Esin Attorney Partnership.

# Esin Arbitration Quarterly

September 2022 – Fifth Issue

As we approach the last quarter of 2022, changes and developments continue to take place in the world of arbitration. On one hand, jurisprudence on arbitration is increasing, especially with the decisions of arbitral tribunals and international courts. On the other hand, the studies carried out by arbitral institutions and societies serve to give arbitration an increasingly international dimension.

In this fifth issue of Esin Arbitration Quarterly, we provide insight on some of the most significant court decisions and developments regarding arbitration; in the Summer of 2022.

## 1. Significant court decisions in the last trimester concerning arbitration

### 1.1 The ECHR's decision regarding the refusal of enforcement of the arbitral award

The European Court of Human Rights ("**ECHR**") ruled that Slovakia is liable for the refusal of its courts to enforce an International Chamber of Commerce ("**ICC**") award won against a state agency, the National Property Fund of Slovakia ("**NPF**"), in a Paris-seated arbitration under the case of *BTS Holding, A.S.* ("**BTS**") v. *Slovakia* on 30 June 2022.[1]

The dispute between NPF and BTS arose out of the termination of the share purchase agreement ("**SPA**") between the parties for the purchase by the latter of shares in Bratislava Airport as part of its privatization. NPF had terminated the SPA and restored the purchase price payment made by BTS as the first installment upon the parties' execution of a settlement agreement for this re-payment. In 2010, BTS initiated arbitration proceedings by claiming that there were further amounts due by the NPF.

The arbitral tribunal decided that there are due payments of EUR 1,894,597.52 and interest of EUR 1,853,584.45 that should have been made by NPF in 2012. BTS subsequently initiated an enforcement lawsuit in Slovakia to be able to get its receivables from NPF in 2013. NPF objected to this lawsuit by arguing that the SPA had been superseded by the 2008 settlement and that the latter contained no arbitration clause, in the absence of which the enforcement of the arbitral award would be contrary to public policy. Moreover, it would be *contra bonos mores*, as the applicant company was simply seeking further financial satisfaction by claiming a large sum of money from public funds.

1 Case of *BTS Holding, A.S. v. Slovakia*, Application no. 55617/17. You may access the full text of the decision by clicking here.

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In 2014, the District Court accepted the objection of NPF by stating that the arbitral award could not be enforced because the settlement agreement between the parties overruled the SPA, and therefore the parties cannot rely on the arbitration clause under the SPA. Following an appeal by BTS in 2015, the Bratislava Regional Court upheld that decision on grounds of public policy stating that:

- The arbitral award concerned a large sum of money, and its enforcement would impact a large group of people, namely taxpayers, since, in the event of an enforcement of such magnitude, the financial means would come from the State budget. This would have a negative impact on the general public.
- Prior to the arbitration, the parties had waived their right of recourse against the arbitral award, which included the right of access to a court.
- The claims of BTS were based on the termination of the SPA by NPF which was due to the need to protect against market concentration.

In 2015, after the Bratislava Regional Court issued its decision, BTS made an individual application to the Constitutional Court to challenge the decisions regarding NPF's objection to enforcement by arguing that there had been a violation of its rights to a fair trial and protection of property, BTS emphasized that, at the enforcement stage of the proceedings, any objections could only pertain to the enforcement but not to the arbitral award. The Constitutional Court declared a further appeal by BTS inadmissible. Then BTS made an application to the ECHR.

The ECHR noted that the claim was in the scope of the "possession" under Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms ("**Protocol**"), which regulates that every natural or legal person is entitled to the peaceful enjoyment of their possessions. The ECHR pointed out that Slovakia had not raised any objection and/or challenge against the arbitral award at the seat of arbitration, and therefore, the arbitral award was final and binding on the parties. The ECHR held Slovakia liable under Article 1 of the Protocol by deciding that non-enforcement of the arbitral award constitutes an interference with BTS's possession relying upon the following reasons:

- Objection to the enforcement of an arbitral award does not allow for any substantive review of the arbitral award.
- The court can review compliance of an arbitral award with the domestic law only in case of existence of a manifest error or arbitrary conclusions and there are no objections made by Slovakia in that regard.
- The reasons for non-enforcement of the arbitral award do not comply with the reasons under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

## 1.2 SCC tribunal upheld the intra-EU objection

In the case *Green Power Partners K/S & SCE Solar Don Benito APS* ("**Green Power**") v. *The Kingdom of Spain*, the tribunal rendered its award on 16 June 2022 and upheld Spain's intra-EU objection.[2] This is an important decision considering that it is the first time that an arbitral tribunal has upheld an intra-EU objection, with a considerable number of preceding decisions to the contrary.

