

International Arbitration

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I. Introduction

This article surveys developments in international arbitration during 2014. The first two sections survey significant U.S. court actions relevant to international commercial arbitration, with the first section covering developments in arbitration law such as arbitrability, and the second section focusing on significant decisions on recognition and enforcement of awards. The third section examines developments in investment treaty arbitration. Finally, the fourth section reviews significant arbitration decisions from foreign courts.

II. Arbitration Developments in U.S. Courts

A. DECISIONS ON THE ARBITRATOR'S ROLE IN DETERMINING ARBITRABILITY

1. *Decisions on Gateway Questions of Arbitrability*

In *BG Group PLC v. Republic of Argentina*,¹ a case involving the enforcement of an investment treaty arbitration award, the U.S. Supreme Court considered whether the arbitral panel's decision not to require compliance with the treaty's pre-arbitration local litigation requirement should be reviewed *de novo*, or with deference.² An investment treaty between the United Kingdom and Argentina contained a clause requiring parties to attempt to litigate their dispute in local courts prior to commencing arbitration proceedings. This precondition was not met, and Argentina argued BG Group's claims should be dismissed.³ The panel held that Argentina's passage of laws that allegedly hindered BG

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1. *BG Grp. PLC v. Republic of Arg.*, 134 S. Ct. 1198 (2014).

2. *Id.* at 1203–04.

3. *Id.* at 1204.

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Group's recourse to the Argentinian judiciary amounted to a waiver of Argentina's right to object to BG Group's failure to comply with the local litigation requirement.⁴ Argentina sought to vacate the eventual award, in part because of BG Group's non-compliance with the local litigation precondition.

The U.S. Supreme Court upheld the validity of the arbitral award. The Court first examined the issue under regular contract principles,⁵ which presume, unless otherwise specified, that the parties intend courts to decide arbitrability, and arbitrators to decide the meaning and application of procedural preconditions for arbitration.⁶ The Court held the local litigation requirement was akin to a procedural precondition, because it determined "*when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate."⁷ Second, the Court reasoned that the status of the contract as a treaty between sovereigns did not render inapplicable principles of contract interpretation, particularly where, as here, there is an "absence of explicit language in [the] treaty demonstrating that the parties intended a different delegation of authority."⁸ The Court concluded that the arbitrators' determination with respect to the need for BG Group to comply with the local litigation requirement was entitled to considerable deference,⁹ and did not warrant vacatur.¹⁰

In *Employers Insurance Co. of Wausau v. OneBeacon American Insurance Co.*,¹¹ the First Circuit Court of Appeals also examined the respective roles of arbitrators and courts in determining gateway issues of arbitrability. The issue was whether arbitrators or courts should determine the preclusive effect of a prior arbitration award on pending arbitration proceedings. Plaintiff, OneBeacon, sought to arbitrate the same claim against defendants that it previously arbitrated and lost against a different reinsurer, pursuant to a materially identical contract.¹² Defendants petitioned the court for a declaratory judgment that the prior arbitration award precluded the current arbitration.¹³ The district court dismissed the case, holding that "the preclusive effect of a prior arbitration is a matter for arbitrators to decide."¹⁴ The First Circuit affirmed, noting the "broad agreement among the circuit courts that the effect of an arbitration award on future awards . . . is properly resolved through arbitration."¹⁵

Defendants argued that the issue should be decided by a court in this instance because federal courts have exclusive jurisdiction to determine the preclusive effects of their own judgments, and the award at issue had been confirmed by a federal court.¹⁶ The First Circuit rejected this argument on the ground that collateral estoppel applies only when a

4. *Id.* at 1204–05.

5. *See id.* at 1206.

6. *Id.* at 1206–07.

7. *Id.* at 1207.

8. *Id.* at 1208–09.

9. *Id.* at 1210.

10. *Id.* at 1212–13.

11. *Emp'rs Ins. Co. of Wausau v. OneBeacon Am. Ins. Co.*, 744 F.3d 25 (1st Cir. 2014).

12. *Id.* at 26.

13. *Id.*

14. *Id.* at 26–27.

15. *Id.* at 27 (alteration in original) (internal quotation marks omitted).

16. *Id.* at 28.

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subsequent action involves the same issues, but the federal action to confirm the arbitral award was distinct from the arbitral award itself.¹⁷

2. *Interpretation of Whether an Arbitration Clause Permits Class Arbitration*

Class arbitration continued to be a hot topic among U.S. courts in 2014. Several courts considered whether courts or arbitrators should decide if a particular arbitration clause permits class arbitration. In 2003, the Supreme Court came close to resolving the issue, when a four-judge plurality in *Green Tree Financial Corp. v. Bazzle* viewed the permissibility of class arbitration under an arbitration clause as presumptively a procedural issue for the arbitrators to decide.¹⁸ But in its 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,¹⁹ and its 2013 decision in *Oxford Health Plans LLC v. Sutter*,²⁰ the Supreme Court made clear that the *Bazzle* plurality's conclusion is not binding, and that the Court has not yet decided the issue. The Sixth Circuit subsequently addressed this issue in *Reed Elsevier, Inc. v. Crockett*,²¹ and, contrary to the plurality's determination in *Bazzle*, held that whether an arbitration clause permits class arbitration is a gateway issue to be decided by courts.

This year, the Third Circuit weighed in, agreeing with the Sixth Circuit's determination. In *Opalinski v. Robert Half International Inc.*,²² employees wished to bring a class action alleging that Robert Half International (RHI) had violated the Fair Labor Standards Act (FLSA). The employment agreement's arbitration clause made no mention of classwide arbitration.²³ The district court granted RHI's motion to compel arbitration, allocating to the arbitrator the question of whether the arbitration could proceed on a classwide basis.²⁴ The question on appeal was whether, in the absence of allocation in the contract, availability of classwide arbitration should be decided by the district court or left to an arbitrator.²⁵ The Third Circuit reasoned that the availability of class arbitration was a threshold "question of arbitrability" to be decided by the court, because it was a question of *whose* claims an arbitrator is authorized to arbitrate, and such questions presumptively fall to the court to decide.²⁶

17. *Id.* at 29.

18. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003).

19. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680–81 (2010).

20. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013).

21. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

22. *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326 (3d Cir. 2014).

23. *Id.* at 329.

