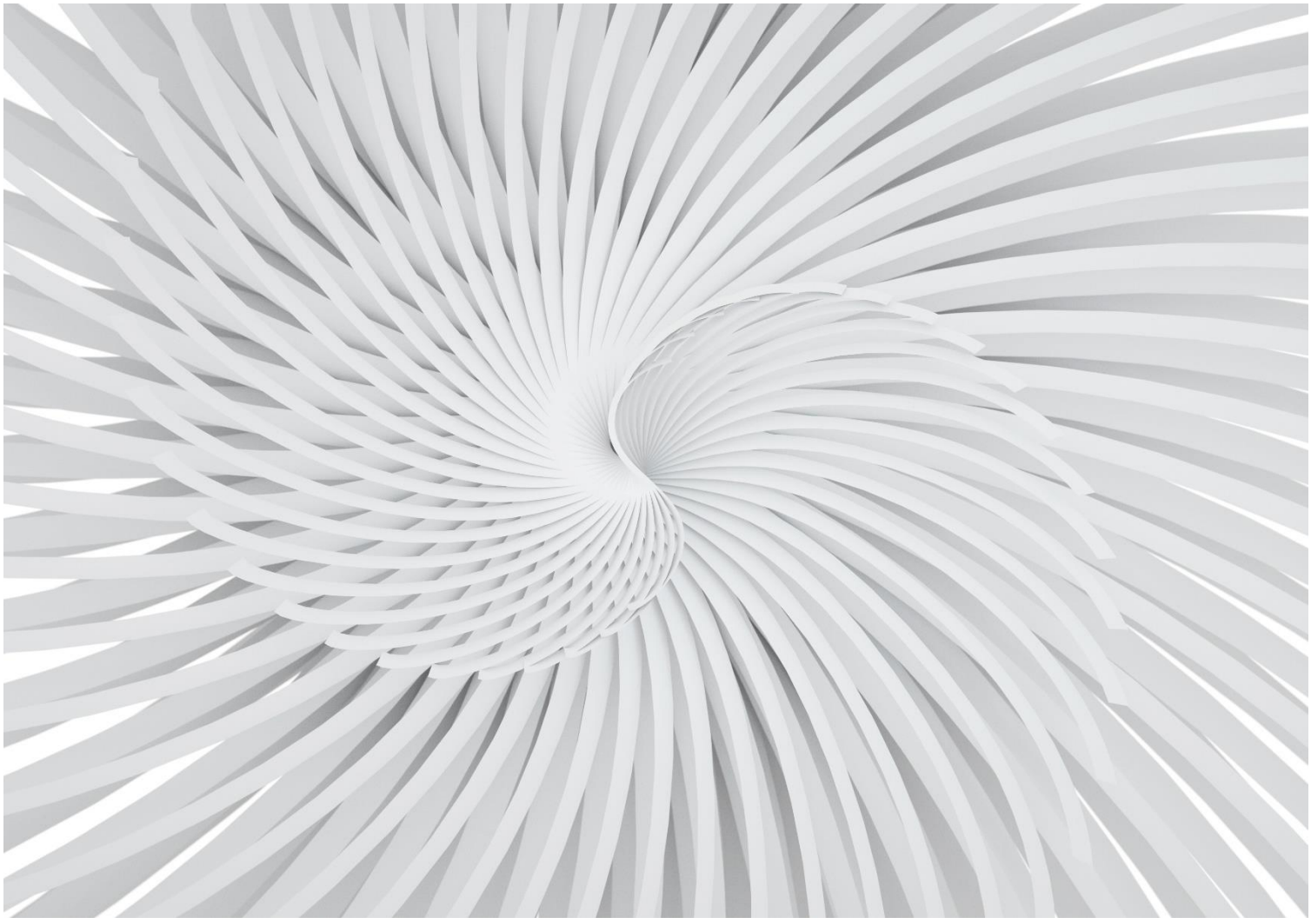
CUATRECASAS

Cuatrecasas Arbitration Highlights

No. 1 | July, 2023

Coordinators: Alberto Fortún and Santiago Rojas



1. Our jurisdictions

CHILE – Juan Manuel Rey and Valentina Alamo

The Supreme Court reaffirms the exclusive competence of arbitral jurisdiction over Chilean courts and confirms the validity of arbitration clauses that allow a party to appoint an arbitrator in the event that its counterparty is reluctant to do so