The investors in the dispute were Danish companies operating in the photovoltaic energy sector who invested in Spain between 2008 and 2011. The investors argued that Spain violated its obligations under the Energy Charter Treaty ("**ECT**"), which is a unique international investment agreement that provides a multilateral framework for energy cooperation, by changing the regulatory framework that affected the investors. The investors brought a claim against Spain in an arbitration seated in Stockholm, Sweden under the Stockholm Chamber of Commerce's ("**SCC**") arbitration rules. The tribunal bifurcated the proceedings to decide first on the issues of jurisdiction and admissibility. Among the four objections submitted by Spain as respondent in the arbitration was the intra-EU objection, i.e., the objection that European Union ("**EU**") law must be applicable to the dispute since both parties are from the EU.

The tribunal first dealt with the issue of law applicable to jurisdiction. In the absence of an explicit or implicit choice of law, the tribunal turned to Achmea and Komstroy Judgments to assert that EU law — to the extent that it is relevant to the issues at hand — would apply by extension in selecting Sweden as seat of arbitration. The tribunal then held that EU law should be applied to determine the tribunal's jurisdiction.

Since the basis of Spain's consent to arbitration was found in the ECT, the tribunal considered Article 26 of the ECT as a starting point and interpreted it according to the Vienna Convention on the Law of Treaties. Although the tribunal's initial interpretation based on the wording of the ECT concluded that the offer to arbitrate was unconditional, the tribunal moved beyond the literal meaning and evaluated the context, relying on the International Court of Justice's Gabčíkovo-Nagymaros Judgement. The tribunal then held that regional economic integration organizations may be subject to special requirements and that Spain, Denmark and Sweden all being EU member states, the dispute - and the ECT - required an analysis within the context of EU law. The tribunal deferred to the Court of Justice of the European Union's ("**CJEU**") Achmea and Komstroy Judgments regarding the validity of an offer to arbitrate by an EU member state and the ECT. The tribunal also remarked on some cases that rejected the Achmea doctrine and drew a distinction by stating that they were International Centre for Settlement of Investment Disputes ("**ICSID**") cases in which selection of an EU member state as seat of arbitration and its effects on law applicable to jurisdiction were not considered. As such, the tribunal applied CJEU's interpretations and decided that it lacked jurisdiction in the case at hand both in terms of state aid and validity of the offer to arbitrate.

In *Green Power v. the Kingdom of Spain*, the tribunal rendered a decision vastly different from the previous decisions on intra-EU objections such as the decision of the tribunal in the case *Renergy S.a.r.l v. The Kingdom of Spain*.[3] In the latter, the tribunal had held that the merits of the

2 SCC Case No. V2016/135.

case did not require the application of EU law and instead focused on the violations of the ECT. Most importantly, the tribunal noted that the ECT and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("**ICSID Convention**") were clear and specific enough and that as such, there was no need for the application of EU law, which is contrary to the tribunal's decision in *Green Power v. The Kingdom of Spain*.

## 1.3 ICSID tribunal's decision on inter-state negotiation clause

The tribunal in Nasib Hasanov v. Georgia dismissed Georgia's preliminary objection to jurisdiction.[4] Mr. Hasanov was the owner of a holding operating in, among others, the telecoms sector and he filed a claim for approximately USD 200 million against Georgia in 2020 due to the appointment of a special board manager in an internet provider company in which he claimed to hold indirect interest.

