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International Arbitration

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I. Introduction

This article surveys developments in International Arbitration in 2014/2015 and is organized into three topical sections.

Section II surveys significant arbitration developments in U.S. courts. Section III highlights developments in the recognition and enforcement of foreign arbitral awards in U.S. courts. Section IV surveys significant arbitration developments around the world, including in France, Nigeria, Switzerland, Italy, India, Bolivia, China, Spain, Iraq, Germany, and Brazil.

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II. Arbitration Developments in U.S. Courts

A. The Arbitrators' Role in Determining Arbitrability

1. *Gateway Questions of Arbitrability*

In *Chevron Corp. v. Ecuador*,[1] the U.S. Court of Appeals for the D.C. Circuit appeared to extend the reasoning of the U.S. Supreme Court in *BG Group PLC v. Republic of Argentina*[2] to the question of whether deference was owed to an arbitral tribunal's determination that a dispute fell within the purview of the arbitration clause of the U.S.-Ecuador Bilateral Investment Treaty (BIT).[3] In contrast to the agreement in *BG Group*, however, the parties in *Chevron* had explicitly agreed that arbitrators would decide such questions, thus creating a stronger case for deference to the arbitrators' decision.[4]

The dispute in *Chevron* arose from a series of lawsuits between Ecuador and Chevron related to an investment and development agreement.[5] In 2006, Chevron commenced an international arbitration, claiming that Ecuador had violated the BIT, which had entered into force in 1997, by failing to resolve those lawsuits in a timely fashion.[6] Ecuador objected to the tribunal's jurisdiction, arguing that it had never agreed to arbitrate with Chevron because Chevron's investments in Ecuador had terminated no later than 1995, two years before the BIT entered into force.[7]

The arbitrators rejected Ecuador's jurisdictional challenge and issued an award in favor of Chevron.[8] It found that Chevron's lawsuits in Ecuadorean courts, related to its pre-BIT investments, were "investments" within the meaning of the BIT.[9] When Chevron petitioned the district court to confirm this award, Ecuador argued that the FSIA's arbitration exception did not apply because Chevron's investments pre-dated Ecuador's agreement to arbitrate in the BIT; if so, the court lacked subject-matter jurisdiction under the Federal Sovereign Immunities Act (FSIA) because Ecuador, as a sovereign, was presumptively immune from suit.[10] The Court of Appeals for the District of Columbia rejected these arguments and upheld the District Court's deference to the tribunal, finding that the FSIA did not require judicial review of the tribunal's determination of arbitrability.[11]

The D.C. Circuit relied in part on *BG Group*,[12] in which the Supreme Court held that the D.C. Circuit should have deferred to an arbitral panel's decision not to require compliance with a bilateral investment treaty's pre-arbitration local litigation

1. Chevron Corp. v. Ecuador, 795 F.3d 200 (D.C. Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3502 (U.S. Feb. 25, 2016) (No. 15-1088).
2. BG Grp. PLC v. Argentina, 134 S. Ct. 1198 (2014).
3. *Chevron*, 795 F.3d at 205–06.
4. *See id.* at 206.
5. *Id.* at 202–03.
6. *Id.*
7. *Id.* at 203.
8. *Chevron Corp.* 795 F.3d at 203.
9. *Id.*
10. *Id.*
11. *Id.* at 205-06.
12. *Id.*

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requirement.[13] The Court found that the arbitrators were entitled to deference because they had decided to issue an issue of interpretation and application of procedural preconditions set forth in an arbitration agreement to which the parties had consented.[14] Accordingly, the D.C. Circuit upheld the district court's deference to the arbitrators' determination that Chevron's lawsuits were "investments" within the meaning of the BIT,[15] thus allowing the district court to exercise jurisdiction over Ecuador within the terms of FSIA.[16]

2. *Claim Preclusion and the Courts' Power to Enjoin Arbitrations*

In *Citigroup, Inc. v. Abu Dhabi Investment Authority*,[17] the Second Circuit considered whether a U.S. court could use its power under the All Writs Act, 28 U.S.C. § 1651(a), to enjoin a second arbitration proceeding on the basis that it was precluded by a federal court's confirmation of an arbitral award issued after an earlier arbitration hearing dealing with similar claims.[18] The Second Circuit held that the "extraordinary remedies" authorized by the All Writs Act could not be used in this manner because the federal court judgment "merely confirmed the result of the parties' earlier arbitration without considering the merits of the underlying claims."[19] Moreover, the Second Circuit held that "the claim-preclusive effect of a prior federal judgment confirming an arbitration award is to be left to the arbitrators."[20]

B. The Arbitrators' Role in Determining Appropriate Remedies, and the Courts' Power to Preemptively Enjoin Certain Remedies in Arbitration

In *Benihana, Inc. v. Benihana of Tokyo, LLC*,[21] the Second Circuit considered whether a court may enjoin a party from requesting a particular remedy in arbitration where that remedy would have no basis in the parties' agreement.[22] In the district court, the plaintiff had obtained an injunction precluding the defendant from arguing to the arbitrators that it was entitled to an extended cure period if they found it in breach.[23] The Second Circuit reversed, holding that the issue of whether the parties' agreement permitted such an award was for the arbitrators to decide.[24] The Second Circuit found no precedent for a prior restraint on the arbitrators' choice of remedy, and it held that the Federal

