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Arbitration annual round-up—international arbitration—key seats: reviewing 2017 and previewing 2018

This year's annual roundup on international arbitration—key seats reviews some of the most significant developments of 2017 and previews what is on the horizon for 2018. This includes key cases and legislative developments from the USA, UAE, China, Singapore, Hong Kong, India and others. Also included are updates on LexisNexis®'s content, including news of exciting developments from the past year and what is coming up in the next 12 months.

Given the potential breadth of this review, we have limited our coverage to only a selection of the key developments.

Reviewing 2017

Arbitration in the Americas

What happened?

In the **USA**, Steve Finizio, partner at WilmerHale, comments, 'it has been a quieter year with regard to international arbitration developments, and the US Supreme Court has not issued any decisions on arbitration-related issues that appear likely to be significant for international arbitration. There have been, however, several recent cases that reflect the fact that US courts continue to wrestle with the application of concepts such as sovereign immunity, *forum non conveniens*, personal jurisdiction and comity as they relate to the enforcement of arbitral awards, and, in particular, enforcement of awards against sovereigns. Lower courts in the US have taken different approaches on some of these issues. For example, some courts have held that the *forum non conveniens* doctrine does not apply to an enforcement action against assets in the US, while other courts have held that an enforcement action can be dismissed on foreign *non conveniens* grounds. Earlier this year, the Supreme Court declined to consider an appeal in a case that might have provided some clarity on this issue.'

In particular, in *Thai-Lao Lignite v Laos* the US Court of Appeals for the Second Circuit upheld a New York federal court's decision to vacate its own order enforcing a US$ 57m arbitral award against Laos after a Malaysian court set the award aside, finding the New York Convention requires deference to the courts of the arbitral seat. Subsequently, Malaysia's Federal Court rejected further attempts to revive enforcement of the award.

Also in the **USA**, as many practitioners will be aware, US statutory law empowers federal district courts to compel discovery of documents, testimony, or other evidence, for use in proceedings before 'a foreign or international tribunal' (section 1782(a) of Title 28 of the United States Code (section 1782) (also cited as 28 USC § 1782)). Section 1782 was used to good effect in *In Re Ex Parte Application of Kleimar*, where a New York district court granted discovery in aid of a London Maritime Arbitrators Association (LMAA) arbitration seated in London.

For a discussion of developments around the recognition and enforcement of investment treaty arbitration awards in the USA, see: Arbitration annual round-up—investment treaty arbitration: reviewing 2017 and previewing 2018.

As for significant case law from **Brazil**, Jean-Paul Dechamps, Principal, Dechamps International Law (London), and Leonie Beyrle, associate, Freshfields Bruckhaus Deringer (London), comment on two key judgments from 2017:

'On 11 October 2017, Brazil's Superior Court of Justice (STJ) resolved a conflict of jurisdiction between an arbitral tribunal and a Brazilian federal court, in relation to a dispute between Brazil's national oil company Petrobras and the country's National Agency of Petroleum, Natural Gas and Biofuels (ANP), in favour of arbitration (Conflict of Jurisdiction Nº 139.519-RJ (2015/0076635-2)). The underlying dispute arose when the ANP passed a resolution unifying multiple fields under an oil and gas concession agreement with Petrobras, which resulted in Petrobras facing additional payment obligations to the ANP of R$ 2.09bn (approximately US$ 640m). In response, Petrobras invoked the arbitration provision in the concession agreement and commenced ICC proceedings to challenge the resolution. The ANP argued that its administrative decisions constitute an exercise of police powers by a regulatory authority and are thus not arbitrable. After the ANP obtained a local court injunction to stop the arbitration on this basis, Petrobras referred the resulting conflict of jurisdiction to the STJ. In a five-two split decision, the STJ held that the tribunal has jurisdiction to hear any dispute about the existence, validity and effectiveness of the arbitration clause in the concession agreement. The majority opinion is in line with a number of recent STJ rulings upholding the principle of kompetenz-kompetenz (see eg Conflict of Jurisdiction Nº 150.830 PA (2017/0024975-1)), as discussed in our 2017 mid-year review). Crucially, this also appears to be the first STJ decision confirming the arbitrability of disputes involving administrative decisions of public bodies.

'Another important development in 2017, also involving the STJ, was its decision to deny the recognition of two awards issued by US-seated ICC tribunals on the grounds that the failure of the chairman of both tribunals to disclose a potential conflict of interest violated Brazilian public policy (SEC 9.412 US (2013/0278872-5)). As discussed in more detail in our mid-year review, following issuance of the arbitration awards, it had come to light that the chairman's law firm had received fees worth approximately US$ 6.5m from the claimant in the arbitrations for work

on unrelated matters. Even though the chairman was not aware of these payments when he made the awards in favour of the claimant, the STJ held in a decision in April 2017 that his failure to disclose any circumstances reasonably capable of casting doubt on his impartiality prevented the awards from being recognised in Brazil. This decision shows that despite their general pro-arbitration attitude, the Brazilian courts are willing to hold arbitrators to very strict standards of transparency and impartiality.'

What are the key implications?

As for the impact of the judgment in *Thai-Lao Lignite v Laos*, in its previous most notable decision on the subject, *Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción*, the Second Circuit Court of Appeals had confirmed that US courts asked to enforce nullified arbitral awards should defer to the decisions of courts of the seat, absent a violation of 'fundamental notions of what is decent and just in the United States', but the court had applied this standard in a way that many found controversial. It is considered that *Thai-Lao Lignite* returns the court to a more deferential application of the standard, which promotes the pro-arbitration and international comity principles embodied in the New York Convention. The decision further ensures that these principles will be vindicated even when an arbitral award has already been recognised and enforced in the United States, but later annulled at the seat of the arbitration.

The *Kleimar* decision has added to the growing number of US court judgments that have allowed a party to a commercial arbitration proceedings seated outside the US to obtain discovery through the US courts in aid of those proceedings pursuant to section 1782—this can be a very useful strategic tool in arbitration proceedings.

Want to know more?

For our coverage of *Thai-Lao Lignite v Laos*, see News Analysis: US Second Circuit upholds order dismissing US$ 57M award against Laos (Thai-Lao Lignite v Laos) and Laos wins final set-aside of US$ 56m arbitral award (Thai-Lao Lignite v Lao).

Our Practice Notes: Enforcing arbitral awards in New York and The New York Convention—the recognition and enforcement of arbitral awards—an introduction may also be of interest.

For a discussion of the *Kleimar* decision, see News Analysis: New York court orders discovery in aid of LMAA arbitration (In re ex parte Application of Kleimar), as also mentioned in our new Practice Note this year: Section 1782 discovery in support of international arbitration in US district courts (28 USC § 1782).

What happened?

Janet Walker, professor of law and member of Arbitration Place in Toronto, comments on legislative developments in **Canada**:

'On 22 March 2017, the Ontario Government enacted the International Commercial Arbitration Act 2017, implementing the 2006 UNCITRAL Model Law. The Act also appends the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which had been replaced in the previous legislation by provisions in the implementing statute that accounted for the additional features of the Convention. The Act adds a provision for the limitation period for the enforcement of an arbitral award, stating that it is ten years from the date the award is rendered.'

Also in 2017, the **Jamaican** Arbitration Act 2017 came into force and **Brazil** put forward reforms to its Labor Code that would allow arbitration of employment disputes, and also published a new law that would permit arbitration of public-private partnership agreement disputes, although the language of the proceedings must be Portuguese and the seat of the arbitration must be Brazil.

What are the key implications?

Ontario, Canada has become the first province to adopt the provisions of the 2006 Model Law, so practitioners should note the revisions. In addition, the changes potentially make Ontario a more attractive seat for international commercial arbitration.

The modernisation of Jamaica's arbitration legislation is hoped to attract international arbitration to the island, but whether it does so remains to be seen.

Want to know more?

For some of our coverage of the above developments, see:

- Ontario legislates to adopt New York Convention, LNB News 28/03/2017 119
- Jamaica: Arbitration Act 2017 enters into force, LNB News 17/07/2017 102 and News Analysis: The benefits of the new Arbitration Bill in Jamaica

Our bespoke content on key arbitration-related issues in Canada, which was amended in light of the new legislation, includes Practice Notes: Challenging jurisdiction and anti-suit provisions in Canada, Interim remedies in support of arbitration in Canada and Enforcing arbitral awards in Canada.

What happened?

It has been an eventful year for US trade policy. This is relevant to arbitration practitioners as trade agreements will include provisions dealing with the resolution of disputes between the states themselves and also between foreign investors and states.

In 2017, the renegotiation of the North American Free Trade Agreement (NAFTA) commenced. NAFTA is an agreement signed by Canada, Mexico, and the United States, creating a trilateral trade bloc in North America. Chapter 11 of NAFTA deals with investor-state dispute settlement and is likely to be modernised as part of the talks, but the precise nature of the final deal, or indeed if one will be achieved, is currently unknown.

