealt with procedural matters and was best understood *“as a matter of administrative convenience and good housekeeping for the benefit of the ICSID.”*

The Tribunal agreed with Indonesia’s position and found that the text of the Australia-Indonesia BIT was clear, unambiguous, and could not be disturbed, and that *“[i]t would be doing violence to the clear terms of Article XI(4)(a) to reduce this clause to a mere administrative formality for ICSID.”* According to the Tribunal, *“[i]f the host State ‘shall consent in writing within 45 days’ after the investor’s request, it follows that consent cannot be located in the Treaty itself and that a separate act is needed.”* The Tribunal observed that Article XI of the Australia-Indonesia BIT did not satisfy the requirements of Article 25(1) of the ICSID Convention that *“the parties to the dispute consent in writing to submit to the Centre”*. Additionally, in comparing the language used in other bilateral investment treaties (“**BITs**”) entered into by Australia, the Tribunal concluded that Australia *“deliberately entertains the distinction between advance consent and promise to consent...”* The Tribunal concluded that express written consent from Indonesia was required as Article XI of the Australia-Indonesia BIT contains no standing offer to arbitrate the claim before ICSID.

The Tribunal then proceeded to find that there was such a further act. It found that Indonesia had provided express consent in a separate document. It was noted that there had been, in 2005, an authorisation by the Indonesian Investment Coordinating Board (a government institution) (“**BKPM**”) for the incorporation of a company, PT Indonesian Coal Development, as an Indonesian foreign direct-investment company and to conduct business in the mining sector in Indonesia (“**BKPM Approval**”). It should be noted that under Article 3 of Indonesia’s Foreign Investment Law, a foreign investor can



only invest in Indonesia through a local vehicle incorporated and domiciled in Indonesia. The BKPM Approval contained a dispute settlement clause which referenced ICSID arbitration, and which the Tribunal found to be evidence of an express and advance consent to ICSID arbitration. Originally in Indonesian, the unofficial translation of the relevant paragraph in the BKPM Approval provides:

“In the event of a dispute between the company and the Government of the Republic of Indonesia that cannot be resolved by consensus, the Government of Indonesia [is] willing to follow the settlement according to the provisions of the Convention on the settlement of disputes between States and Foreign Citizen regarding investments ...”

However, it is important to note that the BKPM Approval is a document that is specifically relevant to the facts and circumstances of this case only.

With respect to the UK-Indonesia BIT, the Tribunal undertook a similar analysis. Article 7(1) of that treaty provides:

*The Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment **shall assent** to any request on the part of such national or company to submit, for conciliation or arbitration, to the [ICSID]... (emphasis added)*

Indonesia similarly argued that Article 7(1) of the UK-Indonesia BIT did not provide consent to ICSID arbitration with respect to Churchill’s claims. It was argued that the words “shall assent” contained in Article 7(1) did not constitute consent for purposes of the ICSID Convention and the treaty, and that a subsequent act was required to achieve consent. According to Indonesia, the expression “shall assent” presumed a sequence “in which the investor first makes a request to which the host state is expected to assent”. It

contrasted this with the UK Model BIT which used the words “*hereby consents*”. Churchill disputed Indonesia’s interpretation on the basis that the word “*shall*” denoted a binding obligation and could not be read as granting Indonesia discretion.

The Tribunal closely examined and analysed the words “*shall assent*”, making references to rules for treaty interpretation, doctrinal writings, the context surrounding the words, and the object and purpose of the UK-Indonesia BIT. In construing the words “*shall assent*”, the Tribunal found that a conclusion could not be reached by way of the words’ ordinary meanings or by looking to the context or the object and purpose of the treaty. But after noting that it was the UK’s and Indonesia’s practice to secure advance consent to international arbitration, the Tribunal found that the UK-Indonesia BIT contained a standing offer to arbitrate any dispute that may arise in connection with an investment before ICSID, and that no further act was required from Indonesia.