13. *BG Grp. PLC*, 134 S. Ct. at 1210–13 (2014).
14. *Id.* at 1207-10.
15. *Chevron Corp.*, 795 F.3d at 206.
16. *Id.* at 205–06. The D.C. Circuit also noted that, even if the FSIA required a *de novo* determination of arbitrability, the district court had subject matter jurisdiction over the enforcement action, because it agreed with the arbitral tribunal that Chevron's lawsuits were "investments" for purposes of the BIT. *Id.* at 206-07.
17. Citigroup, Inc. v. Abu Dhabi Inv. Auth., 776 F.3d 126 (2d Cir. 2015).
18. *Id.* at 127.
19. *Id.*
20. *Id.* at 131.
21. Benihana, Inc. v. Benihana of Tokyo, LLC, 784 F.3d 887 (2d Cir. 2015).
22. *Id.* at 889-90.
23. *Id.* at 893–94.
24. *Id.* at 899.

Arbitration Act (FAA) does not permit a court to render a "pre-arbitration assessment" of whether an arbitration agreement authorizes a particular remedy.[25]

C. Finality of Interim Arbitral Awards

In *Schatt v. Aventura Limousine & Transportation Service, Inc.*,[26] the Eleventh Circuit considered whether a court has jurisdiction to vacate an arbitrator's award on liability where the issues of liability and damages were bifurcated.[27] Following a three-day hearing, the arbitrator had issued an award captioned "Interim Award on Liability," which stated that a damages award would be forthcoming after a separate hearing.[28] Because the arbitrator's work "was not complete," the Eleventh Circuit determined that the district court lacked jurisdiction under the FAA to review this award.[29] The Eleventh Circuit holding is distinguishable from decisions in other circuits that awards limited to specific issues are reviewable where the parties have agreed that such awards will be final.[30]

D. Appealability of District Court Orders Compelling Arbitration

Two circuit courts addressed the appealability of district court decisions regarding motions to compel arbitration under the FAA. In *Pine Top Receivables of Illinois, LLC v. Banco de Seguros del Estado*,[31] the Seventh Circuit considered whether Chapter 3 of the FAA, which implements the Inter-American Convention on International Commercial Arbitration, permits interlocutory appeals from denials of motions to compel arbitration.[32] Unlike Chapters 1 and 2 of the FAA (which apply to domestic arbitrations and arbitrations subject to the New York Convention, respectively), no provision of the FAA explicitly provides for interlocutory appeals from denials of motions to compel arbitration filed in connection with Chapter 3.[33] Nevertheless, the Seventh Circuit held that § 307 of Chapter 1, which provides for residual application of that chapter's appeal provisions, confers appellate jurisdiction over such denials.[34]

In *Southwestern Electric Power Company v. Certain Underwriters at Lloyds of London*,[35] the Fifth Circuit held that a district court's order granting a motion to compel and closing a case for administrative purposes was not appealable in the absence of a timely petition

25. *Id.* at 900–01.
26. Schatt v. Aventura Limousine & Transp. Serv., Inc., 603 Fed. App'x 881 (11th Cir. 2015).
27. *Id.* at 883, 886.
28. *Id.* at 883.
29. *Id.* at 887.
30. *See* Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231, 235-36 (1st Cir. 2001) ("Though we hold that the district court can review the partial award in this case, we think it best to limit our holding to the situation in which there is a formal, agreed-to bifurcation at the arbitration stage."); Trade & Transp., Inc. v. Natural Pet. Charterers Inc., 931 F.2d 191, 193–95 (2d Cir. 1991) ("[I]f the parties have asked the arbitrators to make a final partial award as to a particular issue and the arbitrators have done so, the arbitrators have no further authority, absent agreement by the parties, to redetermine that issue" and therefore the award is final for purposes of court review.).
31. Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado, 771 F.3d 980 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2891 (2015).
32. *Id.* at 987-88.
33. *Id.* at 988–89.
34. *Id.* at 990.
35. Sw. Elec. Power Co. v. Certain Underwriters at Lloyds of London, 772 F.3d 384 (5th Cir. 2014).

under 28 U.S.C. § 1292(b) for discretionary interlocutory review, even though the district court had issued a subsequent order construing its prior order as appealable.[36] The Fifth Circuit reasoned that the prior order was not final and appealable because it "did not close the case outright" but permitted the parties to "easily reopen" the case.[37] It declined to decide whether the analysis would be different if the district court's subsequent order had clarified "that its prior order was intended to be final and appealable."[38]

E. FAA Preemption of State Law

In *Generational Equity LLC v. Schomaker*,[39] the Third Circuit considered whether a Pennsylvania statute that prohibits non-registered entities from maintaining actions in the state's courts could use that statute to block enforcement of an arbitral award.[40] After determining that this statute applies to federal district courts sitting in Pennsylvania,[41] the Third Circuit held that the state statute was preempted by the FAA because it "stands as an obstacle to the accomplishment of the intended objectives of the FAA," including the promotion of arbitration.[42] In reaching this decision, the Third Circuit recognized that many states have similar registration laws, but nevertheless concluded that such laws are "inconsistent with the enforcement mechanism established under the FAA . . . ."[43]

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

A. Definition of "Commercial" in U.S. Declaration to the New York Convention

In *Belize Social Development Ltd. . v. Government of Belize*,[44] the D.C. Circuit addressed the meaning of the term "commercial" in the United States' declaration to the New York Convention, as codified in the FAA.[45] In this case, the Government of Belize agreed to provide tax, regulatory, and other accommodations to a private telecommunications company, which agreed to purchase real estate from Belize to facilitate the company's

