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LATIN AMERICA

Chile

The Challenges of Dualism in the Regulation of Arbitration

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Domestic arbitration in Chile has a well-established history, originating with the Organic Code of Courts enacted in 1875. In 2004, Law No. 19.971 concerning International Commercial Arbitration (LACI) came into force, grounded in the UNCITRAL Model Law on Arbitration. The enactment of LACI did not alter the existing domestic arbitration regulations, thereby resulting in a dualist regulatory framework. This analysis examines two recent decisions from the Supreme Court, both addressing the applicability of the legal framework governing international commercial arbitration.

Introduction

According to the Organic Code of Courts ("COT") enacted in 1943:

- Domestic arbitrators are subject to the same regime as members of the state system of administration of justice (Art. 222).
- Certain matters are subject to compulsory arbitration (Art. 227), while others are subject to semi-mandatory arbitration, i.e. when arbitration applies in the absence of an agreement by the parties to resort to ordinary courts (e.g. Art. 125 of Law 18.046 on Corporations).
- Domestic arbitral awards are subject to all remedies before the ordinary courts, unless the parties waive them or agree on a second-instance arbitral tribunal (Art. 239 COT). In the vast majority of cases, the parties waive all remedies.

Non-waivable remedies include annulment for *ultra petita* (Art. 768, No. 4 Code or Civil Procedure "CPC") and lack of jurisdiction of the arbitral tribunal (Art. 768, No. 1 CPC). Likewise, the complaint appeal ("*recurso de queja*") before the respective Court of Appeals is non-waivable when based on a serious fault or abuse committed in rendering the award (Art. 545 COT). (The complaint appeal only applies when no other ordinary or extraordinary remedies are available.)

Paragraph 1 of Article 1 of Law No. 19.971 on International Commercial Arbitration (LACI) provides:[1]

> "This law shall apply to international commercial arbitration, without prejudice to any multilateral or bilateral treaties in force in Chile."

In other words, the application of this law is automatic, provided that the arbitration meets the requirements of internationality and commerciality, which are defined in paragraph 3 of Article 1[2] and Article 2(g),[3] respectively.

In some cases, the international nature of the arbitration has become the main contentious issue, since this determines whether or not remedies are available.[4]

1 Author's translation. The following quotations are made from the English version of the UNCITRAL Model Law.

2 Art. 1(3): "An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."

3 Art. 2(g): "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road."

4 On the repercussion of the Chilean dualistic system, see E. Mereminskaya, "Recent Dismissal of a 'Recourse of Complaint' against an Arbitrator Acting in an ICC Arbitration", *ICC Dispute Resolution Bulletin*, 2017, Issue 3, pp. 24-26. On practical implications of a dual regime in other countries, see M. Hauser-Morel: ICC YAF, "What makes a great arbitration law?", *ICC Dispute Resolution Bulletin*, 2021, Issue 1, pp. 99-101.

1. *Sociedad Generadora Austral S.A. v. Cerro Dominador Spain Development SLU:* The exclusion of the foreign party does not preclude the international nature of the arbitration

The first case involves two Chilean parties – Sociedad Generadora Austral S.A. ("SGA") and Likana Solar SpA ("Likana") – along with the latter's parent company, Cerro Dominador Spain Development SLU ("Cerro Dominador" or "CD Spain"), a company based in Madrid, Spain.

Cerro Dominador requested the application of the LACI in the arbitration proceedings, arguing that the requirements for its application had been met and that its application was therefore mandatory. Cerro Dominador also challenged the jurisdiction of the arbitral tribunal, asserting that no valid and binding arbitration agreement existed between itself and SGA. Although Cerro Dominador was present at the signing of an amendment to the contract between SGA and Likana, it had not expressly consented to be bound by arbitration with SGA.

The arbitration agreement applied to the "Parties" to the contract, which excluded Cerro Dominador who merely acted as guarantor and joint and several debtor for Likana, without expressly adhering to the arbitration clause in the contract between SGA and Likana. The arbitral tribunal dismissed the objection to jurisdiction raised by Cerro Dominador.

Cerro Dominador filed a special application before the President of the Santiago Court of Appeals, as provided in Article 16(3) of the LACI, seeking a declaration that the arbitral tribunal lacked jurisdiction to hear the claims brought against it.[5]

Special application before the President of the Santiago Court of Appeals for a lack of jurisdiction against the non-signatory party

The President of the Court admitted the jurisdictional challenge by declaring that:

> "the objection to jurisdiction submitted under Article 16(3) of Law No. 19.971 on International Commercial Arbitration is hereby admitted";

thus recognising that the LACI was applicable.

First, this decision emphasised the "predominantly contractual nature of arbitration",[6] noting that:

> "The jurisdiction of the arbitral tribunal extends solely to those parties who have signed the contract and who have explicitly or unequivocally agreed to submit to the decision of private justice."[7]

Second, it held that:

> "The establishment of a guarantee and joint and several liability is not sufficient to subject 'CD Spain' to arbitration proceedings (or, as the Supreme Court would phrase it, to be 'dragged' into arbitration). Indeed, the inherent purpose of such a guarantee, as its name indicates, is to secure the fulfillment of obligations undertaken by a third party, providing surety and personal security with respect to the obligations set forth in the underlying (power supply) contract. However, this in itself does not constitute an expression of will to waive the right to be judged by the courts that the Constitution and the law primarily entrust with the administration of justice. For that purpose, more is required than a mere statement of being bound 'under the same terms and conditions as Likana'. Rather, a declaration by 'CD Spain' expressly agreeing to adhere to or adopt the arbitration clause, or some additional evidence demonstrating its consent to arbitration, would have been necessary."[8]

5 Santiago Court of Appeals, *Sociedad Generadora Austral S.A. v. Cerro Dominador Spain Development SLU*, 22.1.2025, Civil Case No. 17.411-2024.

6 Presidente de la Corte de Santiago, *Sociedad Generadora Austral S.A. v. Cerro Dominador Spain Development SLU*, 22.1.2025, Rol 17.411-2024, Considerando 8.

7 Id. Considerando 9.

8 Id. Considerando 9.

Third, it stated that belonging to the same corporate group is not sufficient to warrant the broad application of the arbitration agreement, in the absence of any allegation of fraud or misuse of legal personality.[9]

Finally, the special application was upheld, and it was declared that the arbitral tribunal lacked jurisdiction over Cerro Dominador.

Complaint appeal before the Supreme Court

SGA filed a recourse of cassation that was declared inadmissible.[10] SGA then filed a complaint appeal, which is a disciplinary recourse, before the Supreme Court that was likewise declared inadmissible by the Supreme Court.[11]

First, although the President of the Santiago Court of Appeals did not examine the scope of application of the LACI in detail, he admitted and ruled on the special application, thereby accepting Cerro Dominador's argument that the LACI was applicable.

By ruling in this manner, the President also accepted the doctrine of automatic application of the LACI. In particular, he implicitly recognised the distinction between a company's establishment and its postal address. Therefore, designating a postal address in Chile does not nullify the international character of the arbitration under the LACI.[12]

Second, the extension of the arbitration agreement to a non-signatory party is only possible in cases of fraud or abuse of legal personality. In other cases, a third party must expressly consent to arbitration to be considered a party. The criterion applied by the President of the Court was strict, even though there was sufficient room to consider that the Spanish company had expressed its consent to arbitrate.

In this case, the international nature of the arbitration was surprisingly based on the involvement of a party with a place of business situated abroad who was excluded from the arbitration by the decision of the President of the Court of Appeals, who treated this case as if it were international.

2. *Goodgate Productions SpA y otros v. Cristóbal Sotomayor Díaz*: The complaint appeal is admitted in the domestic arbitration

In this case, the international nature of this arbitration had not been established prior or during the arbitration proceedings. When determining the procedural rules, the parties expressly agreed that:

> "The application of Law No. 19.971, on a supplementary basis, will be definitively decided after the statement of claim and the statement of defense have been filed."[13]

Having addressed both the principal claim and the counterclaim, the arbitral tribunal did not rule on the subsidiary application of the LACI, and neither party raised any objection in this regard. It was only in the arbitral award that the arbitral tribunal finally declared that the LACI was applicable.

The Court of Appeal

The Santiago Court of Appeals declared inadmissible a complaint appeal ("*recurso de queja*") against the arbitral award, considering that it was an international award, which cannot be challenged by remedies specific to domestic arbitration, such as the complaint appeal.[14]

The Supreme Court decision

The Supreme Court dismissed the complaint appeal filed against this decision. However, in the context of this latter proceeding, the highest court was not convinced of the international nature of the arbitration and, acting *ex officio*, annulled the decision of the Court of Appeal.

The Supreme Court stated:

> "The determination of the basic procedural rules for conducting the proceedings is a requirement that forms part of due process, as it provides certainty and legal security for the parties appearing before a court. It naturally

9 Id. Considerando 10.

10 Santiago Court of Appeals, Civil Case No. 2.787-2025.

11 Case No. 16.883–2025.

12 Cerro Dominador alleged that the concept of "establishment" or place of business of a party was distinct from a "postal address". In this case, the Spanish company's place of business remained abroad, even though it may have designated a postal address in Chile for contractual purposes.

13 Corte Suprema, *Goodgate Productions SpA y otros v. Cristóbal Sotomayor Díaz*, 6 May 2025, Rol 38.869-2024, Considerando 4.

14 A complaint appeal is a disciplinary remedy based on a serious fault or abuse committed in rendering the award or a judicial decision. The preliminary question was whether this arbitration was national, in which case the complaint appeal applied, or whether it was international, in which case the complaint appeal did not apply.

> conditions the actions they bring, the claims they submit, the defenses and arguments they raise, and ultimately, the behavior of the parties throughout the procedural course in order to clarify and obtain recognition of their respective rights ...."[15]

In the Supreme Court's view, the arbitrator's ruling in the award on the international character of the arbitration should not produce effects in the concluded proceedings:

> "In such a way that this decision cannot have effects in this case, since it would violate the guarantee of due process by seeking to enforce procedural rules that were not established in due time, and by altering those established in accordance with the law, thereby creating a system of appeals not agreed upon by the parties nor applicable on a supplementary basis; circumstances that represent a particular and exceptional situation that cannot be upheld by this Court." [16]

The Supreme Court held:

> "Accordingly, any claim or argument concerning the application of the LACI should have been raised and resolved at the beginning of the arbitration proceedings, at the time the procedural framework was established, or, as the parties expressly agreed in this case, after the statement of defense was submitted – which did not occur. Therefore, in order to resolve the legal issue raised in this case, it is not necessary to discuss or rule on the presence of any element or criterion of internationality that would render the aforementioned legal framework applicable, since this was not done in the proper procedural stage. This is even more evident considering that the case record shows the parties complied with the procedural rules set in the first hearing and participated in every stage of the proceedings, without raising this discussion again at any point."[17]

The Supreme Court then examined the non-waivable nature of the complaint appeal as a disciplinary remedy, and concluded that:

> "It was improper to declare the inadmissibility of the complaint appeal that had been filed, since it was not appropriate to give effect to the LACI, and the waiver referred to in the arbitration clause could not have applied to the complaint appeal, but only to remedies of a judicial nature."[18]

In this case, all three respondents had their domicile outside Chile, thus fulfilling the requirements for the arbitration to be considered international under Article 1.3(a) of the LACI. Nevertheless, in light of the absence of a timely determination on its international nature, the Supreme Court classified the arbitration as domestic in nature, thereby declaring the complaint appeal admissible. In other words, since the arbitration had not been expressly established as international at the outset of the arbitration proceedings, this nature could not be introduced and established in the arbitral award.

Conclusion

The dualist regulatory system distinguishes domestic and international arbitration. This distinction, inherited from the historical regulation of arbitration in the Organic Code of Courts – and only partially modernised with the adoption of the LACI in 2004 – has created overlaps and blind spots. In practice, if the international nature of the arbitration is not expressly established at the beginning of the case, this can leave room for judicial interpretation and procedural uncertainty.

However, a dualist system is not in itself an issue if the distinction between international and domestic arbitration is clear and consistently respected in both arbitral practice and judicial review. Preserving the sphere of international arbitration under the LACI is crucial to (i) safeguard predictability and legal certainty, (ii) uphold the benefits that this law provides to parties in an international arbitration, and (iii) underpin the parties' decision to choose Chile as a seat of arbitration.

The LACI guarantees a regime that minimises judicial intervention, limits recourses, and aligns Chile with international standards based on the UNCITRAL Model Law. As long as Chile maintains a dualist system for the regulation of arbitration, it is essential that parties clearly identify and determine which regime – international or domestic – applies to their case.

