



AMERICAN BAR ASSOCIATION

International Law Section

International Arbitration Committee

Quarterly Newsletter



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I. UPCOMING EVENTS:

[Discussion on US court's treatment of intra-EU investment treaty awards \(November 9th, 2023\) \(virtual\)](#)

DELOS will offer an interactive discussion regarding the United States court's treatment of intra-EU investment treaty awards. The panel will address landmark cases regarding investment arbitration including (i) Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, (ii) 9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15, and (iii) NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11. Questions may be submitted in advance.

[Miami International Arbitration Week \(November 8-15, 2023\) Miami, Florida](#)

Please consider attending the Inaugural Miami Arbitration Week hosted by the Miami International Arbitration Society. The event takes place on November 8-15, 2023, and features a variety of sessions offering lively discussions on arbitration-related topics.

[21st ICC Miami Conference on International Arbitration \(November 12-14, 2023\) Miami, Florida](#)

The 21st ICC Miami Conference on International Arbitration will be held on November 12-14, 2023. This conference will feature “a line-up of expert speakers and topical discussions on the latest developments and trends in arbitration and ADR in Latin America.” Practicing lawyers, arbitrators, corporate counsel or other professionals interested in international arbitration in Latin America and the Caribbean should consider attending.

[MIAS 2nd Annual LATAM Investor State Arbitration Conference \(November 12, 2023\)](#)

This all-day event will occur in Miami on Sunday, November 12, 2023. This event will feature two debates between established practitioners regarding timely questions such as whether the ISDS will exist in 20 years. This event will also feature a Keynote Address from Alexis Mourre, founding partner of MGC Arbitration (France) and a Tylney Hall-style symposium.

[New York Arbitration Week \(November 13-17\) New York, New York](#)

The theme of New York Arbitration Week is “New York, New York: A Celebration of New York Law and Arbitration.” The week will focus on the deep connection between New York and international arbitration. Programming will include discussions on the use of New York law in contracts, the resolution of global disputes in New York, and the role of New York courts in facilitating arbitration. The event will be held in-person.

[SIArb 13th Annual Commercial Arbitration Symposium 2023 \(November 29, 2023\) Singapore, Singapore](#)

This symposium offers a unique opportunity to discuss key issues and achievements in commercial arbitration. In lieu of a set speaker list, delegates will engage in “free flowing” discussions on current issues and developments moderated by experienced practitioners. Delegates are invited to contribute two questions or topics ahead of the symposium.

[6th ICC India Arbitration Day \(December 2, 2023\) Delhi, India](#)

This event will discuss key issues in Indian arbitration as well as international arbitration. This year also constitutes the centenary of the ICC Court. Program and speaker details are forthcoming.

[Celebration of the 75th Anniversary of the Universal Declaration of Human Rights \(UDHR\) \(December 6-8, 2023\) Paris, France](#)

This December will mark the 75th Anniversary of the Universal Declaration of Human Rights (UDHR). The ABA International Law Section has partnered with the Paris Bar Association to present a multi-day event, focusing on the accomplishments, challenges, and the future of the UDHR and broader human rights law. This event will take place in Paris, France. Registration closes on November 29, 2023.

[AAA-ICDR Domestic & International Life Sciences ADR Strategy Conference \(December 7, 2023\) New York, New York](#)

This inaugural full-day event in New York focuses on “the latest trends and developments in alternative dispute resolution (ADR) in the life sciences industry,” such as IP protection, licensing and collaboration disputes, and regulatory compliance. CLE credits will be offered for certain jurisdictions.

[Florida International Law Section’s iLaw Global Forum on International law \(February 16, 2024\) Miami, Florida](#)

The iLaw Conference, held in Miami, FL, is the Florida Bar International Law Sections’ “flagship event,” attended by legal practitioners from the United States Canada, Europe, and Latin America. This conference offers three parallel tracks for its attendees: 1) International Litigation; 2) International Business Transactions; and 3) the ICDR International Arbitration Track. Registration information is forthcoming.

[IBA International Arbitration Day \(February 22-23, 2024\) Shangri-La Singapore, Singapore](#)

The International Bar Association (IBA) Committee invites you

to register for its 25th Annual IBA Arbitration Day in Shangri-La Singapore, Singapore. Programming will address various topics such as “arbitrability and validity of arbitration proceedings,” “how to ensure consent to arbitrate,” and “expectations about arbitrators.” The early-bird registration deadline is January 19, 2024.

[Paris Arbitration Week \(March 18-24, 2024\) Paris, France](#)

The Paris Arbitration Week is one of the “most attended events” for practitioners from all over the world. Attendees will have the opportunity to expand their international network of colleagues, listen to “eminent speakers” and perhaps reunite with old friends. This week allows attendees to fully immerse themselves in debates, practical workshops, and the sharing of ideas from diverse perspectives. This is a week that you do not want to miss.