36. *Id.* at 385-86.
37. *Id.* at 388.
38. *Id.* at 388 & n.3.
39. Generational Equity LLC v. Schomaker, 602 Fed. App'x 560 (3d Cir. 2015).
40. *Id.* at 562–63.
41. *Id.* at 562.
42. *Id.* at 563.
43. *Id.*
44. Belize Soc. Dev. Ltd. v. Belize, 794 F.3d 99 (D.C. Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3361 (U.S. Dec. 22, 2015) (No. 15-830).
45. *Id.* at 103-05. When the United States ratified the New York Convention, it made a declaration under Article I(3) of the Convention providing that the Convention applied "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I(3), June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention]. As a result, in the United States, the New York Convention applies only to arbitral awards arising from "commercial" relationships. *See id.*

provision of communication services.[46] Belize argued that an arbitration agreement it signed was not subject to FAA enforcement because its contractual relationship with the opposing party was not "commercial" but instead was "governmental" in nature.[47] The D.C. Circuit rejected this argument, holding that although the New York Convention, as adopted by the U.S., does not specifically define the term commercial,[48] the Convention is implemented in the FFA with language that is "the functional equivalent" of the broad range of activities over which Congress can exercise power under the Commerce Clause of the U.S. Constitution.[49] The D.C. Circuit rejected a definition based on the narrow meaning of the "commercial activity" exception in the FSIA because the policies underlying foreign sovereign immunity were less germane to the issue than the New York Convention's policy of encouraging enforcement of international arbitration agreements.[50] Consequently, a contractual relationship that involved the sale of real property, telecommunications services, and taxes on a private business was "commercial"[51] so that an award issued under this agreement was subject to the arbitration exception of the FSIA[52] and to New York Convention enforcement procedures.[53]

B. Public Policy Defense Under New York Convention

In *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*,[54] the Fifth Circuit held that U.S. public policy could not preclude enforcement of a Philippine arbitration award in an employment dispute.[55] The Fifth Circuit determined that the arbitration award did not violate U.S. public policy because the evidence did not establish that the arbitration and award "effectively denied" the employee his rights.[56] The Fifth Circuit also concluded that the district court erred in relying on the prospective waiver doctrine to allow the injured employee to pursue his claims under general U.S. maritime law.[57] Citing the Supreme Court's recent decision in *American Express Co. v. Italian Colors*

46. *Belize Soc. Dev. Ltd.*, 794 F.3d at 100–01.
47. *Id.* at 103–05.
48. *Id.* at 103.
49. *Id.* at 104 (quoting Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003)).
50. *Id.* at 104-05.
51. *Belize Soc. Dev. Ltd.*, 794 F.3d at 104.
52. *Id.* at 101-03.
53. *Id.* at 104-05.
54. Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG, 783 F.3d 1010 (5th Cir. 2015).
55. *Id.* at 1020–21.
56. *Id.* at 1020 (internal quotation marks and alterations omitted).
57. *Id.* at 1020–21. The prospective waiver doctrine stems from a footnote in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*. 473 U.S. 614, 637 n. 19 (1985). In *Mitsubishi*, the Supreme Court held that parties may resolve statutory claims based on U.S. antitrust law through arbitration. *Id. at 637-40.* Nevertheless, in holding that such claims are arbitrable under the FAA, the Court issued a warning that became known as the prospective waiver doctrine: parties may not use the freedom to select their dispute resolution forum to evade the application of U.S. public policy recognized in federal statutes and, accordingly, a U.S. court may refuse to enforce arbitration provisions that waive federal statutory rights in violation of U.S. public policy. *Id.* at 637 n. 19. That said, whether a court can refuse to enforce a contractual provision merely because it contravenes *public policy*, or whether courts may only refuse to enforce provisions that curtail an individual's *clear, specific statutory right* is unsettled. *See* Joseph R. Brubaker & Michael P. Daly, *Twenty-Five Years of the "Prospective Waiver" Doctrine in International Dispute Resolution: Mitsubishi's Footnote Nineteen Comes to Life in the Eleventh Circuit*, 64 U. Miami L. Rev. 1233, 1234 (2010).

Restaurant, where the Court refused to apply this doctrine to a waiver of class arbitration,[58] the Fifth Circuit held that "the prospective-waiver doctrine is limited to statutory rights and remedies," which do not include U.S. public policy as reflected in general U.S. maritime law.[59]

C. Res Judicata Effect of Foreign Court Judgments

This year, two circuit courts came to different conclusions regarding the res judicata effect of prior foreign court decisions on parties' attempts to enforce international arbitration awards in the United States.