## OTHER BILATERAL INVESTMENT TREATIES WITH INDONESIA

Although Churchill and Planet Mining were ultimately successful in persuading the Tribunal that it had jurisdiction to hear their claims, the Tribunal’s finding with respect to the Australian-Indonesian BIT is cause for some concern. The interplay between paragraphs (2) and (4) of Article XI was interpreted to be only a promise to consent. Bearing in mind that Planet Mining was fortunate that Indonesia had provided advance consent in a separate document, this is a real concern for Australian companies looking to invest in Indonesia in the future. The concern could be far reaching, as it has other BITs which are very similarly worded to the Australia-Indonesia BIT. Further, this case demonstrates that foreign companies looking to invest in Indonesia will need to be careful in considering whether their respective country’s BIT with Indonesia

contains a standing offer to arbitrate or not. The following list refers to examples of BITs with Indonesia and the respective expressions which need to be considered with respect to referring disputes to arbitration:

- **“hereby consents to submit”** (Turkmenistan (not in force); Sweden; Netherlands; Slovak Republic; Laos; Kyrgyzstan; Suriname (not in force); Pakistan; Ukraine; Sri Lanka; Uzbekistan; Jordan; Mongolia; Bangladesh; Sudan; Yemen (not in force); Zimbabwe (not in force); Algeria (not in force); Tajikistan (not in force); and Denmark);
- **“hereby consents to the submission”** (Romania);
- **“hereby gives its unconditional consent”** (Finland);
- **“hereby irrevocably and anticipatory [sic] gives its consent”** (Belgium);
- **“hereby irrevocably consents in advance”** (Singapore);
- **“irrevocably consents in advance”** (Croatia (not in force));
- **“agrees in advance and irrevocably”** (Libya (not in force); and Serbia (not in force));
- **“the investor may refer”** (Malaysia);
- **“the investor may submit”** (Chile (not in force));
- **“the investor affected may submit”** (South Korea);
- **“the investor concerned may submit”** (Bulgaria; and Qatar (not in force));
- **“the investor in question may submit”** (Italy; Norway; Hungary; and Vietnam);
- **“the investor will be entitled to submit”** (Cuba);

- **“the investor shall be entitled to refer”** (Syria; Thailand; Cambodia; India; and North Korea (not in force));
- **“the dispute may be submitted”** (Spain);
- **“the dispute can be submitted”** (Morocco; and Turkey);
- **“the dispute shall, at the request of the investor be submitted”** (Iran);
- **“the dispute shall, at the request of the investor concerned, be submitted”** (Czech Republic; Mozambique; and Philippines (not in force));
- **“the dispute shall, at the request of the investor of the other Contracting Party, be submitted”** (Germany);
- **“the dispute shall be submitted”** (Argentina; Jamaica (not in force); and Guyana (not in force));
- **“it may be submitted”** (China; Mauritius; and Egypt);
- **“such disputes may be submitted”** (Russia);
- **“it shall be at the request of the investor filed”** (Saudi Arabia);
- **“it shall, upon request of the investor, be submitted”** (Poland); and
- **“either party to the dispute may institute”** (Tunisia).

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## A Reminder to Be Careful What You Draft For: Lessons Learned from The Supreme Court of India's Ruling in *Enercon India*

*Rich Paciaroni, Kimberly Karr (Pittsburgh), and Mike Stewart (London)*

Historically, there have been two dominant interlinked themes regarding arbitration in India. The first is the extent to which appellate courts have been willing to intervene in the arbitral process, particularly with respect to enforcement. The second is the limitation on matters that can be arbitrated under Indian law. This has been especially true after the Indian Supreme Court's decision in *SAW Pipes*, 2003 (2) Arb. LR 5 (SC), established a wide interpretation for when awards may be set aside due to "public policy." *SAW Pipes* and other decisions demonstrated a willingness of Indian courts to intervene in the arbitral process, which left many supporters of arbitration highly concerned.

Recently, however, there has been a watering down of judicial intervention in India. Martin King recently highlighted this trend in the **April 2014 edition of *Arbitration World***, discussing the Indian Supreme Court's decision in *World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.* (Civil Appeal No. 895 of 2014). However, the *World Sport Group* holding applies only to foreign-seated arbitrations. By contrast, Indian courts tend to render stricter holdings when it comes to domestic arbitrations. This increasingly dualistic approach has led some, including Chairman of the Law Commission, Ajit Prakash Shah, to declare that the country is starting to effect two regimes with respect to arbitration.

Recently there has been a slow watering down of judicial intervention in India.

Thus, arbitration agreements should be drafted with precision and clarity any time Indian courts might be involved; otherwise, a party might find itself subject to the regime it did not desire or intend. A recent example of this can be found in *Enercon India Ltd. v. Enercon GmbH* (Civil Appeal No. 2086 of 2014), which the Indian Supreme Court handed down on February 14, 2014.