15 Id. Considerando 1.
16 Id. Considerando 6.
17 Id. Considerando 5.
18 Id. Considerando 13.

ASIA/PACIFIC

China

The 2025 Amendments to the Arbitration Law – Progress with Conservatism

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On 12 September 2025, amendments to the PRC arbitration law ("2025 Amendments") were promulgated, following earlier drafts released for public consultation in 2021, 2024 and early 2025. The 2025 Amendments will take effect on 1 March 2026 and bring major reforms to align China's arbitration law with international norms, including formal recognition of online arbitration, promoting international cooperation, reinforcing of the legal significance of the seat of arbitration, and limited acceptance of ad hoc arbitration. However, the 2025 Amendments remain conservative in three respects: they retain the mandatory requirement to designate an arbitration institution, they do not adopt the competence-competence doctrine, and they do not include provisions to empower arbitral tribunals to grant interim measures.

Introduction

In recent years, there have been a number of proposals mooted for the modernisation of the arbitration law of the PRC ("Arbitration Law"), which was first promulgated in 1994 and implemented in 1995, and has not undergone any major amendments since that time. In July 2021, the Ministry of Justice released a consultation draft setting out a set of extensive proposed reforms ("2021 Draft")[1] which had been eagerly anticipated by the international arbitration community. After a few years away from the public eye, the Standing Committee of the 14th National People's Congress ("Standing Committee") released updated drafts for public comment after its first review during its 12th session in November 2024 ("2024 Draft"),[2] and second review during its 15th session in April 2025 ("2025 Draft").[3] Following the two public consultations, the 2025 Amendments[4] were approved at the 17th session of the Standing Committee, promulgated on 12 September 2025, and will take effect on 1 March 2026.

When it was first released, the 2021 Draft had been described by the international arbitration community as engendering the potential beginning of a new era for arbitration in China.[5] Compared to the 2021 Draft, the 2024 Draft adopted a more conservative approach, and both the 2025 Draft and the 2025 Amendments largely align with the 2024 Draft.

This article highlights: (**1.**) some of the key revisions in the 2025 Amendments, and (**2.**) the features that remain unchanged.

1 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021.

2 The Arbitration Law of the People's Republic of China (Amendment), issued by the Standing Committee, 8 Nov. 2024.

3 The Arbitration Law of the People's Republic of China (Amendment) (Second Draft for Review), issued by the Standing Committee, 30 Apr. 2025.

4 The Arbitration Law of the People's Republic of China, promulgated by the Standing Committee on 12 Sep. 2025. As no official English translation is available, the authors have provided English translations of specific provisions cited in this article.

5 See e.g. K. Fan, The 2021 Proposed Amendments to the Arbitration Law: A New Era of Arbitration? (2021) 3 *ICC Dispute Resolution Bulletin*.

1. What are the key amendments in the 2025 Amendments?

Replacement of "arbitration commission" with "arbitration institution" (Art. 89)

In the 2025 Amendments, the term " arbitration commission" (仲裁委员会) has been globally replaced with "arbitration institution" (仲裁机构),[6] and a new Article 89 has been introduced to define the term.

Article 89 of the 2025 Amendments provides:

> "The term 'arbitration institution' in this Law includes arbitration commissions, arbitration courts, and other institutions legally established."

These amendments are of significant legal and practical importance. Previously, the term "arbitration commission" was undefined and generally understood to refer only to domestic arbitral institutions established within China. This created uncertainty as to whether foreign arbitral institutions could administer arbitrations seated in China, raising concerns that agreements designating such institutions might be considered invalid or unenforceable under Chinese law.[7]

By adopting the broader term "arbitration institution" and providing a clear definition, the 2025 Amendments confirm that both domestic and foreign arbitral institutions legally established may administer arbitrations in China. This reform aligns the Arbitration Law with international practice, strengthens party autonomy in selecting arbitral institutions, and supports China's policy of fostering a more open, market-oriented, and internationally integrated arbitration environment.

Supervisory powers of the State (Arts. 2 and 26)

Articles 2 and 26 of the 2025 Amendments originated in provisions introduced in the 2024 Draft, which empowered Chinese governmental bodies to guide and supervise "arbitration work" (仲裁工作), as well as impose substantial penalties on arbitration institutions that violated the Arbitration Law. There was a concern that these provisions could operate to subject parties and tribunals arbitrating in China to oversight by governmental bodies in the conduct of arbitration proceedings, igniting concerns about the independence and integrity of proceedings.

The updated provisions in the 2025 Amendments appear to be an attempt to address these concerns. The revised language – which includes the replacement of the term "arbitration work" with "arbitration undertakings" (仲裁事业) in Article 2 – suggests that (i) Article 2 pertains to policy-making and promotional activities related to arbitration; and (ii) Article 26 is directed towards the operations of arbitration institutions based in China rather than individual arbitration proceedings.

Article 2 of the 2025 Amendments provide:

> "The development of arbitration undertakings shall implement the guidelines, principles, policies, and decisions of the Communist Party of China and the State, serve the State's high-quality development and high-level opening-up, fosters a market-oriented, law-based, and international business environment, and contribute to the resolution of economic disputes."

Article 26 of the 2025 Amendments provide:

> "The judicial administrative department of the State Council shall, in accordance with the law, guide and supervise arbitration work nationwide, improve the relevant working systems, and coordinate the development of the arbitration undertakings.
>
> The judicial administrative departments of the people's governments of provinces, autonomous regions, and municipalities directly under the Central Government shall, in accordance with the law, guide and supervise arbitration work within their respective administrative areas."

6 See Arts 4, 6, 10, 12–25, 27, 29, 31–33, 35, 36, 39, 40, 43–45, 48, 50, 53, 58, 65, 67, 71, 75, 79, 82, 83, 86, 87, 88, 89, 91, 92, 94 and 95 of the 2025 Amendments.

7 This issue was partially resolved by the Supreme People's Court in the case of *Longlide Packaging Co. Ltd. v. BP Agnati S.R.L.* (2013) MinTa Zi No.13), which upheld the validity of an arbitration clause involving an ICC arbitration with the seat of arbitration in Shanghai, albeit without expressly addressing the question of whether the law allowed foreign arbitral institutions to administer arbitrations in China.

Validity of online arbitration proceedings (Art. 11)

The 2025 Amendments introduces a new provision which expressly confirms the validity of arbitration proceedings conducted online. Online (or at least hybrid) proceedings have become the "norm" in international arbitration post COVID-19,[8] and this provision aligns the Arbitration Law with international practices. Conducting arbitration online can significantly reduce costs associated with travel, accommodation, and venue hire. It also allows for more flexible scheduling, potentially speeding up the resolution process.[9] Notably, under the 2024 and 2025 Drafts, online arbitration required prior consent from the parties, whereas the 2025 Amendments allow arbitration proceedings to be conducted online unless a party expressly objects. This change shifts online arbitration from an opt-in to an opt-out default, which should further enhance the efficiency of proceedings.

Article 11 of the 2025 Amendments provides:

> "Arbitration activities may be conducted online through an information network, except where a party expressly objects.
>
> Arbitration activities conducted online through an information network shall have the same legal effect as offline arbitration activities."

Time limit for setting aside (Art. 72)

The 2025 Amendments shorten the time limit for applications to set aside arbitration awards from six months to three months from the date of receipt of the award, bringing it in line with the time limits under the Model Law.[10] This requires parties to act promptly in respect of any challenge to the arbitral award and will likely accelerate the enforcement process.

Arbitration Law (Art. 59)	2025 Amendments (Art. 72)
"A party that wishes to apply for setting aside the arbitral award shall submit such application within six months from the date of receipt of the award."	"A party that wishes to apply for setting aside the arbitral award shall submit such application within three months from the date of receipt of the award."

Significance of seat (Art. 81)

The requirements applicable to the enforcement of arbitral awards in China differ depending on whether the award in question is regarded as a "foreign" or "domestic" award.[11] The previous version of the Arbitration Law does not expressly recognise the concept of a seat of arbitration, and there has been some ambiguity over how the "nationality" of an arbitral award ought to be determined under PRC law for the purposes of enforcement proceedings, with some Chinese courts determining the nationality of awards based on the location of the arbitral institution administering the case.[12]

The 2025 Amendments addresses this ambiguity by confirming the significance of the parties' choice of the "seat of arbitration" under PRC law, aligning the law with international arbitration practice. The wording also provides that the seat of the arbitration would determine the nationality of the arbitral award, and in turn determine whether the award will be deemed to satisfy the requirement of reciprocity, which is a precondition to enforcement of a foreign award in China.

8 In the Queen Mary University of London 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, 72% of respondents reported sometimes, frequently or always using virtual hearing rooms.

9 This ICC report on Leveraging Technology for Fair, Effective and Efficient International Arbitration Proceedings describes features and functionalities that may enhance the arbitral process, including in relation to virtual hearing. The report is available in English and Chinese.

10 UNCITRAL Model Law, Art. 34(3).

11 There are also separate requirements applicable to Hong Kong and Macau awards,

12 E.g. *Duferco S.A. v. Ningbo Arts & Crafts Import and Export Co., Ltd.* (2008) Yong Zhong Jian Zi No. 4.

Article 81 of the 2025 Amendments provides:

> "The parties may agree in writing on the seat of arbitration. The seat of arbitration shall serve as the basis for determining the applicable governing law and the court of jurisdiction for the arbitration proceedings, unless the parties have otherwise agreed on the applicable governing law for the arbitration proceedings. The arbitral award shall be deemed to have been rendered at the seat of arbitration.
>
> If the parties have not agreed on the seat of arbitration, or their agreement is unclear, the seat of arbitration shall be determined in accordance with the arbitration rules agreed upon by the parties; if the arbitration rules do not provide for a place, the arbitral tribunal shall determine the seat of arbitration based on the circumstances of the case and in accordance with the principle of facilitating the resolution of the dispute."

Permitting specific types of *ad hoc* arbitration (Art. 82)

Under the previous version of the Arbitration Law, arbitration proceedings are required to be administered by institutions, except for limited exceptions in certain free trade zones. The 2025 Amendments relax this restriction, by permitting *ad hoc* arbitration in relation to two categories of foreign-related disputes:

1. disputes arising from foreign-related maritime affairs; and
2. disputes involving foreign elements between enterprises registered in pilot free trade zones established by approval of the State Council, the Hainan Free Trade Port or other regions[13] designated by the State.

This provides parties with greater autonomy when arbitrating in China, granting them a greater range of options beyond institutional arbitration. As with the amendments to confirm that the administration of arbitrations by foreign arbitral institutions is permitted in China, these changes reflect a more market-oriented policy towards arbitration.

Article 82 of the 2025 Amendments:

> "For foreign-related maritime disputes or foreign-related disputes between enterprises registered in a free trade pilot zone established upon approval of the State Council or the Hainan Free Trade Port or other regions designated by the State, if the parties have agreed in writing to arbitration, they may choose to have the arbitration conducted by an arbitration institution. Alternatively, they may choose the People's Republic of China as the seat of arbitration, with an arbitral tribunal composed of individuals meeting the conditions stipulated by this Law, and conduct the arbitration in accordance with the agreed arbitration rules. The arbitral tribunal shall, within three working days after its formation, file with the arbitration association the names of the parties, the seat of arbitration, the formation of the arbitral tribunal, and the rules of arbitration.
>
> If a party applies for property preservation, evidence preservation, or requests that the other party be ordered to perform or refrain from performing certain actions, the arbitral tribunal shall submit the application to the People's Court, which must handle the matter in accordance with the law and in a timely manner."

13 The specific regions to be designated under this provision have not yet been clarified, leaving room for future designation by the State as appropriate.

2. What key features remain unchanged in the 2025 Amendments?

Compared to the 2021 Draft, the 2025 Amendments appear to be more conservative. This is demonstrated by three key aspects, as set out below.

Mandatory selection of an arbitration institution

The selection of an arbitration institution remains a mandatory element for an arbitration agreement to be valid. The 2021 Draft proposed to remove this requirement.[14] However, Article 27 of the 2025 Amendments fully retains the provisions of Article 16 of the previous version of the Arbitration Law, which stipulates that an arbitration agreement must meet the following four requirements:

- written form;
- mutual consent for arbitration;
- specification of matters for arbitration; and
- designation of an arbitration institution.

This means that, save in relation to the two limited categories of foreign-related disputes identified in Article 82, the 2025 Amendments continues to require arbitration proceedings seated in China to be administered by arbitral institutions.[15]

Non-recognition of the competence-competence doctrine

The competence-competence doctrine is not recognised in the 2025 Amendments. Under the 2025 Amendments, the power to rule on the jurisdiction of an arbitral tribunal is reserved for the arbitration institution or the court. If one party submits its jurisdictional challenge to the arbitration institution and another applies to the court, the court's decision prevails. The 2021 Draft incorporated the competence-competence doctrine,[16] granting arbitral tribunals the authority to determine their own jurisdiction. However, this amendment was removed from the 2025 Amendments. Arbitral tribunals therefore do not have the power to rule on their own jurisdiction (though they may determine whether the arbitration agreement is valid according to Arts. 27 to 30).

Exclusion of interim measures by arbitral tribunals

The 2025 Amendments do not authorise arbitral tribunals to grant interim measures. Under the 2025 Amendments, an application for interim measures must be submitted by the arbitration institution to the competent court for a decision.[17] The 2021 Draft empowered arbitral tribunals to grant interim measures and introduced the mechanism of emergency arbitration.[18] These changes were removed from the 2025 Amendments.