In Tarascona Corp ("**Tarascona**") v. Yarur and Breton (ROL No.21.291-2019), the Supreme Court (*Suprema Corte*) confirmed the validity and enforceability of a clause whereby, to the detriment of the Chilean courts, it was agreed that the resolution of corporate disputes affecting the company and its shareholders, whether arising from the interpretation, fulfilment or non-fulfilment of the bylaws, or any other legal issue affecting the company's business, should be submitted to arbitration.

Tarascona filed its claim with Civil Court No. 25 (*25° Juzgado Civil*) of Santiago because, in its opinion, the clause would only be effective if the arbitration had been initiated in the British Virgin Islands ("**BVI**") because, under BVI law, disputes between a company and its directors are subject to compulsory arbitration. Otherwise, the competent Chilean courts should hear the claim. The defendants, in contrast, alleged lack of jurisdiction because of the existence of an agreement to arbitrate. The Court rejected the lack of jurisdiction plea, but the Santiago Court of Appeals (*Corte de Apelaciones de Santiago*), and subsequently the Supreme Court of Chile, expressly upheld it.

As relevant to the dispute, the arbitration clause provided that *"unless the parties agree to submit the dispute to a single arbitrator, said dispute will be submitted to the decision of two arbitrators, one chosen by each party. Before commencing their work, the arbitrators will appoint a third arbitrator.* (...) *If either party to the arbitration fails to appoint an arbitrator, either originally or by way of replacement (in the event that the appointed arbitrator dies, is incapable or refuses to participate), within 10 days of the other party serving it notice, the other party may appoint the arbitrator to act in place of the arbitrator of the non-complying party*".

In taking its decision, the Supreme Court emphasized the principles governing international arbitration, such as party autonomy, arbitrability and the concept of pathological arbitration clauses. Specifically, it decided that the subject matter was arbitrable and that the will of the parties should be respected. The Supreme Court added that the arbitration clause was not pathological for providing that one party could appoint an arbitrator if the other failed to do so. Under article 11 of Law 19.971 on International Commercial Arbitration (*Ley sobre Arbitraje Comercial Internacional*, "**LACI**"), the Supreme Court ruled that the parties could establish the mechanism for appointing arbitrators. Moreover, should any issues arise regarding the enforceability of the clause, they could be resolved by the arbitrators.

Although the decision was handed down in 2021, the Supreme Court's judgment is allowing many of our clients to ratify their willingness to resort to arbitration in corporate disputes, hence its relevance for our daily practice in the first half of 2023.

COLOMBIA – Alberto Zuleta and Gabriela Forero

Supreme Court reaffirms the effects of recognition of foreign awards in relation to their enforcement in Colombia and restricts the grounds for opposition

In Colombia, the Supreme Court of Justice (*Corte Suprema de Justicia*) has reaffirmed that the recognition of arbitral awards is "*a jurisdictional procedure that seeks to assign to a judicial decision issued by a foreign judge effects equivalent to those of a local ruling so that it may be fulfilled or enforced in the country without having a new trial*", arising from the duty of harmonious cooperation between States. This is based on the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the 1975 Inter-American Convention on International Commercial Arbitration ("**Inter-American Convention**")[1].

[1]Judgment no. SC3650-2022, dated November 15, 2022. Request for recognition of the arbitral award issued on December 14, 2020 in case no. 195-2019, administered by the Chilean National Arbitration Centre ("*Centro Nacional de Arbitrajes*") in the process brought by Zurgroup S.A. against Importaciones y Exportaciones Fenix Ltda.

In another decision on the requirements for recognizing arbitral awards, the Supreme Court reiterated that these are that (i) the decision seeking recognition must be an arbitral award; (ii) the original arbitral award or a copy of it must be attached to the *exequatur* request; and (iii) there must be no grounds for refusal under the New York Convention, the Inter-American Convention or Law 1563 of 2012.[2] However, the Court also laid down certain additional prerequisites, namely, (i) submitting a translated Spanish copy of the award, issued by a certified translator; (ii) dully notifying the opposing party and giving it an opportunity to be heard; (iii) that the subject matter of the arbitration is arbitrable; and (iv) that the recognition of the award does not entail any threat or harm to Colombia's international public policy[3].