In the arbitration, Georgia objected to the tribunal's jurisdiction on the grounds of Article 9 of the Georgia-Azerbaijan Bilateral Investment Treaty ("**Georgia-Azerbaijan BIT**"), the investment treaty under which the claim was brought. Georgia argued that the relevant article foresaw negotiations between the contracting parties, i.e., inter-state negotiations between Georgia and Azerbaijan, before an arbitration claim could be brought by the investor. Georgia argued that Mr. Hasanov had failed to satisfy this requirement before initiating the arbitration. In return, Mr. Hasanov argued that the requirement for inter-state negotiations was a drafting error as only one of the states can be a party to the dispute in investor-state arbitration. Mr. Hasanov emphasized that such a requirement would go against the purpose of investor-state arbitration.

The tribunal on the other hand disagreed with Mr. Hasanov and stated that inter-state negotiations to resolve an investor-state dispute is not an unprecedented phenomenon, nor is it contrary *per se* to the purpose of investor-state dispute settlement. The tribunal added that such negotiations were also not inconsistent with the aim of the Georgia-Azerbaijan BIT and that inter-state negotiations are not precluded by the ICSID Convention either. As such, the tribunal held that Article 9 of the Georgia-Azerbaijan BIT clearly required inter-state negotiations before the initiation of arbitration and proceeded to evaluate whether Mr. Hasanov fulfilled this requirement.

In that regard, the tribunal stated that no guidance or additional requirements were provided in the Georgia-Azerbaijan BIT, which led the tribunal to decide that there could only be "minimal requirements to satisfy the inter-state negotiation precondition" and that the only requirement that could be reasonably imposed on the investor was notifying the contracting parties of the dispute and submitting a written claim to the host state. Notably, the tribunal affirmed Mr. Hasanov's interpretation that the Georgia-Azerbaijan BIT could not reasonably impose an obligation on the investor to initiate inter-state negotiations. In terms of the present case, the tribunal stated that Mr. Hasanov had fulfilled the inter-state negotiations requirement by, among others, issuing a letter to Azerbaijani Ministry of Foreign Affairs. As such, Georgia's preliminary objection to jurisdiction was dismissed by the tribunal.

## 1.4 The ECHR's ruling on electronic filing and the right to a fair trial

With its judgment dated 9 June 2022, the ECHR ruled that the overly formalistic interpretation of the electronic filing requirement for set-aside proceedings constitutes a violation of the right to a fair trial enshrined under Article 6.1 of the European Convention on Human Rights.[5]

The case concerned court rules, which required filings to be made electronically. That said, the electronic form did not permit the applicant to enter accurate information regarding the set-aside proceedings. As such, the applicant opted to submit the accurate information physically, but this was rejected on the basis that it was against the electronic filing requirement.

While acknowledging that the rapid increase of integrating digital technologies into legal procedures for better administration of justice was a legitimate purpose, the ECHR urged for the consideration of the practical hurdles faced by the applicant. It determined that the applicant would have had to submit inaccurate information had the electronic form been filled out, and that, since the applicant cannot be held responsible for the lack of specific means to lodge such an application, it would be disproportionate to make them bear the consequences of the procedural mistake. In that regard, the ECHR ruled that, through rejecting the physical application and barring the case from consideration, the French Supreme Court failed to strike the right balance between upholding procedural requirements and the applicant's right to a fair trial. Accordingly, the ECHR awarded the applicant damages amounting to EUR 3,000.

## 1.5 Singapore Court of Appeal's ruling on arbitrators' excess of jurisdiction

In a recent case, the Singapore Court of Appeal ("**Court of Appeal**") decided that, even if an arbitral tribunal renders a decision regarding the topics that fall beyond the scope of the precise terms of the pleadings and submissions made by the parties, if the conclusions are based on the fundamental points of these submissions, it does not exceed its jurisdiction.[6] In addition, this does not breach the rules of natural justice.

The case at hand concerned a consultancy agreement, under which the applicant undertook to provide consultancy services to the respondent for the merger and acquisition of oil and gas fields. In return, the respondent

3 You may refer to the Fourth Issue of Esin Arbitration Quarterly here for detailed information on the *Renergy S.a.r.l v. The Kingdom of Spain* case.