Conclusion – The likely impact of the 2025 Amendments

Compared to some other jurisdictions, the history of arbitration as an autonomous dispute resolution process – as opposed to an administrative proceeding conducted under tribunals established by executive authorities – is relatively short within China. The enactment of the Arbitration Law in 1994 marked the first time there was legislative recognition of arbitration as a consensual, independent and party-driven process.

Over the past decades – particularly in recent years – PRC legislators and practitioners have made sustained efforts to align the Arbitration Law more closely with international practice. While some commentators view the 2025 Amendments as less progressive than its 2021 predecessor, it nonetheless represents a meaningful effort to bring China's arbitration framework closer in line with international standards in several key respecEts.

14 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021, Art. 21.

15 There is a further potential internal inconsistency between Art. 82 and Art. 27 in the 2025 Draft as *ad hoc* arbitration under Art. 82 does not require the selection of an arbitration institution. However, this inconsistency may not be critical as Art. 82 should prevail over Art. 27, following the doctrine of *lex specialis* (特别法优于一般法). (See Art. 103, PRC Legislation Law).

16 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021, Art. 28.

17 The 2025 Amendments, Art. 39.

18 The Arbitration Law of the People's Republic of China (Amendment) (Public Consultation), issued by the Ministry of Justice on 30 July 2021, Arts. 47, 49.

ASIA/PACIFIC

India

The Court's Inherent Power to Modify an Arbitral Award – Thoughts on the Supreme Court's Decision in *Gayatri Balasamy v. ISG Novasoft Technologies Limited*

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To modify or not to modify (an arbitral award) – that is the question. One would assume the answer depends on the relevant arbitral statute – it does, but not solely. Despite concerted efforts to ensure minimal court intervention in arbitration matters, the Supreme Court's recent decision in *Gayatri Balasamy v. ISG Novasoft Technologies Limited* may have turned the needle back, despite its good intentions. If the "guardrails" stay in place, this decision may bring finality to unnecessary litigation.

1. Introduction

India's Arbitration & Conciliation Act, 1996 (the "1996 Act") expressly confers upon a court the power to set aside an award. There is no express power for modification, in contradistinction to the erstwhile Arbitration Act of 1940 (the "1940 Act"). However, by a majority decision, India's Supreme Court read into Section 34 of the 1996 Act (setting aside of arbitral awards) a limited power of a court to modify awards, circumscribed by the condition that this power could solely be exercised:

> "to rectify computational, clerical, or typographical errors, as well as other manifest errors, provided that such modification [did] not necessitate a merits-based evaluation".

The dissenting opinion – with which the authors agree – opined that the 1996 Act did not confer any such power on a court to modify awards, albeit that courts are empowered to correct computational, clerical or typographical errors or any other errors of similar nature without modifying or adding to the original award.

India's erstwhile arbitration regime was overhauled in 1996. Various statutes, including the 1940 Act (which dealt comprehensively with domestic arbitration), were repealed. While the 1940 Act expressly provided the courts with the power to modify or correct an award under specific circumstances,[1] the 1996 Act omitted this provision, reflecting two key points:

1. the 1996 Act is (expressly), based on the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") – which does not include the power to modify awards, and
2. in line with the Model Law, the 1996 Act expressly restricts judicial intervention.[2]

Pursuant to a series of conflicting judicial decisions by Indian courts on the issue, in early 2024, a five-judge bench of the Supreme Court was constituted in *Gayatri Balasamy v. ISG Novasoft Technologies Limited*,[3] to inter alia decide:

> "Whether the powers of the Court under Sections 34 and 37 of the Arbitration and Conciliation Act 1996 will include the power to modify an arbitral award?"

1 Art. 15, 1940 Act: "Power of Court to modify award .-The Court may by order modify or correct an award: (a) where it appears that a part of, the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

2 1996 Act, Section 5 - Extent of judicial intervention: "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part".

3 2025 SCC OnLine SC 986.

Setting the stage

The Supreme Court noted, in its majority judgment, that it was crucial to adopt a balanced approach between the longstanding conflict between equity and justice, on one hand, and the fetters imposed by the court's jurisdictional limits, on the other.[4] By so observing, it paved the way to a conclusion that the inability of a court to modify awards, does not deliver equity and justice.

Going further, it opined that a denial of the power to modify an award – particularly when such denial would impose significant hardships, escalate costs, and lead to unnecessary delays – would defeat the *raison d'être* of arbitration.[5] Such a view sacrifices, to our mind, the benefits of a narrow scope of review of an award, in favour of a potentially speedier final resolution of the dispute.

These preliminary and overarching observations set the stage and the rationale for the eventual decision of the majority, i.e. that a court does have the power (*albeit* limited), under Section 34 of the 1996 Act, to modify an arbitral award.

Such a ruling regresses the Indian position back to the 1940 Act.

2. Power to modify

The Supreme Court reaffirmed the doctrine of severability qua an arbitral award, and the inherent power of a court to shear the offending part (if so severable), upholding only the valid part of the award .[6] From this position, the Court applied the maxim *omne majus continent in se minus* (the greater power includes the lesser) to hold that modification was a more limited and nuanced power compared to setting aside an award, as the latter entailed a more severe consequence of the award being set aside completely.

Adopting "a holistic and purposive interpretation", the Court held that the power of judicial review, and the setting aside of an award, should be read as "inherently including" a limited power to modify the award within the confines of Section 34. It noted further, that:

> "the practical effect of partially setting aside an award [was] the modification of the award".[7]

One wonders whether the power to modify could be construed as a "lesser" power, if one viewed the path to modification as involving deeper scrutiny of the award, requiring an application of the court's mind to its substance (merits), after which, a potential tampering with the award by a variation of the ultimate dispositive. One hopes that the narrow scope of modification permitted (as explained below) will prevent a merits-based review.

The Supreme Court opined that the "silence in the 1996 Act" should not be read as a complete prohibition, denying the courts the authority to modify an award. In our opinion, there is no silence; it is a loud and deliberate omission, given that the erstwhile 1940 Act empowered such modification – something that was deliberately not imported into the 1996 Act. Going further, the 1996 Act expressly minimised the judicial intervention which was rife under the 1940 regime (save where expressly permitted).

Justice KV Viswanathan, delivering the dissenting opinion, disagreed with the majority, noting that the language of Section 34 (including the phrases "set aside" and "only if" read with the word "recourse"), made it clear that the only relief a court could grant in respect of an offending award was to set aside or annul it, on limited and prescribed grounds. The rule of ordinary interpretation as well as express terms of Section 5 (which provides that no judicial authority shall intervene except where so provided), supports this view.

Justice Viswanathan highlighted the contrast between the powers of an appellate court under India's Code of Civil Procedure, 1908 ("CPC"), and the power of a court – which did not sit in appeal over arbitral awards, under Section 34. A court could not, in a set aside application, review the award on merits (unlike an appellate court). It was eminently possible that while considering any potential modification of an award, a court may need to conduct a merits based review, and as such, unless expressly authorised by law, this could not has been intended under Section 34. The authors agree with the minority decision.

4 At para. 25.
5 At para. 41.
6 Section 34(2)(a)(iv), 1996 Act.
7 Footnote 36, at para. 39.

a - The "hardship" justification

Setting the stage, the majority ruling emphasised the benefits of modifying an award, i.e. that it would "reduce costs and delays",[8] as, if an award is set aside, parties are relegated back to arbitrating the dispute afresh. In India this could take several years – through the fresh arbitration and potential challenge process, to achieve finality.

On this basis the Supreme Court ruled:

> "To deny courts the authority to modify an award – particularly when such a denial would impose significant hardships, escalate costs, and lead to unnecessary delays –would defeat the raison d'être of arbitration."

While there are equities in such a rationale (bringing finality to the dispute), let us remember that the Model Law, which was adopted by India, and several other developed jurisdictions, have the rule that a set aside award necessitates a fresh arbitration.

Increased court intervention with an award, because of the delays taken in an award travelling through the Indian court system ought not to be the answer. The answer is to make the process more efficient.[9]

b - Extent of the limited power to modify – Correction of clerica/typographical errors (or the like)

Thankfully, the majority judgment does not open the floodgates completely to permitting a full scale review of the merits of an award. The Supreme Court noted that the scope of the review would "completely depend on the extent of the modification powers recognised by us", which it ruled was an inherent, but "limited power".[10]

This is a welcome clarification, and indeed, several paragraphs in the majority ruling make the point that the power to modify awards is limited and does not include a review of the award on merits. Rather, the power to modify awards, is restricted to:

> "rectify computational, clerical, or typographical errors, as well as other manifest errors, provided that such modification [did] not necessitate a merits-based evaluation".[11]

The Supreme Court further ruled that:

> "the power should not be exercised where the effect of the order passed by the court would be to rewrite the award or modify the award on merits. However, the power can be exercised where it is required and necessary to bring the litigation or dispute to an end. …"[12]

Notably, the 1996 Act already empowers:

1. an arbitral tribunal, to correct any computational/clerical/typographical errors, or the like, in the award;[13] and
2. a court, to remand the matter back to the tribunal to give the arbitral tribunal an opportunity to eliminate the grounds for setting aside the arbitral award.[14]

The dissenting opinion noted the aforesaid provisions of the 1996 Act, which already provided the safety valves for curable errors. Nevertheless, it agreed with the majority that a court could:

> "correct computational errors, clerical or typographical errors or any other errors of similar nature [but] *without modifying, altering or adding to the original award*." (emphasis added)

The devil is, however, in the detail. The scope of rectification of an award that the Supreme Court permits, also includes "other manifest errors" (see above), which may be read widely and not restricted to clerical or typographical errors (the "curable defects" referred to in the dissenting opinion).

One hopes that the express caution that there should not be "a merits-based evaluation", is strictly followed and not widened by an overbroad interpretation and the entreaties of award debtors.

8 At para. 46.
9 At para. 41. The Supreme Court noted that "applications under Section 34 and appeals under Section 37 often [took] years to resolve."
10 At para. 39.
11 At para. 49
12 At para. 84
13 Section 33.
14 Section 34(4).

c – Modification of post-award interest

The Supreme Court also ruled that the power of modification permitted a modification of post-award interest. The rationale was that the future was unpredictable and unknown to the arbitrator at the time of the award, and it would be unreasonable to suggest that the arbitrator could anticipate or predict future events that may have a bearing on the interest awarded with certainty.

The dissenting opinion disagreed with the majority, as do the authors. Post-award interest is necessarily forward looking and is based on the facts and circumstances at hand when the interest rate is fixed. Hindsight is not foresight and that cannot be a justifiable rationale to interfere with the tribunal's considered decision.

3. Enforceability of modified awards

Addressing concerns regarding enforceability of modified awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("NYC"), the Supreme Court noted that the award must be final and binding before it could be enforced under the NYC, for which purpose the law of the seat had supremacy. The Court added that allowing modification under Section 34 would not be at loggerheads with the NYC, as the modified award would be considered as the final and binding award and the modified award would be enforceable.

The dissent opined that in the absence of an express statutory provision for modification of an award, enforcement in a foreign jurisdiction might run into complications as objections would be taken that what was sought to be enforced was not the award but the judgement of a court.

On this aspect, the authors agree with the majority judgement. India being a common law jurisdiction, court made law (in particular, that of the Supreme Court) is binding. Hence, the ruling of the Supreme Court as to the final and binding nature of the modified award ought to suffice for the purposes of enforceability in foreign jurisdictions under the NYC.

4. Powers of the Supreme Court under Art. 142 of the Constitution of India

The majority judgement further affirmed the Indian Supreme Court's supremacy by expressly incorporating its powers under Art. 142 of the Constitution of India into the scope of setting aside applications. Art. 142 empowers the Supreme Court to pass any decree or order "as is necessary for doing complete justice in any cause or matter pending before it". This power has been previously exercised by it in the context of arbitral awards on limited occasions. For example, in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*,[15] Art. 142 was used to set aside the majority award and substitute it with the minority award, due to the exceptional circumstances, where a fundamental principle of justice was breached which shocked the conscience of the Court. In *McDermott International Inc. v. Burn Standard Co. Ltd. & Ors.*,[16] the Supreme Court emphasised the principle of non-interference with arbitral awards, but invoked Art. 142 to modify the rate of interest.

In this case, while the Supreme Court cautioned that the power under Art. 142 should not be exercised if it would mean rewriting or modifying the awards on merits, this standard is open to interpretation, as it is accompanied by the qualification that:

> "the power can be exercised where it is required and necessary to bring the litigation or dispute to an end".[17]

In our assessment, there was no need for the Supreme Court to deal with Art. 142 at all, since the contours of the power already stood well-defined. By giving express license to use this power in the context of arbitral awards, the Supreme Court effectively encourages parties to seek a modification through a power that ought to be exercised only in extraordinary circumstances and not in a routine manner.