Finally, in another decision, the Supreme Court reiterated that the grounds for opposing the recognition of awards are exclusively those laid down in article 112 of Law 1563 of 2012, and they must be seek to (i) refute the validity or existence of the arbitration agreement; (ii) prove that the defendant was not properly involved in the arbitration process; or (iii) prove the overreach of the agreement or the incorrect configuration of the arbitral tribunal that ruled on the dispute[4].

Supreme Court clarifies the content of Colombian international public policy in relation to interest rates

The Supreme Court concluded that the recognition of an award cannot be contrary to Colombia's international public policy, understood as the institutions' basic or fundamental principles and values. In this specific case, the Court established that the awarded interest rate could not contravene the maximum rate laid down for foreign obligations, which is considered a restriction of public economic policy. Recognizing the award would, therefore, be conditional on said caps being considered[5].

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[2]Judgment no. SC3650-2022, dated November 15, 2022. Request for recognition of the arbitral award issued on December 14, 2020 in case no. 195-2019, administered by the Chilean National Arbitration Centre ("*Centro Nacional de Arbitrajes*") in the process brought by Zurgroup S.A. against Importaciones y Exportaciones Fenix Ltda.
[3]Judgment no. SC3462-2022, dated November 15, 2022. Request for recognition of the arbitral award issued on November 30, 2021 by the sole arbitrator Lucienne Carasso Bulow under the Shortened Arbitration Procedure of the Society of Maritime Arbitrators of New York, in the dispute between Tricon Dry Chemicals LLC and Agroindustrias El Molino de la Costa S.A.S.
[4]Judgment no. SC2606-2022, dated August 17, 2022. Request for recognition of the arbitral award issued on March 10, 2017 by the arbitrators of the Court of Arbitration for Sport based in Lausanne (Switzerland) in judgment no. CAS 2015/O/4265 between Efraín Alejandro Pachón Chávez and Eurodata S.A. Marketing Sportivo e Culturale, against Teófilo Antonio Gutiérrez Roncancio.
[5]Judgment no. SC3650-2022, dated November 15, 2022. Request for recognition of the arbitral award issued on December 14, 2020 in case no. 195-2019, administered by the Chilean National Arbitration Centre ("*Centro Nacional de Arbitrajes*") in the process brought by Zurgroup S.A. against Importaciones y Exportaciones Fenix Ltda.

SPAIN – Elia Raboso

The Madrid High Court upholds an application for *exequatur* of a foreign award handed down in London

In order no. 7/2023[6] of April 27, the Madrid High Court (*Tribunal Superior de Justicia*) upheld an application for *exequatur* of an award handed down in London. The court recalled that the process for recognizing foreign awards is limited to the judicial body supervising compliance with the extrinsic elements of the foreign award. Therefore, it declined verifying the adequacy of the award with respect to public policy or reviewing the merits of the award.

The Madrid High Court applies constitutional doctrine on public policy for the exequatur of an award handed down in Zurich

In order no. 5/2023[7] of March 8, the Madrid High Court upheld an application for the recognition of an ICC award handed down in Zurich. After verifying compliance with the procedural requirements established in the New York Convention, the alleged breach of which was the grounds for opposition brought by the opposing party, the High Court rejected the grounds of opposition relating to the merits of the award and the infringement of public policy, in line with the recent jurisprudential line adopted by the Constitutional Court (*Tribunal Constitucional*), consolidated in its judgments No. 46/2020 of June 15; No. 17/2021 of February 15; No. 65/2021 of March 15; No. 50/2022 of April 4; and No. 79/2022 of June 27.

This judgment confirms the Madrid High Court's trend in applying constitutional doctrine on the concept of public policy, also present in the recent Madrid High Court judgments No. 1/2023 of January 17; No. 3/2023 of January 31; 4/2023 of February 7; and No. 22/2023 of May 18, concerning proceedings for the annulment of awards.