In *AVR Communications, Ltd. v. American Hearing Systems, Inc.*,[60] the Eighth Circuit held that, after the Israeli Supreme Court had determined that certain claims fell within the scope of an arbitration agreement, the doctrine of res judicata precluded relitigation of that issue in a U.S. enforcement action.[61] AVR, an Israeli corporation, and Interton, a Minnesota corporation, had entered into an agreement containing an arbitration clause providing for arbitration in Israel.[62] When AVR commenced an arbitration proceeding against Interton in Israel, Interton argued that certain claims were not governed by the arbitration clause.[63] The Israeli Supreme Court, however, rejected this argument, and the arbitrators subsequently issued an award addressing all claims.[64] After the district court confirmed this award, the Eighth Circuit held that the parties could not reargue issues that had already been decided by the Israeli court.[65]

By contrast, in *VRG Linhas Aereas S/A v. MatlinPatterson Global Opportunities Partners II L.P.*,[66] the Second Circuit held that an award issued against various entities affiliated with MatlinPatterson Global Opportunities Partners II L.P. (collectively, "MatlinPatterson") by an arbitral tribunal in Brazil, which Brazilian courts had refused to vacate on multiple occasions, could not be confirmed in the United States because MatlinPatterson was a non-signatory to the arbitration agreement.[67] After reviewing the record, the Second Circuit determined that because MatlinPatterson had signed only a separate side agreement with no arbitration clause, the tribunal's award could not be enforced against it.[68] The Second Circuit emphasized that preclusive effect should not be given to the Brazilian courts' decisions because whether a party has agreed to arbitration is a threshold question in confirmation proceedings to be decided under U.S. arbitration law.[69]

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58. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

59. *Asignacion*, 783 F.3d at 1021.

60. AVR Commc'ns, Ltd. v. Am. Hearing Sys., Inc., 793 F.3d 847 (8th Cir. 2015).

61. *Id.* at 851–52.

62. *Id.* at 848–50.

63. *Id.*

64. *Id.*

65. *Id.* at 851-52.

66. VRG Linhas Aereas S/A v. MatlinPatterson Glob. Opportunities Partners II L.P., 605 Fed. App'x 59 (2d Cir. 2015).

67. *Id.* at 61.

68. *Id.* at 60–61.

69. *Id.*

IV. Arbitration Developments around the World

A. France

In France, the volume of case law generated in 2015 was significant, including on the arbitrability of disputes. In France, as in other Civil Law jurisdictions, the term arbitrability is understood narrowly to mean that the dispute relates to subject matter that is arbitrable, distinct from and in addition to the requirement that the dispute must be covered by the arbitration agreement. Under the French Civil Code, disputes are arbitrable that relate to *droits disponibles*, rights that can be freely disposed of.[70] In a recent judgment refusing a request to deny the recognition and enforcement of a Belgian arbitral award in France, the Paris Court of Appeal[71] followed an earlier ruling of the *Cour de cassation*[72] recognizing, at least implicitly, the arbitrability of a dispute between members of a company, or a member and the company, regarding the *dissolution* and the *liquidation* of a company.

B. Nigeria

Over the years, Nigeria has played an increasingly leading role in arbitration in West Africa and is "gradually becoming a hub for arbitration in Africa."[73] In 2015, the Lagos State Government announced that it would be opening the Lagos Arbitration Center, to add to the growing number of well-respected arbitral institutions in Nigeria such as the Lagos Regional Centre for International Commercial Arbitration and the Lagos Court of Arbitration.[74] Additionally, in October 2015, the President of the National Industrial Court of Nigeria established the National Industrial Court of Nigeria Alternative Dispute Resolution (ADR) Centre.[75] The court's establishment is viewed as a welcome development aimed at reducing both the number and the backlog of labor and industrial-related cases in the court system.

C. Bolivia

In Bolivia, on June 25, 2015, the new Conciliation and Arbitration law was enacted[76] to regulate ADR, including commercial and investment arbitration. Bolivia has separated

70. "*Toutes personnes peuvent compromettre sur les droits dont elles ont la libre disposition.*" ["All persons may make arbitration agreements relating to rights of which they have the free disposal."] Code Civil [C. civ.]Art.2059 (Fr.), *translation at* Georges Rouhette & Anne Rouhette-Berton, *Civil Code*, SSCI Inst., http://www.sccinstitute.com/media/37107/french-civil-code_arbitration.pdf.

71. Cours d'appel (CA) [regional court of appeal] Paris, Apr. 7, 2015, P.1, Ch.1 Societe Congolaise Wireless Network Sprl c/ Societe Vodacom International Limited.

72. Cour de cassation [Cass] [supreme court for judicial matters] 1e civ., Feb. 27, 2013, 1 Ch.civ., Societe Alstom Transport, Societe CDC Projets Urbains c/ Groupe Investimo.

73. Natasha Mellersh, *Positive Steps in Nigerian ADR*, Afr. L. & Bus. (Mar. 2, 2015), http://www.africanlawbusiness.com/news/5423-positive-steps-in-nigerian-adr.

74. *Id.*

75. Hilary Ekpo, *Expanding Frontiers of ADR: National Industrial Court of Nigeria Approach*, Guardian (Oct. 27, 2015, 5:06 AM), http://www.ngrguardiannews.com/2015/10/expanding-frontiers-of-adr-national-industrial-court-of-nigeria-approach/.

76. Law No. 708, June 25, 2015, G. O. 770NEC (replaces Law No. 1770 enacted on 1997 of arbitration and conciliation).

from the international investment arbitration system by denouncing its 22 bilateral investment treaties (BITs),[77] as well as denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[78] thus becoming the first country to separate from the International Centre for Settlement of Investment Disputes (ICSID).

The investment arbitration provisions of Law No. 708 fall within the provisions of Article 320 II of the Bolivian Constitution. According to the Bolivian law, all foreign investments are subject to the jurisdiction, to the laws, and to the Bolivian authorities, and no one may invoke exceptional situation or appeal to diplomatic claims for a more favorable treatment.