We agree with the dissenting opinion which observed the power under Art. 142 ought not to be exercised if it meant contravening the fundamental and non-derogable principle at the core of the 1996 Act (that of non-intervention). Additionally, exercise of such power ought to be tempered by restraint based on fundamental considerations of public policy.

15 (2019) 15 SCC 131, at para. 77.
16 (2006) 11 SCC 181, at paras. 154-159.
17 At para. 84.

5. Comments

The power to modify awards exists in some jurisdictions (e.g. in the UK, the USA, Singapore and Canada), specified (and circumscribed) by the statute, rather than case law. Given that the 1996 Act did not include this power, the majority judgment has arguably overreached by reading into the 1996 Act a power that was deliberately omitted by the legislature.

While the Supreme Court intended to limit the scope of review of an award, India is home to over 850 district courts and 25 High Courts and many of the lower courts do not have specialised expertise in complex commercial disputes or in arbitration related matters. The guardrails the majority judgement cautions of, are nuanced and subject to differing interpretation (at least until further rulings provide more clarity).

It may well be that courts of the first instance, step outside these unspecified guardrails, and unduly modify an award. No doubt, such rulings will be appealed (to a High Court or division bench), ultimately landing up again before the Supreme Court several years later. If at that time, the Supreme Court decides that the power of modification was unduly exercised, or that the modification was excessive, the award may nevertheless be set aside, relegating parties back to arbitrating afresh. Moreover, the very fear of a somewhat merit-based review could deter foreign parties from choosing an Indian seat of arbitration – defeating the overarching intent of both the executive and the judiciary.

As highlighted in the dissenting opinion, the 1996 Act already permits correction of computational, clerical, or typographical errors in awards.[18] Courts are already empowered to remit matters back to the tribunal for the removal of grounds warranting the setting aside of an award.[19] Given the existence of these provisions, there is no compelling reason to confer upon courts an additional power to modify awards, when it was deliberately excluded from the 1996 Act.

From an international standpoint, it is widely recognised that India's legal system is slow-moving. In this context, judicial intervention in arbitration has been kept to a minimum, as parties having voluntarily signed up to the process, must be bound by their bargain.

We hope that the intent of minimal intervention in terms of a merits-based review by the court, prevails such that the power is not misused or overused. If the guardrails prove to be successful to contain modification requests to typographical, clerical and computations errors, the decision may be welcome. As always, time will tell.

18 Section 33.

19 Section 34(4).

ASIA/PACIFIC

India

When "May" Falls Short: Permissive Arbitration Clauses After *BGM v. Eastern Coalfields*

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This year, the Supreme Court's decision in *BGM v. Eastern Coalfields Ltd* ("*BGM*") has sparked renewed interest in the enforceability of permissive arbitration clauses, i.e. those using the word "may" rather than "shall". This article examines the Supreme Court's reasoning in *BGM*, its interpretation of earlier precedents, and evaluates the decision from an international comparative framework.

Introduction

The Supreme Court's ruling in *BGM v. Eastern Coalfields Ltd* ("*BGM*")[1] brings into focus how Indian courts approach jurisdictional consent when arbitration clauses use ostensibly non-mandatory language (**1.**), and arguably marks a departure from the prevailing interpretation adopted in leading arbitral jurisdictions such as England, Canada, Singapore, and Hong Kong (**2.**).

1. The Indian Position: *BGM v. Eastern Coalfields Ltd*

In *BGM*, the Indian Supreme Court interpreted Clause 13 of the governing contract, which read:

> "It is incumbent upon the contractor to avoid litigation … In case of parties other than Govt. Agencies, the redressal of the dispute may be sought through Arbitration and Conciliation Act, 1996 as amended by Amendment Act of 2015."

The full grievance procedure envisaged three steps.

(i) Parties would engage senior management of the coalfields company.

(ii) An internal committee would attempt resolution.

(iii) Only after these preceding steps, and only for non-government parties, "may be sought" redressal of the dispute via arbitration under India's arbitration statute.

The Supreme Court held that this clause did not constitute a binding arbitration agreement under Section 7 of the Arbitration and Conciliation Act, 1996. By hinging arbitration on the permissive "may", the Court concluded that the clause amounted to nothing more than a future "agreement to agree", and was not a present consensus to arbitrate. The Supreme Court explained:

> "Use of the words 'may be sought', imply that there is no subsisting agreement between parties that they, or any one of them, would have to seek settlement of dispute(s) through arbitration. It is just an enabling clause whereunder, if parties agree, they could resolve their dispute(s) through arbitration."[2]

The Court declined to refer the dispute to arbitration, citing *Jagdish Chander v. Ramesh Chander*[3] ("*Jagdish Chander*") and *Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*[4] ("*Mahanadi Coalfields*") to support its conclusion that mandatory language is necessary to constitute an arbitration agreement.

1 *BGM* and *M-RPL-JMCT (JV) v. Eastern Coalfields Ltd* [2025] INSC 874.
2 Id. at para 31.
3 (2007) 5 SCC 719.
4 *Mahanadi Coalfields Ltd v. IVRCL AMR Joint Venture* (2022) 20 SCC 636.

Reliance on *Jagdish Chander* and *Mahanadi Coalfields* misplaced?

The Court's reliance on *Jagdish Chander* is open to question. The clause in that case stated:

> "All disputes … shall be referred for arbitration if the parties so determine."

This phrasing clearly contemplated a future agreement to arbitrate, explicitly making any reference to arbitration conditional on mutual post-dispute consent. In contrast, the clause in *BGM* granted either party an optional right to refer disputes to arbitration. Thus, the decision arguably conflates a clause where no determination to arbitrate had yet been made (*Jagdish Chander*) with one where the parties had already agreed that a party may elect to arbitrate (*BGM*).

The Court also drew support from its earlier ruling in *Mahanadi Coalfields*, but the reliance appears somewhat tenuous. In *Mahanadi Coalfields*, the arbitration clause provided that after certain internal steps, resolution of disputes "may be sought in the Court of Law". It is in this context that the Court in *Mahanadi Coalfields* held that the mere presence of the term "Arbitration" in the heading of the clause would not suffice, as the substantive formulation clearly excluded arbitration and affirmed court-based resolution. By contrast, in *BGM*, the clause at issue stated that disputes:

> "…may be sought through the Arbitration and Conciliation Act, 1996…"

Further, the reference is not to some unspecified procedure but to a complete statutory regime offering institutional support for arbitration. Instead of evaluating whether the clause created a workable arbitration pathway, the Court zeroed in on the phrase "may be sought" and summarily concluded "that there is no subsisting agreement".[5] This literal reading appears to somewhat neglect both the broader legislative context and the clause's commercial function, arguably weakening the force of the Court's reasoning.

Respectfully, the Court in *BGM* also appears to overlook the fact that an arbitration clause can validly grant a party the discretion to initiate arbitration proceedings, and that such discretion, once exercised, creates a binding obligation on both parties to arbitrate. The clause in *BGM* was not pathologically vague, but structured to give either party the option of invoking arbitration, which is a feature accepted in other jurisdictions as seen below.

This interpretation is strengthened by the broader contractual context in *BGM*. Notably, the arbitration clause was prefaced by the language:

> "It is incumbent upon the contractor to avoid litigation."

While this point appears not to have been pressed before the Court, it clearly articulates a shared intent to resolve disputes outside the court system. Against this backdrop, the use of the phrase "the redressal of the dispute may be sought through Arbitration and Conciliation Act" takes on a very different hue. It conveys a clear mandate that disputes should, where possible, be resolved by arbitration, and that either party is empowered to initiate that process. Far from signaling an incomplete or inconclusive agreement, the clause reads as a present and operative commitment to arbitrate at the election of a party.

2. Comparative perspectives

England

In *Anzen Ltd v. Hermes One Ltd*[6] ("*Anzen*") an appeal from the Court of Appeal of the British Virgin Islands (BVI), the Privy Council construed an arbitration clause which stated:

> "If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration …"

The key issue was whether such permissive language ("may submit") constituted a binding arbitration agreement under the BVI Arbitration Ordinance (based on UNCITRAL Model Law[7]), and whether it could be invoked to stay court proceedings.

5 *BGM*, supra note 1, at para 31.

6 [2016] UKPC 1.

7 It is worth noting that India, akin to Canada, Singapore, and Hong Kong, is also regarded as a Model Law jurisdiction, its arbitration legislation being substantially founded on the UNCITRAL Model Law, albeit with certain modifications and departures reflecting local policy choices

It was held that:

- The clause gave each party a unilateral right to arbitration as the dispute resolution mechanism. Once one party exercised that right, for example, by filing for arbitration or applying for a stay of court proceedings, arbitration became binding on both parties.
- The word "may" did not indicate a need for further agreement. Rather, it reflected an option that, once exercised, became obligatory.
- Thus, the clause amounted to a completed consensus to arbitrate, contingent only upon a party's election to do so.

The Privy Council illustrated this by drawing an analogy to optional dispute resolution clauses upheld in other jurisdictions (including Canada, the United States and Singapore), where once notice of election is given, arbitration becomes binding.

Canada

The decision in Anzen drew from *Canadian National Railway Co v. Lovat Tunnel Equipment Inc*,[8] where the Ontario Court of Appeal interpreted the following clause as empowering either party to compel arbitration:

> "The parties may refer any dispute under this Agreement to arbitration"

Rejecting the "agreement to agree" argument, and by focusing on the effect of a party's election rather than the literal meaning of "may", that court, treated unilateral election as satisfying the requirement for consensus.

English courts have since consistently upheld this principle.[9] This purposive interpretation balances party autonomy with commercial efficiency, ensuring that optional arbitration clauses are neither toothless nor subject to fresh negotiation.

Singapore

Singapore's Courts have similarly focused on the parties' intention and autonomy of the parties over strict textual formality. They recognise that even permissive wording, such as clauses stating that either party "may" submit a dispute to arbitration, can amount to a binding and enforceable arbitration agreement if the clause unambiguously vests a party with the right to elect arbitration.

In *WSG Nimbus v. Board of Control for Cricket* in Sri Lanka[10] (which was also quoted with approval in *Anzen*) the matter involved a clause that stated:

> "...either party may elect to submit such matter to arbitration in Singapore..."

The High Court held that this language did not undermine the clause's enforceability. Once a party elected to arbitrate, the other party was bound. The permissive "may" was interpreted as granting a contractual right of election, with the binding effect triggered upon election. The focus was on the parties' clear intention to provide for arbitration. Even if it was not compulsory until an election was made, it became binding once initiated by one party.

In *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd*,[11] the Court of Appeal reinforced this stance. The Court clarified that:

> "It was immaterial for this purpose that the Clause: (a) entitled only the Respondent (but not the Appellant) to compel its counterparty to arbitrate a dispute (the "lack of mutuality" characteristic); and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate their disputes (the "optionality" characteristic)."[12]

The emphasis is on the practical effect of the clause i.e. does it give a party the unequivocal right, upon election, to require arbitration? If so, the clause constitutes a valid arbitration agreement. Singapore courts have indicated that so long as an agreement demonstrates an intention to arbitrate and provides a sufficiently certain mechanism to do so, the use of "may" will not in itself defeat its validity.

8 *Canadian National Railway Co v. Lovat Tunnel Equipment Inc* (1999) 174 DLR (4th) 385.

9 See *Aiteo v. Shell* [2022] EWHC 2912 (Comm), *JSC CB Privatbank v. Kolomoisky* [2018] EWCA Civ 1708, and The "Xiamen Xinda" [2022] EWHC 988 (Comm). These affirm that permissive or optional arbitration clauses are enforceable. Once a party elects to arbitrate (usually by notice or stay application), the right becomes binding, and litigation is stayed.

10 [2002] SGHC 104.

11 [2017] SGCA 32.

12 Id. at para 13.

Hong Kong

Hong Kong's courts have gradually refined their approach to permissive arbitration clauses, moving towards a more nuanced, pro-arbitration stance while emphasising the importance of clear drafting.

In *The Incorporated Owners of Wing Fai Building, Shui Wo Street v. Golden Rise (HK) Project Company Limited*[13] ("*Wing Fai*"), the Court confronted a clause stating that disputes "may" be referred to arbitration. The defendant sought a stay of proceedings, arguing that the clause either created a binding arbitration agreement or conferred a right to compel arbitration. The Court rejected both arguments, holding that the word "may" alone was insufficient to create a binding obligation. It distinguished this clause from those in cases like *Anzen*, noting that the enforceability of permissive clauses depends on the parties' intention and the precise wording of the agreement.

More recently, in *Kinli Civil Engineering Ltd v. Geotech Engineering Ltd*[14] ("*Kinli*"), the Court of First Instance adopted a more arbitration-friendly reading of permissive language. The clause in question similarly used "may" to describe a party's right to refer disputes to arbitration. The clause (as translated) read:

> "If in the course of executing the Contract, any disputes or controversies arise between (G) and (K) on any question and the parties are unable to reach agreement, both parties may in accordance with the relevant arbitration laws of Hong Kong submit the dispute or controversy to the relevant arbitral institution for resolution, and the arbitral award resulting from arbitration in the HKSAR shall be final and binding on both parties, and unless otherwise agreed by both parties, the aforesaid arbitration shall not be conducted before either the completion of the main contract or the determination of the subcontract."

