CLYDE&CO

Arbitration & Litigation

Quarterly Update 2/2022

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Dear reader,

At a time of war in Europe, we provide you with this Quarterly Update Arbitration & Litigation. This update is once again the result of collaboration with our colleagues around the world. We strongly believe in international collaboration and the rule of law. Our thoughts and prayers go out to the Ukrainian people and all those affected by the terror and suffering of war.

As we are regularly handling international disputes with elements relating to more than one legal system, in this issue, we are introducing a new initiative of our firm that aims at ensuring the adequate information of our clients irrespective of the law that is applicable each time. Taking advantage of the international character of our law firm, we prepared three series of articles on interesting topics from the arbitration scene. The series include contributions addressing the same issue under the laws of Germany, UK, France, Spain and Greece. The initiative was supported by the members of our company's Young Arbitrator Group and was coordinated by our UK-based partner Milena Szuniewicz-Wenzel. The three series are the following:

- The process for challenging arbitral awards;
- The involvement of non-signatory third parties in arbitration;
- The enforcement of awards that have been set aside.

Apart from the article series, in this issue, you will find a further selection of current topics and developments:

- European Commission publishes proposal for new Directive on Corporate Sustainability Due Diligence
- Schiedsfähigkeit IV – Zur Wirksamkeit von Schiedsvereinbarungen in Personengesellschaftsverträge

In other news of our firm, we were particularly happy to welcome Professor Loukas Mistelis as a new colleague, who has joined us as partner to strengthen our International Arbitration Team in Europe. Furthermore, we are delighted to announce a promotion in our Dusseldorf office: Dr Michael Pocsay, who is a very experienced arbitration lawyer, has been promoted to counsel.

Clyde & Co actively participated in the Paris Arbitration Week und the London Disputes Week and it has been a real pleasure to be able to greet many of you again in person. We are particularly motivated to maintain that personal contact with all of you and many interesting events are currently in planning.

We hope you enjoy reading this issue! As always, we welcome your questions, suggestions and feedback. Please feel free to write to us anytime at **Arbitration.Germany@clydeco.com**

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Clyde & Co Arbitration Team

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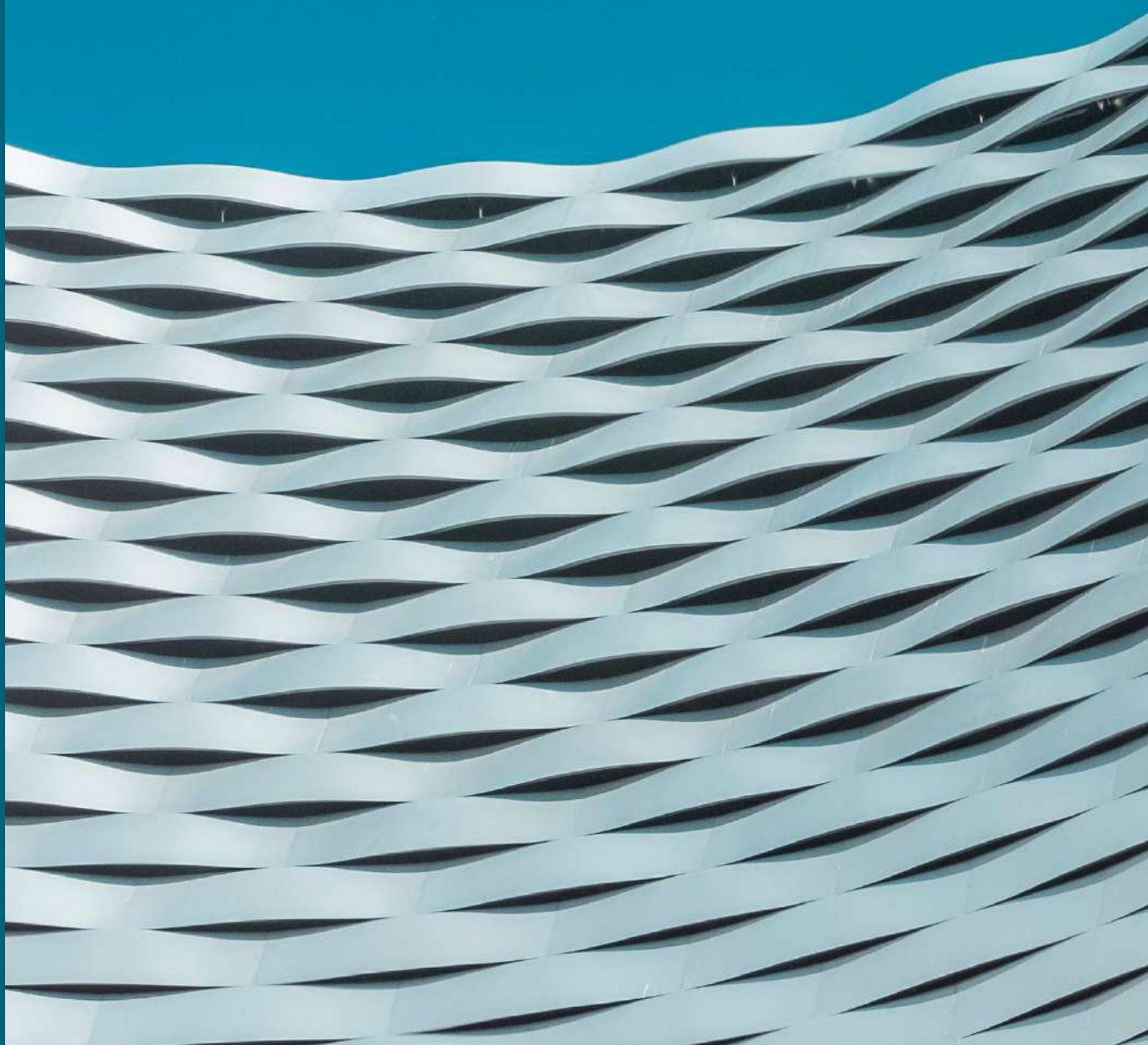
Series 1



Is there a process for challenging awards seated in Germany in the courts of this jurisdiction?

This is the first article in a series focusing on the process and procedure for challenging arbitral awards within various national jurisdictions within Europe, as prepared by Clyde & Co's European international arbitration team. This first piece is on the procedure in Germany and is written by Georg Scherpf, Antonios Politis, and Juliane Kohler, from Clyde & Co's Hamburg Office.

In Germany, arbitration proceedings are regulated by sections 1025 to 1066 Code of Civil Procedure ("CCP"). These sections adopt nearly verbatim the 1985 UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"). In addition, the recognition and enforcement of foreign arbitration awards are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, commonly known as the New York Convention ("NYC"), to which the CCP explicitly and conclusively refers in its section 1061. The implementation of both instruments means that there are hardly any surprises in arbitrations conducted in Germany when compared to other Model Law jurisdictions.

Arbitral awards are in general binding as if they were a judgment ("*rechtskraftiges Urteil*", section 1055 CCP) and cannot be reviewed on the merits, unless the parties agreed to a second instance individually or through the selection of arbitration rules providing for such a review.

Under German arbitration law, only domestic awards (seated in Germany) can be set aside (annulled), per section 1059 CCP. German courts do not assume setting-aside competence for foreign arbitral awards (cf. *Zoller/Geimer*, section 1059, para. 1 b). The grounds for setting aside domestic arbitral awards are almost identical to those listed in Article V NYC with the exception that the application of the *ordre public interne* (instead of the *ordre public internationale*) may lead to slightly different results (cf. Baumert, SchiedsVZ 2014, 139).

There are three main procedural routes to challenge an award or partial award under German law:

a. Challenging the final award because of an invalid arbitration clause or other serious irregularity affecting the tribunal, the proceedings, or the award, under section 1059 CCP. This corresponds to Art. 34 (2) of UNCITRAL Model Law);

b. Challenging a partial award on jurisdiction under section 1040(3) CCP. This largely corresponds to Art. 16 (3) of UNCITRAL Model Law, with the only difference that, under German law, the decision of the state court is open to appeal (sections 1065 (1) sentence 1 and 1062 (1) no. 2 CCP); and

c. Section 1060 (2) CCP, in addition, hinders a domestic award from being declared enforceable if grounds exist pursuant to section 1059 (2) no. 2 CCP. This largely corresponds to Art. 36 (1) of UNCITRAL Model Law.

The most common route is the application under section 1059 CCP. Under this section, any domestic award can be set aside in case of an (i) invalid arbitration clause/agreement; (ii) denial of the right to be heard; (iii) excess of mandate; (iv) procedural irregularities; (v) lack of arbitrability; or (vi) violation of the *ordre public interne*. Any procedural irregularities must have had a causal impact on the award for it to be set aside (section 1059 (2) no. 1 (d) CCP).

Interestingly, although the parties are free to apply for the annulment of the arbitral award, they cannot waive setting aside proceedings from the outset, as section 1059 CCP is not dispositive. Therefore, the parties cannot effectively agree that no legal remedies should be admissible against the arbitral award.

This question is handled differently in some other jurisdictions, where at least those parties who are not from the respective jurisdiction can waive recourse to setting aside procedure.

A particularity of German arbitration law - and one of the very few deviations from the Model Law - is the possibility of applying for a decision to assess the admissibility or inadmissibility of arbitral proceedings at any time before the constitution of the arbitral tribunal (section 1032(2) CCP). While those proceedings are pending before the court, arbitration proceedings may still be initiated or continued and an award may even be issued. This unique feature has recently attracted attention internationally, after the Netherlands filed a section 1032 (2) CCP application relating to the arbitrations brought against them by RWE and Uniper to have those proceedings declared inadmissible considering the judgment in *Slovak Republic v Achmea BV*. The application is still pending. However, as these are delocalised proceedings under the ICSID Convention and generally not under the purview of local courts, the application will most likely be rejected. Although section 1032 (2) CCP is not a setting aside procedure, we consider it worth mentioning in this context as it addresses the fundamental question of admissibility, which encompasses topics also relevant to the grounds for setting aside an award.

What is the legal form of the process? Are there limits on the grounds of challenge and what are they?

The legal form of the process depends on which route is taken to challenge an award.

Partial Award, section 1040 (3) CCP

To apply for a review of a partial award on jurisdiction under section 1040 (3) CCP, the party must file an application at a Higher Regional Court *(Oberlandesgericht)* where the arbitration is seated. The application must be filed within one month of having received the partial award on jurisdiction. While such a request is pending, the arbitral tribunal can continue the arbitral proceedings and issue an award.

In this context, it was previously disputed whether a court seized with an application under section 1040 (3) CCP may render a decision, if a final award was issued whilst the application was still pending. Until 2017, the jurisprudence considered that there would be a lack of legal interest/ standing *(Rechtsschutzbediirfnis)* because the rendering of the final award meant that there was no longer a partial award on which to decide.

However, the German Federal Court of Justice *(Bundesgerichtshof - "BGH')* decided in 2017 that a court may nevertheless decide on the admissibility of the arbitral proceedings (BGH, decision dated 09.08.2016 - I ZB 1/15). Previously, the proceedings under section 1040 (3) CCP would have had to be discontinued and setting aside proceedings initiated.

Final award, section 1059 CCP

For a decision pursuant to section 1059 CCP, which corresponds to Art. 34 (3) UNCITRAL Model Law, the party must file an application at the Higher Regional Court *(Oberlandesgericht)* where the arbitration is seated (if the competent Higher Regional Court is not designated in the arbitration agreement). The application must be filed

within a period of three months, beginning on the day the applicant received the award. An application is inadmissible if the award has already been declared enforceable by a German court. Another slight deviation from the Model Law lies in the fact that, if the court concludes that the award is in fact to be set aside, it will not suspend the setting aside proceedings for a period of time pursuant to Art. 34 (4) UNCITRAL Model Law giving the tribunal time to "*eliminate the grounds for setting aside*".

Instead, it will directly annul the award, thereby reviving the arbitration agreement (section 1059 (5) CCP). As a result, an arbitral tribunal is once again competent to decide on the merits of the case. However, if a motion is filed and the proceedings are "suitable", the court has discretion to remand the proceedings back to the original arbitral tribunal (section 1059 (4) CCP). A case is suitable for remand if, for example, there is a procedural error that the arbitral tribunal can easily remedy, e.g. by carrying out the procedural act that was erroneously omitted.

If the court rejects the application under section 1059 CCP, the grounds for setting aside the award considered by the court cannot be reasserted in the recognition and enforcement proceedings (section 1060 (2) CCP, see below).

Objecting to Enforcement, section 1060 CCP

Where a party applies for a declaration of enforceability (*Vollstreckbarerklarung,* section 1060 CCP), there are several grounds for refusing the declaration of enforceability, e.g. those listed in section 1059 (2) CCP applicable to the setting aside of final awards (see above).

However, a ground for setting aside cannot be relied on if an application under section 1059 (2) CCP was rejected and is no longer open to appeal.

In this case, a court has already finally decided that there is in fact no ground for setting aside. This decision is legally binding and must not be circumvented through a process for declaration of enforceability.

In addition, one cannot raise the objection against the enforceability of an award based on the grounds for setting aside set forth in section 1059 (2) no. 1 CCP, if the time period of section 1059 (3) CCP - regularly three months - lapses without an application having been made. In this case, the declaration of enforceability can only be denied if the subject matter of dispute is not arbitrable under German law, or if recognition or enforcement of the award would be contrary to the *ordre public*.

Does the challenge involve a rehearing of some or all of the merits?

German courts will not review the merits of an arbitral award. In particular, there is no de-novo review of the merits. Furthermore, the arbitral tribunal's assessment of the evidence cannot, in principle, be replaced by a state court's own assessment of the evidence in setting aside proceedings due to the prohibition of a *revision au fond*.

In this context, a court might set aside an award, in part or in full, but will never "correct" an award by modifying it.

In summary, what is the process and how does it work?

The main way to challenge an arbitral award is to file an application for the setting aside of a final award in a German-seated arbitration under section 1059 CCP. The application requires an interest in legal protection *(Rechtsschutzinteresse)*. Usually only the party that (wholly or partially) lost the arbitral proceedings has such an interest.

An application to set aside an arbitral award must be filed with the competent court within three months of the award being received (section 1059 (3) CCP). Jurisdiction for these applications lies with the Higher Regional Court

(Oberlandesgericht) designated in the arbitration agreement or, if no competent court for the application was agreed upon, with the Higher Regional Court at the seat of arbitration, section 1062 (1) CCP.

There are relatively few formal requirements for applying to set aside an arbitral award:

- An attorney is not required at the outset to file the application (sections 1063 (4), 78 (3) CCP), but must do so when the date of the oral hearing is fixed.

- Also, the terms "setting aside" or "annulment" do not have to be used explicitly. It is sufficient if it is clear from the application that the arbitral award as such is challenged and that its judicial review is requested, stating the grounds for setting aside (OLG Hamburg, decision of 12 December 2019 - 6 Sch 12/18).

- The application to set aside an arbitral award must be in German and a translation of the award should be attached if it is in a foreign language. The court may require a certified translation of the award by a sworn translator (section 142 CCP). Some courts are willing to accept awards in English without translation, but this needs to be clarified prior to filing an application.

- In addition, the applicant must pay an advance for the court costs calculated according to the amount in dispute (sections 10 et seqq. German Court Costs Act - GKG).

Although the factual findings of the arbitral tribunal are not binding, no new procedural material may be introduced, and the assessment of evidence is excluded.

The setting aside proceedings have no suspensive effect. However, the German courts may stay any recognition and enforcement proceedings initiated by the other side pending the setting aside decision (section 148 CCP).

If the Higher Regional Court sets aside the arbitral award, the arbitral tribunal's award is thereby annulled. As a result, the arbitration agreement is revived (section 1059 (5) CCP) and an arbitral tribunal is once again competent to decide on the merits of the case. However, if a motion is filed and the proceedings are "suitable", the proceedings may also be referred back to the arbitral tribunal (section 1059 (4) CCP).

The decision can be appealed to the BGH, which only allows an appeal if the dispute is of "fundamental importance" or if the further development of the law or the uniformity of jurisprudence requires its decision (sections 574 (2), 1065 (1) CCP).

Are there any legal thresholds before the process can be commenced?

A party commencing setting aside proceedings must issue a written application while observing the legal deadlines. The deadlines are (i) the constitution of the tribunal (proceedings under section 1032 (2) CCP), (ii) one month after having received a partial award on jurisdiction (section 1040 (3) CCP) or (iii) three months after receipt of the final award (section 1059 (3) CCP).

The person entitled to file an application for setting aside is the one who is adversely affected (by the award, not by the ground for setting aside), i.e. mostly the parties, but also a third party like e.g. an intervener. Importantly, the claimant in arbitration lacks an interest in legal protection *(Rechtsschutzbediirfnis)* if he has fully prevailed because he can simply choose not to make further use of the award.

If the application for setting aside is based on procedural violations (section 1059 (2) no. 1 lit. d alternative 2 CCP), it must be remembered that each party is obliged to complain to the arbitral tribunal as soon as they become aware of a violation. If they fail to do that, it impossible to raise the procedural violation at a later stage (section 1027 CCP). The party adversely affected can then no longer invoke the procedural violation in the setting aside proceedings.

Roughly what is the cost and timescale to complete the process? Is the challenge itself appealable?

Costs can vary significantly depending on the amount in dispute, the complexity of the case and whether the decision is appealed. Even though it is common to charge on an hourly fee basis in setting aside proceedings, the total fees charged for representing a client may not be below the statutory fees payable under the Act on the Remuneration of Lawyers *(Rechtsanwaltsvergiitungsgesetz)*. These fees are a good indication as to what the base fees and court costs will be.