At the start of the year, the new US President, Donald Trump, notably pulled US participation from the Trans-Pacific Partnership (TPP) (which was replaced by the remaining states in November with the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)). It was thought that the US withdrawal from TPP would swiftly be followed by the country's denunciation of the Transatlantic Trade and Investment Partnership (TTIP). While that has not occurred, neither have there been any developments to report on this year.

In May this year, Ecuador's legislature approved the termination of 12 bilateral investment treaties (BITs) entered into with China, Chile, Venezuela, the Netherlands, Switzerland, Canada, Argentina, the US, Spain, Peru, Bolivia and Italy.

Want to know more?

For some of our coverage of the above developments, see:

- News Analysis: Ecuador's legislative branch approves termination of 12 Bilateral Investment Treaties
- News Analysis: What to expect on investment arbitration in NAFTA reboot, Canada stays firm on NAFTA trade disputes provision, Arbitration opt-in could allow NAFTA states to fix political problem, NAFTA withdrawal could thwart US investors
- EU–Canada trade agreement enters into force, LNB News 20/09/2017 80

You may also be interested in the following mid-year reviews:

- Mid-year review 2017—arbitration developments in the US
- Mid-year review 2017—arbitration developments in Brazil

Arbitration in the Middle East

What happened?

There have been several arbitration-specific developments of interest across the Middle East this year, and we highlight some of these below.

After a long wait, **Qatar** revised its arbitration legislation this year, with the new arbitration law coming into force on 12 April 2017, and the PCA signed an agreement with the Qatar International Centre for Conciliation and Arbitration (QICCA), setting out a framework for co-operation between the two institutions for settlement of international disputes.

Dr Gordon Blanke, partner of international commercial and investment arbitration at DWF (Middle East) LLP, comments on key DIFC (**Dubai**) developments in 2017:

'There have been a number of significant arbitration developments in the UAE over 2017 to date, both onshore and offshore. Most importantly, the Dubai-DIFC Joint Judicial Tribunal (JT) established by the Ruler of Dubai by virtue of Decree No. (19) of 2016 for the resolution of conflicts of jurisdiction between the onshore Dubai and offshore DIFC courts has put in doubt the continued service of the DIFC courts as a conduit for the recognition and enforcement of domestic and foreign arbitral awards for onward execution against the award debtor's assets in onshore Dubai.

'Two JT rulings of 2017 (*Cassation No. 1/2017—Gulf Navigation Holding PJSC v Jinhai Heavy Industry Co Ltd* and *Cassation No. 3/2017—Ramadan Mousa Mishmish v Sweet Homes Real Estate*) find in favour of the proper competence of the onshore Dubai courts on the basis that these enjoy general jurisdiction (albeit in disregard of the New York Convention). The minority, led by the Chief Justice of the DIFC Courts Michael Hwang, has voiced its opposition in no uncertain terms, denying the Dubai Courts' general jurisdiction in favour of the DIFC courts' exclusive jurisdiction in the prevailing circumstances and warning that the UAE courts—whether onshore or offshore—will be at risk of violating their enforcement obligations under the New York Convention.

'The continued service of the DIFC courts as a conduit has also been questioned by the Dubai Court of First Instance (see Commercial Case No 1619/2016, ruling of the Dubai Court of First Instance of 15 February 2017), annulling the DIFC courts' rulings in the *Banyan Tree* line of cases (Case No. ARB/003/2013, rulings of the DIFC Court of First Instance of 2 April 2015 and 8 April 2015), recognising and enforcing a DIAC award and confirming the DIFC courts' competence to serve as a conduit jurisdiction.

'Last but not least, the DIFC courts are also presently advising the Government of Kazakhstan on the establishment of the Astana International Financial Centre (AIFC), which is modelled on the DIFC judicial system and will offer a free zone litigation and arbitration alternative to international investors in Kazakhstan. The AIFC is expected to start operations on 1 January 2018.'

Also in **Dubai**, the question of whether DIFC law recognises sovereign or state immunity was raised in *Pearl Petroleum Company v The Kurdistan Regional Government of Iraq*, in which the defendant applied to set aside an order of the DIFC Court of First Instance recognising and enforcing two arbitration awards rendered against it on the grounds, inter alia, of its claim to sovereign or state immunity. The court found that it did not need to determine this issue because the defendant had expressly waived any claim to immunity for itself and its assets (which was held to mean a waiver of immunity from suit and execution).

As discussed elsewhere, the Dubai International Arbitration Centre (DIAC) announced the release of its 2018 administered arbitration rules at an event in November, but the final rules have not been released to the public and no clear indication has been given as to when the revised rules will enter into force—see: Arbitration annual round-up—institutional and ad-hoc: reviewing 2017 and previewing 2018.

What are the key implications?

The 'on the ground' impact of Qatar's revised arbitration law will be seen in due course, but the revisions show that the State is keen to keep pace with modern arbitration law and practice, even if some questions remain as to the scope of the changes.

In respect of the developments in the DIFC, Dr Blanke considers that 'these developments fail to respect the intended role of Article 7 of the Judicial Authority Law as amended, which establishes an area of free movement of judgments, orders and ratified awards between the onshore Dubai and the offshore DIFC courts, requiring each to recognise the respective other's legal instruments without engaging in a review on the merits.'

The revisions to DIAC's arbitration rules will hopefully boost the success of the centre (which has suffered a decline in recent years), particularly as the institutional landscape in the region is competitive, with the DIFC-LCIA proving a significant draw.

Want to know more?

To read more about the DIFC decision in *Pearl Petroleum*, see News Analysis: A question of state immunity and service (Pearl Petroleum Company Ltd v The Kurdistan Regional Government of Iraq) and our Practice Note: State immunity and arbitration in the United Arab Emirates (UAE). The following News Analysis may also be of interest: Recent developments in UAE arbitration and Comparison of UAE and DIFC-seated arbitrations.

Our content on arbitration in Qatar was significantly revised in light of the new arbitration law—see Practice Notes: Arbitration in Qatar—an introduction, Challenging arbitral jurisdiction in Qatar, Interim remedies in support of arbitration in Qatar and Enforcement of arbitral awards in Qatar.

In respect of the DIFC-LCIA, we have published a new suite of Practice Notes on the centre this year—see: DIFC-LCIA arbitration—overview.

Arbitration in Australasia

What happened?

In **Australia**, Bronwyn Lincoln, partner, and Catherine O'Keefe, associate, at Corrs Chambers Westgarth comment:

'On the legislative front, Australia now has uniform Arbitration Acts based on the Model Law in all States and Territories for domestic commercial arbitration with the enactment by the Australian Capital Territory of the Commercial Arbitration Act 2017 (ACT). International commercial arbitration is regulated separately by the International Arbitration Act 1974 (Cth).'

As for key judgments of the Australian courts, Bronwyn Lincoln and Catherine O'Keefe draw attention to the decision in *Lahoud v Congo* (see: Arbitration annual round-up—investment treaty arbitration: reviewing 2017 and previewing 2018) as well as two noteworthy decisions on the use of subpoenas:

'In *Aurecon Australia Pty Ltd v BMD Constructions Pty Ltd* [2017] VSC 382, Justice Croft of the Supreme Court of Victoria addressed the question of whether an element of reasonableness needs to be considered before the court can issue a subpoena to give evidence before an arbitral Tribunal. His Honour held that the fact that there are serious consequences if a party fails to answer a subpoena meant that the court must independently satisfy itself that the issue of a subpoena is reasonable.

'More recently in *Re Samsung C & T Corporation* [2017] FCA 1169, Justice Gilmour of the Federal Court of Australia refused a request by Samsung C & T for a subpoena to obtain evidence in a Singapore seated arbitration finding, among other things, that the court only had jurisdiction to grant the request where the arbitration was seated in Australia.'

In **New Zealand**, Tim Stephens, barrister at Stout Street Chambers in Wellington, New Zealand, comments on the coming into force of the Arbitration Amendment Act 2016 on 1 March 2017, which introduced two significant changes to the Act, which is the principal legislation in New Zealand governing both domestic and international arbitrations:

'Firstly, the 1996 Act now expressly provides that the definition of 'arbitral tribunal' includes any emergency arbitrator appointed under either: the arbitration agreement that the parties have entered into, or the arbitration rules of any institution or organisation that the parties have adopted. This amendment follows the lead of Singapore and subsequently other leading arbitral jurisdictions in enacting domestic legislation that recognises the emerging role of emergency arbitrators to provide interim measures pending the constitution of tribunals, and clarifies that awards and orders made by emergency arbitrators have the same binding and enforceable status.

'Secondly, previously, where parties were unable to agree on the identity of their arbitrator (or arbitrators), the 1996 Act provided that the High Court of New Zealand would make the appointment. The 2016 Amendment Act transfers the appointment function to a body appointed by the Minister of Justice. The Arbitrators' and Mediators' Institute of New Zealand (AMINZ) has subsequently been chosen to perform the role. A party may nonetheless apply to the High Court to appoint an arbitrator if AMINZ were to fail to make an appointment within 30 days of receiving a request to do so, or if a dispute arises in respect of the appointment process.'