24. *Id.*

25. *See id.*

26. *Id.* at 332. U.S. District Courts are also split on this issue. *See, e.g.*, *Chico v. Hilton Worldwide, Inc.*, No. CV 14–5750–JFW (SSx), 2014 WL 5088240, at *11 (C.D. Cal. Oct. 7, 2014) (following *Opalinski*); *In re A2P SMS Antitrust Litig.*, No. 12 CV 2656(AJN), 2014 WL 2445756, at *10 (S.D.N.Y. May 29, 2014) (rejecting *Opalinski* view).

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B. ARBITRABILITY OF STATUTORY CLAIMS

In *Walthour v. Chipio Windshield Repair, LLC*,²⁷ the Eleventh Circuit applied the Supreme Court's reasoning in *CompuCredit Corp. v. Greenwood*²⁸ to the question of whether certain claims arising under FLSA can be arbitrated. In *CompuCredit*, the Supreme Court held that the Credit Repair Organizations Act (CROA)²⁹ did not preclude enforcement of an arbitration agreement to resolve alleged violations of CROA because the "CROA is silent on whether claims under the Act can proceed in an arbitrable forum."³⁰ The issue in *Walthour* was "whether an arbitration agreement, which waives an employee's ability to bring a collective action under [FLSA] is enforceable under the Federal Arbitration Act."³¹ Plaintiffs argued that the arbitration agreements were unenforceable because they contained a waiver of their statutory right to file a collective action.³² The Eleventh Circuit noted that, per *CompuCredit*, the focus of its analysis must be on whether the statutory text contains a "contrary congressional command" that specifically precludes the arbitration of FLSA claims.³³ The Eleventh Circuit joined a growing number of circuit courts in holding that claims brought under the FLSA are arbitrable because there is no "contrary congressional command" in the statute's text.³⁴ Accordingly, it held that the arbitration agreements' waivers of plaintiffs' right to file FLSA collective actions were valid.³⁵

Similarly, in *Santoro v. Accenture Federal Services, LLC*,³⁶ the Fourth Circuit applied the *CompuCredit* holding to claims brought under the Age Discrimination in Employment Act (ADEA), the Family Medical Leave Act (FMLA), and the Employee Income Retirement Security Act (ERISA), finding that none of these statutes preclude a waiver of statutory rights. The Fourth Circuit noted that, as the Supreme Court pointed out in dicta in *CompuCredit*, certain whistleblower claims brought under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) are not arbitrable.³⁷ Here, however, because the plaintiff was not bringing any Dodd-Frank whistleblower claims, all of his federal statutory claims were subject to arbitration.³⁸

C. APPEALABILITY OF DISTRICT COURT ORDERS COMPELLING ARBITRATION

This year, a number of federal courts addressed the issue of whether a district court order compelling arbitration is a final, appealable ruling under the FAA. While the Ninth

27. *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014).

28. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012).

29. 15 U.S.C. §§ 1679–1679j (2012).

30. *CompuCredit Corp.*, 132 S. Ct. at 673.

31. *Walthour*, 745 F.3d at 1327.

32. *Id.* at 1330.

33. *Id.*

34. *See, e.g.*, *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002).

35. *Walthour*, 745 F.3d at 1337.

36. *Santoro v. Accenture Fed. Servs., LLC*, 748 F.3d 217 (4th Cir. 2014).

37. *Id.* at 222.

38. *Id.* at 223–24.

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Circuit adopted a rebuttable presumption that an order compelling arbitration is not final and appealable, the Eleventh Circuit opted for a functional inquiry.

In *MediVas, LLC v. Marubeni Corp.*,³⁹ the Ninth Circuit held that an order compelling arbitration is not appealable when the district court neither explicitly dismisses nor explicitly stays the court action during the arbitral proceedings. The district court in *MediVas* entered an order compelling arbitration with respect to certain claims and remanding the remaining claims to state court. On appeal, the Ninth Circuit adopted a “a rebuttable presumption that an order compelling arbitration but not explicitly dismissing the underlying claims stays the action as to those claims pending the completion of the arbitration.”⁴⁰ Thus, the district court’s order was not final and appealable under Section 16(a)(3) of the FAA.⁴¹

In contrast, in *Martinez v. Carnival Corp.*,⁴² the Eleventh Circuit held that the district court’s order compelling arbitration of a worker’s action against a cruise ship owner was a final appealable decision, even though the district court did not dismiss the case but closed it for administrative purposes. The Eleventh Circuit reasoned that “[w]hat matters is whether the case, in all practicality, is finished.”⁴³ Because the district court dismissed as moot all other pending motions, and did not retain jurisdiction to confirm the arbitration award or to award attorneys’ fees, the district court was left with nothing more to decide, and the order was final.⁴⁴ Thus, the Eleventh Circuit’s ruling demonstrates a practical approach as to whether the case before the district court has been concluded.

D. RES JUDICATA *Effect of Prior Arbitrations on U.S. Federal Court Actions*

In *W.J. O’Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*,⁴⁵ the Sixth Circuit held that an arbitration award did not bar a subsequent suit asserting additional claims that the parties had not agreed to arbitrate, reasoning that a prior arbitration award “cannot bar a claim that the arbitrator lacked authority to decide, and an arbitrator lacks authority to decide a claim that the parties did not agree to arbitrate.”⁴⁶ This was a split panel decision, in which the dissent argued that a suit following a prior arbitration award is barred by the doctrine of *res judicata*, where, as here, plaintiff and defendant were active, adverse participants in the prior arbitration proceeding, arose from the same facts as the lawsuit.⁴⁷

39. *MediVas, LLC v. Marubeni Corp.*, 741 F.3d 4 (9th Cir. 2014); *see also* *Johnson v. Consumerinfo.com, Inc.*, 745 F.3d 1019 (9th Cir. 2014).

40. *MediVas*, 741 F.3d at 9.

41. 9 U.S.C. § 16(a)(3) (2012).

42. *Martinez v. Carnival Corp.*, 744 F.3d 1240 (11th Cir. 2014).

43. *Id.* at 1245.

44. *Id.*

45. *W.J. O’Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc.*, 765 F.3d 625 (6th Cir. 2014).

46. *Id.* at 627.

47. *Id.* at 635.