German statutory cost law calculates court costs and lawyers' fees according to the amount in dispute, which is why no specific calculation can be made here.
However, it can generally be said that the higher the amount in dispute of the setting aside proceedings (i.e. the value of the arbitral award to be set aside), the lower the costs of the proceedings will be, relatively speaking.

A forthcoming study of applications for setting aside (section 1059 CCP) and recognition of enforceability (sections 1060 and 1061 CCP) filed between 2012 and 2016 indicates that the average duration of proceedings is 5.68 months at each level, although 2 - 4 months should be added to take into account the mandatory oral hearing for the motion to set aside (section 1063 (2) CCP) (see in detail *Wolff*, SchiedsVZ 2021, 328 with reference to the study "Schiedsstandort Deutschland - Eine Erhebung zur Schiedsgerichtsbarkeit und zur Spruchpraxis der Gerichte", to be published in 2022).

Our experience is that it usually takes between 5-8 months to obtain a decision at first instance.

The court's decision on the challenge itself is open to appeal under section 1065 (1) and 574 et. seq. CCP within one month of service of the decision. This also applies to procedures under section 1040 (3) CCP - contrary to Art. 16 (3) UNCITRAL. It should, however, be noted that the scope of review is restricted.

Roughly what proportion of challenges are successful?

The study mentioned above has estimated the success rate of applications for setting aside under section 1059 CCP at approximately 11%, with the setting aside grounds "lack of an effective arbitration agreement" and "deficiencies in the constitution of the arbitral tribunal" dominating the successful applications. In light of the overall low number of applications and in order to achieve greater statistical reliability, the study combined these cases with applications for declarations of enforceability (as far as the objections raised were comparable to the setting-aside grounds) to provide a combined success rate for setting-aside applications and resisting enforcement of 4.19 % (see in detail Wolff, SchiedsVZ 2021, 328 with reference to the study "Schiedsstandort Deutschland - Eine Erhebung zur Schiedsgerichtsbarkeit und zur Spruchpraxis der Gerichte", to be published in 2022).

Are there any other points of interest that you would like to highlight in relation to challenges in the jurisdiction in which you operate?

Since German arbitration law is based on the UNCITRAL Model Law and New York Convention, it contains very few surprises. The most unusual aspect of it is perhaps the possibility, already mentioned, of having a court review the admissibility (or otherwise) of arbitral proceedings before the tribunal is constituted, pursuant to section 1032 CCP

Below we briefly highlight three interesting setting aside cases.

Dissenting Opinions

The Higher Regional Court of Frankfurt (Main) noted in 2020 that it considers dissenting opinions in German-seated arbitrations to violate the procedural *ordre public*, hence opening the door for possible setting aside applications pursuant to Sec. 1059 (2) no. 2 (b) CCP. In its *obiter dictum*, it stated that the issuing of dissenting opinion is likely to violate the principle that deliberations ought to remain secret. However, this decision is not yet binding, since it is currently being appealed to the BGH. This *obiter dictum* was criticised heavily in the German arbitration community as it does not reflect arbitral practice within Germany (OLG Frankfurt, Decision of 16 January 2020 - 26 Sch 14/18).

Violation of Party Agreement on Procedure

The Higher Regional Court of Frankfurt (Main) decided in 2011 to set aside an award because it deviated from party agreement on procedural and evidentiary matters. This decision is interesting because the court found a party agreement cloaked in a procedural order rendered by the tribunal. The later deviation from this order/party agreement by the tribunal was a violation of section 1059 (2) no. 1 (d) CCP because the arbitral proceedings were not in line with the agreed procedure. The procedural order stated that the tribunal confirms the procedure for certain evidentiary issues, which were previously agreed between the parties. This decision shows that arbitrators must distinguish carefully between their own decisions and party agreements. Even if the parties are "merely" invited to comment on draft procedural orders, the comments made can later amount to a party agreement (OLG Frankfurt, Decision of 17 February 2011 - 26 Sch 13/10).

Impartiality and independence of expert witness

The BGH has clarified that an arbitral award is to be set aside if the expert who gave evidence in the arbitral proceedings did not disclose material circumstances which could give rise to the appearance of bias and the award is based on the expert's opinion. Pursuant to section 1049 (3) CCP, experts (as well as arbitrators) have the obligation to disclose any circumstances that could raise doubts as to their independence and impartiality, both before and during an arbitration.

Before the BGH's clarification, if the non-disclosure of such circumstances only became known after the arbitral award was rendered, this only constituted grounds for setting aside in cases of particularly grave violations of disclosure obligations. The threshold has now been lowered (BGH, Order of 2.5.2017 - I ZB 1/16).

Conclusion

In Germany, as in many other jurisdictions, an arbitral award may not be appealed or revised after it has been issued. Only in the event of serious procedural irregularities or a violation of fundamental principles of law ("*ordre public*") can domestic arbitral awards be set aside by state courts. These requirements - which are largely in step with the requirements of the UNCITRAL Model Law - pose high hurdles for the annulment of arbitral awards, as demonstrated by the low success rate of such applications.

An application for annulment should therefore be well thought out and, above all, prepared and managed by experienced counsel.

Georg Scherpf

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Is there a process for challenging awards seated in England and Wales in the courts of this jurisdiction?

This is the second article in a series focusing on the process and procedure for challenging arbitral awards within various national jurisdictions within Europe, as prepared by Clyde & Co's European international arbitration team. This piece covers the process and procedure in England and Wales and is written by London associate Robin Bandar.

The opportunities for challenging arbitral awards in England and Wales are set out in in the Arbitration Act 1996 (the "Act") as follows:

a. section 67, allowing a challenge to the tribunal's substantive jurisdiction;

b. section 68, allowing a challenge on the ground of serious irregularity affecting the tribunal, the proceedings, or the award; and

c. section 69, permitting an appeal on a point of law.

Case law makes it clear that the courts view arbitration increasingly as an independent pillar of dispute resolution, and the hurdle for challenging an arbitral award is correspondingly high.

However, a challenge can be successful if it satisfies the relevant criteria. These should be considered carefully with experienced legal advisors before any challenge is made.

What is the legal form of the process? Are there limits on the grounds of challenge and what are they?

The formal requirements of sections 67 and 68 are similar. Essentially, a challenge is initiated by issuing an arbitration claim form, in accordance with CPR Part 8 (CPR 62.3 and PD 62.2.1). Notice must also be given to the tribunal, which involves sending them the claim form and the witness statement (or other evidence) supporting the challenge.

Section 69 (appeal on a point of law) is different in that it requires leave from the court, or the agreement of all parties to the proceedings, before the award can be challenged. In addition, the applicant must have exhausted all available avenues of review or appeal within the arbitration itself. Section 69(3) provides that leave will be given only where (among other things) the tribunal's decision was "obviously wrong" or open to "serious doubt".

Various time limits apply, although a challenge must generally be made within 28 days of the date of the award. However, a challenge to the tribunal's jurisdiction (or where a party determines there is improper conduct in the proceedings or any other irregularity) has the terser requirement of needing to be raised promptly, otherwise the party risks their ultimate right to bring the challenge (see section 73(1) of the Act).

Does the challenge involve a rehearing of some or all of the merits?

Firstly, the onus is on the claimant to arrange a hearing date with the court after the claim form has been issued. If it is appealing an award under section 69 of the Act, obtaining permission to appeal should be the first priority.

In terms of the need for a hearing, there is scope for the court to decide issues without one, but this is only where costs savings can be made (see sections 32 and 45 of the Act). Applications for *permission* to appeal against an arbitration award themselves are decided without a hearing.

The claimant is generally required to prepare all evidence and documents to be used at a hearing (PD 62.7, para 6.3).

Under section 67, an application will take the form of a full re-hearing with the possibility of live witness evidence. However, parties are bound by issue estoppel in respect of substantive issues already decided in the arbitration *(Province of Balochistan v Tethyan Copper Co Pty Ltd [20201 EWHC 938 (Comm))*.

Under section 68, the court will consider the exhaustive list of potential irregularities set out in section 68(2) of the Act to remedy procedural failings. If the challenge is successful, it will remit the award (in whole or in part) to the tribunal, or alternatively set it aside or declare it to have no effect.

Section 69 enables appeals to be heard on a question of English law arising out of an award. It will not consider questions which the tribunal was not asked to determine. After obtaining leave to appeal, the court has the power to confirm or vary the award. It may also remit the award to the tribunal, or set it aside - in each case in whole or in part.

In summary, what is the process and how does it work?

Once an award has been made by a tribunal, parties must then consider their position and in particular whether a challenge, pursuant to the Act, would be an appropriate next step.

The merits of any challenge will need to be assessed carefully by reference to the relevant sections of the Act in order to determine whether the necessary criteria have been met to maximise the chance of success.

It is important to bear in mind the 28-day deadline, which leaves parties little time to assess and prepare a challenge.

If a party decides to proceed, the next step is for its lawyers to issue an arbitration claim form and notify the tribunal, as explained above. The onus is on the applicant to arrange a hearing date with the court and, if necessary, obtain leave to appeal under section 69. It should be borne in mind that leave is granted in only about 30% of cases.

Generally, challenges are dealt with on the papers rather than at a live hearing. However, this depends on the complexity of the matter and the requests made by the parties.

Those who seek to keep their dispute confidential should be aware that appeals under section 69 are in most cases made public by order of the court, which has the result of revealing the underlying arbitration.

Roughly what is the cost and timescale to complete the process? Is the challenge itself appealable?

Costs vary significantly depending on the issues raised in the arbitration and the subsequent challenge. However, appeals in this context are generally much cheaper than those arising from litigation. Costs will mainly be incurred in the preparation of witness statements, other evidence and new submissions, although the process as a whole is relatively inexpensive, given that there is no substantial merits hearing. That said, additional costs will be incurred if the applicant is faced with a cross-appeal, which will require reply submissions. If there is a hearing, that is a further expense, although it is unlikely to last more than a day.

As a rough estimate, an applicant can expect to pay a total of £100,000 (inclusive of fees) for an appeal, but this may vary considerably, depending on the circumstances. If the appeal is successful, the applicant should be able to recover its reasonable costs associated with the application.

In terms of timescale, an appeal typically takes between six and nine months from the request for leave through to the hearing, or a full calendar year from the request to the receipt of judgment from the court.

Roughly what proportion of challenges are successful?

In the Commercial Court, there have been a diminishing number of section 68 and 69 challenges year-on-year from 2017, with the 2019-20 figures showing only a total of 16 and 22 (respectively) being made under these sections of the Act.

Success rates are very low. In any given year it appears that there are between zero and two successful applications made pursuant to these sections of the Act. Applicants are taking an increasingly cautious approach despite a steady growth in arbitration as a method of dispute resolution.

Are there any other points of interest that you would like to highlight in relation to challenges in the jurisdiction in which you operate?

The most important recent development has been the release of the 11th edition of the Commercial Court Guide in February 2022. There are multiple changes which clarify and underscore the high bar across sections 67-69 to both commence and successfully argue a challenge. They also confirm the power of the court to dismiss claims under sections 67 and 68 where there is "no real prospect of success". Of particular note is the wording allowing an extension of the right of respondents to seek indemnity costs, further demonstrating that courts want parties to exercise caution, and consider their merits carefully, before pursuing a challenge.

There have also been numerous case studies which highlight the importance of making sure the merits of an appeal are considered carefully. Indeed, their low success rate should serve as a warning for those looking to make a trivial challenge (and the revised Commercial Court Guide might further deter parties).

In October 2021, for example, a challenge of an LCIA award under section 67 was dismissed when Calver J found that there was simply no underlying issue of jurisdiction in the case that was brought (see *NWA and others v NVF and others [20211 EWHC 2666 (Comm)).*

In *Alegrow v Yayla* (2020), the court emphasised that even after granting leave to appeal, English courts should seek to uphold an arbitral award, seeking to resolve issues in the award so that it can be considered valid, rather than detecting flaws and simply ruling it invalid.

On a practical level, commercial parties should note that appeals on points of law can only be brought where section 69 is not excluded in the arbitration agreement, either explicitly or by reference to rules that exclude

appeals of this kind. This is the only type of challenge than can be excluded under the Act, and parties may wish to consider whether they want to do so when drafting arbitration clauses.

Nevertheless, and as a final point, London continues to be a first-tier choice for the seat of arbitrations and part of its attraction is the opportunity the Act provides to challenge awards in the ways described. Those looking to do the same in other jurisdictions will often find either no equivalent right of process, or one that presents the aggrieved applicant with greater hurdles.

Robin Bandar

Is there a process for challenging awards seated in Spain in the courts of this jurisdiction?

This is the third article in a series focusing on the process and procedure for challenging arbitral awards within various national jurisdictions within Europe, as prepared by Clyde & Co's European international arbitration team. This third piece is on the procedure in Spain and is written by Carlos Cid and Pablo Nvono, from Clyde & Co's Madrid Office.

The relevant Spanish legal framework is set out in the Spanish Arbitration Act (Law 60/2003) (the "Act"), which follows broadly the UNCITRAL Model Law. The Act protects arbitration from the influence of the Spanish Judicial Courts, ensuring the validity and effectiveness of arbitral awards. The result is that such awards are in principle final and binding.

Nonetheless, the Act also includes an annulment process under which Spanish awards can be challenged (Article 40). However, this process applies only to very specific circumstances that are expressly regulated (Article 41), as explained below.

What is the legal form of the process? Are there limits on the grounds of challenge and what are they?

Article 42 of the Act describes the legal process to be followed. According to this article, an action for annulment involves abbreviated proceedings within the civil jurisdiction court.

Various limits apply. The interested party must challenge the validity of the award by filing an action for annulment within two months of the notification of the final award.

In addition, the Act only provides a limited number of grounds for challenging and eventually obtaining such an annulment, consisting of a serious breach of (i) the arbitration contract; or (ii) of the essential procedural guarantees sanctioned in Article 24 of the Spanish Constitution, both expressly regulated in Article 41.1 of the Act. Under Article 41, the following are the relevant grounds for obtaining such an annulment:

- the arbitration agreement does not exist or is not valid;
- the party has not been duly notified of the appointment of an arbitrator or of the arbitration proceedings or has not been able, for any other reason, to enforce its rights;
- the arbitrators have ruled on matters not submitted to them for decision;
- the appointment of the arbitrators or the arbitration proceedings have not been in accordance with the agreement between the parties, unless such agreement was contrary to a mandatory rule of the Act, or, in the absence of such agreement, that they have not been in accordance with the Act;
- the arbitrators have ruled on issues not subject to arbitration; and
- the award is contrary to public order.

Does the challenge involve a rehearing of some or all of the merits?

According to case law, an annulment cannot lead to a new trial of the merits of the case. It only has the effect of rescinding the original award.

The application for annulment of the award is not technically an application for a remedy or a means of challenge but is an autonomous and exceptional procedure for the purpose of checking that the arbitration has been validly conducted. The result of procedure is that the relevant award may be declared null and void on one of the bases set out in Article 41.1.

This procedure cannot be understood as an appeal of the arbitration award before the courts, in which the Tribunal can reassess the facts and evidence submitted to arbitration and/or the application of law. If parties were able to do this it would frustrate the purpose of arbitration, which is to avoid the resolution of a dispute by means of litigation.

In this context, the Spanish Constitutional Court (i.e. decisions No.174/1995 and No.46/2020) deemed that the annulment procedure consists of an external control process which precludes further pronouncements on arbitral awards and any interference with their assessment.

In summary, what is the process and how does it work?

Pursuant to Title VII of the Act, the annulment action is subject to the procedure of abbreviated claims. The procedure starts with the filing of the annulment request. This claim must be filed in accordance with the provisions of Article 399 of Law 1/2000, of 7 January 2000, on Civil Procedure, together with relevant documents and the arbitration agreement. After this, the Court clerk notifies the defendant, summoning him to make allegations/ defence within 20 days. Together with this defence the party might submit supporting evidence and propose evidence for the hearing.

Finally, once the claim has been answered, or the deadline for this has passed, the Court clerk summons the parties to an oral hearing if this is requested by the parties in the pleadings or the statement of reply. If the parties have not requested a hearing, or only intend to use documentary evidence, and this has already been submitted without being challenged, the Court will simply issue a decision, without the need for further formalities.

Are there any legal thresholds before the process can be commenced?

Spanish courts have been consistent in rejecting applications for annulment when the grounds for annulment could have been avoided by the party challenging the award. It is relevant that the Act includes a mechanism allowing a party to request the arbitral tribunal within ten days (or other agreed period) of the issuance of the award to correct any computation, clerical or typographical errors, to clarify specific parts of the award, to issue an additional award on claims submitted but not decided, or to rectify an award that has ruled on claims that were not submitted to the tribunal or were not arbitrable.

In order to obtain the annulment of an award, the party challenging it must have been diligent and have made attempts to remedy the alleged defect when it occurred, using the mechanisms available. Article 6 of the Act clearly states that:

> “where a party, knowing of the infringement of any non-mandatory provision of this Act or any requirement of the arbitration agreement, does not state its objection within the term provided or, in the absence of such a term, as soon as possible, that party will be deemed to have waived its right to object as provided in this Act.

Roughly what is the cost and timescale to complete the process? Is the challenge itself appealable?

It is common practice to agree the cost in line with the economic interest of the dispute. Legal advisors typically calculate legal fees in accordance with the Rules of the Bar Association where the proceedings take place.

It is important to highlight that the economic interest of the proceeding in which the annulment action is brought is that derived from the award itself, which does not necessarily match with the amount of the arbitration proceeding in which the award was rendered.

It should also be noted that if the challenge succeeds in full, the applicant may be awarded its legal costs. Article 42.2 of the Act, the outcome of a challenge cannot be appealed.