Mr Stephens also highlights that in May 2017 'AMINZ promulgated a set of arbitration rules for the first time, based on rules from other UNCITRAL Model Law jurisdictions. They include an Emergency Arbitration Protocol and a model arbitration clause for insertion in commercial agreements.'

As for case law developments in New Zealand, in September Mr Stephens commented:

'...the New Zealand Court of Appeal delivered its judgment in *Ngāti Hurungaterangi & Ors v Ngāti Wahiao* overturning the decision of the High Court and set aside an arbitral award on the grounds of the panel's failure to give reasons. The 1996 Act introduced a requirement for an award to state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given. This requirement reflects the same provisions in the UNCITRAL Model Law. A unanimous court described the panel's reasons as "essentially conclusory in nature and to the extent they purport to explain the result they are so inadequate and inconsistent that they fall short of discharging the panel's mandate to give a reasoned award". The court held that the nature and extent of the duty to give reasons varies with the subject matter of each arbitration. However, in the context of the arbitration at issue, the court ruled that the panel was required to formulate the issues by reference to: the parties' determination notices, discrete analyses of the competing positions, and a coherent explanation of the panel's determination of the issues.'

Further, there was news from Fiji this year as its new 'Model Law' International Arbitration Act 2017 was passed.

What are the key implications?

Arbitration in Australasia is having a moment in the sun, particularly given the IBA in 2017 and ICCA to come in 2018.

Want to know more?

Our Practice Notes on arbitration in New Zealand were updated in light of the legislation changes: Arbitration in New Zealand and Arbitration in New Zealand—recognition and enforcement of arbitral awards.

To learn more about developments in Fiji, see News Analysis: Fiji enacts new 'Model Law' International Arbitration Act 2017. You can read more about the decision in *Re Samsung C & T Corporation* here: Australian court dismisses document subpoena bid for Singapore arbitration (Samsung C&T Corporation).

See also Practice Notes on arbitration in Australia: Arbitration in Australia—International Arbitration Act 1974, Arbitration in Australia—recognition and enforcement of foreign awards, Challenging arbitral jurisdiction and anti-suit measures in Australia, Interim remedies in arbitrations relating to Australia and State immunity and arbitration in Australia.

Arbitration in Asia

What happened?

In **India**, the courts continued to demonstrate an arbitration-friendly approach. Moazzam Khan, co-head of the international dispute resolution practice at Nishith Desai in New Delhi, and Mohammad Kamran in his team, highlight a series of cases, each of which was the subject of a case analysis by members of his firm, which we published during the year:

'In a line of rulings, including:

- *IMAX Corporation v E-City Entertainment (I) Pvt. Ltd.* 2017 SCC OnLine SC 239 (not reported by LexisNexis® UK),
- *Katra Holdings v Corsair Investments LLC & Ors* Petition No 436 of 2016 (not reported by LexisNexis® UK), and
- *Government of West Bengal v Chatterjee Petrochem* AP No 1046 of 2016 and GA No 211 of 2017 (not reported by LexisNexis® UK)

the Supreme Court, along with leading High Courts of the country, has continued to ensure a more hands-off approach towards arbitration and specifically international commercial arbitrations seated outside India. The courts have conclusively held that the choice of institutional arbitral rules coupled with a choice of foreign seat, operated as exclusion of Part I of the Arbitration and Conciliation Act 1996, thereby ousting the jurisdiction of Indian courts to maintain and entertain a challenge to the foreign award. These rulings further boost the confidence of foreign parties to do business in India.'

What are the key implications?

For Moazzam Khan and Mohammad Kamran, these decisions are part of a 'surge of court rulings' which are 'excellent examples of the continued thrust towards a pro-arbitration environment in India.'

Want to know more?

See News Analysis: Indian Arbitration Act: is this the end of the applicability debate? (Government of West Bengal v Chatterjee Petrochem and Katra Holdings v Corsair Investments LLC & Ors) and Indian Supreme Court upholds choice of foreign seat by an arbitral institution (IMAX v E-City).

What happened?

In **Hong Kong**, Justin D'Agostino, global head of Herbert Smith Freehills' dispute resolution practice, and regional managing partner for Asia, draws attention to an amendment to the Arbitration Ordinance, which was passed at the same time as the amendment to legalise third-party funding in arbitration (see: Arbitration annual round-up—trends and hot topics: reviewing 2017 and previewing 2018). This second amendment confirms that intellectual property (IP) rights are arbitrable in Hong Kong.

Justin D'Agostino says:

'...Hong Kong passed additional amendments to the Arbitration Ordinance (Cap. 609) to clarify that disputes over intellectual property rights (including the validity of a patent) may be resolved by arbitration and that it is not contrary to Hong Kong public policy to enforce arbitral awards involving IPRs. The Ordinance did not previously include any specific provisions on arbitrability of IPR disputes, and there is no authoritative judgment in Hong Kong on the point. To put the matter beyond doubt, the amendments make clear that IPR disputes, whether they arise as the main issue, or are incidental to another dispute, are capable of settlement by arbitration, and that it is not contrary to the public policy of Hong Kong to enforce the ensuing award.'

What are the key implications?

For Justin D'Agostino: 'This is a positive development that was essential for Hong Kong to be able to achieve the government's stated aim of gaining an edge over other APAC jurisdictions as a venue for settling IPR disputes. Another welcome development in this arena was HKIAC's establishment of a dedicated panel of 30-plus arbitrators with IP expertise.'

Want to know more?

See: Hong Kong confirms arbitrability of IP rights disputes, LNB News 20/06/2017 129.

What happened?

In **Singapore**, the courts have continued to demonstrate their support for arbitration. Alongside the statutory reforms legalising third-party funding in arbitration (see: Arbitration annual round-up—trends and hot topics: reviewing 2017 and previewing 2018), the courts are already grappling with alternative costs arrangements. Shaun Lee, Singapore advocate and solicitor and a supervising associate in the dispute resolution practice of JWS Asia Law Corporation, the constituent Singapore law practice of Simmons & Simmons JWS Pte Ltd, draws attention to an unreported decision (HC/OS 1104/2016) to the effect that an English damages based agreement (DBA) was not contrary to Singapore public policy.

Shaun Lee says: 'an applicant (the respondent in a Singapore seated SIAC international arbitration) had unsuccessfully sought to set aside a cost award rendered in favour of the claimant, which had entered into an English law governed Damages Based Agreement with its English solicitors The dispute involved an underlying contract governed by English law. The applicant had sought to argue that the costs award was contrary to Singapore public policy against champerty and maintenance and therefore ought to be set aside. The Singapore High Court held that such a cost award was not contrary to the public policy of Singapore for purposes of setting aside the award pursuant to the Singapore International Arbitration Act. This judgment is not being appealed against.'

In *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32, the Singapore Court of Appeal confirmed that the Singapore courts will enforce a dispute resolution clause even if it gives only one party the option to arbitrate. The Court of Appeal dismissed an appeal against a High Court decision that court proceedings which the respondent had brought against the appellant should not be stayed, pursuant to section 6 of the International Arbitration Act (IAA), in favour of arbitration. Although the Court of Appeal agreed with the appellant that a clause in its contract with the respondent was a valid arbitration agreement notwithstanding that it gave only the latter a right to elect to arbitrate a dispute, it held that one of the requirements for a stay under IAA, s 6, as set out in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57, [2016] 1 LRC 147, was not met because the dispute did not fall within the scope of the arbitration agreement after the respondent had chosen to refer it to litigation.

What are the practical implications?

Alastair Henderson, managing partner, and Emmanuel Chua, senior associate, at Herbert Smith Freehills, analysed the decision in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* for us and commented:

'This decision confirms that the Singapore courts will enforce a properly drafted dispute resolution clause granting one party the sole option to arbitrate. This already represents the position in many major common law and civil law jurisdictions, and while this was assumed to also represent the position in Singapore, the Court of Appeal's express endorsement of the decision below provides a welcome measure of certainty. On the basis of the court's reasoning, it is likely that a similar clause granting one party the option to submit disputes to litigation over a default arbitration provision would similarly be upheld (although the Singapore courts have not made a definitive pronouncement on this issue).

'More broadly the decision, in particular the Court of Appeal's thorough analysis which led to its departure from the High Court's finding that the dispute fell within the ambit of the clause in question, also shows once again that the Singapore courts will not shy away from scrutinising the scope and content of the underlying dispute and the clause before it in order to arrive at a correct decision, whether or not this ultimately results in the dispute being referred to arbitration. This robust approach reaffirms Singapore's standing as a supervisory jurisdiction of choice and should bolster confidence in parties considering Singapore as a forum for arbitration.'

Want to know more?