4 ICSID Case No. ARB/20/44.

5 You may access the English summary of the judgment here.

6 You may find a more detailed analysis of this case on Global Arbitration News, which you may access here.

agreed to pay a success fee, should the applicant succeed in presenting an opportunity leading to a successful acquisition. Later, the respondent successfully acquired the shares of a company, which was an operator and owner of oil fields. Then, a dispute arose regarding the aforementioned success fee. The applicant initiated the arbitral proceedings and argued that the consultancy agreement, which had expired on paper, was extended orally, while the respondent denied this argument.

Although, the arbitral tribunal rejected the applicant's claim regarding the oral extension of the consultancy agreement, it nevertheless concluded that the applicant had a right to the success fee because the consultancy agreement did not require the opportunity to be concluded prior to its expiration. The respondent initiated set-aside proceedings before the Singapore High Court ("**High Court**") by claiming that the award was outside the scope of the submissions and that the rules of natural justice were violated. The High Court decided in favor of the respondent and the applicant appealed the High Court's decision to the Court of Appeal.

The Court of Appeal ruled in favor of the appeal and decided that the success fee is payable even after the expiration of the consultancy agreement. The Court of Appeal applied a two-step test while deciding the set-aside of an award for an excess of jurisdiction: (i) the determination of the topics submitted to the arbitral tribunal and (ii) the determination of whether these topics were touched on in the award or whether there were differences with the submission. Accordingly, the Court of Appeal analyzed the pleadings, list of issues, statements, evidence and closing submissions. The Court of Appeal emphasized that the fundamental points were obvious in the applicant's pleadings and were already discussed in the closing submissions. About the alleged breach of natural justice, the Court of Appeal ruled that an arbitral tribunal may decide differently from the parties (as long as it falls within the scope of the evidence), and that an arbitral tribunal may find another basis for its decision. Lastly, the Court of Appeal held that the way of reasoning adopted by the arbitral tribunal was sufficiently linked to the parties' cases.

# 2. Developments in arbitration practice

## 2.1 Recent developments related to the investment arbitration practice

### (a) Modernization of ICSID Rules and other related developments

After the amendments made in 1984, 2003 and 2006, ICSID recently amended its arbitration and conciliation rules, while establishing new stand-alone rules on mediation and fact-finding ("**Rules**"). This amendment was realized in a five-year process involving six working papers and inputs from many states and other stakeholders, and finally was approved by majority of the ICSID member states, then entered into force on 1 July 2022. With these amendments, ICSID aims to increase the time and cost efficiency of proceedings by streamlining them and provide greater transparency.[7] In accordance with the revision of the Rules, ICSID also revised Schedule of Fees[8] and Memorandum on Fees and Expenses,[9] which also entered into force on 1 July 2022.

Following the amendments, ICSID published new guidance notes on the Rules to help practitioners navigate ICSID procedures under the Rules on ICSID's website on 22 July 2022.[10]

### (b) The fourth version of the Code of Conduct for Adjudicators in International Investment Disputes

On 25 July 2022, the fourth version of the Code of Conduct for Adjudicators in International Investment Disputes ("**Code**"), a collaboration between the secretariats of ICSID and the United Nations Commission on International Trade Law, was published.

The purpose of drafting this Code is to provide applicable principles and provisions addressing matters such as independence and impartiality, and the duty to conduct proceedings with integrity, fairness, efficiency and civility in proceedings.

This version will be discussed further in the next Working Group session on September 2022, and the Code is expected to be finalized in 2023.

### (c) Model BIT published by Africa Arbitration Academy

The Africa Arbitration Academy published a model bilateral investment treaty for the African States ("**Model BIT**")[11] on 12 July 2022 to promote foreign direct investment in Africa considering the growing importance of such investments. The aim of the Model BIT is to guide and enable the African States to regulate and introduce new measures relating to investments in their territories in order to meet national policy objectives in accordance with the established principles of international law and accordingly create an attractive investment climate in the region.