The new law establishes the following common provisions, which apply to all cases of investment disputes[79]: (a) Bolivian law applies; (b) parties must participate in compulsory conciliation prior to the arbitration; and (c) the territory of Bolivia will be the place for conciliation and the seat of arbitration, although hearings may be held outside Bolivia.

In the case of Commercial Arbitration, Article 54 II of Law No. 708 allows the parties to agree on a seat of the arbitration outside of Bolivia, in which case it will be considered to be international arbitration and subject to the parties' choice of law, provided their choice of law or seat of arbitration does not violate the Constitution of Bolivia. For example, Article 366 of the Constitution provides for the application of Bolivian law and jurisdiction for all companies operating in the hydrocarbon chain.

D. ITALY

In Italy, a recent decision of the Italian Supreme Court, the *Corte Suprema di Cassazione*,[80] has significantly contributed to the arbitration-friendliness of that jurisdiction. The *Corte di Cassazione* has ruled that, if an arbitration is seated in Italy, the President of the Italian court where the seat of the tribunal is located[81] is authorized to appoint an arbitrator when a party refuses or fails to appoint. The decision has significantly extended the respective court powers, which were originally limited to a certain type of arbitration.

77. *See* Carlos Corz, *Bolivia denunció al menos 20 tratados internacionales contrarios a la Constitución* [Bolivia denounced at least 20 international treaties that were contrary to the Bolivian constitution], LA RAZON [THE REASON] (May 20, 2015), http://www.la-razon.com/seguridad_nacional/Bolivia-tratados-internacionales-contrarios-Constitucion_0_2274372629.html.

78. On May 2, 2007, the World Bank received a written notice of denunciation of the ICSID Convention from Bolivia. *See* ICSID, 2007 ANNUAL REPORT, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2007%20-%20Annual%20Report%20-%20English.pdf

79. *See* Ley No. 708, Ley de Conciliación y Arbitraje [LCyA] [Law No. 708, Conciliation and Arbitraion Law], art. 129, June 25, 2015, GACETA OFICIAL [G.O.] (Bol.).

80. Corte di cassazione (Cass.) (court of last appeal), Third Civil Section, Judgment 8 May 8, 2015, n. 9315.

81. Art. 810(2), Codice di procedura civile [C.p.c.] [Code of Civil Procedure] (It.).

E. India

In India, the Arbitration and Conciliation (Ordinance), 2015 (Amendment)[82] was promulgated by the President of India on October 23, 2015, ushering in much-anticipated amendments to the Arbitration and Conciliation Act, 1996 ("Act").[83] The policy objective of the Amendment was to facilitate efficiency in doing business in India and consequently attract more foreign investment.

The Amendment formally adopts the ruling of *BALCO*,[84] which overturned the ruling in *Bhatia*,[85] by generally excluding the application of Part I of the Act to international arbitrations. The effect of *BALCO* was well received, but it deprived any party to an international arbitration from enforcing interim orders or seeking assistance of the Indian Courts in taking evidence. The Amendment addresses this issue by selectively making two provisions of Part I applicable to international arbitrations: Section 9 pertaining to Courts' powers to grant interim relief, and Section 37 for assistance in taking evidence.[86] But the parties retain the power to exclude the application of even these sections.

Until recently, the Indian Courts applied an exceptionally broad test for public policy as laid down in *ONGC v Saw Pipes*,[87] including "patent illegality," for setting aside foreign awards.[88] The Amendment limits this definition by setting forth an exhaustive list of grounds for finding that a foreign award conflicts with India's public policy.[89] It specifically omits "patent illegality" from the list, and it contemplates that Indian courts will not review an award on the merits of the dispute in determining whether the award violates India's public policy.[90]

F. Germany

In Germany, in a decision of November 5, 2014, published in 2015,[91] the Federal Supreme Court dismissed an appeal at law (*Rechtsbeschwerde*) due to the lack of fundamental importance of the legal problem it presented. The Supreme Court expressly agreed with the Karlsruhe Higher Regional Court (Oberlandesgericht) on the merits. The Higher Regional Court had denied an application to have a Swiss ICC award declared enforceable. The Respondent in the arbitration was a joint venture residing in Qatar and consisting of an Abu Dhabi company as well as a German corporation. The Claimant, a German sub-contractor, applied with the Karlsruhe Higher Regional Court

82. The Arbitration and Conciliation Amendment Ordinance 2015, No. 9 of 2015, Ministry of Law and Justice, Extraordinary Gazette of India, Oct. 23 2015, *available at* http://lawmin.nic.in/la/Arbitration.pdf [hereinafter Amendment].

83. The Arbitration and Conciliation Act 1996, No. 26 of 1996, Ministry of Law and Justice, Gazette of India, Aug. 16 1996, *available at* http://www.ficci-arbitration.com/htm/acts.pdf [hereinafter Arbitration Act, 1996].

84. Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. ("BALCO") (2012) 9 S.C.C. 552 (India).

85. Bhatia International v. Bulk Trading S.A. ("Bhatia") (2002) 4 S.C.C. 105 (India).

86. *See* proviso to Section 2, Arbitration Act, 1996.

87. ONGC v Saw Pipes (2003) 5 S.C.C. 705 (India).

88. Phulchand Exports Ltd. v O.O.O. Patriot (2011) 10 S.C.C. 300 (India).

89. *See* explanation 1 to Section 48, Arbitration Act 1996.