For our coverage of the judgment, see News Analysis: Enforcing unilateral option clauses in Singapore (Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd).

See also our Practice Notes on unilateral option clauses: Unilateral option clauses—a practical approach and Unilateral option clauses—review of selected jurisdictions.

Arbitration in Europe

What happened?

In **France**, Simon Greenberg, partner in the international arbitration group at Clifford Chance, Paris highlighted:

'One particular legislative change at the end of 2016 led to considerable commentary and discussion in 2017. Entitled 'Justice in the 21st Century', a core feature of the new law was designed to encourage and increase recourse to alternative dispute resolution. One amendment relating to arbitration (but most likely limited to domestic arbitration) is a revision to Article 2061 of the French Civil Code. The revision to Article 2061 of the French Civil Code modifies and broadens the validity of arbitration clauses, putting the focus on the consent of the party against which an arbitration clause is enforced.'

In case developments, there were two notable decisions in the ongoing *Yukos* proceedings which are progressing internationally. Simon Greenberg noted: 'The French courts refused to enforce the *Yukos* arbitral awards (made against Russia) against the assets of Russian state-owned aerospace companies in France' (for a number of the *Yukos* decisions, see *Russian Federation v Yukos Universal Ltd*, Case No 15/11668, *Russian Federation v Veteran Petroleum Ltd*, Case No 15/11664 and *Russian Federation v Hulley Enterprises Ltd*, Case No 15/11666).

Simon Greenberg commented:

'The enforcement decisions in France were in a first instance Evry court (Tribunal de Grande Instance d'Evry, 10 February 2017, 16/04274) and in the Paris Court of Appeal (27 June 2017, no. 15/11668-15/11669). In the first of the two enforcement decisions in the ongoing *Yukos* proceedings, the Evry court analysed the companies' prerogatives under Russian law and found that the companies were legally, financially and organically independent and that any control exercised over them by Russia was insufficient to qualify them as 'state emanations' for award enforcement purposes. Incidentally, the case also confirmed the delocalised French position that the annulment of an arbitral award at the seat of arbitration (here, Amsterdam) is insufficient as a ground to refuse enforcement of the award in France. The analysis in the Paris Court of Appeal case was similar.'

The former majority shareholders of the Yukos Oil Co subsequently announced on 10 October 2017 that they had abandoned their efforts in France to enforce US$ 50bn in arbitral awards that were set aside in 2016.

Finally, in a challenge on the improper constitution of a tribunal in June 2017, the French Cour de Cassation rejected an appeal against a 2015 decision by the Paris Cour d'Appel not to set aside an International Chamber of Commerce (ICC) arbitration award. The award, made in July 2014, was in favour of a company in the French telecoms group, Orange, against the republic of Equatorial Guinea. The challenge had been brought on the grounds that the tribunal had been improperly constituted, the chairman having failed to make a disclosure about a previous arbitration involving the Orange parent company, in which he had been a member of the tribunal.

What are the key implications?

Simon Greenberg concludes that the revision to Article 2061 of the French Civil Code not only:

'modifies and broadens the validity of arbitration clauses, putting the focus on the consent of the party against which an arbitration clause is enforced, it also significantly broadens the arbitrability of civil non-commercial disputes (eg insurance contracts, sale contracts between individuals in non-business transactions, etc). The only limitation is where one of the parties is acting in a professional capacity and the other is not (eg in a business to consumer contract), in which case the arbitration clause is only enforceable against the professional. The non-professional party to an arbitration agreement with a professional can opt to either arbitrate or litigate in the courts.'

Following French enforcement decisions in *Yukos*, the former shareholders announced in October 2017 that they had decided to withdraw from the enforcement proceedings in France, stating that it doesn't make economic sense at the moment to try to enforce the awards. They stated their intention to focus their attention on having the awards reinstated by a Dutch appeals court.

The Cour de Cassation's judgment in June is a reminder of the need to carry out any investigations into disclosures affecting questions of an arbitrator's independence and impartiality as soon as such disclosures are made and however they might have been communicated. In an arbitration in which terms of reference (ToR) are drawn up, an express

acknowledgement in the ToR that the tribunal has been properly constituted may amount to a waiver of a party's right to challenge an arbitrator on the basis of facts which could have been ascertained as a result of a disclosure.

Want to know more?

For News Analyses, see:

- Yukos owners abandon French enforcement bid for US$ 50bn awards (Russia v Yukos)
- In brief: French Supreme Court rejects late challenge to arbitrator (Orange Middle East and Africa v Equatorial Guinea)

What happened?

Hendrik Puschmann, partner at Farrer & Co highlighted three particularly noteworthy rulings on arbitration issues in 2017 from the Supreme Court (the Bundesgerichtshof or BGH) in **Germany**, each marking 'a continuation of existing trends in terms of the courts' approach to arbitration claims':

- the BGH clarified the ambit within which parties can challenge the jurisdiction of arbitral tribunals in the German court. In its much-discussed 2013 decision in *Achmea v Slovakia* (case no. III ZB 37/12), the BGH stated that any applications for court decisions on the jurisdiction of arbitral tribunals become moot once that tribunal has issued a final award. From that point onward, it was held, the applicant no longer has any legitimate need for legal relief (*Rechtsschutzbedürfnis*). This stance was reversed by a 2016 judgment (case no. I ZB 1/15). The BGH fully overturned that decision in a ruling issued in May 2017 (but not published until late October) (Case no. I ZB 75/16)
- the BGH also widened the extent to which company law disputes are arbitrable. Following a controversial 1996 BGH ruling (case no. II ZR 124/95), such disputes were generally not arbitrable under German law. The BGH reversed its position in 2009 (case no. II ZR 255/08) in respect of private limited companies (*Gesellschaften mit beschränkter Haftung*, GmbH). In that case, the court held that a dispute concerning the formal validity of a members' resolution could be resolved by arbitration. In judgments handed down in two parallel proceedings in April 2017 (case nos I ZB 23/16 and I ZB 32/16) the court has now extended this principle to limited partnerships (*Kommanditgesellschaften*)
- finally, the BGH asserted that by submitting a dispute to the state courts, parties do not waive their right to arbitrate under future agreement. Case no. I ZB 45/15 concerned a partnership agreement containing an arbitration clause. A dispute concerning the resignation of one of the partners had been resolved through the courts. A similar dispute later arose, and the partnership commenced arbitration. The former partner went to court, alleging that the right to arbitration had been waived. In its decision dated 7 July 2016, published in early 2017, the BGH made clear that this was not the case

What are the key implications?

Hendrik Puschmann commented that the BGH's decision in *Achmea v Slovakia* that 'applications for a court decision on tribunal jurisdiction will not be rendered moot by either a partial tribunal award on jurisdiction or a full award on the merits increases the scope for (and risk of) tactical jurisdictional challenges in the German courts' and that 'the BGH has also widened the extent to which company law disputes are arbitrable, extending the principle that the formal validity of a members' resolution could be resolved by arbitration to limited partnerships.'

Hendrik Puschmann concluded:

'As Germany is a major Model Law jurisdiction, such judgments tend to inform the approach of other Model Law countries to the interpretation of their arbitration laws.'

Want to know more?

See News Analyses:

- Court of Justice's Advocate General: Intra-EU BIT award compatible with EU law (Slovak Republic v Achmea)
- AG Opinion—arbitration clause in intra-EU BIT does not infringe EU law (Slovak Republic v Achmea)

What happened?

A number of key legislative changes came into force in **Russia** in 2017. Andrey Panov at Norton Rose Fulbright (Central Europe) in Moscow noted that, 'Under the reform arbitration legislation which came into force on 1 September 2016, there were a number of important milestones in 2017.'

Andrey Panov noted: 'On 1 January 2017, the updated procedural legislation came into force. Since then, the courts of the first instance must render decisions on applications to set aside an award on jurisdiction or the final award as well as applications for enforcement of awards, within one month of the filing date (this was previously three months).' Since 1 February 2017, parties have been able to enter into arbitration agreements in relation to corporate disputes in Russian companies under the reform legislation.

There have been a number of interesting decisions on enforcement from the Russian courts. In October 2017, the Supreme Court of the Russian Federation upheld a decision refusing to recognise and enforce an SCC arbitration award issued in favour of Italian manufacturer, SPIG, against the indirectly state-owned Russian company Promkontroller (see SPIG SpA v ZAO PK Promkontroller, Case No A40-230545/16, Moscow Circuit Court, second level and SPIG SpA v ZAO PK Promkontroller, Supreme Court).

In other decisions on enforcement, the Moscow Commercial Court denied recognition and enforcement of arbitration awards rendered by the International Commercial Arbitration Court (ICAC) at the Ukrainian Chamber of Commerce and Industry (UCCI) (Cases no. A40-78411/17 and no. A40-4668/2017).

What are the practical implications?