## INDIA ARBITRATION ACT

Before turning to the *Enercon India* decision, it is important to understand how arbitration is treated under Indian statutory law. The Indian Arbitration and Conciliation Act of 1996 (the “Act”) is divided into two parts. Part I concerns domestic awards, i.e., arbitrations seated in India. Part I provides Indian courts with substantial procedural and determinative powers, including the grant of interim measures, authority to make arbitral appointments in the absence of party agreement, and the power to set aside arbitral awards. Part II deals with the recognition and enforcement of “foreign” awards (i.e., awards rendered in arbitrations seated outside India) under the New York and Geneva Conventions. The Act’s dual nature thus allows for differing decisions, depending upon whether Part I or Part II of the Act applies.

## THE ENERCON INDIA DECISION

The *Enercon India* decision centers on a dispute over the validity of an intellectual property license agreement. One of the parties, Enercon GmbH, is a German company that manufactures wind turbines. In 1994, it formed Enercon India Ltd. (“EIL”) through a joint venture with Mehra Group, an Indian company. Ten years later, Enercon GmbH sought to enforce the provisions of an intellectual property license agreement with EIL. However, EIL refused, arguing that the agreement was unenforceable because it was never signed.

EIL subsequently commenced court proceedings in India, seeking an order to compel Enercon GmbH to continue supplying wind turbine parts and equipment. However, Enercon GmbH instead commenced arbitration in London, pursuant to an arbitration clause in the intellectual property license agreement. Specifically, Clause 18.3 of the agreement read:

[P]roceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be in London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the Party(ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply.

Enercon GmbH then obtained an anti-suit injunction through English courts to restrain the Indian proceedings.

The question before the Supreme Court of India was whether English courts could grant interim relief in support of the arbitration. To decide this question, the court first needed to determine the seat of the arbitration. It held that India was the seat, as the parties agreed in Clause 18.3 that the “Indian Arbitration and Conciliation Act, 1996 shall apply.” The Supreme Court reasoned that because the procedural law of the arbitration was Indian, it followed that the juridical seat of the proceedings must be within India as well. Moreover, the parties did not expressly exclude the operation of Part I of the Act. The Supreme Court reasoned that Part I thus applied by default, rendering London a mere “venue” for what was effectively a domestic, Indian arbitration. It is unclear whether the court would have held the same had Clause 18.3 referred to London as the “seat” of the arbitration.

Because Part I of the Act applied (even if by default), the Supreme Court rejected the English court’s anti-suit injunction, holding that only Indian courts could grant interim relief. This decision stands in

contrast with the approach taken by the English Commercial Court in *U&M Mining Zambia Ltd. v. Konkola Coppers Mines PLC* (2013) EWHC 260 (Comm.), which would have allowed the parties to seek relief from courts in either India or the United Kingdom. Thus, had London been the seat of the arbitration, the English court's anti-suit injunction would in all likelihood have been sustained by the Indian Supreme Court.

## CONCLUSION

The *Enercon India* decision serves a reminder to choose wisely and draft carefully when it comes to arbitration agreements. If the parties agree to the application of Indian procedural law in their arbitration clause but do not intend to engage in domestic arbitration, they should expressly exclude Part I of the Act.

This is particularly important because, as highlighted above, Indian courts tend to treat domestic and foreign-seated arbitrations differently. Selecting domestic arbitration allows parties to have greater access to interim relief under Part I of the Act, yet they risk the expanded likelihood of judicial intervention. By contrast, Indian courts are less likely to intervene in foreign-seated arbitrations, though parties may not get the same level of interim relief.

Indian courts tend to treat domestic and foreign-seated arbitrations very differently.



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## In Case of First Impression, Texas Court Invalidates Arbitration Award for Tardiness

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For the first time in Texas jurisprudence, a Texas intermediate appellate court struck down an arbitral award solely on the grounds that it was issued too far after both the deadlines agreed to by the parties and later ordered by the court. See *Sims v. Building Tomorrow's Talent, LLC*, No. 07-12-00170-CV, 2014 WL 1800839 (Tex. App.—Amarillo Apr. 30, 2014, no pet. h.) (mem. op.).