90. *See* explanation 2 to Section 48, Arbitration Act 1996.

91. SchiedsVZ 2015, 149 - BGH III ZB 75/13.

to have the award declared enforceable against the German joint venture partner. That court denied the application because the German JV partner had not been a party to the arbitration proceedings. The court also refused a request under section 319 of the German Civil Procedure Act for correction of the arbitration award – which named the joint venture, but not the joint venture partners – for lack of any "formal incorrectness" because the arbitration proceedings had been taken against the joint venture only. The court had also denied a motion to remand the case to the arbitration tribunal because that action would be permissible only on setting aside the award, which was beyond the competence of the German court because the award was Swiss.

In a partial judgment issued on January 15, 2015, the Higher Regional Court in Munich invalidated the arbitration agreement between Claudia Pechstein and the International Skating Union (ISU) due to an infringement of mandatory rules of German competition law.[92] The court held that ISU had abused its market power by requiring the athlete to consent to the Court of Arbitration of Sports (CAS) arbitration agreement because the tribunal had been constituted by a monopoly of sports associations. In contrast to the judgment of the first instance, the Higher Regional Court in Munich also held that the award of the CAS is not recognisable in Germany so domestic courts are not bound by the decision on the legitimacy of the doping ban in the award. The decision has not ended the debate, and it certainly does not mean the end of sports arbitration. The two holdings do not entail any danger for the autonomy of sports as a whole. But the Munich courts have made abundantly clear the need to reform CAS rules on the appointment and composition of tribunals.

G. Switzerland

In Switzerland, 2015 was another busy year for the case docket of Swiss Supreme Court ("the Court") related to international arbitration. To date, the Court has rendered thirty-three decisions relating to appeals from arbitral awards issued by international arbitral tribunals seated in Switzerland. Among the most important decisions are the following three:

Res Judicata in International Arbitration (141 III 229): The Court reaffirmed that an arbitral award rendered in Switzerland violates procedural public policy if it disregards the principle of res judicata. The Court decided that the question of the identity of subject matter must be assessed based on the lex fori. At the same time, no foreign decision may have a broader effect than under the legal system from which it originates. The Court acknowledged the lack of transnational concepts and consistent international standards, yet declined to endorse the recommendations in the ILA's 2006 Report on res judicata. In particular, the more far-reaching concepts of Anglo-American origin, such as issue estoppel, were not applicable under the Swiss lex fori.

First Decision on Arbitral Secretaries (4A_709/2014): The Swiss Court found that arbitrators are entitled to rely on the assistance of consultants and administrative secretaries as long as they do not delegate their core decision-making functions. The appointment does not require the prior approval of the parties, but a secretary may not be appointed if the parties have agreed to exclude that option. The Court compared the tasks

92. SchiedsVZ 2015, 40 - OLG München U 1110/14 Kart.

of an administrative secretary to those of a clerk in state court proceedings, such as organizing briefs and correspondence, preparing hearings, taking minutes, and drawing up accounts. In addition, the Court held that secretaries can provide "a certain degree of assistance" in drafting the award under the supervision and in accordance with the instructions of the arbitral tribunal. The proper legal basis to challenge a purported excessive delegation of duties is Art. 190(2)(a) of the Swiss Private International Law Act.

First Decision on Investment Treaty Arbitration (4A_34/2015): The Swiss Court rejected a petition by Hungary to set aside an award under the Energy Charter Treaty in favor of French company EDF. The Court adopted a broad interpretation of the host State's general obligation to accord fair and equitable treatment to all investments made under the ECT, under which Hungary had consented to arbitration. Conversely, it adopted a rather narrow interpretation of the umbrella clause to which Hungary had withheld its consent to arbitration. Faced with a matter in which claims for breach of fair and equitable treatment were said to overlap with umbrella clause claims, the Supreme Court held that States could not "shut the umbrella" by withholding consent to arbitration. The decision may have repercussions outside of Switzerland with respect to other States that have exercised the right not to consent to arbitrate umbrella clause claims pursuant to Article 26(2) of the ECT. Similarly, the Court confirmed its strict interpretation of international public policy. It left open the question of whether an award that would oblige a party to violate obligations resulting from international treaties would be contrary to public policy, and it refused to take into consideration the recent *Micula v. Romania* case in which the European Commission had decided, in relatively similar circumstances, that the damages awarded by an arbitral tribunal amounted to illegal State aid under EU law.

H. China

In China, the year 2015 marks the 20th anniversary of the implementation of the Arbitration Law. On January 1, 2015, the new China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules became effective.[93] On April 1, 2015, the new Beijing Arbitration Commission (BAC) Arbitration Rules became effective.[94] Both CIETAC and BAC include updated clauses on the appointment of emergency arbitrators, joinder of additional parties, and consolidation of arbitrations.[95] In addition, in the CIETAC Rules, the Hong Kong Arbitration Center of CIETAC is recognized as a new option for arbitration.[96] On December 31, 2014, CIETAC announced the decision to restructure Shanghai and South China (Shenzhen) Sub-Commissions, which led to a lingering effect on the controversy in that jurisdiction in 2015. In January 2015, Shenzhen Court of International Arbitration (SCIA) announced Shenzhen Intermediate People's Court recognized the legitimacy of the jurisdiction of the

93. [China International Economic and Trade Arbitration Commission Arbitration Rules], (amended Nov 4, 2014, effective Jan. 1, 2015), (P.R.C.), *available at* http://www.cietac.org/index.cms [hereinafter CIETAC Rules].