Andrey Panov comments that following the updated procedural legislation which came into force on 1 January 2017, the implication has been 'that respondents must react to such applications much more quickly than before, and ideally to monitor any applications which may have been filed in the Russian courts in relation to their existing or completed arbitral proceedings. This is only relevant if the seat of arbitration is in Russia (for set-aside and enforcement) or if the enforcement might be sought in Russia.'

He notes further, that the reform legislation allows 'for arbitration of certain so-called "corporate disputes" (ie disputes in relation to shareholders' rights and corporate governance within a Russian-registered company), whereas previously the prevailing view was that such disputes were non-arbitrable (even though there were cases where the courts adopted an opposing view). The reform law states that all arbitration agreements in relation to corporate disputes concluded before 1 February are deemed unenforceable.'

In relation to the Russian court decisions, the *SPIG* decision marks the end of an award battle after two other unsuccessful challenges of the award in the Moscow state commercial courts. The decision reinstates the importance of the Russian courts' interpretation of public policy and its impact on the ability to enforce arbitration awards. Parties are reminded that Russian courts are prone to literal interpretations of commercial contracts and that deviations from the text of arbitration agreements are taken very seriously, which is why both the parties and the foreign arbitral tribunals need to be meticulously compliant.

The Moscow Commercial Court decisions also reinforce the position that the Russian courts may apply a wide interpretation of the concept of public policy when considering the recognition and enforcement of arbitration awards.

Want to know more?

See News Analyses:

- New rules for the ICAC at the Russian Chamber of Commerce
- Russian Supreme Court upholds refusal to enforce SCC award against Tecon Group Company (SPIG SpA v ZAO PK Promcontroller)
- Russian court refuses recognition and enforcement of two Ukrainian awards

- Applicability of dispute settlement procedures to the enforcement of arbitral awards in Russia

For more on Russian institutional developments, see: Arbitration annual round-up—institutional and ad-hoc: reviewing 2017 and previewing 2018.

What happened?

As for **Sweden**, Cecilia Relfsson, associate, Elin Norbe, associate, and Niklas Åstenius, partner, at Mannheimer Swartling Advokatbyrå in Malmo noted that 'arbitration decisions from the Swedish courts are generally scarce.' However, they commented that in a March 2017 decision 'the Svea Court of Appeal tried a challenge of an award based on the argument that the arbitrator (among other things) had failed to communicate to the parties that he considered to apply a certain law (not referred to by the parties) by analogy, and thereby committed a procedural error which likely affected the outcome of the arbitration' (*City Säkerhet i Stockholm v SafeTeam*, 9 March 2017 (Case No. T1968-16), and: 'The court confirmed that the principle of *jura novit curia*, described by the court as: "the arbitrators are not bound by the parties' legal arguments, but are free to decide which provisions of the law that apply based on the referenced legal facts" (translation), applies also in Swedish arbitration.'

What are the key implications?

Cecilia Relfsson, associate, Elin Norbe, associate, and Niklas Åstenius, partner, at Mannheimer Swartling Advokatbyrå in Malmo commented:

'It can be read from the judgment that a tribunal shall seek to avoid surprising the parties and that if the tribunal considers 'applying a legal provision that has not been referenced by either party, reasons may exist for the arbitrator to bring this to the parties' attention within the framework of procedural guidance, so as to avoid surprises' (translation). In this case, the court concluded that the application of the law was not surprising and rejected the challenge. Worth noting is that this case relates to a Swedish domestic arbitration and not to an international arbitration in Sweden. The latter remains to be tried by Swedish courts.

Want to know more?

See News Analysis: Svea Court of Appeal upholds award made on law not referenced by parties (City Säkerhet v SafeTeam).

For more on Swedish institutional developments, see: Arbitration annual round-up—institutional and ad-hoc: reviewing 2017 and previewing 2018.

What happened?

In **Switzerland**, in further *Yukos* proceedings, the Swiss Supreme Court heard a challenge by the Russian Federation of a Swiss-seated arbitral tribunal's interim award on jurisdiction, which had been handed down in January 2017 (Federation of Russia v Yukos Capital Sarl, 4A_98/2017, 20 July 2017, Swiss Federal Court (in French)). The Swiss Court rejected the challenge to the award on jurisdiction made by a tribunal sitting in Geneva, constituted under the Energy Charter Treaty (ECT).

Dr Charles Poncet, independent Swiss lawyer and arbitrator also considered the following cases to be of particular interest:

- on 2 March 2017, the court had to deal with an interesting 'formality' when an arbitrator extended the deadline for a brief by one day after the Claimant failed to abide by the original deadline. A challenge was made because the Swiss Rules, applicable to the case, state that in such a case the arbitral tribunal 'shall' terminate the proceedings. The challenge failed because the court rightly refused to see a mandatory rule in this provision (which could, however, still raise a problem at the enforcement stage if any) (*See Decision 4A_405/2016*)
- on 16 June 2017, the court dealt with a case (docket number 4A_532/2016) involving the consequences of a Palestinian law from 2002 declaring gambling illegal on a casino in the West Bank that opened in 1998 but closed in 2002 during the second intifada. The award was annulled in part on due process grounds, but the court (regrettably) reiterated its interpretation of the (substantive) public policy rule of *pacta sunt servanda* (ie agreements must be kept). An international arbitrator sitting in Switzerland will breach it only

by upholding a contractual provision and refusing to enforce it or, conversely, by enforcing a contractual obligation the existence of which was denied by the arbitrator. This extremely narrow interpretation of the rule has been sternly criticised (see, for example, Andreas Bucher: Que devient le droit (civil) international au Tribunal fédéral? Jusletter 8 mai 2017 pp. 13-16)

What are the practical implications?

The decision of the Supreme Court in *Yukos* clarifies an issue which in practice probably happens fairly often, although this is the first time it has been properly considered before the court: what happens when a tribunal examines only some, but not all, of the jurisdictional objections that a party raises, and renders an award only on those objections, reserving its final decision on its jurisdiction for a subsequent award? The Swiss Supreme Court has clarified that you do not have the obligation to attack that preliminary award right away.

In decision 4A_532/2016, the Swiss court reiterated its interpretation of the substantive, public policy rule that agreements must be kept. Dr Charles Poncet considers this a narrow interpretation of the rule, so an arbitrator is unlikely to fall foul of it.

Want to know more?

See News Analysis: Multiple challenges of awards on jurisdiction (Russia v Yukos).

We have the following content which provides key practical guidance on the Swiss Rules of International Arbitration:

- Swiss Rules—overview

Arbitration in Africa

What happened?

As for developments in **South Africa** this year, Duncan Bagshaw, barrister and a member of the international arbitration and Africa groups at Stephenson Harwood LLP, comments:

'South Africa has been looking forward for years to a new arbitration law to replace the current Arbitration Act of 1965, to bring South African arbitration law into line with modern international standards. The arbitration bill, which will apply to international arbitrations and which follows the UNCITRAL Model Law, was approved by the South African cabinet on 1 March 2017. On 25 October 2017 the bill was passed by the lower house of Parliament. It only remains for the upper House to pass the bill and for the President to sign it into law. All being well, this should happen in 2018 and usher in a new and long-awaited era in South African arbitration.'

Regarding the **OHADA** region, Duncan Bagshaw highlights:

'...another instalment in the famous *Getma* saga (*Getma Int'l v Republic of Guinea* (2017 WL 2883755 (D.C. Cir. July 7, 2017)) took place when the US Court of Appeals for the District of Columbia affirmed the District Court's refusal to grant recognition and enforcement under the New York Convention of the award rendered by an arbitral tribunal under the OHADA arbitration regime. The award had been set aside by the *Cour Commune de Justice et Arbitrage* on the grounds that the Arbitrators had agreed with the parties to be paid fees in excess of the permitted scales under the OHADA arbitration rules. The DC Court of Appeals dismissed all the arguments raised by the award creditor and remarked that 'there is scant evidence of taint in the CCJA proceedings'. While some negative perceptions of the CCJA may linger, the case has at least left no doubt as to the importance of careful compliance with the institutions' rules.'

In respect of institutional arbitration in Africa, Mr Bagshaw offers the view that:

'The rapid expansion of the facilities on offer in arbitral institutions in Africa has continued. In Mauritius, the MARC arbitration centre announced a significant restructuring, with the appointment of a new MARC Court to deal with arbitrator appointments, with renowned Hong Kong-based arbitrator Neil Kaplan QC as its president. The institution has also appointed an international advisory board to provide the institution with guidance on best practices, development and projects.

'Further steps were taken in the project started in 2015 by the Arbitration Foundation of South Africa and the Shanghai International Arbitration Centre to create a China-Africa Joint Arbitration Centre. In 2017 a further cooperation agreement was signed between the Beijing Arbitration Commission and the Nairobi Centre for International Arbitration. This will allow disputes resolved under the CAJAC rules to be heard in Nairobi or Beijing, and should expand the pool of arbitrators available to be appointed by the institutions in appropriate cases.'