The Court held that the clause conferred a unilateral option to elect arbitration, and once exercised, arbitration became binding on both parties. In doing so, the Court reaffirmed the presumption in favour of arbitration and underscored that optional clauses could be enforceable when structured to give one party a clear right to initiate arbitration. The Court clarified that the *Wing Fai* decision is distinguishable on facts, and cannot be applied as a general rule to all cases where the arbitration clause in question adopts the word "may".

Taken together, these decisions illustrate how Hong Kong has moved towards a pragmatic approach. While *Wing Fai* cautioned that permissive language alone does not automatically impose an obligation, *Kinli* demonstrates that carefully drafted "may" clauses can create enforceable arbitration rights. This approach is akin to other leading arbitration jurisdictions examined previously, where permissive clauses granting a party the right to elect arbitration are recognised as binding once exercised. The needle has therefore shifted in Hong Kong in favour of giving effect to parties' commercial intentions and preserving arbitration as a viable dispute resolution option, provided the mechanism for election is sufficiently certain.

Concluding remarks

The Supreme Court's decision in *BGM* sacrifices purpose at the altar of form by treating the word "may" as a deal-breaker rather than the flexible drafting tool it often is. By design, permissive clauses give businesses the freedom to switch to arbitration when it suits them, rather than forcing arbitration as the only path. By demanding unequivocal "shall" language, the Court risks driving parties toward litigation when they intended to preserve arbitration as an optional pathway.

BGM marks a clear divergence between India's approach and the relatively pro-arbitration philosophies embraced in England, Canada, Singapore and more recently, Hong Kong. While Indian courts will require explicit, mandatory commitments to arbitrate, their counterparts in other common-law jurisdictions routinely enforce clauses that empower a party to elect arbitration, regardless of whether the language is framed as permissive.

13 [2016] DCCJ 225/2016
14 [2021] HKCFI 2503

All this results in a heightened drafting burden on practitioners operating in India, who must now guard against any hint of permissiveness or risk unenforceability. Arbitration clauses should employ unambiguous "shall" provisions and avoid any suggestion of future or contingent consent. In relatively more arbitration-friendly jurisdictions, drafters can preserve flexibility by using "may" to confer an optional right, confident that courts will uphold the clause when a party chooses to invoke it. Tailoring dispute resolution language to local jurisprudence is essential to ensure that an arbitration clause fulfils its promise of efficiency and enforceability.

Before concluding, it is important to situate *BGM* within the broader trajectory of Indian arbitration law. Over the past decade, India has steadily moved toward a more pragmatic and arbitration-supportive regime, aligning its practices with international standards and addressing long-standing criticisms. Occasional setbacks such as *BGM* serve as reminders that doctrinal rigidity can persist, but they do not negate the overall trend. Rather, they highlight the areas where jurisprudence still needs refinement. In that sense, the decision is less a retreat and more a reflection of the uneven process by which India continues to reconcile its legal traditions with the commercial realities of modern arbitration.

EUROPE

Norway

Arbitrator Impartiality – Supreme Court Guidance from the Decision of 19 May 2025

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Challenges to arbitral awards are rare in Norway, with even fewer cases being heard by the Norwegian Supreme Court. On 19 May 2025, the Supreme Court considered a case in which the lack of impartiality of an arbitrator was invoked as a ground for setting aside the arbitral award. The Supreme Court determined that, based on the specific factual circumstances, there were no grounds to disqualify the arbitrator from serving on the tribunal and consequently dismissed the challenge to the award.

1. Introduction – Brief overview of challenges to arbitral awards in Norway

There is no comprehensive database which provides easily accessible information on challenges to arbitral awards in Norway. However, since 2023, four Nordic law firms have been collecting and analysing data on challenges to arbitral awards from their respective jurisdictions, i.e. Denmark, Finland, Norway and Sweden,[1] and publishing the results in annual Surveys.[2]

The 2023 and 2024 Surveys show that only three challenge cases were decided in Norway in each year, none of which were successful.

The Surveys also show that multiple legal grounds were invoked in almost all cases. Based on the available statistics, the most common legal grounds invoked for setting aside an award in Norway can be divided into three categories:

- lack of impartiality, independence, or legal capacity;
- excess of mandate; and
- violation of due process, procedural irregularity.

1 The firms are Punct (Denmark), Castrén & Snellman (Finland), Wikborg Rein (Norway) and Westerberg (Sweden).

2 Challenging Arbitral Awards in the Nordics - 2023 Survey (the "2023 Survey"), and Challenging Arbitral Awards in the Nordics - 2024 Survey (the "2024 Survey").

2. Background to the Supreme Court's decision of 19 May 2025[3]

One of the decisions on challenges mentioned in the 2023 and 2024 Surveys was appealed and admitted to the Supreme Court, which issued its ruling on 19 May 2025.

The arbitral award, rendered in February 2023 in an *ad hoc* arbitration, related to a dispute concerning a capital increase in a private limited company with three shareholders. The arbitral tribunal was constituted in February 2022, with one of the arbitrators, whose impartiality was later called into question, being appointed by the Court of First Instance in accordance with Section 13 of the Norwegian Arbitration Act.[4] In March 2023, the award was challenged, partly on the basis that the arbitrator's law firm, where he had worked for 20 years and in which he was a partner, had assisted one of the parties to the arbitration at the time the arbitrator was appointed and the arbitration proceedings were ongoing.[5] The challenging party had only became aware of these circumstances after the arbitral award was issued.[6]

The parties agreed that the arbitrator's law firm maintained an on-going client relationship with one of the parties to the arbitration over several years, although the arbitrator was not involved in the client relationship.[7] However, the parties disagreed as to the significance of the legal assistance provided by the arbitrator's law firm in terms of scope, timeframe and invoiced amount, and whether, despite the arbitrator not having been involved in the client relationship, the assistance and its scope created legitimate doubts about the arbitrator's impartiality and independence.[8] The Supreme Court based its assessment on the fact that the legal assistance provided by the arbitrator's law firm:

- related to a matter unrelated to the arbitral proceedings;
- pertained to an area of law outside the arbitrator's speciality;
- was provided by colleagues of the arbitrator from a different department within the firm; and
- did not involve any participation of the arbitrator.[9]

It was unclear whether the arbitrator had failed to inform the appointing court of his firm's legal assistance to one of the parties to the arbitration. The Supreme Court noted that the Court of Appeal, based on direct evidence before it, had found that this was the case, and did not find reason to conclude otherwise.[10] The Supreme Court therefore proceeded on the assumption that the arbitrator had not informed the Court of First Instance of his firm's involvement with one of the parties.

3. The Supreme Court's conclusion and the main questions at issue

The Supreme Court concluded that the arbitrator was not disqualified from serving on the tribunal and upheld the arbitral award. The case raised three questions of principle.

i) Whether the threshold for lack of impartiality differs for judges and arbitrators.

Both parties argued that this was the case, albeit in opposite directions. The challenging party submitted that the impartiality requirement in the Arbitration Act[11] is stricter than the impartiality requirement in the Norwegian Courts of Justice Act.[12] The opposing party asserted that the standard under the Arbitration Act is more flexible than that prescribed by the Courts of Justice Act:

3 HR-2025-921-A, see The Supreme Court of Norway - Judgment: HR-2025-921-A - Lovdata (English summary) and Norges Høyesterett - Dom: HR-2025-921-A - Lovdata (Norwegian original, full version).

4 LOV-2004-05-14-25 (Norwegian version) and unofficial English version (not updated as it does not reflect revisions to the Act after June 2005). The Arbitration Act is based on the UNCITRAL Model Law.

5 HR-2025-921-A, supra note 3, para. 8, paras. 64, 66-68.

6 Id. para. 8.

7 Id. paras. 18, 19, 27.

8 Ibid.

9 Id. paras. 67-68.

10 Id. paras. 70-71.

11 The Arbitration Act, supra note 4, section 13 first paragraph and section 14 second paragraph.

12 LOV-1915-08-13-5, Sections 106, 108.

> "Sections 13 and 14 of the Arbitration Act are based on Article 12 of the UNCITRAL model law and its requirement of 'impartiality' and 'independence'. Pursuant to Section 13 ..., the arbitrators shall be *impartial* and *independent* of the parties and be qualified for the position. Section 14 ... establishes that an objection may only be raised against an arbitrator if there are circumstances that give rise to *justified doubts* as to the arbitrator's impartiality or independence, or if the arbitrator is not qualified as agreed by the parties. Where a party has participated in the appointment of the arbitrator, the party can only invoke circumstances that it has become aware of after the appointment.
>
> By contrast, Section 106 of the Court of Justice Act lists specific examples of when a judge cannot adjudicate a case. Section 108 of the Court of Justice Act establishes that a judge cannot adjudicate a case 'when other special circumstances exist that are *likely to weaken confidence* in his impartiality. In particular, this applies when a party for that reason demands that he should give up his seat'."

ii) Client relationship with one of the parties.

How to assess impartiality where a lawyer appointed as arbitrator, or the lawyer's law firm, had a client relationship with one of the parties?

iii) The duty of arbitrators to disclose.

What circumstances can raise doubts about the arbitrators' impartiality or independence, and to whom is this duty owed when the appointment is made by courts – to the parties or the appointing court?

4. The Supreme Court's reasoning

i) The threshold for disqualification

The Supreme Court held that the threshold for disqualifying an arbitrator is the same as that for judges. However, differences in outcome can arise due to the specific features of arbitration and the goal of reaching a uniform international arbitral practice.

The Supreme Court highlighted that while relevant provisions in the Arbitration Act and the Courts of Justice Act differ in terminology (i.e. abstract vs. concrete regulation), their preparatory works show that the impartiality requirements in both texts are intended to be the same.[13] It did not agree that the overarching considerations, which the impartiality requirements intend to safeguard, suggests a different threshold for arbitrators and judges, as the challenging party had argued.[14]

The Supreme Court acknowledged that, for the courts, preserving public confidence is a key consideration, and that, in arbitration, the standard set by General Standard 2(c) of the IBA Guidelines is whether a reasonable and well-informed third party would have grounds to doubt impartiality.

The Supreme Court noted that arbitration also serves to meet society's need for dispute resolution and therefore depends on the trust of both users and the public. Accordingly, it held that a robust and trustworthy arbitration system requires strict enforcement of the impartiality requirement, just as in courts.

ii) Client relationships and assessment of arbitrator impartiality

The Supreme Court stated that the disqualification of an arbitrator on the basis of a client relationship with a party to the arbitration depends on an overall assessment, in which the nature, scope and duration of the relationship in question are decisive.[15] Even when the client relationship only involved other lawyers of the firm, factors such as the size and structure of the firm and the lawyer's in the firm must be taken into account.[16]

The Supreme Court noted that lawyers are identified with their law firm, irrespective of whether they are partners or employees.[17] The Supreme Court noted that

13 HR-2025-921-A, supra note 3, para. 43.
14 Id. paras. 45-47.
15 Id. para. 55.
16 Id. para. 55.
17 Id. para. 56.

this approach is in line with Norwegian case law, General Standard 6(a) and Practical Application 2.3.6 and 3.1.7 of the 2024 version of the IBA Guidelines on Conflicts of Interest in International Arbitration, and prevailing views in the arbitration literature. It then clarified that this presumption can be displaced if the client relationship is limited in scope. The relevant factors being the scope of the assignment and its commercial significance to the firm's overall business.[18] However, disqualification is likely if there are clear connections between the lawyer and the client relationship.[19]

iii) The arbitrator's obligation to disclose

The Supreme Court ruled 4-1 on the question of *who* arbitrators appointed by the Court of First Instance must disclose relevant client relationships to.

Relying primarily on the wording of Section 14, first paragraph, of the Arbitration Act and the appointment regime therein, the majority held that disclosure to the appointing court is sufficient. It is then to the court to relay the information to the parties and seek their views before appointing the arbitrator.[20] While the majority noted that it would be preferable for the arbitrator to also inform the parties directly, it found no obligation to do so.[21] The minority, placing decisive weight on the preparatory works of the Arbitration Act and the purpose of the obligation to disclose, held that arbitrators have an independent obligation to inform the parties.[22]

The Supreme Court unanimously found that a failure to disclose may undermine the parties' trust and that it therefore must be considered when assessing an arbitrator's impartiality. It noted, however, that a failure to disclose would likely only be decisive in cases where it is not immediately clear whether a tribunal member is conflicted.

iv) The concrete assessment

The Supreme Court unanimously concluded that the arbitrator was not disqualified, emphasising that both (a) the scope and character of the assignment and (b) the lack of connecting points between the arbitrator and the client relationship weighed against a lack of impartiality.[23]

The assignment was insignificant in scope compared to the firm's overall activities, was unrelated to the arbitration, concerned a different area of law, and was handled by another department of the firm, without the arbitrator's involvement. In these circumstances, the arbitrator's failure to disclose did not affect the arbitrator's impartiality.[24]

The Supreme Court made two important observations:

(a) **Scope and character of the assignment**. The assignment in question focused on assistance in a specialised area of law rather than strategic advice. The latter, it observed, could create greater ties to the client and insight into the client's situation. This highlights the importance of the assignment's nature when assessing impartiality.