Roughly what proportion of challenges are successful?

Case law is very restrictive and demanding in relation to annulment actions. Since the High Courts of Justice assumed jurisdiction to hear annulment actions in June 2011, approximately 25% of the annulment actions brought before them have been upheld.

At present, the Spanish Courts have become increasingly protective of arbitration, and have sought to limit challenges to the validity and effectiveness of arbitration awards.

Are there any other points of interest that you would like to highlight in relation to challenges in the jurisdiction in which you operate?

A number of recent judgments have had the effect of restricting the judicial annulment of awards. On 15 June 2020, the Spanish Constitutional Court handed down a judgment confirming that the High Court of Justice of Madrid had exceeded its powers by annulling an award after considering its underlying merits. The judgment supported arbitration in Spain by emphasising party autonomy and (despite previous court decisions) the limited relevance of public policy to the annulment of awards.

On 15 February 2021 and 15 March 2021, the Constitutional Court issued a further judgment limiting the courts' interpretation of the notion of public policy under Art. 24 of the Spanish Constitution, and the Spanish courts' role in policing the validity and effectiveness of the arbitration awards.

The Constitutional Court explained that:

> The action for annulment is the judicial control mechanism provided in the arbitration legislation to ensure that the arbitration procedure complies with the provisions of its rules. Such control has a very limited content and does not allow a review of the merits of the matter decided by the arbitrator, nor should it be considered as a second instance, being able to be based exclusively on the assessed causes established in the law, without any of them -not even the one related to public order- being able to be interpreted in a way that alters this limitation.

These judgments have increased both companies' and investors' confidence in Spanish arbitration, since they confirm that awards should not be annulled by the courts for substantive reasons regarding the subject matter of the dispute. Their effect is to reduce significantly the legal uncertainty relating to this form of dispute resolution.

Carlos Cid

Pablo Nvono

Is there a process for challenging awards seated in France in the courts of this jurisdiction?

This is the fourth article in a series focusing on the process and procedure for challenging arbitral awards within various national jurisdictions within Europe, as prepared by Clyde & Co's European international arbitration team. This piece is on the procedure in France and is written by associate Remi Sassine, from Clyde & Co's Paris Office.

An award rendered in France in an international arbitration may only be challenged by applying to have it set aside (art. 1518 of the French Code of Civil Procedure (the "CCP")). It may not be subject to appeal, even if the parties have otherwise agreed. Applications to have the award set aside are limited to five grounds:

1. the arbitral tribunal wrongly upheld or declined jurisdiction;

2. the arbitral tribunal was irregularly constituted;

3. the arbitral tribunal ruled without complying with the mandate conferred on it;

4. the due process principle was violated; and

5. the recognition or enforcement of the award breaches international public policy (art. 1520 CCP).

What is the legal form of the process? Are there limits on the grounds of challenge and what are they?

The requesting party must apply to set aside the award within one month of its notification (art. 1519 CPC) before the relevant Court Registry. Where the requesting party resides abroad, this timescale is extended by two months (arts. 1527 and 643 CCP). The application must indicate the lawyer who has been instructed; the reference number of the award being challenged; the court before which the setting aside is sought; the object of the request; and the parties' details. It must also be accompanied by a copy of the award itself (art. 901 CPC).

The action for setting aside an award is brought before the Court of Appeal that has territorial jurisdiction over the place where the award was rendered (art. 1519 CPC). Regarding international awards, the application to set aside will generally be brought before the international commercial chamber of the Paris Court of Appeal (established on 7 February 2018). Before this chamber, the parties may use the English language for exhibits and, if need be, oral arguments.

Does the challenge involve a rehearing of some or all of the merits?

French Courts are prevented from reviewing the merits of the dispute and thereby from making an assessment on the legal and factual reasoning of the award.

However, the scope of the court's review varies depending on the ground relied upon. Under articles 1520-1 *(jurisdiction)* and 1520-5 *(international public policy)*, the powers of French courts have significantly evolved and are now quite extensive. In relation to the international public policy ground, and specifically as it pertains to allegations of corruption, the scope of review exercised by the Court has transitioned from a minimalistic approach to an in-depth review. French Courts now even go as far as examining new arguments and evidence that were not raised before the arbitral tribunal, thus highlighting the significance given to the fight against corruption.

Roughly what is the timescale to complete the process? Is the challenge itself appealable?

Once the application to set aside the award has been filed, the requesting party has three months to file its submissions (art. 908 CCP). Where the requesting party resides abroad, this timescale is increased by two months (art. 911-2 CCP). Starting from the date the submissions are filed, the respondent has three months to respond (art. 909 CCP). Similarly, where the respondent resides abroad, this deadline is extended by a further two months (art. 911-2 CCP). After the first exchange of submissions, a pretrial judge will generally set a date for a case management hearing to determine whether the parties wish to agree on a procedural timetable and to proceed with the standard protocol of the specific chamber.

Overall, proceedings to set aside an award take typically between 18 to 30 months.

The judgment rendered by the Court of Appeal can be appealed before the French Supreme Court (the "*Cour de cassation*") within two months of service of the judgment (art. 612 CPC). The Cour de cassation solely rules on the law and never on the facts. It can either uphold the decision or quash it in whole or in part. In the latter case, the Cour de cassation will remit the case to another court of appeal which will rule on the case again.

Roughly what proportion of challenges are successful?

Successful challenges to arbitral awards before French courts used to be scarce. However, they have increased over the years. Between 1981 and 1990, approximately 16% of challenges were successful, whereas, since 2016, approximately 25% of challenges have been successful, underlying the evolution of French courts' scope of review of international awards.

Are there any other points of interest that you would like to highlight in relation to challenges in the jurisdiction in which you operate?

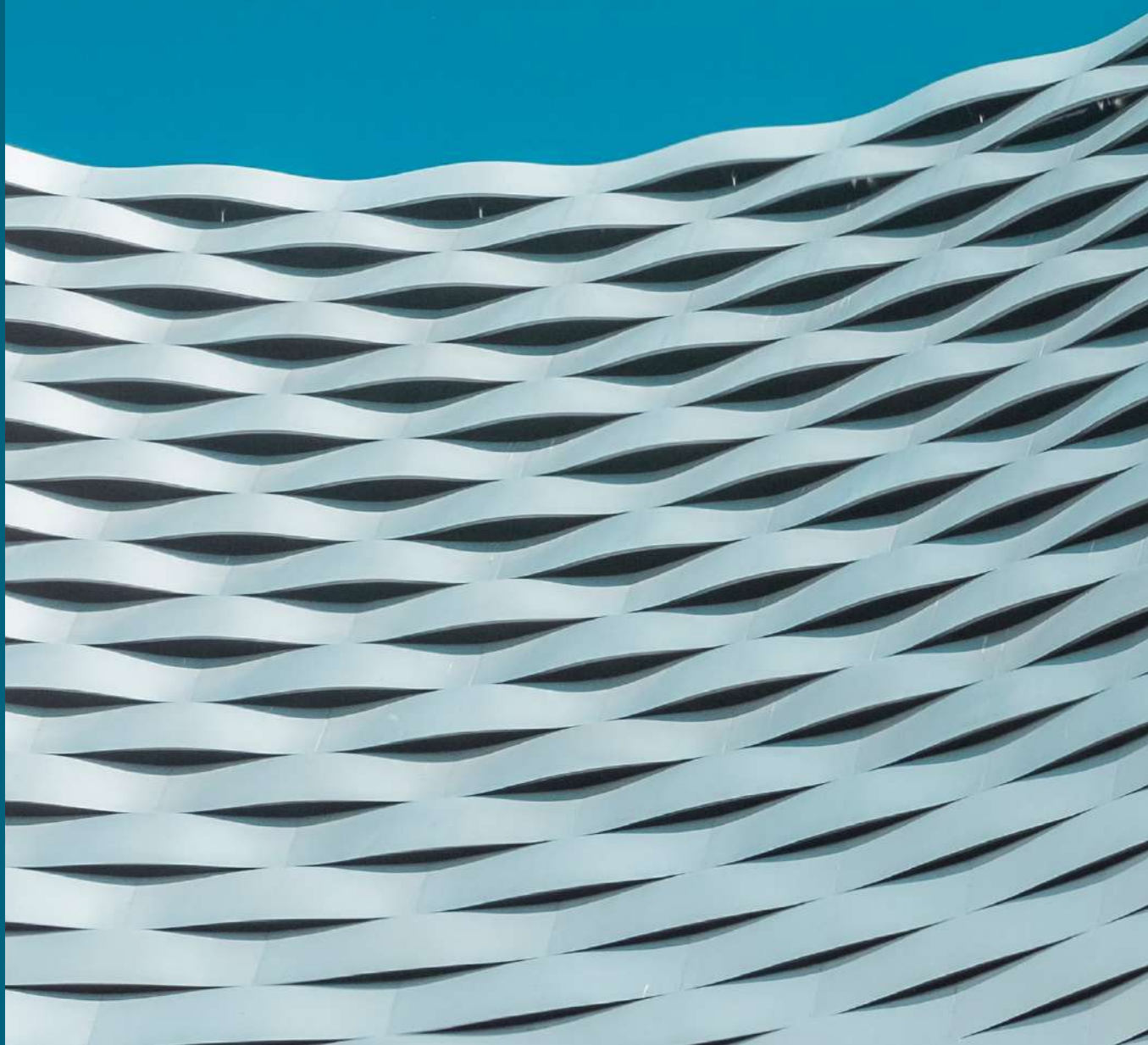
New fields have emerged and are now considered as part of international public policy. Recently, the Paris Court of Appeal has held that some international sanctions, namely European embargo measures, should be considered part of the French conception of international public policy (Paris Court of Appeal, *AD Trade*, 13 April 2021, n. 18/09809). It added that conformity with international public policy "*is assessed at the time the court rules on the measure*" and that "*it is therefore necessary to take into account the evolution of the international situation* [if the sanction is still enforced] *and of the values commonly accepted by the international community in order to assess whether the incorporation of an award into the domestic legal order is in conformity with international public policy*".

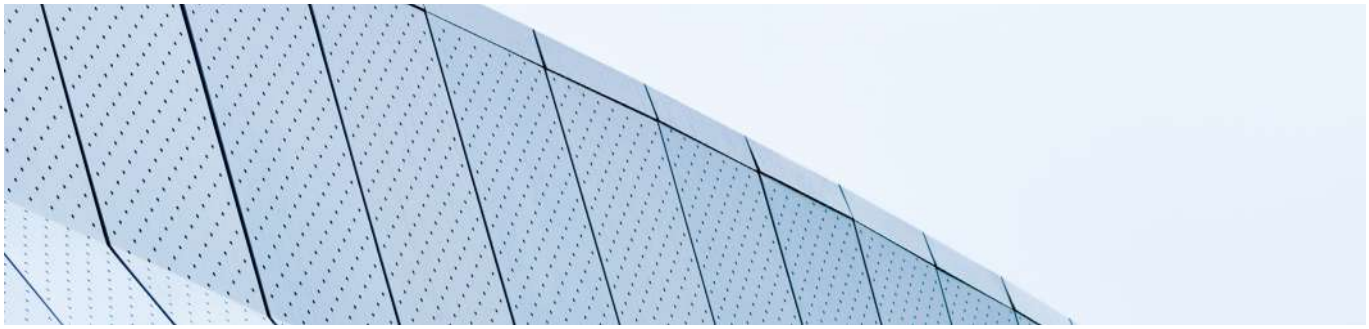
In an even more recent decision, the Paris Court of Appeal firmly established that international sanctions - the European Union and United Nations sanctions - are part of French international public policy, but also propelled the fight against violations of human rights to the same heights, as it is protected by several international instruments (Paris Court of Appeal, 5 October 2021, n° 19/16601).

These decisions illustrate the desire by French courts to increasingly protect internationally accepted values, but also raise the question whether to include other fields within French international public policy, such as, for example, environmental related issues.

Remi Sassine

Series 2





To arbitrate or not to arbitrate - The pertinent question for non-signatory third parties

This is the first article in a series which explores the key considerations for non-signatory third parties in relation to arbitration agreements. Clyde & Co's European international arbitration teams have prepared various jurisdictional perspectives and this first piece is written by associate Marta Cerrada, an associate in the Madrid office.

Arbitration is the result of contracting parties' voluntary decision to resolve disputes that arise with respect to a particular legal relationship according to the decision of an arbitrator or arbitral tribunal. This agreement between parties to submit to arbitration is set out in what is known as an arbitration agreement, which, like any contract in Spain,[1] is typically binding only on the parties that sign it.

However, as explained below, the Spanish Courts (the **Courts**) have allowed arbitration agreements to extend to non-signatory third parties in certain cases. However, the relevant criteria for doing so is quite restrictive and must be applied with caution, taking into account the particular circumstances of the case. As a result of this restrictive position, it is often difficult to determine the most appropriate approach under Spanish law in cases where one of the co-defendants is not a party to the arbitration agreement.

The aim of this article is to provide an overview of the legislative framework and the position of the Courts in order to clarify the specific circumstances that should be considered when deciding whether to arbitrate against a non-signatory third party.

The extension of the arbitration agreement and the attractiveness of the jurisdiction

The Spanish Arbitration Act **(SAA)** follows the UNCITRAL Model and, as such, does not contain a specific provision for the extension of the arbitration agreement to non-signatory third parties. However, the SAA does provide that the arbitration agreement must "*be in writing, in a document signed by the parties*"*and* "*express the will of the parties to submit all or some disputes to arbitration*" (Article 9).

The Courts, applying the European Community doctrine, consider that for there to be a valid and binding arbitration agreement where parties waive access to a jurisdiction, it is necessary that such waiver is "*explicit, clear, definite and unequivocal*" (Ruling No. 65/2009 of the Constitutional Court, of 9 March -RTC 2009/65- and Ruling No. 409/2017, of the Supreme Court, of 27 June -RJ 2017/3021-).

The Courts, while recognising this doctrine, have acknowledged the possibility of extending the arbitration agreement to non-signatories. However, this requires an analysis of the common will of the parties, including that of the non-signatory, **to identify** the **explicit, clear, categorical and unequivocal intention of all parties to be subject to the arbitration agreement**. The Courts have identified this common intention in the following cases:

1. The Courts have accepted the possibility of extending the arbitration agreement to financial institutions guaranteeing obligations in a contract subject to an arbitration agreement (Ruling No. 404/2005, of the Supreme Court, of 26 May -RJ 2005/4140- and Ruling No. 64/2015, of the High Court of Justice of Madrid, of 16 September -JUR 2015\242481-). In these cases, it was essential for the Courts that the guarantee contract signed with the financial entity did not include any other choice of dispute forum.

2. A non-signatory third party may be bound by the arbitration agreement if it has been involved in the execution of the contract. In these cases, the Courts have stated that, to the extent that it was involved in the execution of the contract, the non-signatory party's refusal to submit to arbitration will contradict its prior acts.(Ruling No. 20/2018 of the High Court of Justice of Madrid, of April 24; and Order No. 22/2018 of the High Court of Justice of the Basque Country, of November 7 -RJ 2018/5890-).

1. Principle of relativity of contracts (Article 1,257 of the Civil Code)

3. The insurance company of one of the signatory parties may be bound by the arbitration agreement signed by its insured if the insured subrogates its contractual position to the insurer after an indemnity under the policy has been paid (Ruling No. 1097/2008, of the Supreme Court of 20 November -RJ 2009\8- and Ruling No. 64/2003, of the Supreme Court, of 6 February -RJ 2003/850-). However, the Courts have clarified that the arbitration agreement cannot bind insurers in cases where a third party initiates legal proceedings against both the insured and insurer in exercise of the "direct action" provided for in Article 76 of the Spanish Insurance Contract Act.

4. Arbitration agreements may extend to non-signatories in cases of contractual assignments, provided that such assignments have been accepted both by the original contracting parties and the assignee (Ruling No. 60/2013, of the High Court of Justice of Madrid, of 22 July -JUR 2013/284880-).

5. In some cases, the arbitration agreement bound non-signatory companies belonging to the same corporate group. In these cases, the Courts have been prepared to pierce the corporate veil on the basis that there was bad faith or an abuse of rights. The Courts have also made decisions to determine the company that executed the relevant contract (Ruling no. 8/2007, of the Provincial Court of Barcelona, of February 13 -JUR 2007\204898- ; Ruling No. 227/2010, of the Provincial Court of Madrid, of October 15 -JUR 2011\37153-; and Ruling No. 13/2015, of the High Court of Justice of the Valencian Community, of May 5 -RJ 2015/4994-).

However, there is an abundance of judgments in which the Courts have refused to extend arbitration agreements to a non-signatory, despite the fact that the non-signatory participated in the disputed legal relationship, on the grounds that such participation was not sufficient to break the principle of the 'relativity' of the arbitration agreement.[2]

Given the wide variety of cases, it is difficult to give a simple answer to the question at the beginning of this article, even though it arises quite often in arbitration practice. It is therefore advisable to dispense with rigid rules and to examine the circumstances of each case carefully, looking for evidence of whether the non-signatory had the explicit, clear and unequivocal intention of being bound by the arbitration agreement. Only where that can be proved is it advisable to initiate a single arbitration involving all the parties - including the non-signatory.

Where this cannot be proved, and so a single arbitration is not possible, the position is somewhat complicated. To deal with this problem, the Courts have developed the jurisdictional doctrine of *vis atractiva*, which allows an arbitration agreement to be overridden (contrary to the provisions of Article 11 of the SAAM)[3] and all parties to be subject to a single set of court proceedings. However, the doctrine only permits this where there is an **imminent risk of contradictory pronouncements in arbitral and jurisdictional venues** (Ruling no. 79/2018, of the Provincial Court of Navarra, of February 19 -JUR 2018/244944-; Ruling no. 177/2012 of the Provincial Court of Madrid, of July 2 -JUR 2012/289937-; and Ruling no. 82/2002, of the Provincial Court of Gipuzkoa, of February 26 -JUR 2002/219608-).