94. [Beijing Arbitration Commission Arbitration Rules], (revised and adopted Jul. 9, 2014, effective Apr. 1, 2015), (P.R.C.), *available at* http://www.bjac.org.cn/page/zc/guize_en.html [hereinafter BAC Rules].

95. *See* CIETAC Rules § 18 (joinder and additional parties), §19 (consolidations of arbitrations), §23(conservatory and interim measures); BAC Rules §13 (joinder and additional parties), § 28 (concurrent hearings), §63 (emergency arbitrator).

96. *See* CIETAC Rules, ch. VI (special provisions for Hong Kong arbitration).

SCIA to arbitrate when referring to the South China Sub-Commission.[97] On November 19, 2015, the Hong Kong International Arbitration Centre (HKIAC) officially launched its Shanghai Office in the Shanghai Free Trade Zone, which is the first international arbitration institution to set a representative office in Mainland China.[98] Meanwhile, on April 30, 2015, ICSID dismissed, for lack of jurisdiction, the first investment arbitration brought by China, *Ping An Insurance (Group) Company of China, Ltd. v. Kingdom of Belgium*.[99]

I. IRAQ

On November 17, 2015, the Government of Iraq signed the ICSID Convention.[100] The Convention will enter into force for Iraq on December 17, 2015.[101] The ratification comes at a time of major economic crisis in Iraq. A new era of fiscal austerity has enhanced the importance of foreign investment for Iraq to rebuild its infrastructure. But a major risk for foreign investors has been the lack of an effective legal regime for arbitration. Historically, Iraqi legal and political traditions have been hostile to international arbitration, notably demonstrated by Iraq's failure to join the New York Convention. But Iraq's ratification of the ICSID Convention signifies a major departure from that tradition and will contribute to addressing the lack of an effective enforcement regime for foreign arbitral awards in Iraq's legal framework. Currently, Iraq's Civil Procedure Code gives substantial discretion to Iraqi courts to refuse enforcement of foreign arbitral awards.[102]

Although the ICSID Convention will not solve enforcement problems for commercial disputes or even non-ICSID investment disputes, it will provide an enforcement mechanism for investors covered by Iraq's recently enacted bilateral investment treaties (BITs). Within the last year, the Iraqi Council of Representatives[103] has ratified BITs with

97. Shandong Fuyu Lanshi Tires Co., Ltd. v. Shenzhen Nianfu Enterprise Development Co., Ltd., Civil Ruling, (Jan. 6, 2015), *available at* http://www.sccietac.org/files/fckFile/file/mscds.pdf.

98. *See* Press Release, Hong Kong Government, SJ officiates at opening of Hong Kong International Arbitration Centre Shanghai Office, Hong Kong Government (Nov. 19, 2015), *available at* http://www.info.gov.hk/gia/general/201511/19/P201511190763.htm.

99. Ping An Ins. (Grp.) Co. of China, Ltd. . v. Kingdom of Belgium, ICSID Case No.ARB/12/29, Award, (Apr. 31, 2015), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=casesRH&actionVal=showDoc&docId=DC5912_En&caseId=C2463.

100. Convention on the Settlement of Investment Disputes between States and National of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966), *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID Convention]. The ICSID Convention was adopted by the Executive Directors of the World Bank on March 18, 1965. The Convention created the International Centre for Settlement of Investment Disputes (ICSID), which is why it is commonly referred to as the "ICSID Convention." Iraq became the 160th signatory of the ICSID Convention and the 152nd country to become a member of ICSID after depositing the instrument of ratification.

101. *See* ICSID Convention, art. 68(2) (providing that the Convention enters into force thirty days after a State "deposits its instrument of ratification, acceptance or approval").

102. *See* Law No. 83 (1969) at art. 251-276; *see* Ali Fawzi Al-Mosawi, International Commercial Arbitration and the Possible Application Thereof in Iraq (2010) (unpublished) (on file with the author). (Dr. Al-Mosawi is currently a professor of commercial law at the University of Baghdad, School of Law).

103. The Iraqi Council of Representatives represents the legislative branch of the Iraqi government.

Kuwait[104] and Jordan,[105] both of which include Iraq's consent to ICSID arbitration. At least three other BITs are currently in force with Japan, France, and Germany,[106] all of which include an ICSID provision. Iraq's long-awaited ratification of the ICSID Convention will finally activate the ICSID arbitration mechanisms in those BITs, allowing investors to avoid Iraq's courts and domestic laws to enforce their awards. Iraq's investment law does not provide for ICSID arbitration, but foreign investors who are not covered by a BIT can now potentially add ICSID arbitration provisions to their investment contracts with state entities in Iraq. Despite the clear benefits of the ICSID ratification for certain foreign investors, Iraq will ultimately need to join the New York Convention to attract the level of investment and trade that will rebuild its infrastructure and diversify its economy.