(b) **No connection between the arbitrator and the firm's client relationship**. The arbitrator did not have a connection to the relevant area of law or to the lawyer in charge of the matter during the relevant time period, apart from a collegial relationship. The arbitrator, who was a partner in the firm, had also held directorships and was the managing partner of the firm at the time of the judgment. The Supreme Court did not find that such circumstances outweighed those militating against identifying him with the firm and explicitly observed that the arbitrator had become managing partner after the arbitration assignment. This implies that the identification between arbitrators and their law firm may be stronger if the arbitrator holds, for example, managerial positions within the firm.

5. Concluding remarks

While the number of challenges of arbitral awards has increased globally in recent years, the number of challenges in Norway has remained fairly low. International trends are typically reflected in Norway, although there may be a delay before these developments become fully visible. Norway is an arbitration-friendly jurisdiction, and its courts take a pragmatic approach when deciding challenges – this is reflected in the 19 May 2025 Supreme Court decision that indicates that the threshold for setting aside arbitral awards in Norway is high.[25]

18 Id. para. 57.
19 Ibid.
20 Id. paras. 58-61.
21 Id. para. 62.
22 Id paras. 83-85.
23 Id. paras. 66-68.
24 Id. para. 72.
25 As confirmed by the 2023 and 2024 Surveys, supra note 2.

EUROPE

Spain

Public Policy and Annulment of Arbitral Awards – Further Turmoil or Settled Case Law?

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In December 2024, the Constitutional Court overturned a ruling by the Madrid High Court of Justice, which had set aside an arbitral award on the ground of a breach of public policy. The Constitutional Court found that the Madrid High Court of Justice had not complied with the standard of "external review" ("*control externo*") imposed by the Constitutional Court, but had instead considered the merits of the dispute and decided the case ex novo, applying European Union (EU) law. The controversy continues as, on 20 March 2025, following the Constitutional Court decision to return the case to the pre-judgment stage – the Madrid High Court of Justice requested a preliminary ruling from the Court of Justice of the European Union (CJEU). This ruling – which is still pending – concerns the validity of the external review standard imposed by the Constitutional Court in cases where a mandatory rule of EU law is applicable and public policy considerations are involved.

1. Background – Defining the scope of public policy

Prior to 2020, Spain witnessed growing judicial interference in decisions in relation to arbitration proceedings. Specifically, parties that were adversely affected by a particular arbitral award often went to court to request its annulment, claiming an alleged violation of public policy when they disagreed with the arbitral tribunal's reasoning and conclusions.

On many occasions, and relying on public policy, courts have opened the door to a full review of the award,[1] by examining the merits of the dispute submitted to arbitration and setting aside the arbitral award. Rulings by the Madrid High Court of Justice – which has jurisdiction to hear most applications for annulment[2] – were particularly unsettling.[3]

Since 2020,[4] to ensure the effectiveness of arbitrations in Spain and prevent public policy from being used as a back door to the judicial review of arbitral awards, the Constitutional Court has issued several judgments analysing and limiting the application of the concept of public policy. The case-law principle established by the Constitutional Court prompted a turnaround in the decisions issued by Spanish courts and ended the courts' indiscriminate intervention in arbitral awards. As a result, the number of awards annulled based on a public policy breach have decreased considerably.

However, despite the limits imposed by the Constitutional Court, some judges have attempted to reinstate the broad interpretation of the notion of public policy. The most striking example can be found in judgment no. 66/2021 rendered on 22 October 2021 by the Madrid High Court of Justice which was overturned by the Constitutional Court Judgement of 2 December 2024 on the grounds that the Madrid High Court of Justice had overstepped the bounds of its external review of the arbitral award, failing to observe the standard established by the Constitutional Court.

1 On the interference of political constitutions in Ibero-American countries, see e.g. 'Interference in the conduct of international arbitration by the political constitutions of ibero-American countries' (*ICC Institute of World Business Law* – Latin American and Iberian Chapter, 2022).

2 In Spain, High Courts of Justice have jurisdiction to hear applications to set aside arbitral awards.

3 Among others, the Madrid High Court of Justice's judgments No. 3/2016, 19 Jan. 2016; No. 16/2018, 12 April 2018; No. 4/2019, 12 Feb. 2019

4 Constitutional Court Judgments No. 46/2020, 15 June 2020; 17/2021, 15 Feb. 2021; 55/2021, 15 March 2021; 65/2021, 15 March 2021; 50/2022, 4 April 2022; 79/2022, 27 June 2022; and 146/2024, 2 Dec. 2024.

2. Judgment No. 66/2021 rendered by the Madrid High Court of Justice[5]

The Madrid High Court of Justice considered an application to set aside an arbitral award on the ground of breach of public policy. The applicant alleged, among other things, that European competition law should have been applied when analysing the validity of the clause instead of Spanish legislation.

The Madrid High Court of Justice granted the application to set aside the arbitral award based on:

- the fact that the reasoning was arbitrary as it considered Spanish competition provisions when it should have applied European competition law. This contravenes public policy and causes a breach of the right to effective judicial protection.[6]
- an analysis of the relevant applicable provisions of European competition law and case law rendered by the CJEU.
- a review of the merits of the dispute, concluding that the contractual clause was fully valid as it did not conflict with European competition law.

To justify its decision to review the merits of the case, in opposition with the standard of external review imposed by the Constitutional Court, the Madrid High Court of Justice stated that, although the proceedings for setting aside awards are not conceived as fresh retrials (*novum iudicium*), in certain cases High Courts of Justice are still entitled to review the assessment of evidence, the merits of the dispute submitted to arbitration and the reasoning in the award (e.g. when it has to determine whether the subject matter was in fact arbitrable or whether the award breaches public policy).

This criterion is even more relevant when it comes to verifying whether the award has failed to apply EU competition law, since Spanish courts must ensure the primacy and correct application of that law.[7]

3. The dissenting opinion in Judgment No. 66/2021 by the Madrid High Court of Justice

The Honourable Judge Celso Rodriguez rendered a dissenting opinion stating that the setting aside procedure should not be used to question whether the arbitral tribunal has correctly applied the law or to carry out a new assessment of the evidence. Instead, it is an exceptional mechanism designed to review arbitral awards with procedural flaws and/or violations of fundamental rights.[8] However, the assessment of a possible contradiction between the arbitral award and public policy by the competent judicial body cannot replace the role of the arbitrator in resolving the dispute.[9]

The Honourable Judge Celso Rodriguez considered that the Madrid High Court of Justice had conducted an improper parallel examination of the merits of the case, placing itself at the level of a court of appeal of ordinary jurisdiction reviewing a first instance tribunal's application of the law. This far exceeds the functions of reviewing awards granted to this court. In addition a review of the reasoning grounded in the concept of public policy, is in clear contradiction with the unequivocal conclusion expressed by the Constitutional Court that the reasoning behind awards has no bearing on public policy.[10]

Finally, the Honourable Judge Celso Rodriguez, by reviewing the substance of the decision – a practice that he had precisely rejected – concluded that, in any event, the Spanish competition provisions applied by the arbitral tribunal were consistent with EU competition law and had therefore been correctly applied.[11]

5 Madrid High Court of Justice Judgment No. 66/2021, 22 Oct. 2021.

6 Id. at p. 20, section B.

7 Judgment No. 65/2021, at p. 20, section B.

8 Id. at pp, 33, 34, section 2.1.

9 Id. at p. 34, section 2.4.

10 Id. at p. 8 (translation by the authors): "Therefore, given that arbitration is based on the autonomy of will and freedom of individuals (Articles 1 and 10 of the Spanish Constitution), the duty to state the reasons for the award is not part of the public policy required by Article 24 of the Spanish Constitution for judicial decisions, but rather is bound by its own parameters, defined in accordance with Article 10 of the Spanish Constitution. These parameters must be established, first and foremost, by the parties themselves who have submitted to arbitration, who are responsible, as agreed in the arbitration rules, for the number of arbitrators, the nature of the arbitration and the rules of evidence, and for agreeing whether the award must be reasoned (Art. 37.4 of the Spanish Arbitration Act) and in what terms. Consequently, the reasoning behind arbitral awards has no bearing on public policy".

11 Id. at p. 37-38, section 4.5.

4. Constitutional Court Judgment No. 146/2024[12]

The 2024 Constitutional Court's Judgement (the "Judgement") stated that public policy comprises a set of legal principles public, private, political, moral and economic spheres that are absolutely obligatory for the preservation of society at a given time. From a procedural point of view, public policy can be defined as the necessary formalities and principles attached to a legal system. Only arbitral awards that contravene one or more of these principles can be set aside for breach of public policy and mandatory rules.[13]

Moreover, the Judgement confirmed the impossibility for a judicial authority to review the merits of a dispute submitted to arbitration, or to replace the arbitrator in its role in resolving the dispute when analysing an alleged violation of public policy.[14] It held that it is not possible to set aside an arbitral award on the basis that the conclusions reached by the arbitral tribunal are considered erroneous or insufficient. On the one hand, the reasoning behind the arbitral award is not, therefore, a matter of public policy. On the other hand, the arbitral award can only be set aside if it lacks any reasoning at all, or if the reasoning is so incoherent and absurd that in practice the award is deemed unreasoned. Thus, the court reviewing the application to set aside the arbitral award must simply verify that the reasoning exists, purely to satisfy the requirement to state reasons set out in the Spanish Arbitration Act.

Considering the above, the Constitutional Court directed that it is only possible to set aside an award on an exceptional basis, i.e. when:[15]

- fundamental procedural guarantees have been breached, such as the right of defence, equality, a hearing process and evidence;
- the award lacks grounds or the grounds are arbitrary, illogical, absurd or irrational;
- mandatory legal rules have been breached; or
- the unassailability of a previous final decision has been violated.

Upon reviewing the merits, the Constitutional Court held that, while the award did consider European competition law, it did not apply to the case in question that was subject to Spanish competition law.

The Constitutional Court set aside judgement No. 66/2021 and returned the proceedings back to the pre-judgment stage, ordering that another ruling be issued in compliance with the standard of external review imposed by the Constitutional Court since 2020.[16]

12 Judgment No. 146/2024, at p. 58 (translation by the authors): "It is settled case law of this court that public policy refers to the set of public, private, political, moral and economic legal principles that are absolutely mandatory for the preservation of society in a given community and at a given time (SSTC 15/1987, of 11 Feb.; 116/1988, of 20 June, and 54/1989, of 23 Feb.), and, from a procedural point of view, public policy is defined as the set of formalities and principles necessary for our system of legal procedure legal, and only arbitration that contradicts one or more of these principles may be declared null and void on the grounds of a violation of public policy".

13 Id. at p. 62, section 5.

14 Id. at pp. 61-62: "Precisely because the concept of public policy is unclear, there is a greater risk that it will become a mere pretext for the court to re-examine the issues discussed in the arbitration proceedings, thereby distorting the institution of arbitration and ultimately violating the autonomy of the parties' will. The court cannot, under the pretext of an alleged violation of public policy, review the merits of a matter submitted to arbitration … The idea must therefore remain firm that the grounds provided for in Article 41(1)(f) of the Spanish Arbitration Act do not allow the criteria reached by the arbitrator to be replaced by the judges hearing the application for annulment of the award".

15 Id. at p. 16, para. 68, p. 63 section 5(b)(ii).

16 Constitutional Court Judgments No. 46/2020, 15 June 2020; 17/2021, 15 Feb. 2021; 55/2021, 15 March 2021; 65/2021, 15 March 2021; 50/2022, 4 April 2022; 79/2022, 27 June 2022; and 146/2024, 2 Dec. 2024, among others.

5. The Madrid High Court of Justice's request for a preliminary ruling from the CJEU[17]

With the post-2020 Constitutional court judgements, Spanish courts have achieved an ideal balance of oversight with regard to the annulment of arbitral awards, by only intervening in those situations set out in Spanish arbitration law (referred to as "LA" in the quote below).[18] Arbitration is strengthened by, on the one hand, courts' intervention where there has been a breach of public policy (in the meaning established by the Constitutional Court), and on the other hand, by the courts' non-intervention in all other situations.