Considering that foreign direct investment inflows increased from USD 39 billion to USD 83 billion in 2021 as per World Investment Report 2022,[12] it can be said that this initiative actualized by Africa Arbitration Academy may be an initial step toward an even faster economic growth in the African region.

### (d) Modernization of the ECT

The modernization studies for the ECT have been conducted by the contracting parties since 2017. The formal negotiations started in July 2020, and after 15 rounds of negotiations, the contracting parties reached an agreement in principle on 24 June 2022. This final version is expected to be adopted at the Energy Charter Conference on 22 November 2022; the modernized ECT will enter into force 90 days after the ratification by three-fourths of the contracting parties.

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7 For detailed explanations on the amendments to the Rules, read our alert here.

8 You may access the Schedule of Fees by clicking here.

9 You may access the Memorandum on Fees and Expenses by clicking here.

10 For detailed explanations on the Guidance Notes, read our alert here.

11 You may access the Model BIT by clicking here.

12 You may access the World Investment Report 2022 by clicking here.

The main revisions of the ECT, which are the outcome of the negotiations for the purposes of modernization, can be summarized as follows:

- **Additional wording in the preamble** strengthens the right of the contracting parties to regulate within their territories in the interest of legitimate public policy objectives.
- **Definition of Economic Activity in the Energy Sector** is extended to be able to cover the capture, utilisation and storage of carbon dioxide (CCUS) in order to decarbonise the energy systems in accordance with the recent clean energy goals of the contracting parties.
- **Definition of Investor** excludes the coverage of individuals who are the national or permanent residents of the host contracting party at the time of the investment.
- **Fair and Equitable Treatment clause** provides a list for designating measures that constitute a violation of this protection standard.
- **Expropriation clause** clarifies the "direct expropriation" and introduces a list of factors that should be considered for the determination of the existence of an "indirect expropriation." The specific regulation is that, in principle, non-discriminatory measures that are adopted to protect legitimate policy objectives, such as public health, safety and the environment (including with respect to climate change mitigation and adaptation), do not constitute indirect expropriation.
- **Most Favoured Nation clause** clarifies that this clause shall not extend to the dispute settlement procedures and other substantive provisions in other international agreements.
- **Umbrella clause** covers only a breach of specific written commitments through the exercise of governmental authority.
- **Valuation of damages** is also revised and monetary damages are limited to the loss suffered by an investor and may not include punitive damages.

The new version also includes specific provisions with regard to the contracting parties that are members of the same regional economic integration organization, which is only the European Union for the time being.

All these revisions show that the amended version of the ECT is responsive to trending topics in investment arbitration.

### (e) Angola joins the ICSID Convention

On 14 July 2022, Angola signed the ICSID Convention.

Meg Kinnear, Secretary-General of ICSID stated:

> "Angola is the 50th African State to sign the ICSID Convention a testament to the important role that African countries have played in the development of ICSID. Today's signature of the Convention demonstrates the importance Angola places on foreign investment for its economic and social development and the concrete steps the country is taking to attract, retain and expand investment."

For the completion of the process to join the ICSID Convention, it now should now be ratified. Once it is ratified and comes into force for Angola, Angola will become more attractive to foreign investors.

## 2.2 Cooperation of the arbitral institutions

### (a) ICSID and MIAC

The ICSID and the Mauritius International Arbitration Center ("**MIAC**") entered into a cooperation agreement on 21 June 2022. This agreement relies on Article 63 of the ICSID Convention, which regulates that conciliation and arbitration proceedings may be held, if the parties so agree at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which ICSID may make arrangements for that purpose. In this respect, the facilities of MIAC can be used to hold ICSID hearings.

Meg Kinnear, Secretary-General of ICSID stated:

> "I am pleased to offer MIAC's first-class hearing facilities to parties in ICSID proceedings and look forward to strengthening our partnership with the MIAC Board and Secretariat."

Salim Moollan QC, Chairman of the Board of MIAC stated:

> "Holding hearings in Africa for cases involving African States will be a further important step in the development of regional capacity and in the fostering of legitimacy which lie at the heart of the Mauritian international arbitration project."