This case arose from a copyright dispute between two former business partners, Doris Sims and Matthew Gay, who subsequently agreed to arbitrate the matter. Pursuant to the parties agreed-upon Proposed Arbitration Guidelines, an arbitration hearing was held in November 2008, and the arbitrator was to issue his final award by January 6, 2009.

When the arbitrator failed to issue his award more than a year after the hearing—a delay during which Sims filed for bankruptcy—Sims sued the arbitrator alleging breach of contract and fraud. Gay intervened and requested the court to compel arbitration. The trial court ordered the arbitrator to issue a final award by August 17, 2010, but the arbitrator failed to do so until more than a year later on August 25, 2011 (and more than 32 months after the parties agreed-upon deadline). Therein, the arbitrator finally issued his final ruling, in which he awarded Gay \$195,000 in damages and \$92,135.32 in attorney fees. Sims objected to and moved to vacate the final award, but the trial court subsequently confirmed it.

The Amarillo Court of Appeals reversed the trial court's confirmation of the award solely on the basis that the arbitrator was without

authority to enter the final award because he failed to comply with the Texas Arbitration Act's ("TAA") directive that arbitrators *shall* make an award, either within the time established by the arbitration agreement or the time ordered by a court. The Court reasoned that the arbitrator's conduct "defeated the intent of arbitration," which has long been understood in Texas to allow the parties to a controversy to contractually obtain a "speedy and inexpensive final disposition" of the dispute.

Although this holding was the first of its kind in Texas, other domestic U.S. jurisdictions have held similarly. Florida, Rhode Island, and Vermont appellate courts have ruled that tardy arbitration awards are void. See *Ruff v. Metro. Prop. and Liab. Ins. Co.*, 508 A.2d 672, 673 (R.I. 1986) ("At common law an arbitrator's award was void if rendered after the time limitation specified by the parties."); *R.R. Bean Constr. Co. v. Middlebury Assocs.*, 428 A.2d 306, 311 (Vt. 1960) ("general common law rule" applied that an award not rendered within a party-established time limitation is void); *Klinefelter v. Am. Emps. Ins. Co.*, 438 So. 2d 864, 864 (Fl. Dist. Ct. App. 1983) ("Clearly the arbitrators acted too late and had no jurisdiction at the time the award was rendered."). The Federal Arbitration Act contains a similar provision to that in the TAA, requiring courts to respect and enforce "the time within which the [arbitration] agreement required the award to be made." 9 U.S.C. § 10(b). Select federal circuit courts have issued decisions finding that arbitrators lose authority to enter tardy arbitral awards. *Jones v. St. Louis–San Francisco Ry. Co.*, 728 F.2d 257, 265 (6th Cir. 1984) ("Thus, since the instant award was rendered after an inordinate period of time, we find that the [arbitration] board had long since lost jurisdiction to resolve this dispute ...."); *Huntington Alloys, Inc. v. U. Steelworkers of Am.*, 623 F.2d 335, 339 (4th Cir. 1980) (finding unenforceable an arbitration decision that was not timely delivered).

It is doubtful that the Texas Supreme Court will grant review of *Sims* because of its unique facts and holding, but Gay's counsel has indicated he will seek review above nonetheless.