On 20 March 2025, the Madrid High Court of Justice requested a preliminary ruling from the CJEU) on whether the standard of external review imposed by the Constitutional Court is valid when a mandatory rule of EU law should apply and public policy is at stake. More specifically, the Madrid High Court of Justice referred the following questions to the CJEU in said preliminary ruling:

> "Is it compatible with Articles 47(1) and 51(1) of the Charter of Fundamental Rights of the European Union, Article 19(1) of the Treaty on European Union and the principles of primacy, effectiveness and unity of EU law that judicial review of the validity of an arbitral award for infringement of fundamental rules of public policy in the EU (in this case, Article 101 TFEU)
>
> 1. … must be purely external, so that the court with jurisdiction under the Law (Articles 8.5 and 41.1 LA) cannot review, with full jurisdiction and in accordance with the case law of the CJEU, the decision of the arbitrators not to apply the mandatory law of the Union?
> 2. … must be purely external, so that the court with jurisdiction under the Law (Articles 8.5 and 41.1 LA) cannot review, with full jurisdiction, whether the arbitrators have correctly applied mandatory EU law in accordance with the case law of the CJEU?
> 3. … may be limited by the doctrine and criteria established in Constitutional Court Judgment No. 146/2024 of 2 December?"[19]

In the coming months, the CJEU will issue a binding decision in response to the preliminary ruling requested by the Madrid High Court and whether this will affect scope of the courts' review of the arbitration awards.[20]

17 Madrid High Court of Justice Court Order No. 4/2025

18 Art. 41.1, Spanish arbitration law (translation by the authors): "The award may only be set aside if the party applying to set it aside argues and proves that: a) The arbitration agreement does not exist or is invalid. b) It was not duly notified of the appointment of an arbitrator or of the arbitral proceedings or was unable, for any other reason, to assert its rights. c) The arbitrators ruled on matters not submitted to their decision. d) The appointment of the arbitrators or the arbitral procedure did not comply with the agreement between the parties, unless such agreement was contrary to a mandatory rule of this Law, or, in the absence of such agreement, that they did not comply with this Law. e) That the arbitrators ruled on matters not subject to arbitration. f) The award is contrary to public policy".

19 Madrid High Court of Justice Court Order No. 4/2025, p. 14, section "Tercero", translation by the authors.

20 Regarding other EU jurisdictions, *Eco Swiss* (C-126/97, 1 June 1999) presents an important case with regards to the concept of public policy in commercial arbitration. Moreover, in *Achmea* (C-284/16, 6 Mar. 2018), although being centred in the ambit of investment arbitration, the CJEU did also make an important reference to the review of arbitral awards by the courts with regards to the examination of fundamental provisions of EU law in relation to commercial arbitration.

EUROPE

Ukraine

Reassessing Arbitrability – Supreme Court Clarifies the Impact of Exclusive Jurisdiction Rules on Arbitration Agreements

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In December 2023, a landmark decision of the Supreme Court marked a significant step towards resolving the issue of inconsistent court practices regarding the interplay of exclusive jurisdiction rules and arbitrability. The decision confirmed that national rules governing exclusive jurisdiction only apply to litigation and do not affect the arbitrability of disputes, which reiterated Ukraine's position in support of arbitration.

1. Introductive remarks – Distinguishing "exclusive jurisdiction" and "arbitrability" under Ukrainian law

For years, Ukrainian courts offered no clarity on whether disputes falling under the exclusive jurisdiction of the courts could be submitted to arbitration. This led to legal uncertainty regarding the enforceability of arbitration agreements, exposing parties to jurisdictional objections and procedural unpredictability.

Before analysing the Supreme Court's decision, a clear distinction must be made between three relevant concepts under Ukrainian law: the Ukrainian courts' international jurisdiction, territorial jurisdiction, and arbitrability.[1]

- **International juridiction** determines whether Ukrainian courts can hear a dispute with a foreign element. International jurisdiction of Ukrainian courts is governed by Articles 75-77 of the Law "On Private International Law" ("PIL").[2] Article 77 of the PIL lists 10 types of disputes which fall under the exclusive jurisdiction of Ukrainian courts, including: (i) disputes over immovable property located in Ukraine; (ii) family disputes; (iii) inheritance disputes; (iv) registration of intellectual property rights; (v) registration of foreign legal entities in Ukraine; (vi) disputes over the validity of entries in state registers in Ukraine; (vii) bankruptcy cases; (viii) disputes over securities issued in Ukraine; (ix) adoption cases; and (x) "in other cases determined by the laws of Ukraine".[3]
- **Territorial jurisdiction** determines which of the local courts in Ukraine should hear a dispute with a foreign element if, (i) the dispute falls within the jurisdiction of Ukrainian courts in the first place, and (ii) no valid arbitration agreement and/or choice-of-court agreement in favor of a foreign court has been concluded between the parties. Territorial jurisdiction of commercial courts is governed by the provisions of Articles 28-31 of the Commercial Procedure Code of Ukraine ("CPC"). Article 30 of the CPC governs "exclusive territorial jurisdiction" (e.g. a case about immovable property located in the city of Kyiv must be brought before Kyiv-based commercial court).

1 See also, *Private International Law: Scientific and Practical Commentary on the Law*, Professor A. Dovhert (ed.) (Odyssey, 2008), at p. 298.

2 This law governs issues arising in the field of private law relations with a foreign element, including the jurisdiction of the courts of Ukraine over the cases with a foreign element. Among other, a foreign element is present if at least one participant in the legal relationship is a citizen of Ukraine residing outside Ukraine, a foreigner, a stateless person or a foreign legal entity (see Art. 1(1)(2) and Art. 2(1)(3), PIL).

3 Art. 77(1), PIL.

- **Arbitrability** determines whether a dispute may be submitted to arbitration. Under Article 8 of the Law "On International Commercial Arbitration" ("ICA Law"), a Ukrainian court must refer a case to arbitration and decline [court] jurisdiction if: (i) the arbitration agreement is valid, and (ii) the dispute falls within its scope and concerns an arbitrable subject matter. Ukrainian courts assess arbitrability, inter alia, by considering whether the subject matter of dispute is barred from arbitration under Ukrainian law.[4]

The exceptions, i.e. categories of disputes that are barred from arbitration and must be resolved by national courts, are defined in Article 1 of the ICA Law, as well as Articles 20 and 22 of the CPC.[5] These provisions set specific boundaries to "arbitrability" and exclude certain categories of disputes from arbitration (e.g. disputes concerning bankruptcy, state registration or recording of rights to immovable property, intellectual property rights, or rights to financial instruments etc.).[6]

Despite a clear distinction between the above three concepts, Ukrainian courts have frequently (mis)applied these concepts, and confused exclusive international jurisdiction (Art. 77 PIL) with exclusive territorial jurisdiction (Art. 30 CPC) or arbitrability (Art. 22 CPC).

This has led to several court decisions disregarding arbitration agreements where disputes fell under the rules of exclusive territorial jurisdiction as per Article 30 of the CPC or the rules of exclusive international jurisdiction under Article 77 of the PIL.

For example,a previous Supreme Court decision stated that:

> "the ability to refer a dispute to arbitration is limited by [Art. 30 CPC and Art. 77 PIL], which define the exclusive jurisdiction of the Ukrainian courts".[7]

Ukrainian courts have consistently held that, in assessing arbitrability, both the subject matter and the parties involved must be considered,[8] which is an approach that reflects internationally accepted standards.[9] That said, in practice, if the subject matter of the case fell within any category of the cases listed in Article 77 of the PIL, Ukrainian courts previously would refuse to recognise and enforce a respective arbitral award.[10] The issue of exclusive jurisdiction of Ukrainian courts was often raised in the context of the recognition and enforcement proceedings, and Ukrainian courts have occasionally applied another provision on jurisdiction – specifically, Article 30 CPC and Article 77 PIL mentioned above, and mistakenly, treated such rules as limiting the arbitrability of disputes under Article V(2)(a) of the 1958 New York Convention.

2. 2023 Supreme Court Decision

A landmark decision of the Supreme Court in case No. 910/8659/23 ("2023 Supreme Court Decision") marks a significant step towards resolving this uncertainty.[11]

The 2023 Supreme Court Decision clarified that;

- Article 30 CPC and Article 77 PIL deal with court's jurisdiction, not arbitrability of disputes submitted to arbitration;
- Such provisions are only relevant in litigation, and not in a situation where a valid arbitration agreement is in place.

4 Resolution of the Supreme Court, 17 March 2020, case No. 907/930/15. Similar conclusion is maintained in the Resolution of the Supreme Court in case No. 824/42/21.

5 It should be noted that this analysis only covers non-arbitrable commercial cases. It does not address the cases that may be referred to foreign courts under Article 23 CPC or Article 22 of the Civil Procedure Code.

6 Notably, as it will be relevant for the 2023 Supreme Court Decision, Art. 22(2)2 CPC, expressly permits the referral to international commercial arbitration of civil-law aspects of disputes arising from the conclusion, modification, termination, and performance of public procurement contracts.

7 E.g. see the Resolution of the Supreme Court, 8 June 2023, case no. 22-3/824/316/2023.

8 Resolution of the Supreme Court, 17 March 2020, case no. 907/930/15. A similar conclusion is contained in the Resolution of the Supreme Court in case No. 824/42/21.

9 Foreign courts determining the consequences of an arbitration agreement generally assess arbitrability based on the nature of the dispute, rather than ancillary or contextual factors. See ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges: "Whether a subject matter of an arbitration is non-arbitrable is a question to be determined under the law of the country where the application for recognition and enforcement is being made. *The non-arbitrability should concern the material part of the claim and not merely an incidental part*" (emphasis added). Furthermore, national courts are expected to interpret arbitrability in a manner that prioritises and promotes the state's pro-arbitration policy over procedural barriers that might otherwise impede the enforcement of arbitration agreements.

10 As per Art. 468(2), CPC.

11 Resolution of the Supreme Court, 19 Dec. 2023, case no. 910/8659/23.

As a result, the Supreme Court clarified that exclusive jurisdiction rules have no impact on the arbitrability of the disputes. Rather, the exclusive jurisdiction rules govern internal allocation of cases within the Ukrainian judicial system. These rules are distinct from, and do not override, the arbitrability rules that determine whether a dispute may be submitted to arbitration under Ukrainian law.

Background of case No. 910/8659/23

In this case, a dispute arose under a defense goods procurement contract between the Ministry of Defense of Ukraine (Ministry of Defense) and a foreign supplier Ahit Solutions (FZC). The contract included an arbitration clause referring disputes to the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (ICAC). Despite a minor naming error in the clause, the courts found that the parties' intent to arbitrate was clear and there was, in principle, a valid arbitration agreement.

When Ahit Solutions (FZC) filed a claim with the Ukrainian commercial court instead of submitting it to ICAC arbitration, the Ministry of Defense objected and invoked the arbitration clause requesting the court to dismiss the case under Article 226(1)(7) CPC, which provides that in case of an existence of an arbitration agreement in a contract a commercial court shall leave the case without consideration.

The first instance court honored the arbitration agreement and declined its jurisdiction.[12] The appellate instance court reversed the first instance decision citing Article 30 CPC and holding that the arbitration agreement was "inoperative" because the dispute fell within the exclusive territorial jurisdiction of the Kyiv City Commercial Court, which is designated as an exclusive forum for all disputes involving Ukrainian ministries and other central executive authorities as defendants. Therefore, in the appellate court's view the dispute could not be subject to arbitration.[13]

On 19 December 2023, the Supreme Court overturned the appellate court decision and reinstated the first instance ruling.

Supreme Court's analysis

In its decision, the Supreme Court determined the following:

1. Arbitrability is governed by Article 22 of the CPC and Article 1 of the ICA Law that outline specific types of disputes that may or may not be submitted to arbitration. Since the dispute in question did not fall within any of the exceptions listed in those provisions, i.e. categories of disputes that are non-arbitrable under Ukrainian law, the Supreme Court concluded that the dispute was in fact arbitrable.
2. Article 77 PIL limits the jurisdiction of foreign courts over certain disputes, which may only be decided by competent Ukrainian courts. The Supreme Court did not explicitly confirm that the disputes falling under Article 77 PIL may be submitted to arbitration but instead went on to conclude that the specific dispute in question did not fall under exclusive jurisdiction of Ukrainian courts.
3. Article 30 CPC addresses how cases are allocated among different local Ukrainian courts and does not address the issue of international jurisdiction of Ukrainian courts or whether disputes can be submitted to arbitration. The Supreme Court rejected the appellate court's conclusion that Article 30 of the CPC barred arbitration:

   "Article 30 of the Commercial Procedure Code of Ukraine outlines the rules of exclusive territorial jurisdiction, which cannot be broadly interpreted. Exclusive jurisdiction is a special type of territorial jurisdiction, prohibiting the application of other rules governing territorial jurisdiction as outlined in Articles 27-29 of the Commercial Procedure Code of Ukraine when filing a lawsuit. In other words, Article 30, referenced by the appellate court, specifies the exclusive territorial jurisdiction of the commercial court, *not the exclusive jurisdiction of Ukrainian courts over cases with a foreign element*." (emphasis added)

These conclusions finally put an end to previously inconsistent Ukrainian court practices and confirm that Ukrainian courts must honor arbitration agreements in respect of arbitrable disputes despite Ukrainian jurisdiction rules that assign certain disputes to specific Ukrainian courts.