[6] Order 7/2023 of 27 April issued by the Civil and Criminal Chamber of the Madrid High Court (reporting judge David Suarez Leoz).
[7] Order no. 5/2023, of March 8 issued by the Civil and Criminal Chamber of the Madrid High Court (reporting judge Jesús María Santos Vijande).

MEXICO – René Irra

Supreme Court clarifies the scope of the annulment of awards due to infringement of the rights to equal treatment and procedural defense

Two corporations applied for annulment of an arbitral award on the grounds that the arbitrators had failed to evaluate certain evidence and arguments submitted by them. The Supreme Court (*Suprema Corte*) ruled on the scope of annulment on the grounds of infringement of the right to equal treatment and full procedural defense (see article V (b) of the New York Convention). It stated that these refer to the merits of the commercial arbitration proceedings but not to any substantive infringements. In particular, the Supreme Court rejected that "*considerations in the sense that the arbitrator(s) did not evaluate the evidence or did not evaluate it applying the same standards*"[8] could be sufficient to annul an award since the issue concerns the merits of the dispute and the alleged cause of nullity is related to the right to defense in the substantiation of the process, not to the evaluation of evidence.

The Supreme Court determined that the requirement to submit the "duly authenticated" original of the award or a certified copy of it in recognition and enforcement proceedings violates the constitutional right of access to justice

Authentication of a private document by a notary is intended to provide a sufficient degree of certainty as to the content of the document. This requirement, set out in article 1461 of the Code of Commerce (*Código de Comercio*) within the judicial procedure for recognition and enforcement of an award, has a constitutionally valid purpose as it aims to provide certainty with respect to the content of the award and avoid delays in the enforcement procedure due to incidents related to its authenticity. However, the absence of authentication, in itself, cannot lead the judicial authority to assume it is false or to disregard its probative value. Accordingly, the legal provision requiring submission of the duly

[8] *Tesis 1a.* XXXII/2022 (10a.), Gaceta del Semanario Judicial de la Federación. Book 20, December 2022, Volume II, page 1246.

authenticated original arbitral award is unconstitutional, since failure to meet this requirement cannot entail the rejection of its recognition and enforcement[9].

Federal Court considers that the arbitrators do not have standing to be sued for annulment of an award

In the context of an action for the annulment of an award, a judge declared the award to be null also in relation to the arbitrators, who were named as co-defendants. Following an appeal against this judgment, a Federal Court declared that arbitrators do not have standing to be considered co-defendants in an action for annulment of an award that they themselves rendered. By the very nature of its action (as a neutral and impartial body), the decision establishes that it cannot validly oppose the interest defended by the parties in the proceedings[10].

Federal Court rules that arbitrators are not obliged to reimburse fees if an award is annulled

The plaintiff sought the annulment of an arbitral award not only against its counterparty in the arbitration proceedings, but also sued the arbitrators who issued the award. The judge declared the annulment and, consequently, considered that the arbitrators should be ordered to reimburse the fees that had been paid to them for their services. On appeal, a Federal Court ruled that arbitrators are at no time obliged to reimburse their fees after an award has been annulled. This is because the arbitrators' obligation consists of "*diligently applying their knowledge to the content of the dispute through a judgment or award, without being required to guarantee that their decisions will not be overturned or nullified*[11].

[9] *Tesis 1a*. XXV/2022 (10a.), Gaceta del Semanario Judicial de la Federación. Book 20, December 2022, Volume II, page 1260.

[10] *Tesis I.8o.C.98 C* (10a.), Gaceta del Semanario Judicial de la Federación.

Book 3, July 2021, Volume II, page 2421.

[11] Tesis I.8o.C.99 C (10a.), Gaceta del Semanario Judicial de la Federación. Book 3, July 2021, Volume II, page 2420.

PERÚ – Domingo Rivarola, Rodrigo Rabines and Alberto Fortún

Lima High Court recognizes an award admitting the principle of *iura novit arbitri*, clarifying the scope of Peruvian international public policy and the obligation to recognize awards pending annulment at their seat

In a case defended by the Cuatrecasas International Arbitration Group, the High Court of Justice (*Corte Superior de Justicia*) of Lima recognized an ICC award rendered in Miami, subject to Spanish law and pending an action for annulment[12], rejecting the grounds for opposition invoked by the opposing party, which was the losing party in the arbitration.