[31st Vienna VIS Moot \(March 22-28, 2024\)](#)

The Willem C. Vis International Commercial Arbitration Moot is a competition for law students who are interested in the practice of international commercial sales law and arbitration. Students from all countries are eligible to register. Established practitioners are invited to serve as an arbitrator for the competition. Student registration closes on November 23, 2023. Arbitrator registration opens at the beginning of November 2023.

[ICCA 2024 Hong Kong \(May 5-8, 2024\)](#)

Registration is now open for the ICCA biennial Congress, taking place in Hong Kong. Programming throughout this multi-day event will focus on the theme “International Arbitration: A Human Endeavour.” ICCA’s biennial Congress is the largest regular gathering of international dispute resolution specialists in the world. The ICCA Congress caters to both newcomers and experts in the dispute resolution sphere.

[London International Disputes Week \(June 3-7, 2024\)](#)

Save the date for the 5th London International Disputes Week held on June 3-7, 2024. The theme this year will be “Uniting for Global Challenge and Opportunity.” This week provides ample opportunity to network and foster collaboration within the international legal community.

II. RELEVANT NEWS:

A. CONVENTION

European Commission proposes withdrawal from the Energy Charter Treaty (July 7, 2023)

On July 7, 2023, the European Committee formally proposed that the EU, its Member States, and Euratom withdraw from the Energy Charter Treaty (“ECT”) in accordance with Article 47 of the ECT. The EU Commission adopts the view that “the unmodernised ECT is incompatible with the principle of autonomy of Union law,” and the protection granted to fossil fuels does not fit with EU objectives to “accelerate the shift away from fossil fuels and towards renewable energy, to achieve a greater energy independence, ensure the EU’s energy security, and, not least, deliver on the commitment to cut emissions by at least 55% by 2030 and to reach climate neutrality by 2050.” In regard to the ISDS mechanism specifically, the EU Committee addressed that the provisions of the Treaty “are not in line with the EU approach to investment protection.” This marks the end of 15 rounds of negotiations with efforts to modernize the ECT since 2018 and brings uncertainty to European energy investment.

UK joins Indo-Pacific trade agreement (July 16, 2023)

On July 16, 2023, The UK became the first European signatory to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – a Indo-Pacific trade bloc worth £12 trillion. The trade agreement contains ISDS provisions, as a UK public body advises the state to withdraw from the Energy Charter Treaty over climate change concerns.

B. LEGISLATIVE REFORMS AND RULES UPDATES

UN Member States adopt code of conduct for arbitrators (July 14, 2023)

The United Nations Commission on International Trade Law (UNCITRAL) adopted a Code of Conduct for Arbitrators in International Investment Disputes during its 56th annual session in Vienna. The code has been jointly developed by the Secretariats of UNCITRAL and ICSID since 2017. It reinforces the duty of independence and impartiality, regulates double-hatting, and lists specific disclosure requirements. The code will be applied to arbitration proceedings by consent of the parties or as required in the instrument of consent to arbitral proceedings. ICSID will also consult further with its membership on the Code’s application in ICSID proceedings.

Albania adopts new arbitration law (July 6, 2023)

On July 6, 2023, the Albanian parliament passed a new arbitration law based on the UNCITRAL Model Law to encourage greater foreign investment in the country. The Law fills almost a decade-old vacuum left by the repeal of arbitration provisions in its Civil Procedure Code back in 2013, which is expected to improve the legal certainty in Albania.

UK Law Commission publishes final recommendations to reform Arbitration Act 1996 (September 6, 2023)

The Law Commission of England and Wales has published its final recommendations for reform of the Arbitration Act 1996 (the “1996 Act”). The 1996 Act provides a framework for arbitration in England and Wales and Northern Ireland, which has been in force for over 25 years. After two rounds of consultations, the commission mainly confined its recommendations to (1) codification of an arbitrator’s duty of disclosure; (2) strengthening arbitrator immunity around resignation and applications for removal; (3) introduction of a power of summary disposal; (4) a revised framework for challenges under section 67; (5) a new rule on the governing law of an arbitration agreement; and (6) clarification of court powers in support of arbitral proceedings and in support of emergency arbitrators. The recommendations aim to provide an excellent basis for UK domestic arbitration, and to continue to support London’s world-leading role in international arbitration.

[CIETAC publishes new arbitration rules \(September 5, 2023\)](#)

On September 5, 2023, China International Economic and Trade Arbitration Commission (CIETAC) published its new version of arbitration rules, which will enter into force on January 1, 2024. The new version of arbitration rules addresses parties' autonomy in the selection and appointment of arbitrators, extends the application of arbitration agreement in multi-contract disputes, enlarges the scope of courts to apply for interim measures, and clarifies the power of tribunals to determine the jurisdiction.