12 Ruling of the Kyiv City Commercial Court, 4 Sep. 2023, case no. 910/8659/23.

13 Resolution of the Northern Appellate Commercial Court, 24 Oct. 2023, case no. 910/8659/23.

The following proper sequence should therefore be applied by Ukrainian courts:

1. assess whether there is a valid arbitration agreement; and only if there is none;
2. assess whether Ukrainian courts have international jurisdiction under the PIL; and if so
3. allocate jurisdiction to a specific Ukrainian court pursuant to Article 30 CPC.

Accordingly, the exclusive jurisdiction rules of Article 77 PIL and Article 30 CPC cannot override valid arbitration agreements and do not have impact the arbitrability of disputes.[14]

3. Practical implications of the 2023 Supreme Court Decision

The 2023 Supreme Court Decision provides important clarification on the interplay between arbitrability (Art. 22, CPC; Art. 1, ICA Law) and jurisdiction rules under Ukrainian law (Art. 77, PIL; Art. 30, CPC).

Although the Supreme Court's stance does not directly address arbitral award recognition and enforcement, it clarifies how Article V(2)(a) of the 1958 New York Convention is applied, which is one of the grounds for refusal to recognise or enforce an arbitral award examined by Ukrainian courts *ex officio*. In the past, Ukrainian courts often relied on the exclusive jurisdiction rules to assess the arbitrability of disputes. The Supreme Court Decision now entails that recognition and enforcement of an arbitral award cannot be denied under Article V(2)(a) of the 1958 New York Convention solely on the basis that the subject matter of the dispute is governed by Ukrainian exclusive jurisdiction rules.

The 2023 Supreme Court Decision also strengthens confidence in the enforceability of arbitration agreements in contracts governed by Ukrainian law with a Ukrainian nexus. Even when a dispute involves matters that are usually assigned to litigation before Ukrainian courts, this by itself does not automatically exclude the possibility of international arbitration.

That said, to ensure the enforceability of any arbitral award, parties and arbitrators must ensure that:

- the subject matter of the dispute is arbitrable under Ukrainian law; and
- the arbitration agreement is valid.

If these conditions are met, Ukrainian courts are required to recognise the arbitration agreement and enforce any resulting arbitral award, without interference based on Ukrainian jurisdiction rules which, according to the 2023 Supreme Court Decision, apply specifically to litigation cases.

14 Resolution of the Grand Chamber of Supreme Court, 28 April 2020, case no. 910/11287/16.

MIDDLE EAST

United Arab Emirates

Extending the Arbitration Agreement to Third Parties, Jurisdiction of ADGM Courts, and Legal Costs (Re)Examined by the Dubai Court of Cassation

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A significant number of arbitration-related cases are being brought before Dubai courts prompting them to address new questions and/or re-examine their earlier positions. In doing so, the courts have occasionally adopted new concepts and reflected international trends and best practices. In this context, the Dubai Court of Cassation, in its judgment rendered on 19 November 2024 in Appeal Nos. 756/2024 and 760/2024 (Commercial), considered three arbitration-related questions: the extension of an arbitration agreement to third parties, the jurisdiction of ADGM Courts in arbitrations governed by the ICC Rules and arbitral tribunal's authority to award legal costs.

1. Summary of the case[1]

In an arbitration conducted under the International Chamber of Commerce Arbitration Rules ("ICC Rules"), an award was issued early 2024 ("Award") in connection with a construction contract. The Respondent filed a request for the annulment of the Award before the Dubai Court of Appeal and obtained a partial annulment of the Award. The annulled portion concerned the legal costs as the Respondent was ordered to pay the Claimant's legal costs of US$1,542,376. Both the Claimant and the Respondent challenged the judgment of the Court of Appeal before the Court of Cassation (the "Court"). The two cases were joined and one judgment was rendered covering both challenges. A variety of arguments were raised by the parties and examined by the Court.

2. Extending the arbitration agreement to third parties

Amongst many arguments, the Respondent argued that it was not a party to the arbitration agreement as the contract was concluded by an entity based in Dubai while the Respondent is an entity based in China. This argument was rejected by the Court on the basis of Article 19 of the Federal Arbitration Law No. 6/2018 ("Arbitration Law"),[2] which allows an arbitral tribunal to decide whether it has jurisdiction. If the tribunal decides that it indeed has jurisdiction, the concerned party can challenge the tribunal's decision before the courts within 15 days. In the current case, it appears that the Respondent had not challenged the decision of the tribunal in line with Article 19, and accordingly, the Court found that the Respondent was no longer entitled to challenge the tribunal's decision on its jurisdiction.

Additionally, the Court provided some insight on the question of extending an arbitration agreement to a third party. It explained that the party bound by an arbitration agreement is not necessarily the signatory of the arbitration agreement, but rather the party who has issued the relevant instructions. Therefore, an arbitration clause may extend from the company which

1 Dubai Court of Cassation, 19 Nov. 2024, in Appeal No. 756/2024 (Commercial). An Arabic version of the judgment can be accessed here (https://www.dc.gov.ae/). This article focuses on points that are purely arbitration related and are worthy of examination.

2 Federal Law No. 6 on Arbitration, issued on 3 May 2018

signed it, if it is a subsidiary,[3] to the parent company and vice-versa depending on which entity had the decisive authority in the formation or performance of the contract.

As the Respondent's challenge was dismissed on the basis of Article 19, the Court's comments on extending an arbitration agreement to a non-signatory should be treated *as dicta*. However, this is very important dicta because it ushers a potential change in the position of the courts. So far, courts have refused the extension of arbitration agreements to third parties and it is, in fact, difficult to imagine such extension in light of the prevailing restrictive approach to arbitration. Courts consistently state that arbitration is an exceptional mechanism to resolve disputes that should be specifically agreed to by the parties, and often require a clear and explicit agreement demonstrating the parties' intention to derogate from the jurisdiction of the courts in favor of arbitration.[4] It is therefore, of particular interest that the Court has introduced the notion of extending the arbitration agreement to third parties. Future decisions will demonstrate if the said concept will be followed and implemented by the courts, and the circumstances in which it will be applied.

3. Jurisdiction of ADGM courts

In its appeal, the Claimant challenged the jurisdiction of the Court of Appeal arguing that the Abu Dhabi Global Market ("ADGM") Courts have jurisdiction over the annulment application filed by the Respondent. The Claimant contented that, according to *jurisprudence constante,* ADGM Courts are the curial courts for arbitrations governed by the ICC Rules, since the ICC office in ADGM should be considered as the seat of the arbitration. The Claimant further asserted that the present arbitration was conducted under the supervision of the ICC office in Abu Dhabi.

The Court dismissed the Claimant's argument providing a relatively elaborate explanation on this question. In its judgment, the Court:

(i) explained the concept of the seat of arbitration and the results that stem from choosing a certain seat, among which the identification of the court having jurisdiction over the set aside proceedings;[5]

(ii) distinguished between the seat and the venue of hearings as a physical location, emphasising that there is no link between arbitration centres and their rules, on the one hand, and the competent annulment court, on the other hand – as such, the location of the arbitration centre has no bearing over determining the court that has jurisdiction over the set aside proceedings;

(iii) turning to the facts of the case, noted that the parties had expressly chosen Dubai as the seat of arbitration during the course of the proceedings – as a result, the Dubai Court of Appeal had jurisdiction over the annulment of the Award, clarifying that there was no link between the ICC Representative Office established in ADGM and the ADGM Arbitration Centre, where the hearings took place;

(iv) concluded that the Claimant's argument that ADGM Courts should have jurisdiction because the arbitration was managed by the ICC in Abu Dhabi was unfounded.

Disassociating the jurisdiction of the ADGM Courts from the presence of the ICC Representative Office in Abu Dhabi is a particularly valuable clarification, as it contrasts with a number of prior decisions issued by the Abu Dhabi Courts that held that ADGM Courts are the supervisory courts in relation to ICC arbitrations seated in Abu Dhabi given the presence of the ICC Representative Office in ADGM.[6] The Court provides a welcome explanation on this point. Although Abu Dhabi Courts are not bound by the decisions of the Dubai Court of Cassation as they are part of another judiciary, one would hope that the Abu Dhabi Courts will reconsider their position.

3 The Court's use of the term "subsidiary" in this context does not necessarily mean it intended it to have the meaning prescribed to it in the Federal Companies Law No. 32/2021 where certain criteria have to be met for a company to be treated as a subsidiary. It is the author's view that it was used loosely.

4 COC Appeal No. 735/2024 (Commercial).

5 The Court of Cassation quotes Art. 1 of the Arbitration Law, which defines competent court as: "The federal or local Court of Appeal agreed upon by the parties or in whose jurisdiction the arbitration is conducted". Art. 18.1 of the Arbitration Law is also relevant in this context as it explains that: "The competent Court shall have jurisdiction to consider arbitration issues referred hereunder in accordance with the procedural laws of the State. The Competent Court shall exercise exclusive jurisdiction until the conclusion of all arbitral proceedings".

6 The first reported case was a decision issued on 19 September 2022, in which Abu Dhabi Courts declared not having jurisdiction to review an application for the annulment of an ICC award issued in an arbitration seated in Abu Dhabi (Abu Dhabi Court of Cassation No. 635/2022 Commercial). They considered that the courts of ADGM have jurisdiction over the matter given the existence of an ICC "branch" in ADGM. For further analysis of this decision, see N. Boghossian, "Jurisdiction of Abu Dhabi Courts v. ADGM Courts", CIArb UAE Branch Newsletter, 2023 Feb. edition.

4. Awarding legal costs

As to the question of legal costs, the Claimant, in its appeal, challenged the Court of Appeal's decision on this point and obtained a reversal of the Court of Appeal judgment. In its reasoning, the Court explained that the arbitration is subject to the 2021 ICC Rules and that the provisions of the Arbitration Law[7] do not apply unless they relate to public policy. The Court then quoted Article 38(1) of the 2021 ICC Rules, in the following manner:

> "The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the legal and other reasonable[8] costs incurred by the parties for the arbitration."

The Court explained that the list of costs set out in this provision was not exhaustive as indicated by the language "and other reasonable costs incurred by the parties for the arbitration". Accordingly, legal costs, which cover attorney fees paid by the parties to their legal representatives, fall under the scope of "reasonable costs", even if Article 38 does not specifically mention the fees of legal representatives. Additionally, the Court relied on the ICC commentary to the 2012 ICC Rules,[9] which states that recoverable costs include the "fees and costs of the parties' lawyers". It also noted that international arbitration practice under the ICC Rules consistently treat lawyers' fees as recoverable costs that may be awarded by an arbitral tribunal.

The Court also found that the parties had agreed to grant the arbitral tribunal the power to award attorney fees, as the Respondent had requested that attorney fees be awarded. The Court explained that such a request is considered an acknowledgment and an empowerment of the arbitral tribunal to determine those costs, especially where the Claimant had not challenged that request. Consequently, the Court reversed the Court of Appeal's judgment annulling the part of the Award related to the legal costs.

There are two observations to be made here:

(i) The Court's reasoning suggests that the term "legal costs" does not refer to attorney fees. In fact, the Court references the Dubai International Arbitration Centre Arbitration Rules that specifically include the term "the fees of the legal representatives" among the costs of arbitration,[10] and contrasts it with the wording of Article 38 in its reasoning. Although it is difficult to accept that legal costs do not cover attorney fees, this decision is still an improvement compared to previous decisions that concluded that the ICC Rules did not allow attorney fees to be awarded.[11]

(ii) Given the Court's interpretation of Article 38 and its clear conclusion that the attorney fees fall within "other reasonable costs" and can hence be awarded, it is unclear why the Court engaged in an analysis of the parties' consent on awarding legal costs. This analysis should not be treated as negating the Court's determination that Article 38 empowers tribunals to award legal costs.

5. Conclusion

The Decision of the Court of Cassation is important not only because it covers three arbitration questions but also because of the positions it reflects. It introduces the concept of extending an arbitration agreement to a third party, thus, creating the possibility for the courts to consider applying the said concept moving forward. It clarifies the ADGM courts' jurisdiction in arbitration cases governed by the ICC Rules. By doing so, it forges the way for a potential reversal of the position of the courts on this question. Lastly, it rectifies prior decisions on tribunals' power to award legal costs under the ICC Rules, which is very commendable and is likely to influence future decisions on this topic.

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7 Supra note 2.

8 To be noted that in the original English version, Art. 38(1) of the ICC Rules reads "and the reasonable legal and other costs", with the word "reasonable" before the word "legal".

9 This must be the Secretariat's Guide to ICC Arbitration (ICC, 2012), at paras. 3-1489 – 3-1493. On the allocation of legal costs in ICC arbitrations, see also the ICC Report of the ICC Commission on Arbitration and ADR on Decisions on Costs in International Arbitration.

10 See Art. 36.1 of the DIAC Arbitration Rules 2022.

11 Dubai Court of Cassation Appeal No. 821/2023 Commercial. An Arabic version of the prior judgement can be accessed here (https://www.dc.gov.ae/) For further analysis, see S. Dilevka, D. Mednikov, Dubai Courts Drastically Curtail Recoverability of Legal Fees in Arbitration under the ICC Rules (Kluwer Arbitration Blog, 15 Apr. 2024).