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III. Recognition and Enforcement of Foreign Arbitral Awards in U.S. Courts

A. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS VERSUS FOREIGN JUDGMENTS

A recent circuit court opinion addressed the issue of whether there is a difference for purposes of FAA preemption between enforcement of an arbitral award and a foreign judgment that enforced an arbitral award. In *Commissions Import Export S.A. v. Republic of the Congo*,⁴⁸ the District Court for the District of Columbia dismissed an action brought to enforce a foreign judgment under the District of Columbia's Uniform Foreign-Country Money Judgments Recognition Act (D.C. Recognition Act) because the foreign judgment was itself the enforcement of an arbitration award. Reversing the district court, the D.C. Circuit Court held that the FAA does not preempt parallel schemes for the enforcement of foreign judgments, even if those judgments are based on an underlying arbitral award.⁴⁹

B. WAIVING DEFENSES TO THE RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

Two circuit courts addressed parties' ability to waive defenses to arbitral award confirmation and enforcement.

In *In re Wal-Mart Wage and Hour Employment Practices Litigation*,⁵⁰ the Ninth Circuit considered as a matter of first impression whether "a non-appealability clause in an arbitration agreement that eliminates all federal court review of arbitration awards, including review under § 10 of the FAA" is enforceable.⁵¹ As part of a global settlement agreement with Wal-Mart, the parties agreed that any fee disputes among plaintiffs' counsel would be resolved through "binding, non-appealable arbitration."⁵² The Ninth Circuit concluded the clause was ambiguous as to whether the parties intended to only preclude review of the merits or also intended to preclude federal court review on the basis of vacatur as found in Section 10 of the FAA.⁵³ The Ninth Circuit determined it did not need to resolve the ambiguity, because the second interpretation would be unenforceable. Allowing parties to waive the FAA's grounds for vacatur, the court found, "would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration."⁵⁴

48. *Comm'n's Imp. Exp. S.A. v. Congo*, 916 F. Supp. 2d 48 (D.D.C. 2013), *rev'd* 757 F.3d 321 (D.C. Cir. 2014).

49. *Comm'n's Imp. Exp. S.A. v. Congo*, 757 F.3d 321 (D.C. Cir. 2014). *See also* *Mont Blanc Trading Ltd. v. Khan*, No. 13 Civ. 700(AJN), 2014 WL 1116733 (S.D.N.Y. Mar. 20, 2014) (holding that when a party seeks to enforce a foreign judgment confirming an arbitral award in the United States, the resulting action involves the enforcement of the foreign court's judgment, governed by state law, not the enforcement of the underlying arbitration award, governed by the FAA).

50. *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 737 F.3d 1262 (9th Cir. 2013).

51. *Id.* at 1264.

52. *Id.* at 1264–65.

53. *Id.* at 1265–66.

54. *Id.* at 1268.

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In *Sonera Holding B.V. v. Cukurova Holding A.S.*,⁵⁵ the Second Circuit addressed the issue of whether, and in what circumstances, parties to an arbitration agreement waive their ability to assert personal jurisdiction defenses in U.S. court. *Sonera Holding* involved an action to confirm a foreign arbitral award brought by a Dutch holding company against a Turkish joint stock corporation.⁵⁶ *Sonera Holding* argued that the language of its arbitration agreement with *Cukurova* indicated an implicit agreement to waive all personal jurisdiction defenses and to consent to the jurisdiction of any court with subject matter jurisdiction over enforcement actions.⁵⁷ The arbitration agreement at issue stated:

Any award of the arbitral tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties. Applications may be made to such court for judicial recognition of the award and/or an order for enforcement, as the case may be.⁵⁸

The Second Circuit rejected plaintiff's reading as overbroad and instead concluded it constituted nothing more than "a standard entry-of-judgment clause designed to clarify that, following any arbitration award, a court of the arbitral venue or in any jurisdiction in which the parties' persons or assets are located would have jurisdiction to enter judgment on that award."⁵⁹ The arbitration clause did not speak to personal jurisdiction, and plaintiff could not establish that New York courts had jurisdiction over *Cukurova*; accordingly, the Second Circuit remanded with an instruction to dismiss for lack of personal jurisdiction.⁶⁰

C. DECISIONS ON THE POWERS OF COURTS IN PRIMARY VERSUS SECONDARY JURISDICTIONS

In *CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc.*,⁶¹ plaintiffs brought an action to enforce a previously unconfirmed French arbitration award against the alter egos or successors-in-interest of the award debtor. Relying on a Second Circuit opinion from 1963, *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*,⁶² the district court held that it did not have subject matter jurisdiction under the FAA to enforce an unconfirmed award against a party who is not the award debtor.⁶³ In *Orion Shipping*, the Second Circuit held that confirmation actions under the FAA are generally not appropriate occasions to extend confirmation of the award to nonparties such as alleged alter egos, because the factual and legal issues involved in whether the nonparty is bound by the award will bog down what is intended to be a summary proceeding.⁶⁴ Accordingly, the

55. *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221 (2d Cir. 2014), cert. denied, 134 S. Ct. 2888 (2014).

56. *Id.* at 223.

57. *Id.* at 226–27.

58. *Id.* at 226.

59. *Id.* at 227.

60. *Id.*

61. *CBF Indústria de Gusa S/A/ v. AMCI Holdings, Inc.*, 14 F. Supp. 3d 463 (S.D.N.Y. Apr. 9, 2014).

62. *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Pan.*, 312 F.2d 299 (2d Cir. 1963).

63. *CBF Indústria*, 14 F. Supp. 3d at 479.

64. *Orion Shipping*, 312 F.2d at 301.

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district court in *CBF Indústria* dismissed the case for lack of jurisdiction.⁶⁵ It noted that plaintiffs were free to recommence their enforcement action after successfully petitioning to have the arbitration award modified in a French court with primary jurisdiction.⁶⁶

*Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*⁶⁷ involved foreign mining companies' request for confirmation and enforcement of a Malaysian arbitral award against the government of Laos. Plaintiffs' request was initially granted by the district court and affirmed by the Second Circuit.⁶⁸ Subsequently, however, after the High Court of Malaysia vacated the arbitral award, the government of Laos moved to vacate the district court's judgment. In response, the mining companies moved to require Laos to post security as a condition for entry of a vacatur order. The district court granted the government of Laos' motion to vacate the prior judgment enforcing the award because Malaysia, the primary jurisdiction, had vacated the award, and no extraordinary circumstances justified the district court's exercise of its discretion to override the Malaysian court's vacatur. In addition, the court held that requiring Laos to post security would violate Laos' sovereign immunity under the Foreign Sovereign Immunities Act.