Although judges sometimes refuse to take advantage of this doctrine,[4] in practice, it has led most Courts to favour court proceedings over arbitration where there is a clear risk of contradictory rulings. As a result, objections raised by signatory parties have been rejected and some Courts have recognized their jurisdiction to hear the case against them despite of the arbitration agreement.

2. Ruling of the Supreme Court of July, 1998 -RJ 1998\6235-.

3. Article 11 of the SAA "Arbitration agreement and claim on the merits before a Court", which states: "*the arbitration agreement obliges the parties to comply with the stipulations and prevents the courts from hearing disputes submitted to arbitration, provided that the party concerned invokes it by means of declinataty action*".

4. Ruling No. 145/2017, of the Provincial Court of Madrid, of April 25 -JUR 2017\201136-; or Ruling No. 283/2010, of the Provincial Court of Valencia, of December 20 -JUR 2011\120913.

Conclusion

In summary, the extension of an arbitration agreement to non-signatories is the exception in Spain, not the general rule. The Courts are reluctant to view non-signatory third parties as bound to an agreement and only take that view where the third party has demonstrated an unequivocal intention to waive access the courts' jurisdiction. Moreover, a high standard of proof is required to demonstrate such an intention.

That said, the Courts do sometimes allow an arbitration agreement to be extended to third parties in exceptional cases, on different legal bases. For example, arbitration agreement may extend to non-signatories where the non-signatory belongs to the same group of companies as one of the contracting parties and has participated in the execution of the contract or, alternatively, where the contract has been assigned.

Closely linked to the above, the Courts have developed the jurisdictional doctrine of vis atractiva to deal with those cases where there is no legal basis for extending an arbitration agreement to non-signatory third parties. Here the court allows all claims and parties in a dispute to be subject to a single set of court proceedings, but only if there is an imminent risk that separate arbitral and court proceedings might result in an award and judgment that contradict each other.

Marta Cerrada

To arbitrate or not to arbitrate - The pertinent question for non-signatory third parties

This piece is the second in a series which explores the key considerations for non-signatory third parties in relation to arbitration agreements. Clyde & Co's European international arbitration teams have prepared various jurisdictional perspectives on this topic and associate Leonor d'Albiousse covers the position in France.

France is well known for its arbitration-friendly approach. It is in this context that French courts have recognized the possibility of extending an arbitration agreement to non-signatory third parties. Such an extension is permitted when it can be established that the non-signatory had knowledge of the arbitration agreement and implicitly consented to arbitrate potential disputes.

On this basis, the extension of the arbitration agreement has been successful in the context of a group of contracts and where several companies from a same group take part in a complex contractual relationship.

This principle is often referred to as "the group of companies doctrine". However, as discussed below, the mere existence of a group of companies does not automatically lead to the extension of the arbitration agreement. French courts permit this only when the non-signatory had the relevant knowledge and consent to be bound by the arbitration agreement.

Determining that a non-signatory had knowledge of the arbitration agreement within a group of contracting parties or a group of companies is rarely an issue. As for the implicit consent, French courts have established that it can be presumed from the non signatory third-party's participation in the negotiation, performance and/or termination of the contract containing the arbitration agreement.

The consequences of this principle are twofold:

- as a positive, it may allow a claimant to benefit from an arbitration agreement to which it is not a party; and
- as a negative, a non-signatory party may be compelled to arbitrate a dispute even though it is not a party to the underlying arbitration agreement.

The overarching principles

Two basic principles of French law should be kept in mind when considering the extension of the arbitration agreement by or to a non-signatory party:

- firstly, the arbitration agreement is considered as a contract in its own right, and its validity and effect is independent of the underlying contract;[1] and
- secondly, privity of contract provides that any contract,[2] including an arbitration agreement, only binds the parties to that contract.[3]

To some extent, the extension of the arbitration agreement to non-signatories constitutes an exception to the second principle. However, commentators agree that it is justified by the practical necessity of resolving in the same forum all disputes arising out of the same contractual framework and relationship. In particular, it guarantees uniformity of decision-making and avoids multiple parallel proceedings relating to disputes that involve different parties but are nevertheless related.

1. Article 1447 of the French Civil Procedure Code: The arbitration agreement is independent from the contract to which it relates. It is not affected by the latter's ineffectiveness. When it is null, the arbitration clause is deemed unwritten.
2. Article 1199 of the French civil code: The contract only creates obligations between the parties. Third parties may neither request performance of the contract nor be forced to perform it, subject to the provisions of this section and those of Chapter III of Title IV.
3. Article 2061 of the French civil code: The arbitration clause must have been accepted by the party against whom it is invoked, unless this party has succeeded to the rights and obligations of the party who accepted it in the first place.

The French test to extend the arbitration agreement to a non-signatory

Under French law, an arbitration agreement must be considered as a contract in its own right, independent of the contract to which it is attached[4]. Although privity of contract applies to the arbitration agreement, the independent status of the latter has allowed French judges to introduce some exceptions, for practical reasons. As a result, in the event of complex contractual structures, there are instances where the arbitration agreement may extend to a non-signatory party.

As explained in more detail below, the test applied by French courts is twofold:

- firstly, the non-signatory must have some knowledge of the arbitration group. This presumption is rarely at issue within a group of companies;[5]. and

- secondly, one must then determine the non-signatory's implicit intention to be part of the arbitration agreement, which is presumed by the non-signatory's involvement in the negotiation, performance and/or termination of the underlying contract/ interrelated contract.

The Dow Chemical case is often cited as a reference.
In the 1982 *Dow Chemical ICC case,*[6] the arbitrators extended the arbitration agreement to a subsidiary and a parent company. The award stated that it was the mutual intention of all the parties to be bound by the arbitration agreement, by virtue of the third party's role in the conclusion, performance, and termination of the contracts containing the arbitration clauses. In this case, the non-signatory company was the supplier of the products ordered under the main contract, and its representatives negotiated and notified the termination of the main contract.

This case is important because the judges have referred to the "economic reality" that constitutes a group of companies to justify the decision to extend the arbitration agreement to a non-signatory company within a group of companies.

Since then, the French Cour de cassation has repeatedly held that "*the effect of the international arbitration clause extends to the parties directly involved in the performance of the contract and the disputes that may arise therefrom.*"[7]
The Paris Court of Appeal further considered that the arbitration agreement may extend to parties involved in the performance of related obligations resulting from an interrelated contract.[8].

As a result of this principle, the Court of Appeal has also annulled arbitral decisions which denied jurisdiction over non-signatories, even though implied consent could be established.

In the 2008 Abela Foundation case, the Paris Court of Appeal annulled an award in which the arbitral tribunal declined a request to extend the arbitration agreement to non-signatories.[9] The French Cour de cassation confirmed the decision. In this case, the arbitration agreement was included in the company articles and bound the shareholders of a company.
The non-signatories were not actually shareholders of the company, but the Court of Appeal found that they had acted as such by entering into a liquidation agreement, which is a formal act normally reserved to actual shareholders. As a result, they were to be bound by the arbitration agreement.

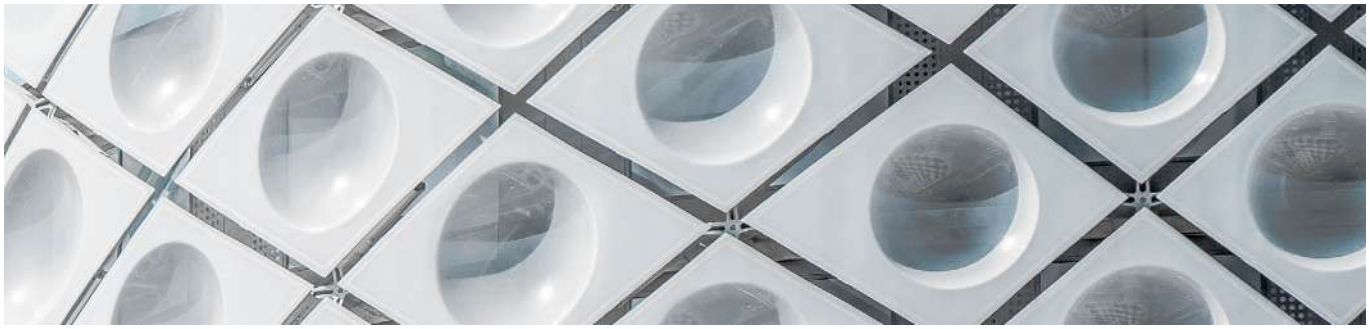
A similar annulment decision was reached in relation to a **2016 arbitration**, in which a main contract had been entered into by a company (Avicenna) representing a consortium of investors and two other companies (NECA and EPIC).[10] Those latter two companies brought a claim against the member companies of the consortium, even though they were not actually signatories to the main contract. The arbitration tribunal declined jurisdiction over the non-signatories after it determined that they did not intend to be bound by the arbitration agreement. In 2018, the Court of Appeal partially annulled the decision of the arbitration tribunal and found that the arbitration should be extended to some of the non-signatories parties who participated in the execution of the main contract pursuant to contractual obligations under an interrelated contract.

4. Article 1447 of the French Civil Procedure Code.
5. See Yves Derains, 'Chapter 7. Is there A Group of Companies Doctrine?', in Bernard Hanotiau and Eric Schwartz (eds), Multiparty Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 7 (© Kluwer Law International; International Chamber of Commerce (ICC) 2010) pp. 131 - 145.
6. ICC Case No. 4131.
7. See for instance Cass. 1 civ., 27 mars 2007, stes ABS et AGF Iart c/ ste Amcor Technology et a., JCP G 2007, I, 168, n 11 et s., obs. Ch. Seraglini.
8. Paris, 18 December 2018, Rev. arb. 2018, p. 847.
9. *Joseph Abela Family Foundation v. Albert Abela Family Foundation et autres*, Cour d'appel, 22 May 2008.
10. Cour d'appel de Paris Pole 1 - Chambre 1 ARRET DU 18 DECEMBRE 2018. Numero d'inscription au repertoire general : N° RG 16/24924 - N° Portalis 35L7-VB7A-B2GJ7

In practice, an MOU that had been signed to organize the consortium of investors provided that some of the investors would participate in the main contract. The Court of Appeal further noted that the non-signatories had participated in meetings and sent emails and recommendations/instructions to NECA and EPIC.

On this basis, the Court of Appeal does not hesitate to apply the relevant doctrine. Within a group of companies or a group of contracts, one should keep in mind that a party may be subject to an arbitration agreement, even though it has not consented to it. If a party does not wish to be in this position, it should therefore expressly state that it does not intend to be bound by the arbitration agreement.

Leonor d'Albiousse



To arbitrate or not to arbitrate - a pertinent question relevant to non-signatory third parties

This is the third article in Clyde & Co's series exploring the key considerations for non-signatory third parties in relation to arbitration agreements. Clyde & Co's European international arbitration teams have prepared various jurisdictional perspectives on this topic and associate Catherine Wang from our London office covers the position in the England and Wales.

Under English law, it is possible for a party to be bound by an arbitration agreement, even where they are not a signatory. This is implicit in section 82(2) of the Arbitration Act 1996, which states that:

> References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement.

In which circumstances could a non-signatory third party be bound by an arbitration agreement?

The circumstances in which a non-signatory third party could be bound by an arbitration agreement are limited. They fall largely into the following categories, although they are not exhaustive:

1. Assignment or transfer of contractual rights or causes of action to a third party. If the contractual rights or causes of action were originally subject to an arbitration agreement, it may also bind the third party (see "*The Jay Bola*" *[19971 EWCA Civ 1420*).

2. Subrogation. A subrogated insurer may be bound by an arbitration agreement applicable to the subrogated rights or claims (see *Starlight Shipping Co and another v Tai Ping Insurance Co Ltd, Hubei Branch and another [20071 EWHC 1893 (Comm)*).

3. Novation. A novatee may be bound by an arbitration agreement contained in a contract between the novator and its counterpart (see *Charles M Willie & Co (Shipping) Ltd v Ocean Laser Shipping Ltd (The Smaro) [19981 EWHC 1206 (Comm)*).

4. Statutory provisions. The Third Parties (Rights Against Insurers) Act 1930 and the Contracts (Rights of Third Parties) Act 1999 entitle a third party to invoke certain contractual terms in circumstances prescribed in those statues. In turn, the third party may be bound by an arbitration agreement contained in the contract (see *Nisshin Shipping Co Ltd v Cleaves & Co Ltd [20031 EWHC 2602 (Comm)*).

When assessing whether a specific set of facts might cause a non-signatory third party to be bound by an arbitration agreement, it is advisable to obtain specialist legal advice.

Are there any points to note when considering joining a non-signatory third party to an arbitration?

The starting point is to check the arbitration rules referred to in an arbitration agreement (if any). These will often set out the criteria and procedure for joining a third party (see, for example, Article 7 of the 2021 ICC Rules).

Where English law applies, there are two main points to bear in mind.

First, there are formal requirements where a non-signatory third party intends to join an arbitration that has already started.

For example, if an assignee wishes to join an on-going arbitration and sue in the assignor's name, it should give written notice to the other parties and the tribunal within a reasonable time, counting from the date of the assignment. If it fails to do this, the court may use its discretion to find that the arbitration agreement ceases to have effect (see *NBP Development Ltd & ors v Buildko and Sons Ltd [19921 8 Const LJ 377*).

Second, the 'group company doctrine' does not apply in England, even though it is well-established in civil law jurisdictions, in particular France (see *Peterson Farms Inc. vs. C&M Farming Ltd. [20041 EWHC 121 (Comm)*). This is the principle that a non-signatory company within the same company group as a signatory party can in certain circumstances be bound by the arbitration agreement that the latter has entered into.

While the circumstances allowing a non-signatory third party to an arbitration are relatively limited, what does English law say about joining a third party to court proceedings?

Joining third parties to court proceedings is governed by rules 19.2 and 19.4 of the English Civil Procedure Rules. Briefly, after the claim form has been served, an existing party or a person who wishes to become a party is required to submit an application to the court to seek for its permission to remove, add, or substitute a party to the litigation (see CPR 19.4(1) and 19.4(2)).

CPR 19.2 sets out the circumstances in which such an application would be granted. These are comparatively broad. For example, CPR 19.2(2)(b) provides that:

> The court may order a person to be added as a new party if[...] there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.

How have the English courts interpreted and applied CPR 19.2?

The English courts enjoy a wide discretion and have interpreted CPR 19.2 broadly in the reported cases. This makes it difficult to predict what a court will decide in any individual dispute.

Waller I-J. justified this approach in *Davies and others v Department of Trade & Industry [20071 W.L.R. 3232* by stating that "*CPR r 19.2 seems to provide a very wide power to enable parties who may be affected by a finding in any proceedings to be joined.*"

Additionally, the parties should bear in mind the potential costs of the application process. In *Molavi v Hibbert [20201 4 W.L.R. 46*, for instance, it was reported that *Whe Claimant's costs of the joinder application alone are said to be £155,282 and the BBC's costs of responding to the application are £32,179.*

Conclusion

Under English law, the circumstances in which a third party can be joined to existing proceedings are limited where arbitration is concerned, compared to litigation. This is not surprising, given the essentially consensual nature of arbitration.

It is important to bear this in mind, in addition to other key factors such as confidentiality, enforcement, and costs, when negotiating the dispute resolution mechanism in a contract. In other words, it is important to consider not only what the best form of dispute resolution is for the parties signing the agreement, but also how it might (or might not) affect other parties. This is perhaps easier said than done, as it can be difficult for parties to foresee the specific involvement of third parties when drafting contract terms, particularly if the agreement spans over a long-term. A possible solution is to discuss the issue with experienced legal advisors at an early stage in order to avoid incurring significant costs during legal proceedings.

Catherine Wang

To arbitrate or not to arbitrate - the pertinent question for non-signatory third parties

This is the fourth and final article in Clyde & Co's series exploring the key considerations for non-signatory third parties to arbitration agreements. Clyde & Co's European international arbitration teams have prepared various jurisdictional perspectives on this topic and Counsel Georg Scherpf, Associate Antonios Politis, and Research Assistant Anna Isfort, from our Hamburg office, dose out the series by covering the position in Germany.

Arbitration is based on consent, which is first and foremost expressed in the arbitration agreement. The arbitration agreement is usually concluded between two parties, sometimes more, binding them to this form of dispute resolution and authorising an arbitral tribunal to decide their dispute. Parties can subsequently be bound by succession, assignment, or agency to the arbitration agreement, but the basic set-up is of a bilateral nature.

There are, however, situations where this set-up does not seem to reflect the economic realities, in particular where more than the two signatory parties are involved in the negotiation or performance of the contract. In such cases, there is often a desire to extend the subjective scope of the arbitration agreement to include third parties who have not signed the arbitration agreement themselves ("non-signatories"). Since national arbitration laws, institutional rules, as well as the New York Convention are mostly silent on this issue, the requirements and limits of an extension to non-signatories has been handled differently depending on the jurisdiction.