First, the Court recognized the application in international arbitration of the *iura novit arbitri* principle, by virtue of which arbitrators are free to apply the sources of law they deem appropriate, even when these have not been proposed or discussed by the parties, provided that they are directly related to the matter in dispute. It also rejected that there had been any violation of the right of defense of the parties by citing a judgment in the award that had not submitted by the parties.

Second, the Court established that the assessment of the violation of international public policy involves a judgment on relevance that is made by applying three principles: (i) the principle of exceptionality, which provides that a highly exceptional circumstance must exist to deprive an award of the authority of *res iudicata*; (ii) the principle of restrictive interpretation, which provides that the concept of international public policy must be assessed in a limited manner; and (iii) the principle of minimum review, which requires that the ordinary courts conduct the minimum indispensable analysis of the subject matter of the award. Applying these principles, the Court also dismissed the public policy violation due to lack of evidence.

Finally, and most importantly, the Court emphasized that the existence of ongoing annulment proceedings at the seat of the arbitration does not qualify as grounds

[12] First Commercial Chamber of the Lima High Court of Justice. (2022). Judgment dated February 15, 2022. File 00207-2021-0-1817-CO-01. The judgment can be accessed by entering the file data in the following link: https://cej.pj.gob.pe/cej/forms/busquedaform.html

for opposing the recognition of a foreign award, in accordance with the provisions of Peruvian arbitration law and the New York Convention. The Lima High Court decided that, since no ruling had been issued in another jurisdiction ordering the suspension of enforcement of the award, recognition could not be refused under Peruvian jurisdiction.

Consequently, the ICC award handed down in Miami was recognized and received *exequatur* in Peru and was subsequently enforced. Through this decision, the Lima High Court aligned itself with international courts in enforcement matters. The judgment is already being cited in other cases

PORTUGAL – Miguel de Almada and Afonso Moucho Diogo

Lisbon Court of Appeal declares that the existence of an annulment action at the seat of arbitration does not preclude recognition of international awards and clarifies the scope of Portuguese international public policy

The Lisbon Court of Appeals (*Tribunal da Relação de Lisboa*)[13] ruled on a case in which the claimant sought recognition in Portugal of a foreign arbitral award that had been the subject of an annulment action before the French courts. The Lisbon Court of Appeal considered that this fact did not preclude its recognition in Portugal. The defendant objected to the recognition and alleged a violation of the principles of contradiction and equality of the parties, stating that they were part of Portuguese international public policy. Specifically, the defendant argued that the court had admitted the postponement of the hearing despite the party and its lawyers not being able attend, meaning that the hearing took place in their absence.

The court considered that only an "*ostensible violation*" of these principles could be considered a breach of Portugal's international public policy, i.e., one that resulted in a shocking and intolerable outcome, which was not the case.

[13] Judgment dated April 28, 2022, File 991/20.5YRLSB-2. The judgment can be accessed by entering the file data in the following link: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/a3af60df6e309d6f80258852002babba?OpenDocument

Lisbon Court of Appeal clarifies the scope of the duty of independence and impartiality of arbitrators, the duty to state reasons for their decisions and the content of Portuguese international public policy

The Lisbon Court of Appeal denied the request for annulment of an arbitral award on the grounds of (i) lack of independence and impartiality on the part of the arbitrators; (ii) breach of the duty to state reasons for decisions; and (iii) violation of Portugal's international public policy (alleged violation of the principles of proportionality and good faith)[14]. The court concluded that the annulment of an arbitral award due to the lack of independence and impartiality of the arbitrators may only be requested when the party was not able to raise any challenge during the arbitration proceedings, by virtue of the objective or subjective occurrence of the circumstances on which that request is based.
It also indicated that the breach of the duty to state reasons only occurs if the reasoning does not exist or if the legal or logical line followed to resolve the litigation is not discernible. Finally, the court specified that the international public policy of the Portuguese State has a very limited scope and is intended only to ensure that the application of a foreign regulation, indirectly via the enforcement of a foreign judgment, does not lead, specifically, to an "*intolerable result*". The Lisbon Court of Appeal leaves no doubt as to its position in favor of arbitration and minimal interference with judicial review actions.