C. DEVELOPMENTS AND CASELOAD STATISTICS

[ICDR launches survey on tech, life sciences and IP disputes \(June 26, 2023\)](#)

The International Centre for Dispute Resolution (ICDR) has launched a survey to gather information on disputes in the technology, life sciences and intellectual property sectors. The result will be a set of proposals outlining what the dispute resolution community should do to assist the information technology, life sciences, construction, energy, aviation, aerospace, and many other industries in resolving their technology and intellectual related disputes.

[Silicon Valley Arbitration and Mediation Centre publishes AI guidelines \(August 31, 2023\)](#)

The Silicon Valley Arbitration and Mediation Centre (SVAMC) published a draft of guidelines on the use of artificial intelligence in arbitration. These guidelines introduce a principle-based framework for the use of AI tools in arbitration, which is intended to assist participants in arbitrations with navigating the potential applications of AI.

[JAMS has released its first ever international caseload report \(June 20, 2023\)](#)

On June 20, 2023, the largest private provider of ADR services, JAMS, released its first international caseload report for 2022, according to which, JAMS had over 23,000 active cases, including 437 international cases over the last year. It also provides a Model Clause that can be incorporated into procedural orders.

D. RECOGNITION AND ENFORCEMENT

[Singapore court upholds the confidentiality of tribunal deliberations \(June 28, 2023\)](#)

In *CZT v. CZU*, the Singapore International Commercial Court has ruled on the confidentiality of tribunal deliberations for the first time. Despite the dissenting arbitrator claiming that the majority had engaged in serious procedural misconduct, the Court concluded that Respondent relied solely on the dissenting arbitrator's conclusions, rather than showing any substantial

evidence. The Court, therefore, refused to order the Tribunal to disclose its deliberations.

[US Supreme Court confirms availability of RICO to foreign award creditors \(June 22, 2023\)](#)

In *Yegiazaryan v. Smagin*, the US Supreme Court has ruled that a foreign plaintiff can sue a domestic U.S. judgment-debtor under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for the debtor's fraudulent domestic efforts to avoid collection on a U.S. judgment confirming a foreign arbitral award, which creates a new avenue for foreign arbitral creditors targeting US assets.

[German court denies intra-EU ECT arbitrations as inadmissible \(July 27, 2023\)](#)

On July 27, 2023, the German Federal Court of Justice (FCJ) ruled that three intra-EU investor-State ICSID arbitrations were inadmissible under German arbitration law. It held that German courts are competent to decide on applications under § 1032(2) German Code of Civil Procedure (ZPO) to declare intra-EU investor-State arbitrations inadmissible, even in case of ICSID arbitrations. Despite the Court acknowledging that ICSID arbitrations are not subject to reviews by State courts, the court considered that in the specific circumstance of intra-EU investor-State arbitration, EU law takes precedence, and it warrants an exception to the rule.

[English court's rare decision to refuse enforcing arbitration award on public policy grounds \(July 14, 2023\)](#)

The English Commercial Court has refused to enforce a U.S. arbitral award made in a JAMS arbitration seated in California, finding that the award won by a US cryptocurrency company would breach UK consumer protection legislation and financial regulation, and it was therefore not enforceable.

III. PRACTICE POINTER

Practical tips when dealing with corruption allegations in arbitration

Corruption allegations have increasingly been raised in international arbitration in recent years, in arbitration and post-arbitration proceedings. In that context, reviewing courts have adopted different positions regarding the extent of their review. Stéphane de Navacelle, Juliette Musso and Gregory Arnoult share their advice to practitioners for handling corruption allegation issues.

Be prepared to deal with the merits again. Court practices will vary depending on jurisdictions, but as the fight against corruption becomes more important, reviewing courts may want to address this issue more thoroughly.

This has notably been a considerable evolution of French case law. When examining whether awards comply with public policy, French courts may review all legal and factual elements without being constrained by the findings of the arbitrators. At the risk of affecting procedural loyalty, French courts have examined corruption allegations that had not been raised in the arbitration, as in the *Belokon* and *Sorelec* cases, or have reviewed in detail the findings of the arbitrators, as in the *Alstom v. ABL* case. By contrast other jurisdictions have sought to limit the extent of the elements under review. For instance, in the *Alstom v. ABL* case, English and Swiss courts deferred to the findings of the arbitrators. A similar position has been adopted by U.S. courts (see e.g. *Vantage Deepwater v. Petrobras*).

In that context and although this will vary depending on the jurisdiction, counsel may be increasingly required to deal with the offence of corruption or other criminal offences and concepts before the reviewing judge, who will himself be required to determine whether or not there is a criminal offence in the facts ruled upon in the award.

Anticipate and adopt industry-specific reflexes. Counsel in arbitration should be trained in addressing these issues, by adopting compliance and white-collar crime work reflexes (whether lawyers, investigators or auditors) or by seeking to be assisted by experts in this field.