### (b) ISTAC and ASA

Istanbul Arbitration Centre ("**ISTAC**"), which had previously signed cooperation protocols with various arbitration and mediation centers has now signed a cooperation protocol with Swiss Arbitration Association ("**ASA**"), one of the leading arbitration centers across Europe and the world.

The cooperation process will start with the organization of joint seminars and workshops and will pave the way for many international events.

Ziya Akıncı, President of ISTAC Board of Arbitration stated:

> "This cooperation is important in two aspects; first of all, Swiss arbitrators serve in almost all international arbitrations involving Turkish parties. Therefore, establishing a close relationship with the Swiss Arbitration Center and Swiss arbitrators on such a basis is very important for both the Istanbul Arbitration Centre and our legal and business world. The second important point is that Switzerland is one of the most important arbitration countries in the world, and signing such a cooperation protocol with the Swiss Arbitration Centre is a very good development in terms of the international credibility and recognition of the Istanbul Arbitration Centre. We give great importance to this cooperation with ASA, one of the most reliable arbitration centers."

Korinna von Trotha, Executive Director of ASA stated:

> "The ASA, which emerged with the merger of arbitration centers in Switzerland, has thus become a very strong arbitration center and has increased its regional power as the country's arbitration center. As a result of this cooperation agreement, ASA will carry out many organizations with ISTAC. We will be very happy to share this experience of our center with our Turkish colleagues."

### (c) ITOTAM and PRIAC

The Istanbul Chamber of Commerce Arbitration and Mediation Center ("**ITOTAM**") and the International Arbitration Court of the Czech Commodity Exchange ("**PRIAC**"), which has authority to adjudicate all property disputes that are in one way or another, related to the commodities traded on Czech Moravian Commodity Exchange, have signed a cooperation agreement. This cooperation may strengthen both centers' capabilities and make them more effective and attractive both in the Czech Republic and in Turkey.

## 2.3 Other developments

### (a) Young ICCA's meeting on Metaverse

The Young International Council for Commercial Arbitration ("**ICCA**") ("**Young ICCA**") organized the "Meet the (Other) Mentors" event on 12 June 2022 as part of the ninth cycle of the Young ICCA Mentoring Programme. What set this event — organized within the scope of this programme, and taking place every year and in which Ceyda Sıla Çetinkaya, one of the associates of our firm, participated as a mentee this year — apart was the platform on which it was organized. The event was held in the Metaverse for the first time.

Metaverse is a technology that is generally defined as a "network of 3D virtual worlds," and although it has been talked about for many years, practically it has entered into our lives only in the last few years. This initiative by Young ICCA again demonstrates how flexible arbitration practitioners are in adapting to new technologies and the latest global trends. Perhaps one day, arbitration hearings conducted on Metaverse platforms will become a daily routine for us.

### (b) Arbitration exception to restrictive measures in view of Russia's actions under EU Regulations

Following Russia's annexation of Crimea in 2014, the EU adopted sanctions on 31 July 2014 with Council Regulation No. 833/2014.[13] These sanctions were extended by the Council Regulation No. 2022/428[14] of 15 March 2022 following Russia's invasion of Ukraine.

On 21 July 2022, Council Regulation No. 2022/428 was amended with Council Regulation No. 2022/1269[15] and the scope of exceptions to prohibited transactions was expanded. Accordingly, transactions that are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in an EU member state, as well as for the recognition or enforcement of a judgment or an arbitral award rendered in an EU member state and if such transactions are consistent with the objectives of Regulations No. 269/2014 and 2022/1269, are no longer subjected to the sanctions.

Upon this amendment to the regulation, Arbitration Institute of the SCC, Camera Arbitrale Di Milano (CAM), German Arbitration Institute (DIS), Finland Arbitration Institute (FAI), Swiss Arbitration Center (ASA) and Vienna International Arbitral Centre (VIAC) issued a joint statement[16] that includes the following:

> "As neutral fora for dispute resolution engrained in a well-functioning, safe and efficient system for international trade, we welcome this clarification which safeguards the rule of law and ensures access to justice for parties in these particularly challenging times."