As for statistics reflecting African interests, Mr Bagshaw highlights the following:

'ICSID announced its latest statistics regarding cases with an African element. As at May 2017, 22% of ICSID's cases involved an African state, with 21 of those cases being brought by a party based in an African state. The cases arose out of a wide variety of sectors, the largest being oil, gas and mining, which accounted for 33% of cases. Only a very small proportion (4%) of arbitrators in ICSID cases were of African origin.

'The LCIA also announced statistics. Of LCIA arbitrations commenced in 2016, 7.9% of parties were African—a small but significant increase from 6.4% in 2015. Of 496 appointments of arbitrators, nine (2%) were Africa.

'At the ICC, which held its second African Arbitration Conference in May 2017, the number of African arbitrators appointed continued to increase: statistics announced in 2017 showed that 31 African arbitrators had been appointed in the latest year for which statistics were announced, although most of these arbitrators were either South African or Egyptian.'

Notably, the Mauritius Convention also came into force this year and has shone a spotlight on African arbitration—see: Arbitration annual round-up—trends and hot topics: reviewing 2017 and previewing 2018.

What are the key implications?

'While the number of African parties to arbitration has grown, the desirability and difficulty of increasing the participation of African lawyers in international arbitration has been a recurring theme of conferences and initiatives in recent years', said Duncan Bagshaw. 'Despite some encouraging signs, the difficulty of increasing the number of appointments of African arbitrators has continued. The importance of gender diversity in arbitration in Africa has also been well-recognised this year. African launches of the Equal Representation in Arbitration Pledge were held in both Johannesburg and Lagos in the last year', he continued.

Want to know more?

Customers may be interested in the following material:

- News Analysis: The International Arbitration Bill: South Africa as a preferred arbitration venue? and International Arbitration Bill passes through South African National Assembly, LNB News 26/10/2017 106
- News Analysis: Arbitration trends in Africa
- Getma loses US appeal in OHADA award enforcement battle, LNB News 24/07/2017 134
- More than a fifth of all current ICSID cases involve an African state party, LNB News 10/07/2017 113
- News Analysis: Novel investment support program may help with asymmetry

Other developments of interest

You may also be interested in:

- Mid-year review 2017—arbitration developments in Brazil
- Mid-year review 2017—arbitration developments in China
- Mid-year review 2017—arbitration developments in England and Wales
- Mid-year review 2017—arbitration developments in Hong Kong
- Mid-year review 2017—arbitration developments in India

Previewing 2018

Arbitration in the Americas

What's on the horizon?

As Steven Finizio of WilmerHale comments: 'it is not yet clear whether the US Supreme Court will address any significant issues relating to international arbitration in the first part of 2018'.

One case that may be heard by the US Supreme Court in 2018 is *CBF Indústria De Gusa v AMCI Holdings*. In that case, the **US** Second Circuit Court of Appeals ruled in January 2017 that a district judge had erred when he held that CBF and the other Brazilian companies that brought the suit needed to first have an ICC award confirmed and turned into a court

judgment before they could seek to enforce the award. The Supreme Court has not yet determined whether it will hear the petition.

Steven Finizio also notes: 'One issue that the court is expected to address is the standard for waiver of class or collective arbitrations, which has resulted in conflicting decisions by a number of US Courts of Appeal as to whether employers can enforce such waivers. Because the issue before the Court relates to agreements subject to US labour law, it is therefore not clear whether the decision will provide any clarification with regard to clauses purporting to waive class arbitration in other contexts.'

The court-approved settlement regarding an investment treaty arbitration award in the proceedings between Crystallex and Venezuela is likely to halt proceedings regarding the award's enforcement before the US courts. Noting that the case involved the standard of review for an arbitral award in an investment dispute, Steven Finizio summarises the position: 'Venezuela had appealed an April 2016 decision by the US District Court in Washington, DC, which had rejected, among other things, Venezuela's argument that the court should apply a de novo standard of review, and instead applied a deferential standard of review, to a $1.2 billion award issued under the ICSID Additional Facilities Rules. The case has reportedly recently settled.'

Next year will also see the continuation and potentially the conclusion of NAFTA renegotiations and potentially movement on TTIP.

As for **Canada**, Janet Walker reflects that, 'following Ontario's lead, other provinces are also considering the implementation of the 2006 Model Law. The adoption of the 2006 UNCITRAL Model Law was, in part, a response to a major study undertaken by a working group of the Uniform Law Conference of Canada, which also undertook a study of potential reforms to the domestic arbitration statutes. Working groups of various professional associations and provincial law reform bodies are reviewing the options for reform in this area.' While such developments may not fall into 2018, they are worth bearing in mind.

In **Argentina**, in November 2017, the upper house of Argentina's parliament passed a bill adopting the UNCITRAL Model Law as part of a major overhaul of its arbitration legislation ahead of the IBA Arbitration Day in Buenos Aires next year.

In **Brazil**, Jean-Paul Dechamps and Leonie Beyrle comment:

'The use of arbitration—both domestic and international—in Brazil has increased significantly over the past two decades. We would expect this trend to continue in 2018, with a special focus on energy arbitrations. Brazil's energy sector has grown considerably in recent years (especially in relation to natural gas) and the STJ decision in the Petrobras case discussed above provides a degree of legal certainty for parties contracting with public entities.

'2018 is also likely to see further developments in corruption-related arbitrations. For example, a number of Petrobras shareholders have brought domestic arbitration proceedings against the company to recoup losses they suffered as a result of the *Lava Jato* corruption scandal. It was also reported in August 2017 that two subsidiaries of Brazilian construction giant Odebrecht sent a notice of dispute to Peru, alleging that certain measures—including a contract cancellation—that the country took in the context of the *Lava Jato* investigation breach international law protections in applicable bilateral investment treaties.

'Other arbitrations-to-watch in 2018 include the arbitration between Heineken and a consortium of Brazilian Coca Cola distributors over the termination of a distribution contract, which is set to commence in February, and the dispute between ATS Brasil, which wants to establish a new stock exchange in Brazil, and B3, an existing stock exchange and depository. ATS is arguing that B3 is rendering its project economically unviable by demanding excessive prices for access to its infrastructure, in breach of the conditions imposed by Brazil's competition authority CADE when it approved the merger which resulted in the creation of B3. These conditions are set out in a so-called Concentrations Control Agreement (*Acordo em Controle de Concentrações*) which provides any party seeking access to B3's services with recourse to arbitration under the rules of the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC) if negotiations about prices and access terms are not successfully completed within a certain timeframe.

'Finally, Brazil still has not ratified any of the bilateral investment treaties it has entered into, but it recently developed an alternative agreement in the form of the so-called Cooperation and Facilitation Investment Agreement (CFIA). Although the model CFIA provides some of the traditional BIT protections, these cannot be enforced via investor-state arbitration. Instead, the agreement envisions a multi-stage dispute resolution process, which focuses on dispute prevention and bilateral governance, and may be escalated to state-to-state arbitration. Since 2015, Brazil has signed CFIAs with seven countries (Mozambique, Angola, Malawi, Mexico, Colombia, Chile and Peru). On 7 April 2017, it concluded with its Mercosur partners (Argentina, Paraguay and Uruguay) a Protocol on Investment Cooperation and Facilitation, which contains similar provisions to those found in the model CFIA.'

What are likely to be the key implications?

We may see new arbitration legislation in Argentina, key judgments from the US Supreme Court and the conclusion of the NAFTA renegotiations, all of which may have significant implications for the practice of arbitration in the Americas, the precise scope of which is yet to be determined.

Where can you find out more?

As for the pending cert petition, see News Analysis: Enforcement efforts stayed for US Supreme Court decision (CBF Indústria De Gusa v AMCI Holdings). We will keep you updated of any developments.

You can also read about the *Crystallex* settlement here: Venezuela settles with Crystallex (Crystallex v Venezuela).

Arbitration in the Middle East

What's on the horizon?

Dr Blanke comments: 'one important arbitration development on the horizon for 2018 is the adoption of the **UAE** Federal Arbitration Law, which is to replace (and essentially repeal) the arbitration-relevant provisions of the UAE Civil Procedures Code (also referred to as the UAE Arbitration Chapter) presently in force. The UAE Federal Arbitration Law is likely to be based on the UNCITRAL Model Law and as such embody best international procedural practice and standards.'

In addition, DIAC's revised arbitration rules are expected to come into force in early 2018.

What are likely to be the key implications?

Dr Blanke comments: 'the new law will therefore give reassurance to international investors that the UAE will have in place mature arbitration legislation that will provide a sophisticated procedural framework for the conduct of UAE-seated arbitrations. That said, it is unlikely that the existing UAE case law precedent which bears on matters of arbitration will lose its practical relevance under the new law: in its majority, old case law precedent will retain relevance to the interpretation of the new law to the extent that it does not contradict the provisions of the new law and/or the new law does not specifically deal with the subject matter of that case law precedent.'

Where can you find out more?

Keep an eye on our news for the latest developments.

What's on the horizon?