In this article, we explain the situation under German law regarding non-signatories. First, we outline the different concepts often put forward to extend the arbitration agreement's subjective scope and whether they are acknowledged by German law. Then we discuss how to determine the applicable law in this regard based on the guidance given by the German Federal Court of Justice *(Bundesgerichtshof- BG.H)*. Finally, we look at other available forms of participation of third parties, in order to allow for a comprehensive dispute resolution.

i. Extending the subjective scope of arbitration agreements under German law

Under German law, the arbitration agreement, in principle, binds only the parties who enter into it. Third parties cannot be included in the arbitration unless they have consented to it. An extension of the arbitration clause is rejected in most cases, as the constitutional guarantee of access to justice before the competent state court will protect a non-signatory from being drawn into an arbitration against their will (Mfiller/ Keilmann, Beteiligung am Schiedsverfahren wider Willen? SchiedsVZ 2007, 113, 121). In that sense, German law is relatively restrictive compared to some other jurisdictions.

Only in exceptional cases and due to special legal considerations can third parties be bound by an arbitration agreement where they are not the legal successor of one of the original parties to the agreement and have not signed it:

- **Representation and implied consent:** Third parties who have either given their authority to be represented or have given implied consent to an arbitration agreement are not - technically "signatories" to the agreement but have given their consent and are therefore bound directly as parties to the arbitration agreement. This is not a case of "extension" *per se*.

- **Assignment:** A person who is assigned a claim connected with an arbitration agreement is bound by it, since he or she can be expected to know of the existence of the arbitration agreement (See, BGH, Decision of 2 October 1997 - III ZR 2/96).

- **Guarantors etc.:** A guarantor, co-obligor or surety will only be bound by an arbitration agreement if this third party has co-signed the arbitration agreement - an extension is not possible (*Zoller/Geimer* ZPO Section 1029 marginal no. 63 for more references.).

- **Contract for the benefit of third parties (Vertrag zugunsten Dritter):** It is widely accepted that the non-signatory third person who benefits from the contract under Section 328 et seqq. German Civil Code (BGB) is also bound by an arbitration clause included in that contract (*Zoller/Geimer* ZPO Section 1031 ZPO marginal no. 19).

- **Accessory liability of shareholders of partnership:** An arbitration agreement concluded by a legal partnership (i.e. Gesellschaft biirgerlichen Rechts, offene Handelsgesellschaft) also extends to the partners/shareholders as a result of their accessory liability stipulated in Section 128 German Commercial Code (HGB).

- **Piercing the Corporate Veil (Durchgriffshaftung):** The extension of an arbitration agreement to the shareholders or the legal representatives of a corporation in the sense of a "veil piercing" is rejected in most cases. Even in case a non-signatory, e.g. a major shareholder of the signatory, is liable under the (strict) conditions of veil piercing e.g. under tort law, such liability does not directly translate to the non-signatory being bound to the arbitration agreement concluded by the signatory as well (see *MiillerlKeilmann*, SchiedsVZ 2007, 113, 117).

- **Group of Companies-doctrine:** Probably the most controversial theory for determining the subjective scope is the "Group of Companies" doctrine. According to this doctrine, an arbitration agreement concluded by a group company can also bind other companies affiliated with it, for example if they participated in the negotiations of the agreements or were involved in their performance in a relevant way. The concept is based on the notion that such companies might be separate legal entities but constitute one "economic reality" (Dow Chemical Company et al. v. Isover Saint Gobain, ICC-Arbitration Court, IX Y.B. Com. Arb. 1984, 131, 136). The BGH has not yet conclusively assessed whether this doctrine can lead to an extension to non-signatories under German law.

  However, in similar cases concerning attribution within company groups it has consistently emphasised that the legal concept of an autonomous juridical person (i.e. the corporate entity) may not be lightly ignored (see e.g. BGH, Decision of 10 December 2007 - II ZR 239/05). Rather, a strict distinction must be made between the different companies of a group. The mere fact that one company has concluded an arbitration agreement does not mean that other companies of the same group should be included against their will. Therefore, an arbitration agreement in contracts concluded by the subsidiary does not generally bind the parent company (and *vice versa*). However, even if the Group of Companies doctrine would most likely be rejected by the BGH for these reasons, a similar result might be achieved relying on the concept of "implied consent" - i.e. on a different legal basis (Mtiller/Keilmann, SchiedsVZ 2007, 113, 119). For example, third parties may be bound by virtue of apparent or ostensible authority ("*Anscheins- oder Duldungsvollmacht*"), where a company has "also concluded" the arbitration agreement for another company from the perspective of the contracting party. The notion of veil-piercing can also play a role in this context (see above).

As can be seen, the options for extending the subjective scope of the arbitration agreement are fairly limited under German law. This does not, however, mean that foreign awards against non-signatories based on a

rejected concept of extension would not be enforceable in Germany. Rather, the legal threshold applicable here is a violation of the *ordre public* in the sense of an incompatibility with the "essence of the domestic legal order" ("*Kernbestand der inlandischen Rechtsordnung*"). In fact, the BGH does not see such incompatibility in Group of Companies cases. If the law applicable to the question of extension - which might very well be different from the law applicable to the arbitration agreement itself (see below) - acknowledges the Group of Company Doctrine, a resulting award will not contravene German public policy and will therefore be enforceable (see BGH, Decision of 8 May 2014 - III ZR 371/12).

ii. Determining the law applicable to the question of extension

How to determine the applicable law in this regard is a separate question altogether. Importantly, it must be separated from the question of which law governs the arbitration agreement (either the law governing the contract or *lex arbitri*), which is the subject of some debate among academics in Germany, as in many other jurisdictions (Stein/Jonas/Schlosser ZPO Section 1029 para. 108; Schtitze, Kollisionsrechtliche Probleme der Schiedsvereinbarung, insbesondere der Erstreckung ihrer Bindungswirkung auf Dritte, SchiedsVZ 2014, 274, 275;

The Proper Law of the Arbitration Agreement: A Comparative Law Perspective: A Report from the CIArb London's Branch Keynote Speech 2021 - Kluwer Arbitration Blog).

The question of which law governs the question of extension has not yet been conclusively decided by German courts. The BGH has briefly touched upon this question in two decisions (See BGH, Decisions of 8 May 2014 (III ZR 371/12), at para. 21, and of 8 November 2018 (I ZB 24/18), at para. 11). It has not, however, rendered a definite decision on the matter, as its decisions have so far only dealt with unusual cases (non-signatory's option to arbitrate / participation in negotiations as representative). Nevertheless, some of the Court's remarks can be used as a guideline on how the question of applicable law might be dealt with.

The BGH seems to take the position that - in principle - the question of extension should be governed by the law applicable to the arbitration agreement (BGH, Decision of 8 November 2018, at para. 11). However, the BGH considers that this is only the case if the third party/non-signatory does not need to be protected from "external determination" (*Schutz vor Fremdbestimmung*). Given that they have not signed the agreement themselves (except as an agent or similar) and would potentially be bound by an arbitration agreement concluded between other parties, a certain risk of third-party determination seems to be inevitable. In most cases, the law applicable to the arbitration agreement will therefore not be applicable to the question of extension. Instead, one has to look at other factors.

The default approach - which is briefly raised as an alternative by the BGH (Decision of 8 May 2014, at para. 21), and also adopted by German legal scholars, is that the law applicable to the extension of an arbitration agreement to third parties is determined by the legal basis of the extension - i.e. usually by the legal relationship between the signatory/ main party and the non-signatory (Schtitze, SchiedsVZ 2014, 274, 275; Gottwald, Zur Bindung Dritter an internationale Gerichtsstands- and Schiedsvereinbarungen, in: Festschrift Geimer 2017, pp. 132 et seqq.). However, the variety of conceivable legal bases results in a rather fragmented and complex situation.

For example, in the case of assignment, the question of extension to the legal successor/assignee depends on the law to which the assignment statute refers. In the case of the contract for the benefit of third parties (*Vertrag zugunsten Dritter*), the question of extension to the third-party beneficiary is determined by the law governing the main contract.

When it comes to extending the subjective scope in the corporate context, identifying the legal basis of extension is considerably more complicated as it is usually not sufficient simply to refer to the law of incorporation. For example, if the extension to other companies within a group is based on a parent company

concluding the arbitration agreement on behalf of its subsidiary as its representative, then the law governing representation is applicable.

As regards the group of companies doctrine, there is some debate as to whether its legal basis lies in the group affiliation per se or in the prima fade power of representation that is strengthened by the group affiliation. Depending on the approach taken, German scholars tend to rely on either the company statute or the statute of *prima fade* power of representation (See, e.g., Schtitze, SchiedsVZ 2014, 274, 277 et seq.).

For these reasons it is clear that the law applicable to the question of extension cannot be simply equated with the law governing the arbitration agreement or even that of the main contract. Rather, it depends on the precise legal ground on which the legal basis of extension - i.e. the relationship between main party and non-signatory - is based.

iii.Considerations regarding multi-contracting situations and conclusion

All things considered, the cases in which a non-signatory may expect to be pulled into an arbitration are few under German law. As long as none of the above-mentioned exceptions applies, third parties which have not agreed to be bound by an arbitration clause may assume that they can only be sued in state courts.

In addition, since an award will not be binding against them, they can generally stay out of pending arbitration between signatories and instead wait for the outcome of the proceedings - e.g., to develop a better defending strategy against recourse claims.

However, the lack of binding effect may also prevent an efficient one-stop dispute resolution process. Particularly in situations involving multiple contracts, for instance when several parties jointly carry out a large project on different contractual levels (e.g. as developers, main contractors and subcontractors), the lack of binding effect of the findings between two proceedings can lead to considerable legal uncertainty. This applies in particular to recourse claims. If, for example, a main contractor wishes to take recourse against a subcontractor in subsequent proceedings, but the second arbitral tribunal does not recognise the first tribunal's findings, the main contractor could face the unjustified loss of its recourse claim. It therefore seems preferable to bring related disputes between several parties before a single tribunal, thereby avoiding the risk of contradictory awards. But, of course, this is not always feasible.

Procedural instruments like "third-party intervention" (*Nebenintervention*) or third-party notices (*Streitverkiindung*) are missing in this context. In German state court proceedings, these instruments allow third parties with a legal interest to participate in the ongoing (first) proceedings as non-parties with certain rights, but binds them to its findings in the subsequent proceedings (so-called "intervention effect", cf. Section 68 German Code of Civil Procedure - CCP). Since contradictory rulings are avoided, this special form of participation for third parties contributes to efficient dispute resolution before state courts. In arbitration, however, the possibility of third-party intervention or third-party notices cannot be read into most bilateral arbitration clauses, as it is usually not expressly included and does not yet play a role in institutional arbitration rules. The latter, however, might change soon, as the German Arbitration Institute (DIS) has set up a working group to look into the possibility of incorporating these procedural instruments into its arbitration rules and, to this end, has already published a preliminary draft on supplementary rules for third-party notices for discussion (https://www.disarb.org/fileadmin//user uploacVFoerderung Vernetzung/DIS-ERSD - Diskussionsentwurf - U berarbeitung vom 20. Dezember 2021.pdf). Such rules could, once included in institutional rules, lead the way towards a more efficient dispute resolution in multi-contracting situations.

Until then, the best approach is not just to rely on state courts as the only suitable forum for multi-contracting situations. Instead, it is of crucial importance to negotiate detailed arbitration clauses which cover not only bilateral situations but the participation of third parties (as well as the binding effect of findings of the Tribunal).

These additional rules could, for example, be based on the rules on third-party notice under German law (Sections 74 and 64 et seqq. CCP). In addition to the rights and obligations of the non-parties, they should also address issues arising from the intermingling of litigation instruments in arbitration proceedings. In particular, the arbitration clause should include rules on whether side-parties have any say when selecting the party-appointed arbitrators or rules on costs allocation.

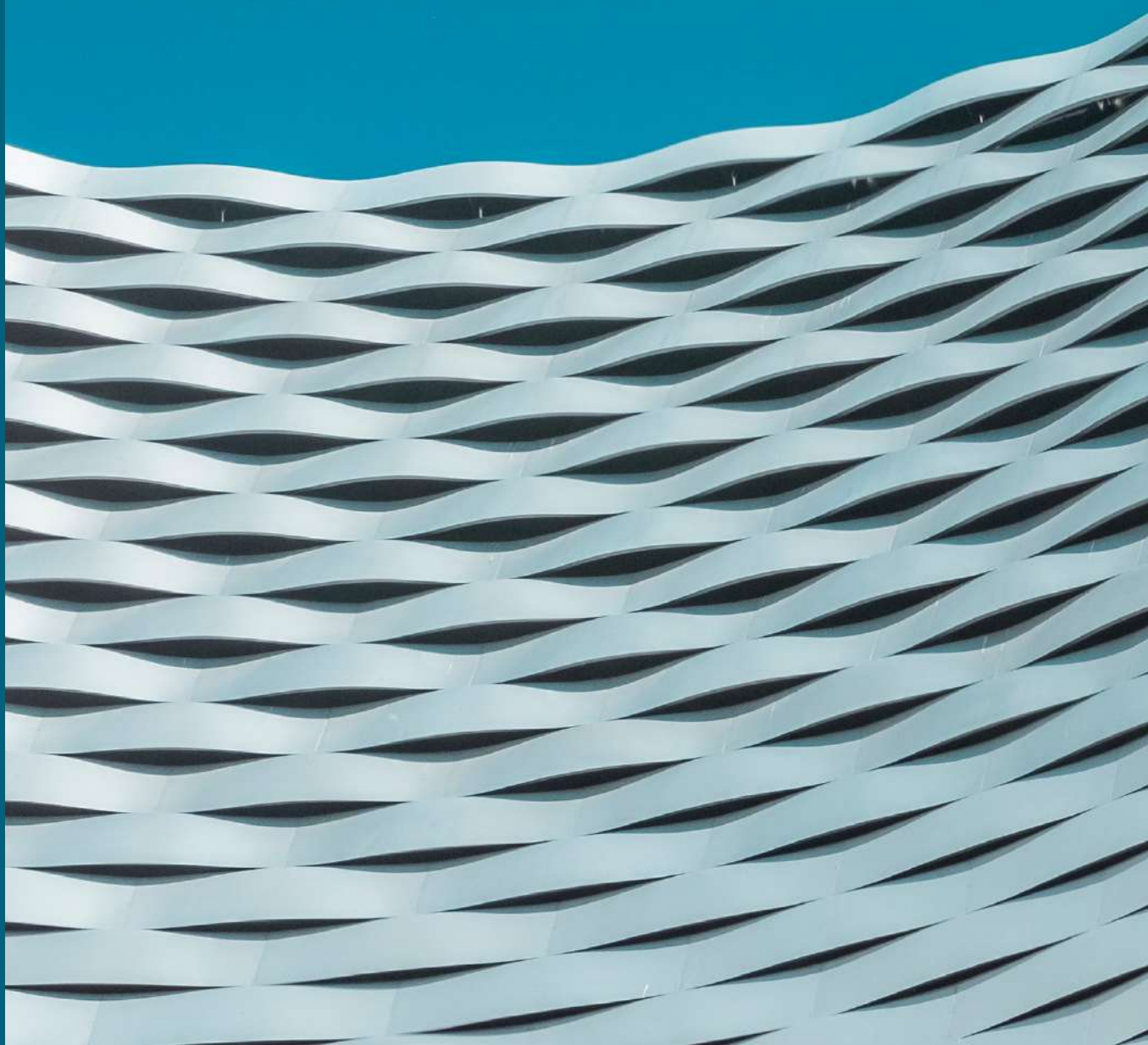
In this way, the advantages of arbitration (tailor-made dispute resolution) can be maintained, whilst overcoming the limitations of the usual bilateral set-up of arbitration clauses. For drafting such comprehensive arbitration and third-party participation clauses, it is advisable to consult experienced counsel.

Georg Scherpf

Antonios Politis

Anna Isfort

Series 3



Can you still enforce awards in France that have been set aside?

In this article, Clyde & Co explores the possibility of enforcing arbitral awards that have been set aside by a court in the seat of arbitration. Clyde & Co's international arbitration team in Paris, associate Remi Sassine and jurist Dilara Khamitova, consider this subject from a French perspective and draw on France's arbitration-friendly approach.

France is widely recognised as a leading arbitration-friendly jurisdiction. Indeed, France earns this distinction because of its approach to recognition and enforcement of arbitral awards which is more favourable than the standard set in the New York Convention. This primarily concerns Article V(1)(e) of the New York Convention, which allows domestic courts to refuse the recognition or enforcement of awards that have been set aside or suspended in the country where that award was issued. Courts in most jurisdictions are guided by this rule, whereas French courts have adopted a different view.

Articles 1520 and 1525 of the French Code of Civil Procedure (the "CCP") do not list setting aside of an international arbitral award by the court at the seat of arbitration abroad as a ground for refusing its enforcement.,[1] French courts rely on Article VII (1) of the New York Convention and the above provisions of the CCP when examining applications for recognition and enforcement of arbitral awards.[2]

Since 1984, *Norsolor*,[3] *Polish Ocean Line*,[4] *Hilmartonal*[5] *Chromalloy*[6] and *Putrabali*[7] have become recognised as major French case law precedents on the recognition and enforcement of annulled arbitral awards. According to the French courts, the enforceability of an international arbitral award in France is not jeopardized when it is set aside at the seat of arbitration as long as such an award does not contradict French international public policy. As the *French Cour de Cassation* ruled in the landmark *Putrabali* decision in 2007:

- an international arbitration award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.[8]

Two recent decisions have confirmed this position, while adding a nuance to the reasoning. On 12 July 2021 and 11 January 2022, the Paris Court of Appeal held that, if a foreign decision setting aside an award has not been granted *exequatur* in France, then it does not prevent the enforcement of the award in France.