IV. Investment Treaty Arbitration

A. TRIBUNAL AWARDS RECORD SUM TO INVESTORS IN YUKOS OIL COMPANY

In July 2014, a tribunal, constituted in three parallel cases brought under the Energy Charter Treaty, awarded the majority shareholders in OAO Yukos Oil Company, once Russia's largest oil company, US\$ 50 billion in compensation for Russia's treatment of Yukos and the expropriation of its assets. While the amount awarded represents less than half what was originally claimed, the sum awarded significantly dwarfs the next largest investment treaty award ever rendered. The three separate arbitrations were heard jointly by the same tribunal and all administered by the Permanent Court of Arbitration in the Netherlands.⁶⁹

Yukos went into bankruptcy in 2006 and its assets were sold off, after the Russian Government retroactively imposed tax demands of US\$ 24 billion for the period 2000–2004. Yukos' then CEO Mikhail Khordorkovsky, an opponent of President Vladimir Putin, was charged with crimes including forgery, fraud, tax evasion, embezzlement, and money laundering.

The tribunal held that Russia's actions constituted a "full assault on Yukos and its beneficial owners in order to bankrupt Yukos and appropriate its assets while, at the same time,

65. *CBF Indústria*, 14 F. Supp. 3d at 479–80.

66. *Id.* at 479.

67. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Laos*, 997 F. Supp. 2d 214 (S.D.N.Y. 2014).

68. *Thai-Lao Lignite (Thailand) Co. v. Gov't of Laos*, No. 10 Civ. 5256(KMW), 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 F. App'x 150 (2d Cir. 2012).

69. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 226, Final Award (July 18, 2014); *Yukos Universal Ltd. (Isle of Man) v. Russian Fed'n*, PCA Case No. AA 227, Final Award (July 18, 2014); *Veteran Petroleum Ltd. (Cyprus) v. Russian Fed'n*, PCA Case No. AA 228, Final Award (July 18, 2014). The Final Awards are, in all material respects, identical and reference in this article will be made only to the Final Award in the *Hulley Enterprises Limited* case.

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removing Mr. Khodorkovsky from the political arena.”⁷⁰ It decided that “the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets.”⁷¹ Yukos’ largest asset was acquired at less than market valuation by Rosneft, a state-owned company, in an auction that the tribunal described as “in effect a devious and calculated expropriation.”⁷² The bankruptcy of Yukos and the auction of its remaining assets was, in the Tribunal’s determination, “the final act of the destruction of the Company by the Russian Federation and the expropriation of its assets for the sole benefit of the Russian State and State-owned companies Rosneft and Gazprom.”⁷³ Furthermore, the tribunal held that the conviction of Mr Khordokovsky and others “indicate[s] that Russian courts bent to the will of Russian executive authorities to bankrupt Yukos, assign its assets to a State-controlled company, and incarcerate a man who gave signs of becoming a political competitor.”⁷⁴

The award is some thirty times larger than the previous largest known award in an investment arbitration of US\$ 1.7 billion, plus interest, in *Occidental Petroleum Corp. v. Republic of Ecuador*.⁷⁵ Russia was also ordered to bear the full \$8.4 million arbitration costs, together with 75 percent of the claimants’ US\$ 80 million legal fees.

The case is significant in a number of respects beyond the huge sum awarded. For example, the award was reduced from the US\$ 113 billion claimed as a result of the claimants’ use of domestic low-tax regions in Russia, and their use of a double taxation agreement between Cyprus and Russia. The tribunal held that as a result of these actions “Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent’s destruction of Yukos” and reduced the award accordingly.⁷⁶ This approach mirrors the approach taken by the tribunal in *Occidental v. Ecuador*⁷⁷ to address misconduct by the claimant; that tribunal was chaired by Yves Fortier, also the chair of the Yukos arbitrations. In addition, the Yukos tribunal’s 2009 jurisdictional decision,⁷⁸ which paved the way for this merits ruling, is notable for its holding that the Energy Charter Treaty was binding on Russia, even though Russia had never ratified it.

B. ARBITRATOR CHALLENGES

Applications challenging the position of arbitrators in particular cases has been a fertile area of activity in Investor-State cases. Most of those applications, as would be expected, failed. This was true in *Chevron v. Ecuador*,⁷⁹ *ConocoPhillips v. Venezuela*,⁸⁰ *Içkale Insaat*

70. *Hulley Enters.*, PCA Case No. AA 226, Final Award, para. 515.

71. *Id.* para. 756.

72. *Id.* para. 1037.

73. *Id.* para. 1180 (quoting the Claimants).

74. *Id.* para. 1583.

75. *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012).

76. *Hulley Enters.*, PCA Case No. AA 226, Final Award, para. 1637.

77. *Occidental Petroleum*, ICSID Case No. ARB/06/11.

78. *Hulley Enters. Ltd. (Cyprus) v. Russian Fed’n*, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility (Nov. 30, 2009).

79. *Chevron Corp. v. Republic of Ecuador (U.S. v. Ecuador)*, PCA Case No. 2009-23, Decision on Challenge to Arbitrator (Nov. 21, 2014) (not published). See also *In-Depth: Why PCA Secretary-General Declined to*

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Limited Sirketi v. Turkmenistan,⁸¹ *Abaclat v. Argentina*,⁸² *RSM v. St. Lucia*,⁸³ and *South American Silver v. Bolivia*.⁸⁴ But the applicant succeeded in unseating the targeted arbitrator in three cases: *Mytilineos v. Serbia*⁸⁵ (removed), *Caratube v. Kazakhstan*⁸⁶ (removed), and *Pey v. Chile*⁸⁷ (stepped down).

The approach of the Permanent Court of Arbitration (PCA) in *Chevron v Ecuador*⁸⁸ is instructive. It stated that the standard governing challenges is objective in nature, and the question should therefore be viewed from the perspective of a reasonable and informed third party. The PCA Secretary-General made it clear that it was not his role to substitute his views on the underlying matters for those of the tribunal. Instead, his responsibility was to scrutinize the integrity of the tribunal's proceedings and decisions: not to assess the wisdom and correctness of the actions of the arbitrators, but instead to decide whether there were procedural failings that are "so manifestly unreasonable that bias is the most likely explanation for them."⁸⁹ The high bar that must be reached by the applicant in a disqualification matter was cited also in *Abaclat v. Argentina*,⁹⁰ an International Center for the Settlement of Investment Disputes (ICSID) case. In that case, the reference in the ICSID Rules to a need to show that the supposed lack of requisite qualities was "manifest" meant that it will always be very difficult for the applicant to prevail.