### (c) New center for arbitration in aviation disputes opens doors

The Hague Court of Arbitration for Aviation ("**HCAA**"), a new arbitration center that will serve as a dispute resolution forum for the aviation industry recently started operations in the Netherlands in July 2022. The HCAA has rules and services for both arbitration and mediation in the aviation industry and its cases will be administered by the Netherlands Arbitration Institute.

The HCAA aims to focus on contractual disputes arising out of the operation, trade, lease and financing of commercial and private aircrafts and has pledged to be independent and have "no allegiance" to any member of the aviation industry.

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13 The full text can be reached by clicking here.

14 The full text can be reached by clicking here.

15 The full text can be reached by clicking here.

16 Joint statement of SCC, VIAC, FAI, DIS, CAM and ASA on the EU's 7th Sanctions Package can be reached by clicking here.

### (d) New arbitration rules adopted by VanIAC

After twenty-two years, new arbitration rules were adopted by the Vancouver International Arbitration Centre ("**VanIAC**") in July 2022. The newly adopted arbitration rules most notably contain provisions on expedited procedures and emergency relief, which is in line with the modern trends in the rules of other arbitration centres.

The new expedited procedures can be used with the parties' consent and will automatically apply if neither a claim nor a counterclaim exceeds CAD 500,000. The expedited procedures allow for a final award to be made based solely on written submissions, i.e., without an oral hearing.

As another important point, unless the parties reach an agreement to the contrary, the newly adopted arbitration rules foresee a sole arbitrator. Furthermore, the arbitral tribunal is empowered to grant interim measures if the parties do not agree otherwise. Also, disclosure of third-party funding agreements is another requirement under the newly adopted arbitration rules. Lastly, they also encourage the use of virtual hearings. All of these amendments demonstrate that the main objective of the amendments was to attain the modern standards reflected in the rules of other prominent international arbitration centers.

### (e) Multi-jurisdictional ICCA report on the right to a physical hearing in international arbitration

ICCA published a general report on the culmination of their multi-jurisdictional survey concerning whether the relevant arbitration laws explicitly or otherwise allow for a right to a physical hearing, as well as the impact of the parties' agreement on the arbitration procedures and the validity or enforceability of an award rendered upon remote hearings.[17] Notably, while the majority of the reporters concluded that the right to a physical hearing is implicitly excluded in their jurisdictions, only five reporters took the view that such a right should be inferred from the *lex arbitri*, and six reporters believed that the issue remains unsettled.

17 You may access the general report here.

In contrast, in most surveyed jurisdictions' litigation rules, the right to a physical hearing is granted to parties or, in any case, hearings are physical as a matter of practice. Only in two of the surveyed jurisdictions — namely Ecuador and Tunisia — did the reporters conclude that the existence of such a right in litigation indicates its existence in arbitration.

In a few of the jurisdictions in which the reporters found a right to a physical hearing, the view was also that this right can be waived by the agreement of the parties.

Finally, the general report also provides an insight on the impact remote hearings might have on the enforceability of the award. The reporters generally agreed that for a procedural implication to constitute a ground for refusal, the enforcement of said award should be contrary to public policy, the threshold of which is very high.

## Conclusion

The updates in Summer 2022 of the arbitration world are generally related to the recent global developments such as the states' changing policies in the energy sector and Russia's invasion of Ukraine. These issues especially affect investment arbitration, accordingly the countries take action to revise the rules and treaties on investments. In that regard, the courts and arbitral tribunals also render decisions that may have an effect on the investment policies of the states. We think that these changes that have occurred in the last two quarters, especially regarding investment arbitration, will continue to be talked about in the next quarter and that the policies of the governments will change in this direction. We will see what will happen in the next issue of Esin Arbitration Quarterly.

In addition, the arbitral institutions continue to make a cooperation with and promote each other to be able to create an environment where the parties from all over the world can easily access an arbitral institution from another region.