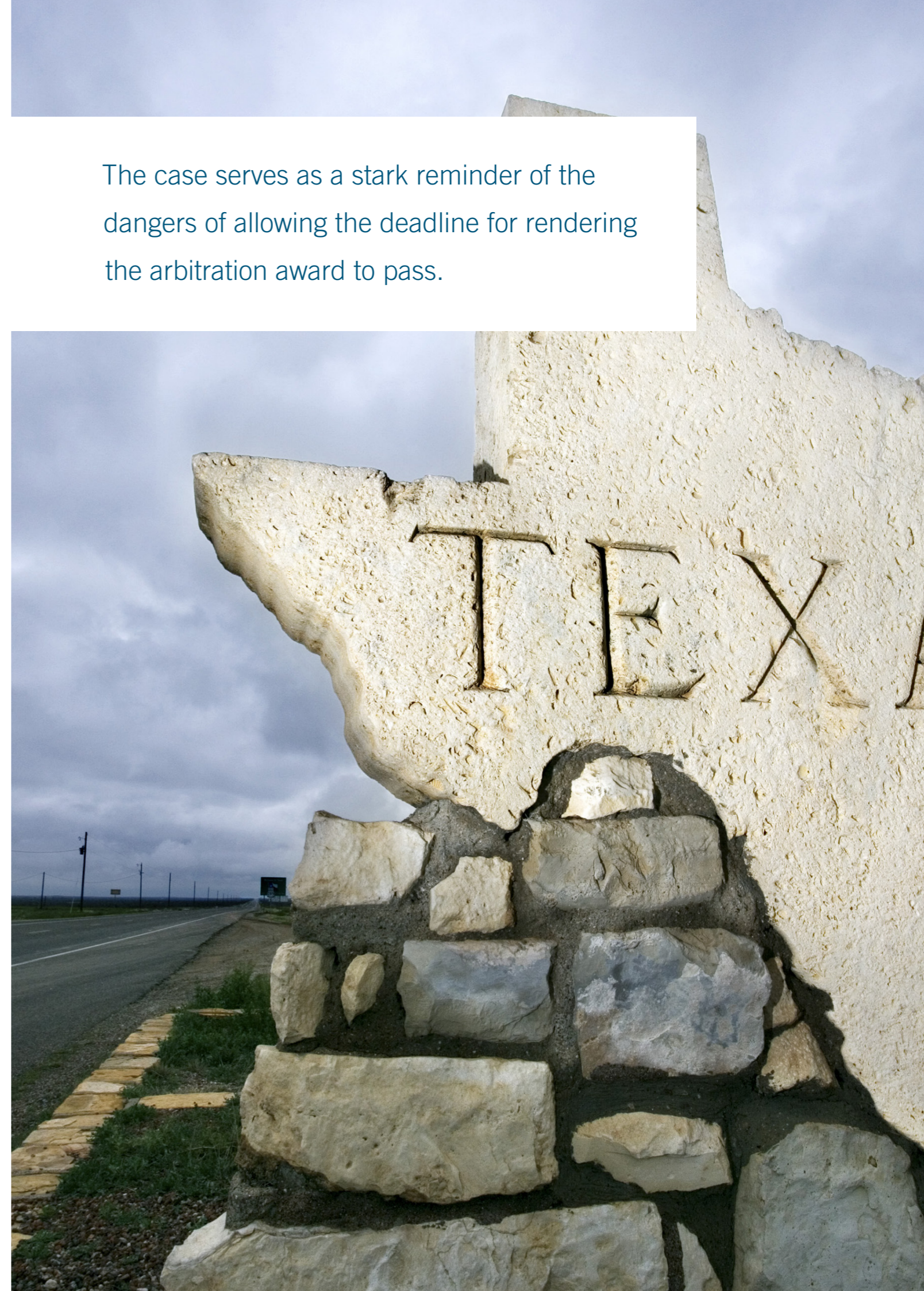
This case serves as a stark reminder of the dangers of allowing the deadline for rendering the arbitration award—whether specified in the arbitration agreement or by a supervising court—to pass.

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## The Approach of Arbitral Tribunals to Issues of Bribery and Corruption

*Jonathan Graham and Christine Braamskamp (London)*

Judge Lagergren famously stated “Corruption is an international evil” in one of the oldest known international arbitration cases dealing with corruption back in 1963 (ICC Case No.1110). Since then a wide range of international conventions—such as the United Nations Convention on Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials—and domestic legislation, including the UK’s Bribery Act and the U.S. Foreign Corrupt Practices Act, have been brought into force in an attempt to out root the practice. It remains widespread in international business, however, as evidenced by Transparency International’s latest Corruption Perceptions Index for 2013. The index found that of the 175 countries assessed on a scale from 0 (very corrupt) to 100 (very clean), 120 scored less than 50. The ramifications are far-reaching. The World Bank, for example, has estimated that corruption can reduce a country’s growth rate by up to 1% a year.

Allegations of corruption are often found in international arbitration, both in commercial and investment treaty arbitration. In most instances, such allegations arise in defending claims made against a party that is alleged to have engaged in corruption. This article aims to discuss a number of key issues which require consideration when dealing with arbitration matters involving allegations of corruption. These key issues include the jurisdiction of the tribunal, the burden and standard of proof, whether tribunals have a duty to report a finding of corruption to national authorities and, finally, what issues may arise at the enforcement stage.