J. BRAZIL

Brazil enacted two important laws in 2015. First, the Amendment to the Brazilian Arbitration Law (the "Amendment") became effective on July 26, 2015.[107] It modifies the international arbitration regulation, in light of the monistic approach of the Brazilian Arbitration Law (Revised Arbitration Law).[108] The Amendment consolidates the pro-arbitration approach supported by prominent scholars and case law since the Revised Arbitration Law was first adopted. The changes include permitting the government and public companies to arbitrate,[109] authorizing arbitrators to issue partial awards,[110] and permitting parties to seek provisional measures in state courts prior to the constitution of the arbitral tribunal.[111] Secondly, Brazil's New Code of Civil Procedure (NCPC) was enacted on March 16, 2015, and will become effective in 2016.[112] It contains some important provisions that affect arbitration, mainly regarding the relationship of the arbitral tribunal and the juge d'appui. Furthermore, other provisions reinforce the competence-competence principle and its negative effect.

104. *See* Law 14, 2014, Kuwait-Iraq BIT (Full text of this BIT in the Iraqi Official Gazette, edition 4346, Dec. 29, 2014, *available at* http://www.moj.gov.iq/uploaded/4346.pdf).

105. *See* Law 1, 2015, Jordan-Iraq BIT (Full text of the BIT in the Iraqi Official Gazette, edition 4353, Feb.23, 2015, *available at* http://www.moj.gov.iq/uploaded/4353.pdf).

106. A list of Iraq's signed BITs is available at http://investmentpolicyhub.unctad.org (Note that this list may not reflect all recently executed Iraqi BITs.). All of Iraq's laws and treaties are required by law to be published in Iraq's Official Gazette in order to have the force of law. BITs, as international treaties, are passed within the same process as domestic legislation and are published in the Official Gazette, which is available online at http://www.moj.gov.iq/iraqmag/.

107. Lei No. 13.129 de 26 de maio de 2015 [Amendment to the Brazilian Arbitration Law], DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 27.5.2015 [hereinafter Amendment].

108. Lei No. 9.307 de 23 de setembro de 1996 [Brazilian Arbitration Law], D.O.U. de 24.9.1996 [hereinafter Revised Arbitration Law].

109. Revised Arbitration Law, art. 1(1).

110. Art. 32, V, was excluded in the Revised Arbitration Law and art. 33, para. 4.

111. Revised Arbitration Law, arts. 22-A, 22-B.

112. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE], Lei No. 13.105 de 16 de marzo de 2015, D.O.U. de 17.3.2015.

K. SPAIN

In Spain, the recent history of arbitration has shown a certain "bi-polarity": while Spanish operators are increasingly accustomed to arbitration in international disputes, they remain reluctant to arbitrate domestic conflicts.[113] A series of 2015 decisions of the Madrid's *Tribunal Superior de Justicia* (the high court responsible for hearing annulment actions against awards issued in Madrid) raises concerns that relevant judicial bodies may share the lack of full confidence in the arbitral institution that is occasionally shown by Spanish users and counsel. The decisions in question expansively apply the concept of "public order" as a ground for annulling arbitral awards issued in favor of financial institutions and against relatively unsophisticated clients in disputes involving financial derivatives. Under the guise of an expansive concept of public order, the decisions appear to allow a substantive review of the underlying merits; they essentially provide that an award rendered in Madrid can be set aside on the basis of error in the application of law by the arbitral tribunal. The decisions have generated considerable controversy in the local arbitral community and a maelstrom of articles, many of which are extremely critical of the decisions and their possible consequences.[114]

K. ICC

On an international level, the growing demand for transparency in international arbitration has prompted a decision of the International Court of Arbitration of the International Chamber of Commerce (ICC) to begin communicating reasons for many of the court's administrative decisions. The new policy was adopted on October 8, 2015, with immediate effect. It will apply only in proceedings where all parties so agree, and even then only in four types of administrative decisions: (i) decisions on the challenge of arbitrators under Article 14 and 15(2) of the ICC Rules of Arbitration, (ii) decisions to initiate replacement proceedings and subsequently to replace an arbitrator on the ICC's own motion, (iii) decisions to consolidate arbitration proceedings under Article 10 of the ICC Rules of Arbitration, and (iv) prima facie decisions on jurisdiction.[115]

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113. For brief overviews of the Spanish arbitral scene, see Clifford J. Hendel, *Arbitration in Spain: Changed Law and Changing Perceptions*, 29 SWISS ARB. ASS'N BULL. 205 (2011) and *Perspectives on Three Recent Annulment Decisions: Is Where You Stand Determined by Where You Sit?*, 28 ARB. INT'L (LCIA) 343 (2012).

114. Some of the most heated criticisms of the decisions can be found in Manuel Conthe, *Swaps de Intereses: la Sentencia del TSJ de Madrid de 28 de enero de 2015*, 8515 DIARIO LA LEY 1 (2015); Gonzalo Stampa Casas, *Comentario a las Sentencias de la Sala de lo Civil y/o Penal del Tribunal Superior de Justicia de Madrid de 28 de enero de 2015, de 6 de abril de 2015 y de 14 de abril de 2015*, 8537 DIARIO LA LEY (2015); and Seguimundo Navarro, *Referencias al orden público en derecho comparado*, 8537 DIARIO LA LEY (2015). In English, see Eduardo Soler & Beverly Timmins *Madrid Court sets aside award on grounds of public order after reviewing merits*, LEXOLOGY, June 2015.

115. *ICC May Communicate Reasons as a New Service to Users*, I.C.C. (Oct. 8, 2015), http://www.iccwbo.org/News/Articles/2015/ICC-Court-to-communicate-reasons-as-a-new-service-to-users/.

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