1. Articles 1520 and 1525 (¶ 4) of the CCP provide that an arbitral award may be set aside or its enforcement may be refused by the French courts only on the following five grounds: (i) the arbitral tribunal wrongly upheld or declined jurisdiction; (ii) the arbitral tribunal was not properly constituted; (iii) the arbitral tribunal ruled without complying with the mandate conferred upon it; (iv) due process was violated; or (v) recognition or enforcement of the award is contrary to international public policy.
2. Nadia Darwazeh, Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention (Kluwer Law International), Chapter on Article V(1)(e), Section on France.
3. French Cour de Cassation, 1st civil chamber, *Pabalk Ti caret Ltd. Sirketi v. Norsolor S.A.*, 9 October 1984, n. 8311.355.
4. French Cour de Cassation, 1st civil chamber, *Polish Ocean Line v. Jolasry*, 10 March 1993, n. 91-16.041.
5. Paris Court of Appeal, *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, 19 December 1991, n. 90/16778.
6. Paris Court of Appeal, *Arab Republic of Egypt v. Chromalloy Aeroservices, Inc.*, 14 January 1997, n. 95/23025
7. French Cour de Cassation, 1st civil chamber, *PT Putrabali Adyamulia (Indonesia) v. Rena Holding, et al.*, 29 June 2007, n. 05-18.053
8. French Cour de Cassation, 1st civil chamber, *PT Putrabali Adyamulia (Indonesia) v. Rena Holding, et al.*, 29 June 2007, n. 05-18.053.

The court made this finding on the basis that the ignorance of the *resjudicata* effect of a foreign court decision does not in itself violate international public policy.[9]

In another decision of 13 January 2021, the French *Cour de Cassation* went even further.[10] The Court confirmed a judgment of the Paris Court of Appeal on 21 May 2019[11] which decided that the provisions in the CCP on recognition and enforcement of awards apply, regardless of the domestic or international nature of an award issued abroad. In that case, following French law and Article VII (1) of the New York Convention, the fact that an award rendered abroad has been set aside in the country of the seat is not a ground for refusing enforcement, even in the context of domestic arbitration. The same rule was already established by the French *Cour de Cassation* on 17 October 2000[12] but the issue had not been addressed since then. Although the French courts ultimately characterized the arbitration as international, the judgments are highly relevant to their effect on "domestic" arbitral awards rendered abroad.

These decisions may surprise some practitioners, since they may alert the legal certainty that parties enjoy in domestic arbitration proceedings. However, they appear to be justified from a legal standpoint. Indeed, given the rules applicable in France, the same provisions on recognition and enforcement of arbitral awards apply whether the award is issued in an international or domestic arbitration located abroad.[13] Therefore, if the award is issued abroad, even in a strictly domestic context, it is subject to the same provisions applicable to international awards, art. 1514 et seq. and 1520 et seq. of the CPC.

This is further supported by the New York Convention, which does not restrict its scope to international awards but also applies to "*arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards is sought*" (Article I (1) of the New York Convention).

Legal scholars have also explained the approach of the French courts by considering the private nature of an award. Unlike a judgment, an award (international or domestic) is not incorporated within a 'legal order' because it is a private act and not a 'legal norm'. On this basis, arbitral awards can be given legal effect in any jurisdiction and not only in that of the seat of arbitration. It therefore becomes coherent to recognize, in France, a foreign domestic award that has been set aside in the country of the seat of arbitration.

Dilara Khamitova

Remi Sassine

9. Paris Court of Appeal, 12 July 2021, n. 19/11413, para. 35: "*Only the recognition or enforcement of an award that is incompatible with a domestic or foreign court decision previously granted exequatur in France is likely to violate international public policy in a manifest, effective and concrete manner, it being specified that court decisions with mutually exclusive legal consequences are incompatible*".Paris Court of Appeal, 11 January 2022, n. 20/17923, para. 54: "*if French international public policy is likely to be affected by the incompatibility between an arbitral award and a decision of a foreign court which have mutually exclusive legal consequences, these decisions must be equally enforceable on French territory*".
10. Wrench Cour de Cassation, 1st civil chamber, 13 January 2021, n. 19-22.932.
11. Paris Court of Appeal, 21 May 2019, n. 17/19850.
12. Wrench *Cour de Cassation*, 17 October 2000, n. 98-11.776.
13. Title of Chapter 3 under Title 2 of the section on arbitration in the CPC: "*The recognition and enforcement of awards rendered abroad or in international arbitration*".

Can you still enforce awards in Greece that have been set aside?

This is the second article in Clyde & Co's international arbitration series covering the possibility of enforcing arbitral awards that have been set aside by a court in the seat of arbitration. In this piece, Senior Associate Styliani Ampatzi from our Dusseldorf office considers this from a Greek law perspective.

The enforcement of arbitral awards that have been set aside in the country of origin remains a controversial question in international arbitration. The complexity of the issue is highlighted by the fact that a number of different relevant theories have been developed and there are significant differences in the way in which each country approaches the problem. Up until now, the Greek courts have not been confronted with the issue to the extent that foreign courts have, for example in France, UK, the USA or the Netherlands. However, it seems that the Greek law does not prohibit the enforcement of foreign arbitral awards that have been set aside in their country of origin.

The issue

If a Greek court decided not to enforce a foreign arbitral award because it has been set aside in the country of origin, this would mean that it had followed the decision of the seat state court regarding the validity of the award. But on what basis should a decision of a seat state court have effect in a foreign state? In other words, should Greece really bow to the country of origin when determining the validity of an award?

Greece is a contracting state to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York of 10 June 1958 (**"New York Convention"**). In Greek legal commentary, the issue of the enforceability of awards that have been set aside is discussed in connection with Article V (1)(e) of the New York Convention. In accordance with that provision, a court may refuse recognition and enforcement of an award that has been set aside in its country of origin, but it does not have to do so. Therefore, the enforcement state (in this case Greece) has to make a decision regarding the legal value attached to the state of origin decision to set aside the foreign award. If it follows that decision, the arbitral award does not have effect and cannot be recognised.

However, if Greece, as the state of recognition, does not recognise the foreign setting aside decision, the foreign arbitral award may be considered enforceable provided that it complies with Article V of the New York Convention.

The Greek approach of the issue

Against this backdrop, and in the absence of any relevant case law from the Greek courts, Greek legal commentary focuses on analysis of the two main approaches that have been developed internationally, citing foreign case law. One approach is to accept the international binding nature of the setting aside decision of the courts of the state of origin. The other is not to accept that decision as binding in any way, and to consider recognition as a procedure independent of the issue of setting aside.

While the first approach has the advantage of simplicity, it has been the subject of some criticism in Greek legal commentary on the basis that it provides no protection against a blatantly biased decision of the state of origin court or a decision that is subject to unfair national peculiarities of that state.

The second approach can be described as much more liberal. It amounts to saying that no state should have the final say on the validity of the award. Instead, each enforcement court should be able to decide independently, and in isolation, the question of the validity of the award, regardless of what the courts of the seat of arbitration may think. Whether or not this is the better approach, it does have the disadvantage, perhaps, of favouring a form of "forum shopping".

A number of theories have been proposed which try to combine elements of each approach. The common starting point of these theories is the possibility, in principle, of recognising a setting aside decision of the courts of the seat of arbitration, but only under certain conditions and not automatically.

In other words, the setting aside decision is neither ignored completely nor followed blindly. In effect, the stage of recognition of the foreign arbitral award is preceded by a separate stage of recognition (or not) of the foreign setting aside decision. In terms of methodology and reasoning, this initial stage is similar to that of the recognition of a foreign court judgment.

As already mentioned, there is as yet no case law dealing with the issue. Nevertheless, *Areios Pagos*, (the Supreme Civil and Criminal Court of Greece) has held that the formalities of domestic law regarding the binding result of an arbitral award, in which the state participates, do not apply in international trade (Areios Pagos 8/1996). This may indicate that, in future, *Areios Pagos* would be reluctant to accept the setting aside of a foreign arbitral award on the basis of national "peculiarities and formalities" of the courts at the seat of arbitration.

Conclusion

In summary, Greek law does not contain any provisions that explicitly prevent the enforcement of arbitral awards that have been set aside in the seat of arbitration. However, as long as the Greek state courts do not deal directly with the issue, the position under Greek law remains ambiguous. That said, certain minor indications given by *Areios Pagos* (Greece's Supreme Court) and legal commentary both suggest that is somewhat unlikely that the Greek courts would adopt an absolution position on the issue, once they are confronted with it. Instead, they would most likely try to find some middle ground between the two basic approaches to the problem.

Dr Styliani Ampatzi, LL.M.

Can you still enforce awards in the UK that have been set aside?

This is the third article in Clyde & Co's international arbitration series covering the possibility of enforcing arbitral awards that have been set aside by a court in the seat of arbitration. In this piece, associate Olivia Fox from our London office provides the English law perspective.

The UK has agreed to recognise and enforce foreign awards under the New York Convention

The United Kingdom is a signatory of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (**"the New York Convention"**). This means, in effect, that the United Kingdom has agreed (subject to certain very limited exceptions) to recognise and enforce awards made in the territories of other signatory states of the New York Convention. It has been incorporated into English domestic law in the form of Sections 100 to 104 of the Arbitration Act 1996 (the "**AA 1996**").

Whilst there are several ways of enforcing a foreign award in England, the regime enshrined in Sections 100 to 104 AA 1996 is generally accepted as the most favourable route to the recognition and enforcement of any New York Convention award in England. This is, in part, because there are only very limited grounds upon which enforcement can be refused by the English courts.

The limits of the agreement to enforce: Section 103 of the Arbitration Act 1996

Section 103(2) provides that recognition or enforcement of an award '*may be refused*' upon proof that one of six specific grounds for refusal is met. The focus of this article is the last ground for refusal, in sub-section (f), which covers circumstances in which '*the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.*'

The wording '*may be refused*' mirrors the language of the New York Convention itself and appears to provide some discretion to domestic courts when deciding whether to refuse enforcement or not. It does not appear to require enforcement to be refused, even where a ground is made out.

So, how has this wording been interpreted and applied by the English courts? Is it possible in England to enforce a New York Convention award that has been set aside, and, if so, in what circumstances?

Guidance from the English courts: Is there any discretion to enforce set aside awards?

As for the word '*may*' in Section 103(2) AA 1996 (and the New York Convention), and whether it affords some form of discretion, the English courts consider that the intention of the wording must be '*to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on [the ground] had been lost, by for example another agreement or estoppel (Yukos Capital SARL v OJSC Rosneft Oil Company [2014] EWHC 1288 (Comm)).*

In the specific context of an award that has been set aside, the English courts clarified that it is sometimes necessary for the court to consider and apply the legal principles '*of honesty, natural justice and domestic concepts of public policy*' when making a determination on refusal to enforce an award *(Yukos Capital SARL v OJSC Rosneft Oil Company [2014] EWHC 1288 (Comm)).*

Those principles are relevant in cases where there are allegations of bias, or any other violations of due process, against the foreign court that rendered the set aside decision.

In such cases, an award can be enforced in England notwithstanding the decision of a foreign court to set aside that award, provided the English court is satisfied on the evidence that the foreign decision offends recognisable principles of due process. In such a case, the right to rely on Section 103(2)(f) is effectively lost.

In *Malicorp Ltd v Government of the Arab Republic of Egypt and ors [2015] EWHC 361(Comm)*, the judge confirmed the '*preferred approach*', and summarised that the decision of the competent court should be upheld unless it offended basic principles of honesty, natural justice and domestic concepts of public policy. There must be '*positive and cogent evidence*' of the alleged violations of due process.

The judge also explained that the English courts do not retain any discretion to enforce an award if the foreign decision setting aside the award is entitled to recognition when applying English conflict of law rules.

In *Nikolay Viktorovich Maximov v. OJSC 'Novolipetsky Metallurgichesky Kombinat'* [2017] EWHC 1911 (Comm), the English High Court provided further guidance. The English High Court stated that it must be satisfied:

1. that the foreign court's decisions were '*wrong or manifestly wrong*'; and

2. the relevant decisions `*are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by bias*'.

It was acknowledged that meeting this test imposed a 'heavy burden' on any party seeking to persuade the English court to exercise its discretion.

Indeed, whilst the English court has recognised its discretion on multiple occasions, there are no known cases in which the English courts have enforced an award set aside by the courts at the seat of the arbitration, at the time of writing.

The English courts continue to preserve the international principle of comity of foreign judgments.

In summary, the answer to the question posed by this article is no, you cannot enforce an award that has been set aside, unless you have '*positive and cogent evidence*' that the foreign decision setting aside the award clearly offends recognisable legal principles of due process.

What happens where a set aside application is pending in a foreign court?

Finally, what if there is a set aside application pending in a foreign court, but no set aside decision has been made yet? Can Section 103(2)(f) AA 1996 still be relied upon to stop enforcement proceedings in England?

In short, it would appear not. Where there is an application to set aside a foreign award pending (with no decision yet granted), the English courts consider the relevant arbitral award to be binding. For this reason,Section 103(2)(f) AA 1996 cannot be relied upon to provide the same protection from enforcement (*Dowans Holding SA and another v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm)).

A more appropriate solution in these circumstances may be to apply, under Section 103(5) AA 1996, for an adjournment of any enforcement proceedings, pending the outcome of annulment proceedings..

Olivia Fox

Can you still enforce awards in Germany that have been set aside?

This is the fourth article in Clyde & Co's international arbitration series covering the possibility of enforcing arbitral awards that have been set aside by a court in the seat of arbitration. In this piece, associate Victor Gontard from our Munich office provides the German law perspective.

The recognition and enforcement of arbitral awards in Germany is governed by Sections 1060 et seq. of the German Code of Civil Procedure (*Zivilprozessordnung*, **ZPO**). While Section 1060 ZPO sets out specific principles applicable to domestic awards, the enforcement and recognition of foreign arbitral awards is subject to the provisions of Section 1061 ZPO.

The first issue to confront is what qualifies as *a foreign* award. Among several theories suggested to settle this question, the "territorial" approach has emerged in line with a reform of the ZPO, which now makes the place of arbitration in Germany the key criterion for the applicability of the provisions of the ZPO. Thus, German courts will consider an award to be foreign if the place of arbitration is located outside Germany.

As provided by Section 1061 of the ZPO, the recognition and the issuance of a declaration of enforceability of a foreign arbitral award by a German court is governed by the provisions of the New York Convention of 1958 (NYC). Therefore, recognition and enforcement may be refused by a German court if one or more grounds for refusal listed in Section 5 of the NYC exist. This covers the situation where an arbitral award has been set aside or suspended by a competent authority of the country in which (or under the law of which) such arbitral award was made (Section V(1)(e) of the NYC).

German courts usually limit their review to the question of whether the requirements or grounds for refusing a declaration of enforceability pursuant to Section V of the NYC exist or not. In principle, German courts seem to consider that the mere existence of a decision of a competent court setting aside the arbitral award would constitute a sufficient ground to hinder its recognition and enforcement.

The Federal Court of Justice, Germany's supreme court, has not issued a ruling that conclusively settles the question of whether a German court may enforce an award that has been set aside by a foreign competent court. Certain German commentators consider that the formulation of Article V(1)(e) NYC, stipulating that a court may refuse the enforcement of an arbitral award that has been set aside, is to be interpreted as if *may* means *must*. However, this approach is controversial and other prominent commentators take the opposite view.

The more restrictive approach arguably loses part of its relevance when the parties involved are from the contracting states of the European Convention on International Commercial Arbitration of 21 April 1961 **(EuC)**. Article IX of the EuC limits the application of Article V(1)(e) of the NYC to decisions setting aside an award on the four grounds listed exhaustively in the same Article IX of the EuC. A decision refusing enforcement in Germany should therefore be preceded by a review of the reasons for setting aside the respective award to confirm that such decision is based on one or more grounds set out in Article IX of the EuC. In such circumstances, it is difficult to justify the German courts only considering the existence or otherwise of a decision to set aside the arbitral award.

A decision rendered in 2008 by the German Federal Court of Justice illustrates the uncertainty surrounding this point (*BGH, 21.05.2008 - III ZB 14/04*. The Highest Regional Court (*Oberlandesgericht,* **OLG Dresden**) of Dresden was asked to recognise and enforce an arbitral award rendered by an arbitral tribunal formed under the international arbitration rules of the Belarusian Chamber of Commerce and Industry **(BCCI)**. The award had been set aside by the Supreme Economic Court of Belarus based on an alleged infringement of the BCCI rules regarding the composition of the arbitral panel. The applicant argued that the annulment of the award by a Belarusian court was nevertheless unlikely to hinder its enforceability in Germany.

Interestingly, the OLG Dresden did not base its refusal to recognize and enforce the award on the mere existence of a decision rendered by a competent Belarusian court. Instead, the OLG Dresden conducted a substantive review of the annulment decision to determine whether the arbitral award had been correctly set aside ("*im Ergebnis zu Recht*"). This review led the OLG Dresden to the conclusion that the setting aside of the award was justified considering the alleged procedural infringement.

The applicant subsequently filed an appeal to the German Federal Court of Justice. However, the Court did not explicitly comment on the approach taken by the OLG Dresden but upheld the decision refusing enforcement of the award simply by reference to the existence of a ground for refusal pursuant to Section 5(e) of the NYC.

The decision of the German Federal Court of Justice therefore leaves room for interpretation as to the nature of the review to be carried out by German courts when deciding on the enforcement of a foreign award set aside by a competent court. The lack of subsequent conclusive decisions in this respect leaves open the question whether the decision of the OLG Dresden is an isolated one or whether it reveals a trend towards substantive review of decisions setting aside foreign arbitral awards.