In *Mytilineos v. Serbia*,⁹¹ the respondent-State's original nominee was removed on the ground that the arbitrator's relationship with the respondent in other cases created an appearance of bias. The claimant objected to the nomination because the arbitrator had already been appointed by the State in another case, allegedly involving similar issues.

Remove Arbitrators for Alleged "Failure to Act" on Ecuador Requests in Chevron Case, INVESTMENT ARB. REP. (Nov. 30, 2014), http://www.iareporter.com/articles/20141201_1.

80. *ConocoPhillips Petrozuata B.V. v. Bolivian Republic of Venez.* (Neth. v. Venez.), ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration (Mar. 10, 2014).

81. *Içkale Insaat Ltd. Sirketi v. Turkmenistan* (Turk. v. Turkm.), ICSID Case No. ARB/10/24, Decision on Claimant's Proposal to Disqualify Professor Philippe Sands (July 11, 2014).

82. *Abaclat & Others v. Argentine Republic* (It. v. Arg.), ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014).

83. *RSM Prod. Corp. v. St. Lucia* (U.S. v. St. Lucia), ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC (Oct. 23, 2014).

84. *S. Am. Silver Ltd. (Berm.) v. Bol.*, PCA Case No. 2013-15, Decision on Bolivia's Challenge to Francisco Orrego Vicuña (Oct. 30, 2013) (not published). See also *Investor's Bid to Disqualify Former Argentine Attorney General from Sitting on Tribunal Is Rejected by PCA Secretary-General*, INVESTMENT ARB. REP. (Apr. 9, 2014), http://www.iareporter.com/articles/20140409_2.

85. *Mytilineos Holdings SA v. Republic of Serb.* (Greece v. Serb.), Decision on Challenge to Arbitrator (Perm. Ct. Arb. 2014) (not published). See also *As Serbia Is Sued at ICSID over Regulation of Animal-Rendering Industry, A Tribunal in UNCITRAL Case Is Finalized after Arbitrator Disqualification*, INVESTMENT ARB. REP. (Nov. 25, 2014), http://www.iareporter.com/articles/20141126_2.

86. *Caratube Int'l Oil Co. v. Kaz.* (U.S. v. Kaz.), ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014).

87. *Pey Casado v. Chile* (Spain v. Chile), ICSID Case No. ARB/98/2, Philippe Sands' Letter of Resignation from the Tribunal (Jan. 10, 2014).

88. *Chevron Corp. v. Republic of Ecuador* (U.S. v. Ecuador), PCA Case No. 2009-23, Decision on Challenge to Arbitrator (Nov. 21, 2014) (not published).

89. *Id.*

90. *Abaclat & Others v. Argentine Republic* (It. v. Arg.), ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal (Feb. 4, 2014).

91. *Mytilineos Holdings SA v. Republic of Serb.* (Greece v. Serb.), Decision on Challenge to Arbitrator (Perm. Ct. Arb. 2014) (not published).

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The judge appointed by the PCA to decide the question acknowledged that no evidence suggested actual bias towards the respondent, but he found that the cumulative effect of the arbitrator's ties with respondent would incline a reasonable third party observer to have justifiable doubts as to his impartiality and independence to sit as an arbitrator. So, the appearance of bias was sufficient to justify disqualification.

Similar grounds existed in the case of *Caratube v Kazakhstan*.⁹² This decision is a watershed as it is the first ICSID case in which an application to disqualify an arbitrator has succeeded. The targeted arbitrator had been appointed previously by the respondent-State, and separately also on numerous occasions by the respondent's counsel. But that did not justify his disqualification. Rather, the decision hinged on the perceived similarity of the issues in the instant case and in a previous ICSID case in which the arbitrator had sat (*Ruby Roz Agricol LLP v. Kazakhstan*⁹³). The fact that there would be arguments from *RubyRozAgricol* that would be familiar to the arbitrator would, in the view of the applicant, create a manifest risk of the issue being pre-judged. Indeed, the relationship between the two cases was unusually close: not only was the respondent-State the same, but the two claimant entities were also closely related.

The developments in the *Pey v. Chile*⁹⁴ case tell little to the observer about the standards applicable in disqualification applications because the challenged arbitrator, Philippe Sands QC, resigned, rather than force the issue. Although the grounds of the application were weak, Mr. Sands stepped down from the tribunal, citing the need for the proceedings to move forward without delay and, in his words, "without distraction." Although this development adds nothing to the body of knowledge of the legal standards in this area, it does demonstrate the tactical utility of a disqualification application for a party content to adopt an aggressive approach.

Finally, a challenge to the independence of an arbitrator failed in *RSM v St Lucia*.⁹⁵ The claimant filed the application following the first ruling in an ICSID case requiring a party to post security for the costs of an arbitration. Appended to that decision had been the "Assenting Reasons" of one of the arbitrators, Dr. Gavan Griffith QC, setting out his own rationale for the decision to order the claimant to post security for costs.⁹⁶ Those reasons had included general comments about the implications for Investor-State arbitration of the involvement of third-party funders: investors who inject money into international arbitration proceedings in exchange for a share of any recovery of compensation achieved by the claimant. The claimant, RSM, contended that these comments, including the colorful language in which they were expressed, revealed a general lack of independence and impartiality on the part of Dr. Griffith, justifying his removal from the tribunal.

92. *Caratube Int'l Oil Co. v. Kaz. (U.S. v. Kaz.)*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch (Mar. 20, 2014).

93. *Ruby Roz Agricol LLP v. Kaz.*, UNCITRAL, Award on Jurisdiction (Aug. 1, 2013).

94. *Pey Casado v. Chile (Spain v. Chile)*, ICSID Case No. ARB/98/2, Philippe Sands' Letter of Resignation from the Tribunal (Jan. 10, 2014).

95. *RSM Prod. Corp. v. St. Lucia (U.S. v. St. Lucia)*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC (Oct. 23, 2014).