2. Relevant cases to our practice

FRANCE

Paris *Cour d'Appel* annuls an award due to the presiding judge's funeral eulogy for a party's lawyer

On January 10, 2023, the Paris Court of Appeals (*Cour d'Appel*) annulled a partial ICC award against a Cameroon port authority on the grounds that the presiding arbitrator, Thomas Clay, failed to disclose his "*close relationship*" with Emmanuel

[14] Judgment dated January 20, 2022, File 1445/20.5YRLSB-6. The judgment can be accessed by entering the file data in the following link: http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/2b99a11c7cca0ffe802587fa004bf1ea?OpenDocument

Gaillard, who had acted as lead counsel for the winning party. The court based its decision on a funeral eulogy Clay wrote after Gaillard's sudden death in April 2021, in which he expressed his admiration and love for the deceased, stating that he consulted with him "*before making any major decisions*". The Court concluded that this created a "*reasonable doubt*" as to Clay's independence and impartiality, meaning that the tribunal had been improperly constituted.

CANADA

Ontario Superior Court of Justice annuls two awards due to the simultaneous appointment of an arbitrator

On March 20, 2023, the Ontario Superior Court of Justice annulled two arbitral awards that granted more than USD 9 million in connection with the termination of a coffee shop franchise agreement. After it was revealed, in an accidental email copy, that the sole arbitrator, David McCutcheon, had accepted an appointment by the prevailing party's counsel in a simultaneous arbitration, the Court considered that this situation should have been disclosed and raised reasonable doubts as to the arbitrator's impartiality.

AUSTRALIA

High Court of Australia rejects Spain's appeal against the recognition and enforcement of the ICSID award in the ANTIN case

On April 12, 2023, the High Court of Australia dismissed Spain's appeal against previous lower court decisions that had granted recognition and enforcement of the ICSID award in the ANTIN case, which condemned Spain over the curtailment of benefits in the renewable energy sector. The Court concluded that the award could be recognized and enforced in Australia in accordance with its laws on sovereign immunities, provided that Spain had waived its immunity against the recognition and enforcement of arbitral awards by adhering to the ICSID Convention. In the same vein, the court considered that the possible incompatibility between the Energy Charter Treaty ("**ECT**") and European Union ("**EU**") law invoked by Spain was irrelevant as a result of this waiver.

UNITED KINGDOM

High Court enforces ICSID award in ANTIN v. Spain case

Similarly, on May 24, 2023, the High Court of the United Kingdom agreed to enforce the ICSID award in ANTIN v. Spain, rejecting Spain's objections based on the incompatibility between EU law and arbitrations between investors and EU Member States ("**Intra-EU Arbitration**"), as interpreted by the Court of Justice of the European Union ("**CJEU**") in decisions such as *Achmea* and *Komstroy*. In addition to highlighting the exceptional circumstances in which enforcement of an ICSID award could be rejected, the Court emphasized that Spain had waived its sovereign immunity by signing the ICSID Convention and the ECT, and that the CJEU was not the "*final arbiter*" of the interpretation of these treaties. Finally, the Court rejected that EU law should prevail over Spain's pre-existing obligations, particularly as the ICSID Convention and the ECT include member States that are not EU members.

3. To follow closely

New DIAC and SCCA Rules seek to modernize arbitration in the MENA region – Santiago Rojas

The Dubai International Arbitration Centre ("**DIAC**") and the Saudi Center for Commercial Arbitration ("**SCCA**") have recently reformed their arbitration rules ("**DIAC Rules**", "**SCCA Rules**", and collectively the "**Rules**") with a view, among other matters, to reducing costs, optimizing their arbitration processes, and aligning these with international best practices. The new DIAC and SCCA Rules, effective as of March 21, 2022[15] and May 1, 2023[16], respectively, have various common components as well as some important differences that should be considered when choosing between them. Given the number of disputes that our group handles in the MENA region, certain common factors and differences between these Rules are highlighted below.

[15] DIAC Arbitration Rules (2022), page 2.
[16] SCCA Arbitration Rules (2023) page 1.