In summary, as long as an order setting aside of an arbitral award has been issued by a competent court, a German court will in principle refuse the enforcement of the award. However, in the absence of a decisive ruling by the Federal Court of Justice to the contrary, a move towards a more "recognition-friendly" approach is not excluded. The judgement of the OLG Dresden mentioned above is an expression of a potential (slow) evolution in this direction. Indeed, one cannot exclude the possibility that the German view will converge with that of certain other jurisdictions where the binding effect of an arbitral award is not systematically superseded by an annulment judgment of a relevant national court.

Victor Gontard

Can you still enforce awards in Spain that have been set aside?

This is the fifth and final article in Clyde & Co's international arbitration series covering the possibility of enforcing arbitral awards that have been set aside by a court in the seat of arbitration. In this piece, Javier Hernandez Valenciano from our Madrid office provides the Spanish law perspective.

The recognition and enforcement of foreign arbitration awards in Spain are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('NYC'). The Spanish courts have repeatedly held that the exequatur procedure has a mere '*homologating*' purpose[1], in line with the enforcement-friendly approach of the NYC.

Nevertheless, the Spanish courts have maintained an ambiguous stance with respect to the scope and extent of the ground of refusal of Article v1[2] of the NYC and the effect of the '*more favourable*' principle. No Spanish court has enforced a foreign award that has been set aside in the state of origin, and the possibility of obtaining the exequatur in that situation has not been properly addressed by the Spanish courts.

That said, many legal voices argue that it is theoretically possible to enforce foreign arbitral awards in Spain which have been set aside in the state of origin, not only based on the literal wording of the NYC, but also on the Spanish arbitration system and a wide interpretation of the current case law.

Indeed, the Spanish arbitration system, mainly contained in the Arbitration Act (Act 60/2003, the **'SAA'**) which follows the 1985 UNCITRAL Model Law on International Commercial Arbitration (**'UNCITRAL Model Law'**), emerged as an international-oriented system with a clear aim of protecting the autonomy and independence of arbitration and the binding character and effectiveness of the decisions issued by arbitral tribunals from external judicial inferences. This idea has been reinforced by Spanish case law which has stated on several occasions that there should be no kind of further control similar to a reinstated mechanism of '*double exequatur*'.

The Spanish case law on the ground for refusal of Art. V.1 (e) of the NYC has revolved around two questions: (a) what is the authority of the judge in relation to the grounds for refusal and the possibility of granting the award for '*more convenient reasons*', and (b) the '*binding character*' of an award for the parties.

The Decision of the High Court of Murcia dated 12 April 2019[3] held that the court has the '*authority*', but no '*obligation*', to refuse exequatur for any of the grounds of refusal of Art. V.1 of the NYC, including the ground for refusal of Art. V.1 (e). Additionally, the authority of the Spanish court must be admitted with respect to the exequatur, otherwise, a foreign annulment decision will be effective *erga omnes* despite the groundings by which the award was set aside in the first place. The legal doctrine has added that the Spanish court should consider whether the decision to set aside the award was consistent with the Spanish legal system[4]

1. Constitutional Court. STC 132/1991 [RTC 199111321 y AATS 3 diciembre 1996 y 21 abril 1998 RJ 1998135621
2. Article 141. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
3. The Decision 1/2019 of the High Court of Murcia dated 12 april 2019. AC 202000. A. Sabater Martin, La eficacia en Espana de los laudos arbitrales extranjeros, Tecnos, Madrid, 2002, p. 8
4. Auto núm. 1/2019 de 12 abril. AC 2020\90

In cases where Art. V.1 (e) of the NYC for refusing enforcement has been argued, the Spanish courts have held that the award must have been effectively set aside if enforcement is to be refused. Merely initiating the setting aside process does not constitute a valid ground.

The Spanish Supreme Court, in a judgment on 20 July 2004, established that the binding character of the award cannot depend on the law of the state of origin. Likewise, the High Court of Catalonia reasoned in its decision dated 127/2011, 17 November 2011 that the binding character of the award is presumed from the date the award is issued. An award that is validly issued, meeting all the legal requirements, is binding for the parties. The concept of a '*firm judgment*' - or appeal - contained in the Spanish Civil Procedure Act cannot be argued under the NYC. It is not possible to argue that an award is not binding because there is a pending action to set aside the award in the state of origin.

Although there is much academic debate on this issue, there is a degree of consensus that a Spanish court might in practice be able to order enforcement of a foreign award that has been set aside under the *lex arbitri*, if the grounds on which the award was set aside constitute a breach of the Spanish constitutional principles and values and are blatantly against the Spanish public policy. An example of this would be an award having been set aside on the basis of discrimination in relation to the arbitral tribunal or the parties.

Nevertheless, there are a few legal commentators who reject outright the possibility of enforcing a foreign award in Spain if it has been set aside in the state of origin.

The key point is that the effect of Art. 46 SAA is that the NYC is part of Spanish domestic law and thus directly applicable. It is therefore far from clear whether a Spanish court can rely on the provisions of the SAA which reflect the principles of the Law Model and the case law resulting from it, or on the '*more favourable law principle*' as per Art. VII of the NYC, when considering any of the grounds for refusal of Article V.1 of the NYC.

The SAA only dedicates one article (Art. 46 SAA[5]) to the exequatur of foreign arbitral awards, and this sets that the exequatur of the foreign awards will be directly governed by the NYC, regardless of any other international Conventions which may be more favourable to enforcement and subject to the proceedings for the recognition of the civil procedure for the enforcement of decisions issued by foreign courts.
If we make this assumption, only an international Convention such as the Geneva Convention 1961[6], and not a piece of Spanish national law, can be used to apply the concept of the '*more favourable*' principle. A Spanish internal law cannot apply subsidiarily because there is no legal vacuum in the NYC, which provides a comprehensive system that does not need to be completed.

There is also controversary in Spain concerning the question of whether or not the literal wording of Art. V - and the use of the word '*podra*' to translate 'may'- gives the judge the discretion for the interpretation of the cause to refuse Art. V to grant the exequatur based on a more '*favourable principle*'.

In our view, the most recent Spanish case law confirms the '*homologating*' purpose of the exequatur and the authority of the Spanish court over the grounds for refusal. In this context, we see it as theoretically possible, but difficult in practice, for a Spanish court to enforce a foreign award that has been set aside under the *lex arbitri*. It remains to be seen what reasons a Spanish court would provide to justify ordering or refusing enforcement of such an award in these circumstances.

Javier Hernandez Valenciano

5. Art 46.1 SAA provides that it is considered a foreign arbitral award any award issued out of the Spanish territory- in the sense of the law of the seat- so in practice the provisions of the SAA are only applicable to arbitrations seated in Spain either international or domestic.
6. European Convention on International Commercial Arbitration of 1961 Done at Geneva, April 21, 1961 United Nations

Schiedsfähigkeit IV – Zur Wirksamkeit von Schiedsvereinbarungen in Personengesellschaftsverträgen (BGH, Beschluss vom 23. September 2021 – I ZB 13/21, SchiedsVZ 2022, 86)

Am 23. September 2021 hat der Bundesgerichtshof (BGH) eine weitere Entscheidung zur Schiedsfähigkeit von gesellschaftsrechtlichen Beschlussmängelstreitigkeiten gefällt.[1] Der Beschluss behandelt Schiedsklauseln in Personengesellschaftsverträgen, die (auch) Beschlussmängelstreitigkeiten umfassen. Es ist die mittlerweile vierte Entscheidung des BGH in diesem Themenkomplex. Dem Beschluss in „Schiedsfähigkeit IV“ sind seit 1996 bereits drei weitere Entscheidungen vorausgegangen. In der aktuellen Entscheidung reagiert der BGH unter anderem auf die breite Kritik an seiner Entscheidung in „Schiedsfähigkeit III“ aus dem Jahr 2017 und nimmt eine gebotene Klarstellung vor: Das Gericht hat die Voraussetzungen konkretisiert, unter welchen Schiedsvereinbarungen in Gesellschaftsverträgen von Personengesellschaften, die Beschlussmängelstreitigkeiten erfassen, wirksam sind. Nach dem BGH müssen solche Schiedsvereinbarungen nur dann den in „Schiedsfähigkeit II“ bestimmten Mindestanforderungen genügen, wenn der Gesellschaftsvertrag vorsieht, dass Beschlussmängelstreitigkeiten nicht unter den Gesellschaftern, sondern mit der Gesellschaft auszutragen sind.

Zur Einordnung der aktuellen Entscheidung folgt eine kurze Zusammenfassung der Entscheidungen in „Schiedsfähigkeit I-III“:

In „Schiedsfähigkeit I“ hat sich der BGH im Jahr 1996 erstmal mit der Schiedsfähigkeit von Beschlussmängelstreitigkeiten auseinandergesetzt.[2] Das Urteil behandelt die Passivlegitimation der GmbH in Bezug auf solche Streitigkeiten und die zwingende Rechtskrafterstreckung der Entscheidung auf alle Gesellschafter.

Der BGH hatte die Problematik dann an den Gesetzgeber verwiesen. Die rechtliche Problematik besteht darin, dass Klagen im Rahmen von Beschlussmängelstreitigkeiten gegen Kapitalgesellschaften gegen die Gesellschaft und nicht gegen die Gesellschafter gerichtet werden müssen. Der Schiedsspruch eines Schiedsgerichts – im Gegensatz zu einer Entscheidung eines staatlichen Gerichts – kann also nicht ohne Weiteres Wirkung gegen alle Gesellschafter einer Kapitalgesellschaft entfalten, wenn diese nicht Teil des Verfahrens waren.

Da der Gesetzgeber die Problematik im Rahmen des Schiedsverfahren-Neuregelungsgesetzes (1997) nicht löste, nahm sich der BGH 2009 in „Schiedsfähigkeit II“ erneut der Frage an.[3] Er entschied, dass eine Schiedsvereinbarung in dem Gesellschaftsvertrag einer GmbH, die auch Beschlussmängelstreitigkeiten einbezieht vier Mindestvoraussetzungen erfüllen muss, ansonsten ist sie gemäß § 138 BGB unwirksam:

1. Alle Gesellschafter haben der Schiedsvereinbarung zugestimmt.

2. Alle Gesellschafter müssen über die Einleitung eines Schiedsverfahrens informiert werden und in die Lage versetzt werden dem Verfahren als Nebenintervenient beizutreten.

3. Sofern die Schiedsrichter nicht von einer neutralen Stelle ausgewählt werden, müssen alle Gesellschafter an der Auswahl und Bestellung dieser mitwirken können.

4. Alle Beschlussmängelstreitigkeiten mit demselben Streitgegenstand müssen von einem Schiedsgericht gesammelt behandelt werden.

1. BGH, Beschluss vom 23.09.2021 – I ZB 13/21, BGH NZG 2022, 264; SchiedsVZ 2022, 86.
2. BGH, Urteil vom 29.03.1996 - II ZR 124/95, BGHZ 132, 278 = NJW 1996, 1753
3. BGH, Urteil vom 06.04.2009 - II ZR 255/08 (OLG Köln), BGHZ 180, 221 = NZG 2009, 620

In der darauffolgenden Entscheidung „Schiedsfähigkeit III“ aus dem Jahr 2017 hat der BGH diese Voraussetzungen auf Personengesellschaften übertragen.[4] Auch den Gesellschaftern von Personengesellschaften sollte so der notwendige Rechtsschutz zugesichert werden. Allerdings nur solange keine Unterschiede zu Kapitalgesellschaften angezeigt sind. Auf diese Entscheidung folgte breite Kritik, da in Personengesellschaften regelmäßig Klage gegen alle anderen Gesellschafter erhoben wird und nicht gegen die Gesellschaft selbst.[5] Somit besteht hier grundsätzlich nicht die Gefahr, dass ein Schiedsspruch Gesellschafter bindet, obwohl diese in einem Verfahren nicht mitwirken konnten. Anders ist die Situation, wenn im Gesellschaftsvertrag festgelegt ist, dass Klagen zur Beschlussmängelstreitigkeit gegen die Gesellschaft selbst zu richten sind.

Auch als Reaktion auf diese Kritik folgte Ende September 2021 „Schiedsfähigkeit IV“, der aktuelle Beschluss des BGH in diesem Komplex:[6]

Die Parteien, vier Kommanditisten und eine Komplementär-GmbH einer GmbH & Co. KG, stritten um den Ausschluss eines der Kommanditisten aus der Gesellschaft. Ein Schiedsgericht sollte auf Antrag des Kommanditisten 1 und der Komplementär-GmbH die Kommanditisten 2 und 3 dazu verurteilen ihre Zustimmung zum Ausschluss des Kommanditisten 4 zu geben. Nachdem sich das bestellte Schiedsgericht für zuständig erklärt hatte, hob das OLG Köln auf Antrag der Kommanditisten 2, 3 und 4 diese Entscheidung wieder auf und entschied, dass das Schiedsgericht in dieser Sache unzuständig sei.[7] Dagegen richtet sich nun die Rechtsbeschwerde des Kommanditisten 1 und der Komplementär-GmbH vor dem BGH.

Das OLG Köln entschied weiterhin, dass der fragliche Gesellschaftsvertrag vorsehe, dass Klagen zur Beschlussmängelstreitigkeit gegen die Gesellschaft zu richten seien. Dies ergebe sich aus der Auslegung des Gesellschaftsvertrags. Deswegen seien auch die Voraussetzungen aus „Schiedsfähigkeit II und III“ anzuwenden. Die fragliche Schiedsvereinbarung erfülle diese Voraussetzungen jedoch nicht.

Diesen Gesichtspunkt der Entscheidung des OLG Köln bestätigte der BGH unter Verweis auf seine Entscheidung in „Schiedsfähigkeit III“. Schiedsvereinbarungen in Gesellschaftsverträgen von Personengesellschaften müssen die Voraussetzungen von „Schiedsfähigkeit II“ nur dann erfüllen, wenn vertraglich geregelt ist, dass Beschlussmängelstreitigkeiten gegen die Gesellschaft zu richten ist. Sieht der Gesellschaftsvertrag vor, dass diese Streitigkeiten zwischen den Gesellschaftern ausgetragen werden sollen – der Regelfall in der Personengesellschaft –, dann müssen diese Voraussetzungen nicht erfüllt werden.

Der BGH folgte jedoch nicht der Auffassung des OLG Köln, dass in einem Personengesellschaftsvertrag vereinbart werden könne, dass ein Urteil, welches in einer Beschlussmängelstreitigkeit ergeht, analog zu den Regelungen im Aktiengesetz Rechtskraftwirkung gegen alle Gesellschafter entfalte. In diesem Fall sind die Gesellschafter nach Entscheidung des BGH lediglich schuldrechtlich verpflichtet sich an die gegen die Gesellschaft ergehende Entscheidung zu halten. Richtet sich die Schiedsklage jedoch gegen die Gesellschaft und nicht gegen die anderen Gesellschafter, finden zur Verhinderung einer prozessualen Benachteiligung und zur Aufrechterhaltung des notwendigen Rechtsschutzes der anderen Gesellschafter die Mindestvoraussetzungen von „Schiedsfähigkeit II“ Anwendung. Dies sei auch im aktuellen Verfahren der Fall.

Dem BGH stellte sich auch die Frage, ob eine Schiedsklausel, die in Bezug auf Beschlussmängelstreitigkeiten unwirksam ist, nur teilweise oder insgesamt nichtig ist. Grundsätzlich sind Schiedsklauseln für gesellschaftsrechtliche Streitigkeiten, welche das Problem der Wirkung gegen nicht am Verfahren beteiligte Gesellschafter nicht betreffen, auch ohne die Voraussetzungen aus „Schiedsfähigkeit II“ wirksam. Das OLG Köln ging im aktuellen Fall jedoch von einer Gesamtnichtigkeit der Schiedsklausel aus. Da die Parteien festgelegt hatten, dass „alle“ Streitigkeiten in einem Schiedsverfahren entschieden werden sollten, wollten die Parteien eine vollumfängliche Regelung für mögliche Streitigkeiten vereinbaren. Deswegen sei davon auszugehen, dass die Parteien bei einer Teilnichtigkeit der Schiedsklausel alle Streitigkeiten einheitlich durch nationale Gerichte entscheiden lassen wollten. Während der BGH auch von der Intention der Parteien ausging eine einheitliche Regelung treffen zu wollen, kam er zu dem Schluss, dass die gewünschte Regelung der umfassende Ausschluss staatliche Gerichtsbarkeit ist. Nehme man nun die Gesamtnichtigkeit der Schiedsvereinbarung an, stehe das im Gegensatz zu dem Interesse der Parteien.

4. BGH, Beschl. v. 06.04.2017 – I ZB 23/16 (OLG Oldenburg), BGH NZG 2017, 657
5. Zu den kritischen Stimmen siehe BGH NZG 2022, 264 Rn. 16
6. BGH, Beschluss vom 23.09.2021 – I ZB 13/21, BGH NZG 2022, 264
7. OLG Köln, Beschluss vom 04.01.2021 – 19 SchH 38/20, BeckRS 2021, 40430

Das Argument des OLG Köln die salvatorische Klausel im Vertrag erstrecke sich nicht auf Teile einzelner Klauseln, da die Parteien dies nicht vereinbart hätten wiederlegte der BGH damit, dass die Parteien zum Zeitpunkt der Unterzeichnung des Gesellschaftsvertrags keinen Anlass für eine Regelung zur Teilnichtigkeit hätten sehen können. Die oben dargestellten Anforderungen an eine Schiedsklausel galten zu diesem Zeitpunkt noch nicht. Der BGH stellte fest, dass eine Schiedsklausel, die sich auf alle Streitigkeiten erstreckt den Schluss zulässt, dass die Parteien im Falle der teilweisen Nichtigkeit, den Willen haben die anderen Teile der Klausel aufrecht zu erhalten.