96. *RSM Prod. Corp. v. St. Lucia (U.S. v. St. Lucia)*, ICSID Case No. ARB/12/10, Decision on St. Lucia's Request for Security for Costs (Aug. 13, 2014).

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The decision rejecting Dr. Griffith's disqualification acknowledged that "the language in the Assenting Reasons [is] radical and perhaps extreme in tone."⁹⁷ While Dr. Griffith

[M]ay well, with the expressions used, have stepped close to the edge of what can be considered as an objective reasoning . . . we believe that he has not actually stepped over the demarcation line between radical and extreme language on the one hand and clearly inappropriate and hence unacceptable expressions in the context of an arbitration on the other hand.⁹⁸

C. EUROPEAN UNION INTERVENES IN INVESTMENT TREATY ARBITRATION

The European Union (EU), through its executive branch, the European Commission (the Commission), has previously made clear its opposition to investment treaties entered into by EU Member States. Regarding treaties made between Member States (intra-EU BITs), the Commission's position is that these are incompatible with European law (and specifically the jurisdiction of Member State courts to decide disputes within Europe) and must be phased out by Member States. Regarding treaties made between Member States and third countries (extra-EU BITs), the Commission's position is that responsibility for investment protection passed to the EU by virtue of the Treaty of Lisbon, and that existing BITs should be replaced with treaties entered into by the EU, although existing BITs should remain in place until replaced. Debate on these points, and in particular the mechanics by which responsibility for cases brought under EU BITs would be handled, has continued in 2014, with a Regulation being passed setting out the division of responsibility between a Member State and the Commission in respect of a claim brought under a treaty negotiated by the EU as a result of the actions of that Member State.⁹⁹

In addition, the EU is currently in the process of negotiating free trade agreements with, among others, the United States and Canada, in which the inclusion of investor-state dispute settlement mechanisms (ISDS) is in doubt. The Commission, which appears to desire a radical change in the way ISDS is conducted, launched a consultation in 2014 on the inclusion of ISDS in the EU-US free trade agreement (the Transatlantic Trade and Investment Partnership), following the publication of a factsheet at the end of 2013 that set out the Commission's proposals in relation to improving ISDS.¹⁰⁰ In brief, the Commission's proposals would seek to: improve transparency by allowing submissions from interested parties and public access to documents and hearings; define the circumstances in which government measures constitute indirect expropriation; define the fair and equitable treatment standard; introduce the "loser pays" principle; introduce a binding code of conduct for arbitrators; introduce a roster of arbitrators; introduce an appellate mechanism for investment disputes; and permit states to influence interpretations and "correct any potential erroneous interpretations" by tribunals.

But, in addition to the EU's actions in shaping the future of investor-state arbitration, the Commission has shown in 2014 that it is also prepared to take a more aggressive

97. *RSM Prod. Corp.*, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC, para. 86.

98. *Id.*

99. Regulation (EU) No 912/2014, 2014 O.J. (L 257) 121.

100. Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements, EUR. COMMISSION (Nov. 2013), http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf.

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approach in relation to current cases and what it considers to be incompatibilities between investment arbitration and EU law. The Commission has previously intervened in cases, as *amicus curiae*, in an effort to persuade arbitrators that they have no jurisdiction over disputes brought under intra-EU BITs. In 2014, the Commission sought to intervene in a variety of cases to argue that a tribunal has no jurisdiction under an intra-EU BIT because the subsequent EU investment protection regime supersedes the BIT;¹⁰¹ more extensive protections contained in intra-EU BITs as compared with EU law would discriminate against EU nationals who do not benefit from that BIT protection, and would therefore be incompatible with EU law;¹⁰² investment arbitration tribunals have no jurisdiction to decide issues of interpretation or application of EU law;¹⁰³ the actions of Member States that are challenged by investors in certain cases were necessary to eliminate unlawful state aid, and an award in favor of the claimants would therefore constitute new unlawful state aid;¹⁰⁴ it has a “systemic interest” in the interpretation of individual extra-EU BITs;¹⁰⁵ and the Energy Charter Treaty contains an implicit disconnection clause, which means that the substantive protections of the treaty do not apply as between EU Member States.¹⁰⁶

In addition to intervening in ongoing arbitral cases, in 2014 the Commission intervened to prevent payment of an award rendered by an ICSID tribunal. In May 2014, the Commission issued an injunction preventing the Romanian government from paying a US\$ 250 million ICSID award rendered in December 2013 in favour of Ioan and Viorel Micula and their associated companies, after an arbitration under the Sweden-Romania BIT.¹⁰⁷ The case revolved around Romania’s withdrawal, ahead of schedule, of incentives and benefits offered to investors to increase investment in certain disadvantaged areas of the country. The Commission had intervened in the arbitration in an attempt to persuade the arbitrators that Romania’s actions were the result of conforming with EU law obligations to eliminate state aid. The Commission had warned the arbitrators that an order requiring Romania to compensate the investors would amount to a new grant of state aid, which would also be unlawful under EU law.

The Commission’s injunction restrains Romania from paying the award until the Commission has ruled on the compatibility of the award with the European single market. In that regard, in October 2014 the Commission launched an investigation into the implementation of the award, under the relevant procedures set out in the Treaty on the Functioning of the European Union, and it has invited interested parties to submit their

101. U.S. Steel Global Holdings I B.V. (Neth.) v. Slovak Republic, PCA Case No. 2013-6.

102. *Id.*

103. *Id.*

104. *Id.*; Antaris Solar GmbH v. Czech (Ger. v. Czech), UNCITRAL (Perm. Ct. Arb.); Natland Inv. Grp. NV v. Czech (Neth. v. Czech), UNCITRAL (Perm. Ct. Arb.); I.C.W. Eur. Invs. Ltd. v. Czech, UNCITRAL (Perm. Ct. Arb.); Voltaic Network GmbH v. Czech (Ger. v. Czech), UNCITRAL (Perm. Ct. Arb.); Photovoltaik Knopf Betriebs-GmbH v. Czech (Eur. v. Czech), UNCITRAL (Perm. Ct. Arb.); WA Invs.-Europa Nova Ltd. v. Czech, UNCITRAL (Perm. Ct. Arb.).

105. Iberdrola Energía S.A. v. Guat. (Spain v. Guat.), ICSID Case No ARB/09/5.

106. EDF Int’l S.A. (Fr.) v. Hung., UNCITRAL. The issue has also been raised in the context of the Czech Republic cases, *supra* note 104, because some of those cases are brought under the Energy Charter Treaty, though it is not clear which ones those are.