This is all the more important as arbitrators and reviewing courts have now adopted the notions of “red flags” used in compliance, at the risk of affecting rules of evidence. For instance, in reviewing corruption allegations, French courts have notably used the notion of “serious, specific and consistent” evidence to determine whether these allegations were material enough for the purpose of compliance with public policy. This determination is subject to the control of the Court of Cassation which can sanction a distortion of the evidence by the judge. This has been the case in the *Alstom v. ABL* case, as the Court of Cassation found that the Court of Appeal of Paris had distorted a piece of evidence by misreading hearing transcripts. On remand, the Court of Appeal of Versailles found that the claims raised by Alstom (i.e. lack of sufficient proof of services, allegedly sensitive or confidential documents and information on the tenders, payments from ABL to an import agent, the fact that the tender submitted by Alstom was less well-rated, irregularities and shortcomings in ABL’s accounts, insufficient material and human resources of ABL, disproportion between ABL’s services and the remuneration received and China’s alleged corruptive culture) did not constitute, separately or as a whole, serious, specific and consistent evidence of corruption, notably because the elements were insufficient to evidence the alleged misconduct.

Counsel should in any case be ready to identify risks and red flags and to explain situations which can raise doubts for supervisory authorities. As arbitration practitioners become trained in dealing with corruption allegations, this may help address this issue at outset, and reduce risks of awards being set aside.

Identify what the reviewing judges are looking for. As discussed above, although some courts will not feel bound by the findings of the arbitrators, most judges will defer to their judgment to the extent the issue has been thoroughly and adequately examined. In addition, in determining whether awards comply with public policy, reviewing judges will apply a specific test.

For instance, after a recent evolution of its case law, French courts only punish “characterized” violations of public policy. This means that the violation must be certain in order to set aside or refuse the recognition of an award. Other jurisdictions, such as U.S. courts also apply high standards in relation to public policy and consider that such exceptions are to be construed narrowly, with a heavy burden of proof on the party raising such an objection.

Counsel should therefore ensure, at the arbitration stage, that grounds and claims of corruption have been properly investigated and discussed in order to avoid any risk of serious breach of public policy.

UNCITRAL Working Group III 46th session in Vienna in October 2023

Velislava Hristova

From 9 to 13 October 2023, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Working Group) held its forty-sixth session in Vienna, Austria.

The discussions during the first three days of the session were dedicated to the draft provisions on establishing an advisory centre on international investment law (Advisory Centre), followed by deliberations on the draft provisions on procedural and cross-cutting issues.¹

Establishment of an Advisory Centre

The Working Group acknowledged that the Advisory Centre should be established as an intergovernmental body, independent from other components of the investor-state dispute settlement (ISDS) reform. Accordingly, the Working Group agreed to prepare draft provisions on the establishment of the Advisory Centre in the form of a protocol or an annex to the multilateral instrument on investment reform (MIIR) which could be adopted by States and regional economic integration organisations. It was agreed that the draft provisions would be adopted in principle, with the flexibility to make future adjustments as required. While the overall support for the creation of the Advisory Centre was reconfirmed, its independence, accessibility of services, diversity of presence and staff members and sustainable operation were emphasised as important requirements to consider.

Procedural and cross-cutting issues

The draft provisions on procedural and cross-cutting issues were said to be able to enhance the harmonization of ISDS rules and modernize the old-generation international investment agreements (IIAs). However, concerns were raised for potential fragmentation and uncertainty if only a limited number of States adopt them. Views differed on the potential form of the draft provisions, whether they should be prepared as model provisions for States to include in their IIAs, as provisions incorporated in the MIIR or as a supplement to the UNCITRAL Arbitration Rules. The Working Group acknowledged that the form of the draft provisions would differ and would depend on each provision's content.

The Working Group gave particular priority to discussing the draft provision on damages. The Secretariat was asked to revise the damages provision, reflecting the general principle of full reparation and clarifying that a tribunal could award monetary damages and reasonable interest and that causation between the breach and the damage would be required. The Secretariat was also requested to revise the provision addressing the elements to be taken into account when assessing damages, the rules on burden of proof and the prohibition of punitive damages.

The Working Group will continue deliberating on the draft provisions for creating an Advisory Centre and on procedural and cross-cutting issues during the forty-seventh session scheduled for 22–26 January 2024 in Vienna.

¹ The discussions were based the following documents: draft provisions on the establishment of an advisory centre on international investment law ([A/CN.9/WG.III/WP.230](#)), draft provisions on procedural and cross-cutting issues ([A/CN.9/WG.III/WP.231](#)) and annotations to the draft provisions on procedural and cross-cutting issues ([A/CN.9/WG.III/WP.232](#))

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