Among the common factors, we highlight the possibility of freely choosing the venue and language of the proceedings, and determine the number, nationality, and method of appointment of the arbitrators[17]. In addition, both sets of Rules facilitate the instigation of emergency arbitrations, the request for interim relief[18], the incorporation of additional parties[19] and the consolidation of arbitrations[20]. They also offer various fast-track arbitration procedures[21].

However, there are also some significant differences. On one hand, the SCCA Rules provide a mechanism for dealing with questions of jurisdiction, admissibility, or merits at a preliminary stage which, in certain cases, allows decisions to be obtained within 30 (extendable) days of the commencement of the proceedings[22]. In contrast, although the DIAC Rules authorize the tribunal to issue partial awards and encourage it to decide on jurisdictional issues as a preliminary question, they do not provide any specific mechanism for deciding on claims or defenses at the commencement of the proceedings, or lay down any time limits in this respect[23].

On the other hand, although both sets of Rules provide for a fast-track procedure for the resolution of small claims, unless otherwise agreed, the thresholds for applying this procedure are AED 1,000,000 at the DIAC (approximately USD 272,000)[24] and SAR 4,000,000 at the SCCA (approximately USD 1,066,000)[25]. Likewise, the deadlines for issuing awards in these expedited procedures also vary: only 3 months under the DIAC Rules[26] and 180 days (just under 6 months) under the SCCA Rules[27].

In conclusion, the choice between the DIAC or SCCA Rules can have a direct impact on the availability, duration, and cost of the proceedings, requiring a case-by-case assessment.

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[17] DIAC Arbitration Rules (2022), Arts. 12-13; SCCA Arbitration Rules (2023), Art. 16.
[18] DIAC Arbitration Rules (2022), Appendix II – Exceptional Procedures, Arts. 1-2; SCCA Arbitration Rules (2023), Art. 7, Appendix III – Emergency Arbitrator Procedure Rules.
[19] DIAC Arbitration Rules (2022), Art. 9; SCCA Arbitration Rules (2023), Art. 12.
[20] DIAC Arbitration Rules (2022), Art. 8; SCCA Arbitration Rules (2023), Art. 13.
[21] DIAC Arbitration Rules (2022), Art. 32; SCCA Arbitration Rules (2023), Appendix II – Expedited Procedure Rules.
[22] SCCA Arbitration Rules (2023), Art. 26.
[23] DIAC Arbitration Rules (2022), Art. 6.2, 6.6, 34.1
[24] DIAC Arbitration Rules (2022), Art. 32; SCCA Arbitration Rules (2023),
[25] SCCA Arbitration Rules (2023), Appendix II – Expedited Procedure Rules.
[26] DIAC Arbitration Rules (2022), Art. 32.5.
[27] SCCA Arbitration Rules (2023), Appendix II – Expedited Procedure Rules, Art. 10.2.

The agreement between mainland China and Hong Kong to allow judges to grant precautionary measures to support Hong Kong-based arbitrations is proving successful - Mingjin Zhang, Jane Jin and Omar Puertas

According to statistics from the Hong Kong International Arbitration Centre ("**HKIAC**") as of April 24, 2023, the center has processed 93 applications, 88 of them for asset preservation. The cumulative value of assets requested for preservation apparently stands at RMB 24,600 million, equivalent to approximately USD 3,500 million. In addition, HKIAC reports 67 decisions issued by mainland Chinese courts, including 63 asset preservation applications granted once the applicant had provided security.

The agreement, which was adopted on October 1, 2019, was an important milestone for Hong Kong as it became the first jurisdiction outside mainland China empowered to provide parties involved in arbitration proceedings with access to provisional measures, known as "preservation measures" under the laws of the People's Republic of China ("**PRC**"). To benefit from the agreement, an applicant for precautionary measures before the Chinese courts must be party to arbitration proceedings based in Hong Kong and administered by one of the designated permanent institutions or offices. The arbitration and dispute resolution institutions and permanent offices that meet the requirements include the HKIAC and the International Court of Arbitration of the International Chamber of Commerce. A similar agreement between mainland China and the Macau Special Administrative Region came into force on March 25, 2022.

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