107. Commission Decision C(2014) 3192 of 13 May 2014 to Enjoin Romania to Suspend the Granting of State Aid to Micula (EC). See *generally* Micula v. Rom., ICSID Case No. ARB/05/20.

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comments.¹⁰⁸ The Commission's preliminary view is, unsurprisingly, that complying with the award would constitute a new grant of unlawful state aid by Romania.

Given that enforcement of the award is currently being sought in the United States, it is possible that a U.S. court will be required to decide whether Romania must comply with its obligations under the ICSID Convention or its obligations to the European Union.

**D. NEW TRANSPARENCY RULES FOR INVESTOR-STATE ARBITRATIONS ISSUED BY
UNCITRAL**

One of the numerous areas of discussion and debate in relation to Investor-State arbitration revolves around transparency, confidentiality, and openness. In a very small minority of examples, such as in treaties entered into recently by the United States and Canada, the parties have agreed to provisions stipulating that any Investor-State disputes brought under them shall be conducted openly. In the general absence of such transparency provisions in the governing treaty, it is very unusual to see the parties to a particular dispute agree to conduct the case openly. One example where such consensus did arise was in *Guaracachi America, Inc. v. Bolivia*.¹⁰⁹

In April 2014, the United Nations Commission on International Trade Law (UNCITRAL) issued a set of rules intended to bring greater transparency to Investor-State disputes. The Rules on Transparency in Treaty-Based Investor-State Arbitration¹¹⁰ will require open hearings and publication of a host of dispute-related documents (including notices of arbitration, statements of case and pleadings, and awards and orders issued by the tribunal). But the rules will only apply in arbitrations begun under investment treaties coming into force after the rules came into effect (absent consent of the parties or an order of the tribunal). Efforts are underway, however, to make the rules applicable to disputes arising under the more than three thousand existing BITs.

Pursuant to Article 1.9 of the transparency rules, the rules can be used in not only UNCITRAL arbitrations, but also arbitrations conducted under other rules (ICSID Arbitration Rules, ICSID Additional Facility Rules, International Center of Commerce (ICC) Rules, etc.).

Alongside the transparency rules themselves, an online registry has been launched by UNCITRAL.¹¹¹ The parties will be responsible for sending the notice of arbitration to the UNCITRAL registry. The document will not be posted immediately; instead, UNCITRAL will publish details of the names of the parties, the treaty under which the claim is brought, and the economic sector in which the dispute arises. The notice of arbitration, along with subsequent documents, will be posted on the online registry after an arbitral tribunal has been constituted.

108. State Aid SA.38517 (2014/C) (ex 2014/NN) — Implementation of Arbitral Award *Micula v Romania* of 11 December 2013 — Invitation to Submit Comments Pursuant to Article 108(2) of the Treaty on the Functioning of the European Union, 2014 O.J. (C 393) 27.

109. *Guaracachi America, Inc. v. Bol.*, PCA Case No. 2011-17.

110. UNITED NATIONS COMM'N ON INT'L TRADE LAW, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (2014), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

111. *Transparency Registry*, UNITED NATIONS COMMISSION ON INT'L TRADE L., <http://www.uncitral.org/transparency-registry> (last visited Mar. 28, 2015).

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V. Country Case Law Developments in Arbitration

A. EUROPEAN COURT OF JUSTICE (ECJ)

In a decision of February 13, 2014, the European Court of Justice (ECJ) confirmed that an arbitral tribunal established by law is a “court or tribunal” within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU), so that the tribunal may refer a question to the ECJ for a preliminary ruling in interpretation of EU law.¹¹²

In *Merck Canada Inc. v. Accord Healthcare Ltd.*, the Portuguese “Tribunal Arbitral necessário” referred a question to the ECJ in interpretation of EU intellectual property law. The ECJ first verified the issue of admissibility of the question. The ECJ started by reminding the national court that it should take a number of factors into account to determine whether a referring body is a “court or tribunal” (such a question being governed by EU law alone), such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law, and whether it is independent.

The ECJ reaffirmed that a conventional arbitration tribunal is not a “court or tribunal of a Member State” within the meaning of Article 267 of TFEU if the parties are under no obligation, in law or in fact, to refer their disputes to arbitration, and the public authorities of the Member State concerned are not involved in the decision to opt for arbitration and are not required to intervene of their own accord in the proceedings before the arbitrator.

The principal interest of the decision is the statement by the Court that an arbitral tribunal, which may vary in form, composition, and rules of procedure, and which is dissolved after making its decision, may still be a “permanent” body. Indeed, the Court weighed the preceding factors raising doubts as to its permanence with the facts that the “Tribunal Arbitral necessário” had been established on a legislative basis, that it had permanent compulsory jurisdiction and, in addition, that the Portuguese legislation defined and framed the applicable procedural rules. In consequence, the Court found that, in the present case, the requirement of permanence was also met.

B. CHINA

Beginning January 1, 2014, all court judgments in China must be published on a centralized database managed by the Supreme People’s Court.¹¹³ A regulation published by the Supreme People’s Court on November 21, 2013, requires the publication of all court judgments except for cases involving national secrets, personal privacy, or settlement by mediation.¹¹⁴ To date, courts from twenty-two out of the thirty-one provinces in main-

112. Case C-555/13, *Merck Can. Inc. v. Accord Healthcare Ltd.*, <http://curia.europa.eu/juris/celex.jsf?celex=62013CO0555&lang1=en&type=TEXT>.

113. ZHONGGUÓ CAIPÀN WÉNSHÙ WǎNG [JUDICIAL OPINIONS OF CHINA], <http://www.court.gov.cn/zqcpwsw/> (last visited Mar. 28, 2015).

114. Zuìgāo Rénmín Fāyuàn Guānyú Rénmín Fāyuàn Zài Hùliánwǎng Gōngbù Cáipàn Wénshù de Guǐdìng (最高法院关于人民法院在互联网公布裁判文书的规定) [Supreme People’s Court’s Measures for the People’s Courts to Publish Judicial Opinions on the Internet] (promulgated by Sup. People’s Ct., Nov. 21, 2013, effective Jan. 1, 2014), <http://www.chinacourt.org/article/detail/2013/11/id/1152212.shtml> (China).