## JURISDICTION OF THE TRIBUNAL

In ICC Case No.1110, Judge Lagergren declined jurisdiction on the basis that by engaging in corruption, the parties had lost their right to seek assistance from both national courts and arbitral tribunals. However, in more recent decisions it has often been found appropriate for arbitral tribunals to assume jurisdiction and to determine whether or not there has been corruption such that it would render the contract invalid (see, for example, *Fiona Trust v Privalov* [2007] All ER (D) 233 (Oct) and *Bilta (UK) Ltd v Muhammad Nazir* [2010] All ER ( ) 146 (May)). Underlying this view is the principle of severability—namely that the arbitration agreement be treated as independent of the contract in which it is contained—so as to survive in the event the contract is held to be invalid. Most arbitral rules and national laws also recognise the principle of “kompetenz-kompetenz” whereby the arbitral tribunal has the power to determine its own jurisdiction.

As such parties should be aware that raising allegations of corruption as a defence to arbitration proceedings may not invalidate the arbitration clause itself. There is, however, an exception where corruption does affect the arbitration clause as well as the main contract; for example, where the contract itself was never entered into, then the arbitration agreement will also be illegal and void.

## BURDEN AND STANDARD OF PROOF

Where the arbitral tribunal assumes jurisdiction in a matter involving an allegation of corruption, it must determine whether or not the relevant agreements are tainted as a result, potentially rendering them unenforceable. However, the tribunals’ ability to obtain evidence of corruption is limited. For example, arbitrators do not have the power to compel third party witnesses to attend. This has resulted in



comparatively few actual findings of corruption. In the high-profile decision of *World Duty Free v Kenya* (ICSID Case No ARB/00/7 IIC 277 (2006)), however, the case was dismissed after the tribunal found that corruption had occurred, namely that the former president of Kenya had received a US\$2million bribe. In this case, the claimant had unusually readily admitted to its corrupt acts in the course of pleading its investment treaty claim against Kenya. However, such an admission tends to be the exception rather than the rule and, in cases of corruption, evidence of such a crime is often difficult to establish.

The difficulties faced by tribunals in investigating corruption have led to disparate approaches, both in the determination of who has the burden of proof and what the standard of proof should be. This has led to unpredictability in what is required both of the party alleging corruption and of the accused party. It is, however, possible to observe a subtle shift in favour of a more flexible approach to establishing corruption, reflective perhaps of a heightened concern to avoid arbitration being used to conceal illicit trade practices.

As can be expected, it is usually the party alleging corruption who has the burden of proof (see, for example, Article 27(1) UNCITRAL Rules 2010). However, some tribunals have sought to shift the evidential burden in certain circumstances, requiring the party seeking to establish corruption only to establish a *prima facie* case of corruption to shift the burden to the party accused of employing corruption. This was, for example, the approach of the ICC in award no 6497 of 1994. This is a significant development as it substantially alleviates the evidential burden on the party alleging corruption. Once the allegation is made, the accused party is required to produce counter evidence, e.g. proof that a non-transparent ownership structure is not a means to conceal illicit activities.

With respect to the standard of proof, there is no uniform standard regarding allegations of corruption in international arbitration. Some tribunals have demanded a high standard, taking the view that allegations of particularly serious wrong-doing require more convincing evidence than that required for other, less serious allegations. For example in *Westinghouse v Republic of The Philippines* (ICC Case No.6401 of 1991), the tribunal stated that corruption must be established by “a clear preponderance of the evidence,” and in *Hilmarton* (ICC Case No.5622 of 1988) the tribunal demanded proof “beyond doubt.” However, this approach has been criticized for rendering such proof impossible and, increasingly, tribunals appear to be moving away from adopting the criminal standard of proof. For example, in ICC Case No.6497 of 1994, the tribunal stated that “the alleging party may bring some relevant evidence for its allegations without these elements being really conclusive,” such evidence being enough, even though not conclusive, for the arbitral tribunal to decide that the real object of the contract was bribery.