Dr Blanke further comments that 'apart from the anticipated adoption of the UAE Federal Arbitration Law, the ADGM-ICC will enter into operation with effect from January 2018. The ADGM-ICC, which is located in the Abu Dhabi Global Market (ADGM), is the ICC's first free-zone representative office and will enter into direct competition with the DIFC-LCIA, the DIFC-based sister organisation of the London Court of International Arbitration.'

What are likely to be the key implications?

Dr Blanke considers that 'the addition of the ADGM-ICC to the UAE arbitration landscape will further enhance the UAE's free-zone arbitration offering and increase the arbitration user's institutional choice in particular for ADGM-seated arbitrations.'

Where can you find out more?

Keep an eye on our news for the latest developments.

Arbitration in Australasia

What's on the horizon?

In **Australia**, Bronwyn Lincoln and Catherine O'Keefe comment:

‘There are no foreshadowed legislative amendments proposed for 2018 in either the States and Territories or nationally in relation to commercial arbitration; however, each of the courts in those jurisdictions is expected to continue its strong support for arbitration, including through robust decisions on the enforcement of arbitration agreements and the recognition and enforcement of foreign arbitral awards.

‘Australia, and its arbitration community, is looking forward with great anticipation to welcoming delegates to ICCA 2018 in Sydney in April 2018, which will provide an opportunity to showcase the Australian Centre for International Commercial Arbitration and State arbitration centres, including the Australian Disputes Centre and the Melbourne Commercial Arbitration and Mediation Centre.’

In **New Zealand**, Tim Stephens comments on developments for 2018:

‘In April 2017, a private member’s bill (Arbitration Amendment Bill 2017) containing further amendments to the Arbitration Act 1996 was drawn from the ballot. It gained near universal support of the New Zealand Parliament on its first reading and was referred to Select Committee. Following the New Zealand general election in September 2017, the bill has a new sponsor but is otherwise due to be reported back in May 2018.

‘The bill introduces amendments to the Arbitration Act 1996 designed to remedy discrete deficiencies in the current regime: arbitration clauses in trust deeds are validated; the current position on confidentiality of related court proceedings is reversed, so as to introduce a rebuttable presumption of privacy; and the position in relation to jurisdictional challenges is clarified following the New Zealand Supreme Court decision in *Carr v Gallaway Cook Allan* [2014] NZSC 75, [2014] 1 NZLR 792 and the Singapore Court of Appeal decision in *PT First Media TBK (Lippo) v Astro* [2013] SGCA 57.

‘In terms of the last point, parties are now required to raise jurisdictional challenges before the arbitrator at a time they can be dealt with, rather after the completion of the arbitration proceedings. These changes are expected to become law at some stage later in 2018.’

Where can you find out more?

Keep an eye on our current awareness feed for the latest developments.

Arbitration in Asia

What’s on the horizon?

India will be a seat to watch in 2018. Moazzam Khan and Mohammad Kamran report:

‘A high-powered committee was established under the directions of the Indian Prime Minister Narendra Modi to prepare a road map to turn India into an international hub of arbitration. In its report published in 2017, Justice B N Srikrishna’s committee has recommended some holistic changes and reforms such as:

- establishment of Arbitration Promotion Council of India (APCI)—which will work on inter alia, recognizing professional institutes for accreditation of arbitrators, holding training workshops to train advocates with a goal to create a specialist arbitration bar etc
- setting up a dedicated bar for arbitration and creating special arbitration benches for commercial dispute in courts
- promotion of institutionalization of arbitration mechanism
- amendment to Section 48 of the Arbitration and Conciliation Act 1996, to put a timeline of one year on the enforcement of a foreign award—this change is surely the priority. As it stands, getting an award is only half the battle: enforcement proceedings take years to complete, rendering an award holder completely remediless in the interim. With this change it is hoped that award holders will be able to realise the fruits of arbitration significantly more quickly.

‘We also expect to see recommendations of the B N Srikrishna Committee Report to be implemented by the government in 2018. This may either be done through legislative measures or certain non-legislative measures to promote the practice of arbitration in India.

‘It is a little-known fact that since 2012, there have hardly been any cases where enforcement of a foreign award was refused in India. However, the main grievance of the parties seeking to enforce a foreign award in India continues to be the time taken in courts to finally realise their monies (which currently averages two years). This is one of the reasons why the proposed amendment in Section 48 is a particularly important change to watch out for.’

What are likely to be the key implications?

The reforms in India are already translating into increased interest and confidence in institutional arbitration. The new Mumbai Centre for International Arbitration (MCIA) is at the forefront and can be expected to feature in headlines in 2018.

Where can you find out more?

Our new Practice Note on the MCIA was published in 2017: Arbitrating under the MCIA Rules.

Arbitration in Europe

What's on the horizon?

In **France**, Simon Greenberg, partner in the international arbitration group at Clifford Chance's Paris office highlighted that:

'the French Supreme Court (*Cour de Cassation*) recently confirmed that an appeal (*pourvoi*) has been lodged against the Paris Court of Appeal decision of 28 February 2017, no. 15/06036 relating to the use of adverse inferences in international arbitration. The final decision is expected at the end of 2018.'

He also noted there may be legislative developments in France: 'The French Ministry of Justice has opened a public consultation (from 15 November to 11 December 2017) for five different reforms, one of which is intended to further simplify the rules of Civil Procedure.' although he concluded: 'We are not yet in a position to say whether, or to what extent, this will have an impact on the rules concerning arbitration.'

Paris may stand to benefit as an arbitral seat as a result of Brexit.

What are likely to be the practical implications?

'The outcome of the *Cour de Cassation* appeal will be interesting' said Simon Greenberg. 'The underlying Paris Court of Appeal decision rejected an application to set aside an arbitral award where the arbitral tribunal had drawn adverse inference from a party's failure to produce documents that it had been ordered to produce. The Court of Appeal ruled that there was no breach of due process, one reason being that the parties had accepted the application of the IBA Guidelines on the Taking of Evidence in International Arbitration, including Article 9.5 which allows for adverse inferences. Importantly, the Court of Appeal noted that the parties had the opportunity to comment on the arbitral tribunal's document production order, meaning that their due process rights were preserved. The fact that a party had failed to object to the order made no difference.'

Simon Greenberg predicted a positive knock-on effect of Brexit for international arbitration in Paris, 'We expect to see in 2018 international arbitrations seated in Paris that may have previously been destined for London, but where the contracting parties have sought to avoid any possible uncertainties from Brexit (perceived or actual). Since the Brexit vote in mid-2016, Paris arbitration practitioners have increasingly been receiving enquiries about the differences between London and Paris as a seat, as some contracting parties look for alternatives to London. Since the bulk of international commercial arbitrations are commenced around 12 to 24 months after the relevant contract was made, the initial effects of Brexit-motivated shifts from London to Paris for the seat of arbitration are likely to be seen in 2018.'

Where can you find out more?

Keep an eye on our news for the latest developments.

For practical guidance on arbitration in France more generally, see:

- Challenging arbitral jurisdiction and anti-suit injunctions in France
- Interim remedies granted by French courts in support of arbitration
- Enforcing arbitral awards in France
- State immunity and arbitration in France

For a discussion of some of the issues in the debate about Paris's prospects as an arbitral seat post-Brexit, see blog post: Can Paris be the new London?

What's on the horizon?

In **Germany**, Hendrik Puschmann, partner at Farrer & Co commented that another expected case development is 'the final judgment in the *Pechstein* sports arbitration saga':

'Claudia Pechstein, an Olympic gold medallist speed skater, was banned by the International Skating Union (ISU) for doping. A CAS arbitral tribunal upheld the ban. However, Ms Pechstein obtained a German court judgment declaring her CAS arbitration agreement with the ISU void based on competition law. It found that the ISU had abused its dominant bargaining position to force Ms Pechstein to consent to CAS arbitration. However, the BGH subsequently reversed this ruling. Ms Pechstein then appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*), Germany's highest court, alleging the BGH's decision is unconstitutional.'

Germany is seeking to market itself more actively as a centre for international arbitration and litigation.

What are likely to be the practical implications?

Hendrik Puschmann notes that a ruling in the *Pechstein* case 'is expected in the early part of 2018'.

On Brexit, he comments that German 'practitioners and politicians can also be expected to be calling for Germany (and particularly Frankfurt) to market itself more actively as a centre for international arbitration and litigation in order to benefit from the expected Brexit fallout. For example, a long-running initiative to set up commercial courts that hear cases (including on arbitration matters) in English looks likely to gain some political traction. However, it is not likely that such courts will be set up in the immediate future. Germany clearly lacks behind other continental European jurisdictions in this respect: France and Belgium, in particular, are already in the process of setting up English-language commercial courts.'

Where can you find out more?