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land China have managed to publish all their cases online. This is considered to be a major development in China's drive to achieve greater judicial transparency, as part of a broader scheme aimed at reforming the court system in China to make information more accessible to the public. From the arbitration practitioner's point of view, the publication of court judgments in China, together with the requirement under the PRC Civil Procedure Law that any decision for setting aside or refusing to enforce arbitral awards must set out the reasons for such set-aside or refusal, should increase the visibility of the Chinese judiciary's approach and practice in arbitration-related matters. Even though prior judgments in China do not form binding precedents, the ability to search previous court judgments on enforcement and setting aside of arbitral awards should offer some points of reference and guidelines to parties who need to enforce or set aside their arbitral awards in China.

C. ENGLAND AND WALES

The long-running arbitration proceedings in *U&M Mining Zambia Ltd. v. Konkola Copper Mines PLC* have so far given rise to no fewer than four decisions of the Commercial Court between 2013 and 2014. In the latest decision,¹¹⁵ the court continued a world-wide freezing order first granted in June 2014 on a without-notice application in support of the enforcement of awards granted by an arbitral tribunal in arbitration proceedings seated in London. The arbitral tribunal had made three awards in favor of the claimant, none of which had been satisfied. The court held that it could infer from the respondent's conduct in the arbitration, which included dishonest evidence given by its employees and obstructive tactics, a real risk that the respondent would dissipate its assets to thwart enforcement of the awards.

The decision clarifies that, if the seat of the arbitration is in London, the English courts have jurisdiction to issue orders in support of arbitration and that it will ordinarily be appropriate to do so. The fact that most of the respondent's assets were located in Zambia, where enforcement would take place, and that the Zambian courts also had jurisdiction to grant a freezing order, would not make it inappropriate for the English courts to grant a world-wide freezing order. If the seat of arbitration is in England and Wales, the English courts may grant a world-wide freezing order in support of enforcement of arbitral awards even in the absence of assets within the jurisdiction.

D. FRANCE

On January 15, 2014, the French Cour de cassation confirmed that the liability of the arbitrator may be upheld only if she committed gross negligence.¹¹⁶ In this case, an individual sold the shares of an audit company to another individual, with the right for the seller to purchase at a later stage, in whole or in part, the portfolio of clients of the sold company. A difficulty arose between the parties during the sale of the portfolio of clients, and the purchaser of the audit company initiated arbitration against the seller. A first award was issued on June 23, 2000, ordering the seller to indemnify the purchaser. In

115. *U&M Mining Zambia Ltd. v. Konkola Copper Mines PLC*, [2014] EWHC 3250 (Comm).

116. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 15, 2014, Bull. civ. I, No. 1 (Fr.).

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October 18, 2001, the court of appeal confirmed the award. On December 19, 2001, the seller initiated a new arbitration against the purchaser for misrepresentation, with the arbitral tribunal being identical to the one that issued the first award. The arbitral tribunal decided to reopen the arbitral proceedings, and that decision was overturned by the court of appeal on February 19, 2004. In 2004, the arbitral tribunal nonetheless issued three awards conflicting with the first 2000 award insofar as this time, the purchaser was ordered to indemnify the seller.

The purchaser initiated proceedings against the arbitrators *inter alia* for failing to respect the preclusive effect of the October 18, 2001, and February 19, 2004, decisions. He based his claim on the contractual liability of the arbitrators.

Both the Court of Appeal of Paris (March 1, 2011) and the Cour de cassation denied the request. The Cour de cassation found that the purchaser was in fact trying to challenge the content of the 2004 awards and consequently was challenging the jurisdictional powers of the arbitrators. In particular, the Cour de cassation found that the arbitral tribunal, which assumed in 2004 the powers of *amiable compositeur*, decided to pursue the arbitral proceedings after the October 18, 2001, decision due to the submission of new facts. As a result, the purchaser's claim was dismissed because he had not proven "a personal wrong" of the arbitrators "equivalent to a guilty mind or constitutive of a fraud, a gross negligence or a denial of justice."¹¹⁷

E. SWITZERLAND

Switzerland's Federal Supreme Court (Supreme Court) considered, for the first time, Article 20 of the 1999 FIDIC Conditions of Contract and the jurisdiction of an arbitral tribunal to hear a dispute that has not gone through the Dispute Adjudication Board (DAB) procedure.¹¹⁸ Because Swiss law is frequently chosen in FIDIC and international construction contracts, this decision is particularly relevant. Relying on the principle of good faith enshrined in Swiss law, the Supreme Court held that while the DAB procedure is, in principle, mandatory and therefore a condition precedent to arbitration, the parties need not undergo the process if doing so would amount to an abuse of rights because it appears futile to an efficient resolution of the dispute in the event of an inordinate delay in appointing the DAB. The Supreme Court also confirmed that the alleged non-compliance with a pre-arbitration dispute resolution provision may be challenged in setting aside proceedings against an arbitral award on the basis of lack of jurisdiction *ratione temporis*.¹¹⁹ The Supreme Court further held that, just like an arbitration agreement, a pre-arbitration dispute resolution provision is valid if it conforms either to the law chosen by the parties, to the law governing the subject-matter of the dispute, in particular the law governing the

117. *Id.*

118. Bundesgericht [BGer] [Federal Supreme Court] July 7, 2014, docket no. 4A_124/2014 (Switz.), available at <http://www.bger.ch>. This decision has also been reviewed in more detail in Schellenberg Wittmer Ltd's Arbitration Case Digest. Christopher Boog & James Menz, *First Decision on FIDIC Dispute Adjudication Boards (Swiss Supreme Court)*, SCHELLENBERG WITTMER LTD (Sept. 25, 2014), http://www.swlegal.ch/getdoc/c72ab5f7-c0a6-4a38-b21d-5e7e7872e605/2014_Christopher-Boog_James-Menz_First-decision-on.aspx.

119. See Bundesgesetz über das Internationale Privatrecht [Swiss International Private Law Act] Dec. 18, 1987, SR 291, art. 190(2)(b) (Switz.).

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main contract, or to Swiss law.¹²⁰ Finally, the Supreme Court confirmed that, in deciding on an arbitral tribunal's jurisdiction, it may rely on pertinent foreign law—an approach befitting international contract schemes like FIDIC.

120. *See id.* art. 178(2) (reflecting the principle of *favorem validitatis*).