Parties alleging corruption may also be assisted by the tribunals’ discretion to determine the weight and credibility to be given to the evidence presented. The IBA Rules on the Taking of Evidence in International Arbitration provide that the admissibility, relevance, materiality and weight of the evidence submitted are at the discretion of the tribunal (Article 9.1). With this in mind, what sort of evidence should parties be looking to adduce when making allegations of corruption? Firstly, circumstantial evidence of corruption can certainly be presented and may alone be sufficient to discharge the applicable standard of proof. For example, in ICC Case No.3916 of 1982, the widespread nature of corruption in Iran was considered to be appropriate circumstantial evidence in support of an allegation of corrupt practices. A similar approach was taken in the ICSID case *Rumeli Telekom v Republic of Kazakhstan* (ICSID Case No. ARB/05/16

(2008)). Other “red flags” of evidential value would include an unusually high commission relative to the value of the contract, the rapidity of the award of the contract or unexplained payment terms. Also, where parties have refused requests to produce documents, this can lead to the tribunal drawing an inference that the evidence being withheld would be adverse to the party refusing to produce it (as in *Europe Cement v Republic of Turkey*, ICSID Case No.ARB(AF)/07/2 (2009)).

### DUTY ON TRIBUNALS TO REPORT SUSPICIONS OF CORRUPTION?

Where one of the parties makes an allegation of corruption or the tribunal itself becomes suspicious, the question arises whether the arbitral tribunal is required, or is able of its own accord, to alert domestic authorities to allegations or evidence of possible corruption. This prospect may be particularly alarming to parties who fear tactical, bad-faith, allegations of corruption by the other side and who sought to resolve their dispute through arbitration in the first place because of the confidentiality of arbitral proceedings.

Any duty of disclosure can only arise from national legislation to which the tribunal members are subject. A duty arising from national legislation can override a contractual obligation of confidentiality. However, where the tribunal is under no obligation to report suspicions, the position is less clear-cut. The disclosure may still fall under the public interest or interests of justice exceptions to confidentiality, but this depends in part on any express confidentiality provision that exists. In *Fraport AG v Republic of The Philippines* (ICSID Case No.ARB/03/25 (2010)), a party-negotiated confidentiality agreement was held to preclude the respondent state from using documents obtained in the arbitration in criminal proceedings and commentators have suggested that such a confidentiality agreement would also

likely preclude an arbitrator’s ability to report to domestic authorities allegations of corruption, unless under a legal duty to do so.

### DECISION OF THE TRIBUNAL—WHAT NEXT?

#### *Finding of corruption*

It is often thought that the primary effect of a finding of corruption is a declaratory award that the contract is null and void. However, most legal systems draw a distinction between contracts that are procured by corruption and contracts that *provide* for corruption. Contracts that are procured by corruption are merely voidable at the instance of the innocent party (i.e., the innocent party has to take positive steps to set it aside) whereas contracts which provide for corruption may be considered null and void and the parties are not able to maintain any claims founded upon the contract (whether they wish to or not).

For example, in the *World Duty Free v Kenya* arbitration, where the contract to run the duty-free operations in Nairobi and Mombasa airports was procured by a US\$2 million bribe, the contract was voidable. The innocent party had the choice either to set aside the contract (which they elected to do) or to continue with the enforcement and performance of the voidable contract. The right to continue with the performance of the contract may be valuable, such as where the innocent party is still due his payment under the contract. Careful consideration is thus required to determine whether it is in the party’s interest to void the contract or not.

#### *Dismissal of corruption allegations*

Where the tribunal has dismissed evidence of corruption, the dissatisfied party might seek to have the award set aside by the courts of the seat of the arbitration. Alternatively, a party can consider challenging the award in enforcement proceedings brought by the

claimant in the jurisdiction where enforcement is sought. The challenging party could make a claim of illegality, arguing that enforcing the award would be contrary to the public interest.

The success of such an argument will depend on many factors, including where it is being made. It is only in cases where there has been a clear violation of fundamental rules of public policy that, for example, the English courts will set aside an award. Thus, in *Soleimany v Soleimany* [1998] EWCA Civ 285 where there was an agreement for the smuggling of carpets out of Iran, the English courts refused to enforce the award on those grounds. On the other hand in *Omnium de Traitment v Hilmarton* [1999] All ER (D) 704, where there was a consultancy agreement for lobbying (illegal in the place of performance, Algeria, but permitted under the law of the contract, Switzerland), the English courts refused an application to stop the enforcement of the award.