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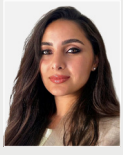

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# Arbitration Courses and Events Calendar

## September 2022

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| 28 | 29<br>Singapore Convention Week 2022<br>HYBRID - SINGAPORE | 30 | 31 | 1 | 2 | 3 |
| 4 | 5 | 6 | 7<br>GAR Live: Beijing<br>HYBRID - BEIJING, CHINA | 8<br>DebateFest Bratislava<br>BRATISLAVA, SLOVAKIA<br>Making the most of arbitration in Bosnia and Herzegovina<br>SARAJEVO, BOSNIA AND HERZEGOVINA<br>Q&A with Claudia Salomon and roundtable on Diversity in Arbitration<br>LISBON, PORTUGAL<br>One Year In: What's New in Swiss Arbitration?<br>ONLINE | 9 | 10 |
| 11<br>9th World Women Lawyers' Conference: Women in leadership<br>COPENHAGEN, DENMARK | 12 | 13<br>GAR Live: Atlanta<br>ATLANTA, USA | 14 | 15<br>Revised ICSID Arbitration Rules: Key Changes<br>LONDON, UK | 16<br>ASA below 40 Seminar (The IBA Rules on the Taking of Evidence – 'Best Practice Tools' revised)<br>BERN, SWITZERLAND<br>ASA Conferences and General Meeting September (Sanctions and Their Impact on International Arbitration)<br>BERN, SWITZERLAND | 17 |
| 18<br>ICCA Congress 2022<br>EDINBURGH, SCOTLAND (UK) | 19 | 20 | 21 | 22<br>GAR Live: Energy Disputes<br>EDINBURGH, SCOTLAND (UK) | 23 | 24 |
| 25 | 26 | 27 | 28<br>17th ICC New York Conference on International Arbitration<br>NEW YORK, USA | 29 | 30<br>GAR Live: New York<br>NEW YORK, USA | |

## October 2022

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
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| 2 | 3 | 4 | 5 | 6<br>SIArb Annual Lecture 2022: Determining Consent To Arbitration: Formalism, Realism Or Negativism?<br>ONLINE | 7<br>Conférence ASA/AFA sous le parrainage des Ordres des Avocats de Genève et de Paris<br>GENEVA, SWITZERLAND | 8 |
| 9 | 10 | 11 | 12 | 13 | 14<br>ICC FIDIC Conference on International Construction Contracts and Dispute Resolution<br>DUBROVNIK | 15 |
| 16 | 17 | 18 | 19<br>Tribunal Secretaries In International Arbitration<br>ONLINE | 20<br>Swiss Arbitration Conference in Italy with CAM<br>MILANO, ITALY | 21<br>Masterclass on Networking in Arbitration & drinks reception<br>LONDON, UK | 22 |
| 23 | 24<br>11th Hong Kong Arbitration Week<br>HONG KONG | 25 | 26 | 27<br>GAR Live: Hong Kong<br>HONG KONG<br>20th ICC Miami Conference on International Arbitration<br>MIAMI, USA | 28 | 29 |
| 30 | 31 | | | | | |

Organized by: SML GAR ICC YAAF WCPH & Dorr LLP IBA BIIL & CL & ICSID ASA ICC SIA ICC & FIDIC SIAC HKIAC ICCA

## November - December 2022

| Sunday | Monday | Tuesday | Wednesday | Thursday | Friday | Saturday |
|---|---|---|---|---|---|---|
| 30 | 31 | 1 | 2 | 3 | 4 | 5 |
| The International Bar Association (IBA) Annual Conference 2022<br>MIAMI USA | | | | | | |
| 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16<br>GAR Live: Dubai<br>DUBAI, UAE | 17<br>SIAC Academy<br>HYBRID - SINGAPORE | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | 26 |
| 27 | 28 | 29<br>The Revised 2020 IBA Rules of Evidence and its Commentary: Compliance with an Order to Produce an Adverse Inference<br>ONLINE | 30<br>Investor State Arbitration – A New Frontier?<br>HONG KONG | 1 | 2 | 3 |
| | | Online Mediation Training<br>ONLINE | | | | |
| 4 | 5 | 6<br>Online Mediation Training<br>ONLINE | 7 | 8 | 9 | 10 |

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