See: Status of CAS upheld by German court in Pechstein case, LNB News 09/06/2016 157

Keep an eye on our news for the latest developments. For practical guidance on arbitration in Germany more generally, see:

- Challenging the tribunal's jurisdiction and anti-suit injunctions in Germany
- Interim measures in support of arbitration in Germany
- Enforcing arbitral awards in Germany
- State immunity and arbitration in Germany

What's on the horizon?

Andrey Panov, senior associate at Norton Rose Fulbright (Central Europe) in Moscow notes that a number of arbitration-related cases in **Russia** in 2017 dealt with the arbitrability of certain disputes. He predicts that 'in 2018, the Constitutional Court (on reference from the Supreme Court) will consider a question of whether the use of public funds in financing an agreement renders disputes non-arbitrable.' and that 'it is also likely that in 2018 the first corporate disputes will be arbitrated under the reform law (and potentially the related cases before Russian state courts).'

What are likely to be the practical implications?

'The decision on the arbitrability of certain disputes is potentially a very important question for the future of arbitration in Russia, given the proportion of state and state-owned companies in the structure of Russian economy' says Andrey Panov. Further: 'The provisions on corporate disputes under the reform law raise many questions which remain unanswered in the current legislation. The practice of the courts in this area is therefore going to be of particular importance.'

Where can you find out more?

Keep an eye on our news for the latest developments.

For practical guidance on arbitration in Russia more generally, see:

- Interim measures in support of arbitration—Russia
- Challenging jurisdiction and anti-suit provisions in Russia
- Enforcing arbitral awards in Russia
- State immunity and arbitration in Russia

What's on the horizon?

Cecilia Relfsson, associate, Elin Norbe, associate, and Niklas Åstenius, partner, at Mannheimer Swartling Advokatbyrå in Malmo suggest that 'looking into the near future, there are a few known changes that are currently awaited in **Sweden**.' One such change is 'a review of the Swedish Arbitration Act presented in 2015 suggesting several changes of the Act. The review specifically addresses certain issues identified by stake holders in the arbitration community and also seeks to make Swedish arbitration even more attractive both in Sweden and internationally.'

What are likely to be the key implications?

Cecilia Relfsson, Elin Norbe and Niklas Åstenius note that the proposed changes to the Swedish Arbitration Act, include:

- how applicable substantive law is decided by the tribunal
- the use of English language in Swedish court in setting aside proceedings
- grounds for setting aside and/or invalidity of an award as well as the forum for such decisions

No formal proposition of changes has yet been presented, but the question has been raised again on a political level.

Where can you find out more?

Keep an eye on our news for the latest developments.

For practical guidance on arbitration in Sweden more generally, see:

- Challenging the tribunal's jurisdiction under Swedish law
- Enforcing arbitral awards in Sweden
- State immunity and arbitration in Sweden

What's on the horizon?

Dr Charles Poncet, independent Swiss lawyer and arbitrator refers to the ongoing process of legislative reform in **Switzerland**: 'in recent years there has been a significant development in the (more or less energetic) efforts to revisit the Swiss International Arbitration Law (more precisely articles 176 to 194 of the Private International Law Act 'PILA' of 18 December 1987). PILA is now an old piece of law and the arcane ways of Swiss legislative procedure are such that a bill introduced by Christian Lüscher (a Geneva lawyer, Swiss MP and CMS von EP partner) in 2008 to adopt negative Kompetenz-Kompetenz in Switzerland along French lines, gave birth in 2012 to the idea that articles 176 to 194 PILA needed 'touching up'.

What are likely to be the practical implications?

Dr Poncet concludes that: 'political analysts with even a moderate dose of acumen will recognise the [Swiss] approach for what it is: being seen to do something without actually doing anything even remotely controversial. The draft bill and the accompanying report (both in French) have been circulated and obtained mixed reviews.'

He continues: 'the Swiss Government is supposed to introduce the final bill in Parliament "soon". However, the attempt is largely doomed for a number of reasons. Firstly, the bill, which is an honest attempt at bringing some improvements at

least, is self-defeating: it is insufficient for those who think the law should be overhauled, and annoying to partisans of the 'if it ain't broke, don't fix it' school of thought. Furthermore, the bill is likely to upset both the (few) MPs who think international arbitration is a good thing and the (increasing) number of politicians who regard it as "justice for the rich", particularly when it comes to investment arbitration. There may well be some developments in 2018, but it is unlikely to become law just yet.'

Where can you find out more?

Revision of Swiss international arbitration law welcomed by Swiss arbitrators LNB News 12/05/2017 38

Keep an eye on our news for the latest developments. For practical guidance on arbitration in Switzerland more generally, see:

- Swiss Rules—overview

Arbitration in Africa

What's on the horizon?

Duncan Bagshaw discusses some of the developments we may see in 2018:

'Funke Adekoya SAN, of Aelex, Nigeria, has been appointed as a Vice President of the International Council for Commercial Arbitration (ICCA). Her appointment is part of a significant programme of work which has flowed from the ICCA Congress held in Mauritius in 2016, the first to take place in Africa. This work includes the establishment of an ICCA Working Group on African Arbitral Practice, which will focus on issues of particular relevance to the continent. A launch of the Working Group, on a dedicated online platform, is planned for 2018.

'As described above, it now seems likely that South Africa will adopt its new legislation on international arbitration in 2018.

'Work has continued in 2017 on the project to establish a dispute resolution service for the IGAD region, based in Djibouti and supported by the Djibouti Chamber of Commerce. Benoit Lebars, of Lazareff Lebars in Paris, and Baiju Vasani of Jones Day in London co-chair a working group which is expected to make announcements on the new institution in 2018.

'A number of major cases concerning African parties have made progress without reaching any definite resolution in 2017, but are likely to see results in 2018. The United Republic of Tanzania sought annulment of the award issued in 2016 by an ICSID tribunal, ordering Tanzania's state electricity company to pay US$ 148m to Standard Chartered (HK). The annulment proceedings are ongoing. This matter is now one of four pending ICSID cases against Tanzania and its state electricity company, Tanesco.

'2017 has been a busy year for African respondents in ICSID cases, with new proceedings commenced against The Gambia, Tanzania, Egypt, Madagascar, Mozambique, Algeria and Cameroon, and it will be interesting to see if this trend continues into 2018. Two other arbitration claims were also commenced against Tanzania in 2017, by mining companies AngloGold Ashanti and Acacia Mining, arising out of Tanzania's adoption of new legislation which allows the government, amongst other things, to renegotiate or cancel mining contracts which the government considers to be 'unconscionable'. However, Tanzania has shown signs of willingness to resolve the disputes amicably almost immediately.'

What are likely to be the key implications?

As Matt Harley of Allen & Overy commented in a recent interview for LexisNexis, 'the most important factor in the establishment of viable African seats (at least for international parties) is arguably closing the gap between the international community's perception of Africa and reality. There are already several jurisdictions in Africa which have strong credentials as safe and efficient arbitral seats. The rise of Singapore as a leading global arbitral seat shows that perceptions can change, and that African-based arbitration of Africa-related disputes could become the norm rather than the exception.'

Where can you find out more?

We will bring you more news of arbitration-related developments in Africa in our news.

LexisNexis

Brexit

As the UK prepares to withdraw from the EU in March 2019, Brexit will continue to be a topic of interest for all legal practitioners. The full legal and practical impact of Brexit remains to be established but the future shape of the EU and UK domestic legal landscape should gradually become clearer during 2018, as the Brexit negotiations, the passage of the European Union (Withdrawal) Bill and further legislative preparation for Brexit continues. Meanwhile, the UK will remain an EU Member State fully subject to EU law. We are reviewing our content on the basis of information available and will keep it under regular review throughout the withdrawal period. In the meantime, for further reading on this subject, see: Brexit round-up: reviewing 2017 and previewing 2018.

Did you know?

In 2017 our customers were most interested in the following documents:

- Practice Note: The New York Convention—the recognition and enforcement of arbitral awards—an introduction
- Practice Note: Stay of proceedings in favour of arbitration in Singapore
- Practice Note: Enforcing arbitral awards in New York

LexisAsk Q&As have increased by over 43% in 2017.

Looking at LexisNexis®

In 2017, LexisNexis® expanded its practical guidance portfolio with the launch of seven new practice areas:

- Energy annual round-up: reviewing 2017 and previewing 2018
- Information Law annual round-up: reviewing 2017 and previewing 2018
- Insurance & Reinsurance annual round-up: reviewing 2017 and previewing 2018
- Life Sciences annual round-up: reviewing 2017 and previewing 2018
- Property Disputes annual round-up: reviewing 2017 and previewing 2018
- Risk & Compliance annual round-up: reviewing 2017 and previewing 2018
- TMT annual round-up: reviewing 2017 and previewing 2018

You may be interested in end-of-year reviews produced by Arbitration, covering England and Wales, Arbitration annual round-up—institutional and ad-hoc: reviewing 2017 and previewing 2018, investment treaty arbitration and trends and hot topics.

Contact us

Please feel free to contact the Arbitration team with your comments or queries via LexisAsk.