## CONCLUSION

Given the principle of severability, it is not surprising that many tribunals faced with corruption allegations assume jurisdiction. Arbitral tribunals appear to be using their discretion in respect of the level of evidence required to establish corruption, allowing circumstantial evidence and drawing adverse inferences when necessary given the difficulties in many cases of adducing direct, concrete evidence of corruption. Parties should take full advantage of this when making submissions and look for the “red flags” which may point towards

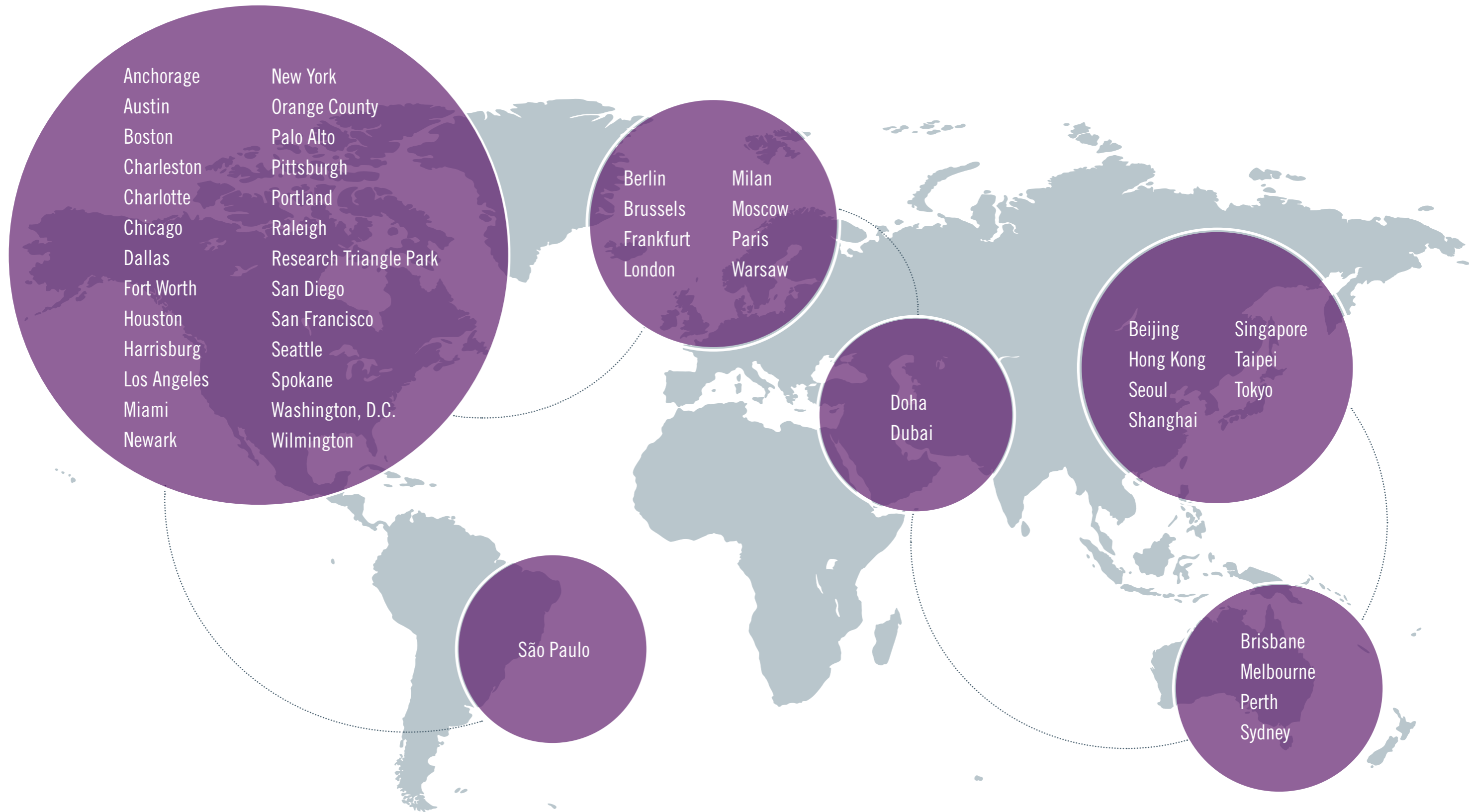
the existence of corruption. There is generally no duty on arbitrators to report a finding of corruption to national authorities, unless the law specifically requires them to do so. Voluntary disclosure may fall under the exemptions to confidentiality provisions, which, therefore, should be carefully considered when drafting the arbitration agreement. Even if the tribunal finds against the party making the allegation of corruption and the contract is upheld, that party may be able to challenge the award or its enforcement. This could involve requesting the court to make a determination of public interest and public policy.

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