Ausblick

Für die Praxis ist der Beschluss ein weiterer Weckruf, Schiedsvereinbarungen in Personengesellschaftsverträgen auf ihre Vereinbarkeit mit der Rechtsprechung des BGH zu prüfen und sie gegebenenfalls entsprechend zu überarbeiten. Als Anhaltspunkt kann das Regelwerk der Deutschen Institution für Schiedsgerichtsbarkeit mit seinen Ergänzenden Regeln für Gesellschaftsrechtliche Streitigkeiten (DIS-ERGeS) berücksichtigt werden.

Dr. Henning Schaloske

Dr. Styliani Ampatzi, LL.M.

European Commission publishes proposal for new Directive on Corporate Sustainability Due Diligence

On 23 February 2022 the European Commission published a proposal for a New Directive on "Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937". The proposal aims to foster sustainable and responsible corporate behaviour throughout global value chains. The proposal provides for new due diligence obligations, tightening the existing requirements under the German Act on Corporate Due Diligence in Supply Chains (Lieferkettensorgfaltspflichtengesetz).

Who is affected?

The new due diligence rules distinguish between EU and non-EU companies.

EU companies are divided into Group 1 and 2 according to different thresholds. Companies of Group 1 are all EU companies of substantial size and economic power (more than 500 employees and EUR 150 million in net turnover worldwide). Group 2 includes other companies which operate in defined high-impact sectors, such as textiles, agriculture, forestry, fisheries, manufacture of food products, trade in beverages, extraction of natural resources, and manufacture and trade of metal and non-metallic mineral products. Group 2 companies do not meet both Group 1 thresholds, but have more than 250 employees and a net turnover of at least EUR 40 million worldwide, provided that at least 50% of this net turnover comes from engaging in one or more of the high-impact sectors.

The rules will also apply to non-EU companies which are active in the EU with turnover threshold aligned with Group 1 and 2, generated in the EU.

In general, the proposal does not only apply to the company's own operations, but also to its subsidiaries and its value chains as direct and indirect established business relationships. While small and medium enterprises (SMEs) are not directly in the scope of this proposal, they are likely to be caught indirectly through requirements placed on them by their in-scope business partners.

What obligations does the proposal contain?

In-scope companies will be required to identify and, where necessary, prevent, terminate or mitigate adverse impacts of their activities on human rights, such as child labour and exploitation of workers, and on the environment, for example pollution and biodiversity loss. They must establish appropriate complaints procedures, assess the implementation of their due diligence measures and report on the due diligence matters covered by the proposed Directive, including public communications. The proposal aims to more effective protection of human rights included in international conventions and of key environmental conventions.

Companies will therefore need to take appropriate measures. The proposal introduces directors' duties to set up and oversee the implementation of due diligence and to integrate it into the corporate strategy. In addition, when fulfilling their duty to act in the best interest of the company, directors must take into account the consequences of their decisions for sustainability matters, including human rights, climate change and environmental consequences. In general, Member States shall ensure that national provisions on breach of directors' duties also apply to these provisions, e.g. by adding personal liability of directors for non-compliance with sustainability.

Furthermore, Group 1 companies need to adopt a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement.

What are the consequences of infringements?

The proposed Directive lays out a combination of administrative sanctions, turnover-based sanctions and civil liability.

The Proposal provides for turnover-based fines, with the amount of the sanction and the competent national authority still to be designated by the Member States. National authorities will have the power to request information and carry out investigations related to compliance with the obligations set out in the draft Directive. Further, they will supervise the new rules and may impose effective, proportionate and dissuasive sanctions, including fines and compliance orders in case of non-compliance.

Member States shall ensure that companies are liable for damages, e.g. if they failed to comply with the proposal's obligations. Moreover, they have to ensure that their laws, regulations and administrative provisions (about infringements of directors' duties) apply also to the provisions of the proposal. Victims may take legal action for damages. Any person may inform supervisory authorities about concerns that a company is not complying with its due diligence obligations.

When do the rules come into force?

The proposal will first be submitted to the European Parliament and the Council for approval. When the Directive comes into force, Member States will have two years to transpose the Directive into national law. From this point on, companies must comply with the regulations. There is an exception for companies in Group 2, as the regulations only apply to them after a further two years.

Link to Proposal and Annex

Christoph Pies

Insight: Clyde & Co

The Paris Arbitration team successfully defeat an ICSID claim

The Paris Arbitration team, led by Nadia Darwazeh, has successfully defeated an International Centre for Settlement of Investment Disputes (ICSID) claim brought against the Republic of Cameroon by the Delaware-incorporated company Hope Services LLC.

Hope Services LLC alleged that it owned and controlled companies that built an online platform called Hope, which aimed at gathering donations in order to fund community projects in Cameroon. However, this platform never went online and no projects were ever financed on the territory of Cameroon.

At the outset of the case, the Paris team was successful in obtaining the bifurcation of the arbitration proceedings on the basis that the Tribunal lacked jurisdiction. The Republic of Cameroon raised several objections to the Tribunal's jurisdiction, including that the Claimant did not own or control the alleged investment. The Republic of Cameroon also argued that this case constituted a clear abuse of right of ICSID proceedings and also contested the authenticity of a number of documents that Claimant produced during the proceedings.

The Tribunal ruled that Hope had failed to show that it owned or controlled the alleged investment.

Commenting on the decision Nadia said: "Cameroon's position has been vindicated, namely that this case should never have been brought. The case is a prime example of an individual trying to misuse the system, which is meant to protect genuine investor."

Sophie Gremaud, Counsel, notes: "This is a well-structured decision which is enjoyable to read. The Tribunal's decision confirms that a claimant cannot hide behind an amalgam of companies in an attempt to unduly benefit from the protection of the US-Cameroon BIT."

Clyde & Co secures further landmark win for client in EastMed gas pricing dispute

Clyde & Co has successfully defended its client Public Gas Corporation of Greece S.A. (DEPA) in an application in the Svea Court of Appeal in Stockholm, in relation to the setting aside of an ICC arbitration award brought by the Turkish state-owned energy company Boru Hatlari Ile Petrol Taşima AŞ (BOTAŞ).

In doing so, the Swedish Court reconfirmed the landmark win achieved in 2020 by Clyde & Co international arbitration Partner Devika Khanna and team on behalf of DEPA in an ICC gas pricing arbitration.

In 2020, a Stockholm-seated arbitral tribunal ruled in favour of DEPA and revised the contract price at which natural gas is supplied to Greece, realigning it with the appropriate gas price reference retroactively from 2011.

In compliance with the arbitration award, in 2020, BOTAŞ paid to DEPA the entire retroactive sums due and DEPA in turn refunded significant amounts to its customers, constituting a vital injection of liquidity into the Greek energy market, at a difficult time in the midst of the COVID-19 pandemic.

Due to the significance of the tribunal's decision and the serious practical implications, BOTAŞ tried to have the award set aside before the Swedish state courts arguing excess of powers of arbitral tribunal.

On 24 February 2022, the Svea Court of Appeal rejected the application of BOTAŞ on all counts and refused to set aside the arbitration award. Since an appeal against the judgement is not possible, the decision of the Swedish court marks the end to a long commercial dispute over the adjustment of the contractual price of natural gas between major players in the gas market in South-eastern Europe, which started in 2009.

In the case, Clyde & Co worked alongside arbitration experts at Sweden-based law firm Mannheimer Swartling Advokatbyrå AB, with a team led by Robin Oldenstam and Kristoffer Löf and Three Crowns.

The Clyde & Co team was led by Partner Devika Khanna, based in Athens, and included Senior Associate Styliani Ampatzi, based in Dusseldorf.

Clyde & Co secures landmark judgement in successfully defending Covid-19 Business Closure coverage claim

The firm has successfully secured a landmark judgement in a COVID-19 Business Closure coverage claim.

In the case, the policyholder (a restaurant operator) claimed loss of profits due to the administrative orders enacted by the local German government in March 2020 following the outbreak of the COVID-19 pandemic requiring closure of the restaurant on site. Under the measures, guests were not allowed to dine at restaurants or stay at hotels for leisure, whereas take away food and non-tourist hotel guests were still permitted.

Policy wordings usually contain a catalogue of insured diseases and pathogens, in which COVID-19 is not mentioned. However, the wording also includes mention of Sections 6, 7 of the German Infection Protection Act (IfSG). The Infection Protection Act is the legal basis for the business closure measures implemented in Germany and lists notifiable diseases and pathogens in those provisions. As such, the case examined whether the contractual catalogue is exhaustive and effective, thereby excluding cover for COVID-19, or if it included a dynamic reference to the statutory provisions under which COVID-19 was listed.

The German Federal Court of Justice ruled in favour of the insurer that there is no coverage for business closures based on COVID-19 since the policy wording is decisive and enforceable, contains an enumerative definition of insured perils which does not mention COVID-19 and, in particular, is not to be interpreted as including a dynamic reference to the Infection Protection Act. The judgement will thus have wide ranging affects for the insurance industry in Germany.

Commenting on the judgment, Dr. Henning Schaloske says: “This decision we have secured has a very wide legal and financial impact and is an important milestone bringing legal certainty for insurers, reinsurers and insured. I would like to thank our team which has worked extremely hard over the past two years representing insurers across the country that our advice has been confirmed and that we have been able to secure one of the most important coverage decisions in recent years.”

The Clyde & Co team was led by Dr Henning Schaloske and included Counsels Eva-Maria Goergen and Dr Nikolaus Wank, Senior Associates Dr Boris Derkum and Dr Florian Pötzlberger, and Associates Sita Rau, Yesra-Cecile Pauly, Dennis Tontsch, Dr Saskia Michel, Marilena Mross, Bastian Pöhler and Maria Weber.

Leading arbitration academic and practitioner Professor Loukas Mistelis joins Clyde & Co

Professor Loukas Mistelis has joined us as Partner to strengthen our International Arbitration Team in Europe. Loukas is a leading expert in international dispute resolution and investment treaty law, and has extensive experience as an arbitrator, counsel, and expert witness in complex matters.

Loukas has been the Clive M. Schmitthoff Professor of Transnational Commercial Law and Arbitration at the Centre for Commercial Law Studies at Queen Mary University of London, one of the leading law schools for international arbitration. He was previously the Director of the School of International Arbitration. He will maintain a part-time position at Queen Mary alongside his Partner position at Clyde & Co.

Loukas is a well-known figure in the industry and has practiced for more than 20 years in well over 70 international arbitration proceedings, including commercial, investment, energy and construction matters. His substantial arbitration experience covers ad hoc and ICC, ICSID, LCIA, UNCITRAL, SCC, Swiss Chambers and Moscow cases. He has practised law in Germany, Greece, and the United Kingdom, and acted as a consultant in Japan, Nigeria, Poland, Ukraine, Moldova, Cambodia and Vietnam. He is multi-lingual and able to handle cases in English, German and Greek.

His arrival is the latest addition to our International Arbitration practice in the past year, following the hires of Partners Hery Ranjeva and Ivan Urzhumov in Paris in October 2020, Counsel Georg Scherpf in Hamburg in February 2021, and Counsel Christoph Pies in Düsseldorf in April 2021.

Ben Knowles, Partner and Chair, International Arbitration, comments: “This is a unique opportunity to appoint a leading light in the international arbitration space, which is recognised in many quarters as the fastest growing area of dispute resolution.

We're absolutely delighted that Loukas is joining our multifaceted team of arbitration specialists and together with our recent international arbitration hires across continental Europe, demonstrates our ambitions in this space."

Clyde & Co Senior Partner Carolena Gordon comments: "At Clyde & Co we are always looking to bring on board diverse experience and expertise to offer our clients the best possible legal advice. Loukas is hugely well regarded as an academic and practitioner in the international arbitration community and further afield and will strengthen our international offering considerably."

Professor Loukas Mistelis adds: "Joining a law firm represents a new and exciting challenge for me and Clyde & Co is a natural fit for this next stage in my career. Not only is it a firm with the right infrastructure and scale to enable me to further develop my counsel and arbitrator work, but it's also a firm and a diverse and talented team to which I feel I can add tremendous value as it seeks to cement its position as a leading global arbitration firm."

Our International Arbitration Group specialises in representing its clients in complex, big-ticket, multi-jurisdictional international arbitrations across sectors and in the world's established and emerging markets. The group has a breadth and depth of arbitration experience, and clients include corporations, investors, financial institutions, private individuals, governments, states, and state-owned entities.

Nadia Darwazeh awarded the ASA Prize for Advocacy in International Commercial Arbitration 2022

Nadia Darwazeh has been awarded the ASA (Swiss Arbitration Association) Prize for Advocacy in International Commercial Arbitration 2022.

The prize is awarded bi-annually to counsel who, through their exceptional talents in advocacy, contribute to promoting the effective resolution of international commercial disputes through arbitration.

Nadia commented "I feel truly honoured that the ASA has awarded me this prestigious prize. Oral advocacy is one of my favourite aspects of international arbitration and it is fantastic to be recognised by my peers for it.

To me, oral advocacy is about telling a compelling story to the tribunal. At the same time, it is also about taming wild horses – by this I mean controlling the witness, holding the reins tight, but then also following your instinct and letting the witness loose a little bit to get the best result out of the cross-examination. It is important for younger arbitration practitioners to go and seek out opportunities of oral advocacy, get out of their comfort zone and have the confidence to do so. It is equally important for the more seasoned arbitration practitioners to grant such opportunities early on and instill confidence."

Benjamin Knowles, Head of our global Dispute Resolution Practice Group said "Nadia is thoroughly deserving of this illustrious award, which recognises not only her personal advocacy skills, but also the strength of the team that Nadia has helped to build up within the firm."

Counsel Promotions in Germany

With effect from 1 May 2022, we celebrated the promotions of three of our lawyers in Germany, Dr Michael Pocsay, LL.M., Dr Isabelle Kilian and Rory Duncan to Counsel.

Michael Pocsay specializes in domestic and international litigation and arbitration. In particular, he advises and represents clients from the manufacturing industry and the mechanical and plant engineering sectors in complex, often cross-border commercial disputes. In addition to disputes in the areas of steel production, aerospace, raw materials and power plant engineering, his experience includes disputes in the areas of post-M&A and renewable energy.

Isabelle Kilian is an expert in insurance law with a focus on financial lines (D&O, E&O and PI insurance), product liability and product recall, and accident & health. She advises domestic and international insurers and insureds on coverage, liability and subrogation matters and has experience in contentious litigation matters.

Rory Duncan specializes in maritime law. As a member of the "English Law Team" in Hamburg, his area of focus are disputes involving charter parties, bills of lading, shipbuilding, yachts and marine insurance. He represents ship owners, managers, charterers and their insurers in London maritime arbitrations and before the English High Court. He further assists clients in drafting and negotiating various contracts, including charter parties, sale and purchase agreements, and refit/repair agreements, and advises shipping companies and their insurers on compliance with UK and EU sanctions.

Paris Arbitration Week Event

On 30 March 2022, Clyde & Co Paris hosted a conference entitled "Arbitrability: Decoding the Present and Predicting the Future", offering an interesting overview on the different perspectives and questions that the issue of arbitrability raises and how arbitral tribunal may address these.

The panellists were Bernard Hanotiau, partner at Hanotiau & van den Berg, Jennifer Kirby, independent arbitrator, Loukas Mistelis, professor at Queen Mary University of London and partner at Clyde & Co and Annet van Hooft, independent arbitrator. The event was moderated by Nadia Darwazeh, partner and Head of Arbitration at Clyde & Co Paris, and introductory remarks were given by Ben Knowles, partner, and Head of the global Dispute Resolution Practice Group at Clyde & Co.

The conference began with an innovative keynote speech by Professor Loukas Mistelis on "Promethean Arbitration: Democratisation, Sharing Gifts and Expansion" and a presentation by Nadia Darwazeh on the prominence of the issue of arbitrability.

The panel discussion first focused on the law applicable to the issue of arbitrability. While the panellists agreed that there is no clear-cut answer, they shared slightly different views. Loukas Mistelis considered that arbitrability should be assessed based on the law of the seat or the law of the place of the likely enforcement of the award. Annett van Hooft considered that arbitrability should be studied from all possible aspects whereas Bernard Hanotiau considered that the arbitral tribunal should stick to the law of the agreement and turn to the law of the seat if there are contradicting provisions between the two laws.
Jennifer Kirby stressed the importance of the law of the seat of arbitration, as an arbitral tribunal's primary objective is to render an award that will not be set aside. Ultimately, all four panellists agreed that the issue of arbitrability is particularly challenging when the matter is one of public policy.

After highlighting the differences between objective and subjective arbitrability, the panellists shared their insights on whether the arbitral tribunal had the duty to raise the issue ex officio. According to Professor Loukas Mistelis, such duty lies on the tribunal if arbitrability is a matter of jurisdiction. According to the three other panellists, an arbitral tribunal should raise the issue ex officio if the matter concerns public policy.

Finally, the panellists reflected on the recent evolution of arbitrability and the prospects for the future. While Loukas Mistelis pointed out that, in certain countries, progress was still needed, all four panellists agreed that, all in all, more matters had become arbitrable. Jennifer Kerby explained that in the US virtually, all matters are arbitrable. Looking to the future, all four panellists were optimistic as to the future evolution, but Bernard Hanotiau and Annet van Hooft expressed reservation on the fact that not all matters should become arbitrable.

Nadia Darwazeh concluded the conference by thanking the panellists and highlighting the link between arbitrability and diversity, the theme of the 2022 Paris Arbitration Week.

To explore more about arbitrability: **Arbitrability: International and Comparative Perspectives (International Arbitration Law Library Series): Amazon.co.uk: Mistelis, Loukas: 9789041127303: Books**


Prologue: The Theme

440

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2352524 - 06 - 2022