THE INTERNATIONAL ARBITRATION REVIEW

ELEVENTH EDITION

Editor
James H Carter

THE LAWREVIEWS

II THE YEAR IN REVIEW

Following a year of significant changes and developments in the field of international arbitration (particularly through the enactment of the ICAL), during the past year there were some Argentine court decisions that are worth mentioning.

i Arbitration developments in local courts

Judicial review of arbitral awards

On 18 July 2019, the Court of Appeals on Commercial Matters seated in the city of Buenos Aires rendered a decision in the *Pott* case,[46] in which it confirmed the restrictive criterion adopted by the referred court[47] – as well as by the Federal Supreme Court[48] – concerning the scope and extent of the judicial review of arbitral awards.

In this case, in which three defendants in an international arbitration proceeding challenged a partial award on jurisdiction, the Court of Appeals stated that annulment is limited to the specific grounds set forth under the applicable law and must not be treated as an appeal, in equivalent terms as those used by the Federal Supreme Court of Justice in two relevant precedents from 2017 and 2018.[49]

The decision of the Court of Appeals is particularly relevant because it ratifies the restrictive interpretation that must be made in assessing the admissibility of a request for annulment, and the fact that the courts cannot review the merits of a dispute.

Recognition and enforcement of foreign arbitral awards

On 24 September 2019, the Federal Supreme Court issued a relevant decision with respect to the recognition and enforcement of foreign arbitral awards in the *Deutsche Rückversicherung AG* case.[50]

After obtaining a favourable award against Caja Nacional de Ahorro y Seguro en liquidación (Caja Nacional) in an international arbitration proceeding seated in New York, Deutsche Rückversicherung AG requested a federal judge seated in Buenos Aires, Argentina, to recognise and enforce the award. Although the federal judge rejected the recognition and enforcement of the award considering that it was contrary to the Argentinian public order,

46 Court of Appeals on Commercial Matters, 18 July 2019, *Pott, Alfredo Carlos c/ Patagonia Financial Holdings LLC y otros s/ recurso de queja.*

47 See Court of Appeals on Commercial Matters, 11 July 2013, *Seven Group SA c. ADT Security Services SA s/ nulidad de laudo arbitral*; id., 12 April 2016, *Amarilla Automotores SA c. BMW Argentina SA s/ recurso de queja*; id., 12 April 2017, *Díaz, Rubén H c/Techint Cía. Técnica Internacional SACEI s/Recurso de Queja*; id., 19 December 2017, *Pan American Energy LLC (Sucursal Argentina) c. Metrogas SA (Chile)*; id., 20 March 2018, *Emaco SA c/Finisterre SA s/Organismos Externos.*

48 See Federal Supreme Court, 17 November 1994, *Color SA c/ Max Factor Sucursal Argentina s/laudo arbitral s/pedido de nulidad de laudo*; id., 24 August 2005, *Pestarino de Alfani, Mónica Amalia c/ Urbaser Argentina SA*; id., 5 September 2017, *Ricardo Agustín López, Marcelo Gustavo Daelli, Juan Manuel Flo Díaz, Jorge Zorzópulos el Gemabiotech SA si organismos externos*; id., 6 November 2018, *EN - Procuración del Tesoro Nacional c/(nulidad del laudo del 20-111-09) s/ recurso directo.*

49 The relevant precedents in which the Federal Supreme Court of Justice adopted the restrictive criterion in the judicial review of arbitral awards are the *Ricardo López y otros c/ Gemabiotech SA s/ organismos externos* case (decided on 5 September 2017) and the *EN – Procuración del Tesoro Nacional c/ (nulidad del laudo del 20–III–09) s/ recurso directo* case (decided on 6 November 2018).

50 Federal Supreme Court, 24 September 2019, *Deutsche Rückversicherung AG c/ Caja Nacional de Ahorro y Seguro en liquidac. y otros s/ proceso de ejecución.*

since it did not comply with the consolidation of public debts regime established by Laws. No. 23.892 and No. 25.565, the Federal Court of Appeals in Civil and Commercial Matters revoked that decision and granted the recognition and enforcement of the arbitral award.

To reach such decision, the Court of Appeals considered that even when the award was contrary to the consolidation of the public debts regime and, therefore, to the Argentine public order, this did not prevent the granting of the recognition and enforcement of an award subject to its adaptation to the referred consolidation regime, in accordance with Articles III and V of the NY Convention.

Caja Nacional (a state-owned company under liquidation proceedings) appealed such decision before the Federal Supreme Court of Justice alleging, among other circumstances, that the arbitral award could not be recognised or enforced since it was contrary to the Argentine public order. In a unanimous decision, the Supreme Court rejected Caja Nacional's appeal, stating that the existence of any of the grounds set forth in Article V of the NY Convention to refuse the recognition and enforcement of a foreign arbitral award was not proved. In addition, the Supreme Court expressed that in this kind of proceeding, judges cannot review the merits of a dispute or modify a foreign award, since they only have limited jurisdiction to decide about its recognition and enforcement.

Separability of the arbitration clause principle

On 30 August 2019, the Court of Appeals in Commercial Matters seated in Buenos Aires rendered a decision in the *Abre SRL* case,[51] reaffirming a relevant interpretation of the separability of the arbitration clause principle.

The claimant filed a lawsuit against Telecom Personal SA (Telecom) seeking damages for an alleged breach of a contract executed by the parties, stating that several contractual clauses – including the arbitration agreement – were null and void since they were imposed by Telecom, which had abused its dominant position. In its statement of defence, Telecom opposed the lack of jurisdiction of the judicial courts by invoking the arbitration clause contained in the agreement between the parties. In response to such defence, the claimant insisted that the arbitration clause was null and void, since it was imposed by Telecom in an adhesion contract, and disputes related to this kind of agreement were excluded from arbitration according to Article 1651 of the NCCC.[52]

In its decision, the Court of Appeals confirmed the lower court's finding (which had admitted the defence opposed by Telecom) and, thus, referred the parties to arbitration. The Court expressly based its decision on the separability of the arbitration clause principle, highlighting that, although the claimant questioned the validity of several contractual clauses, the Court had to evaluate only the validity of the arbitration agreement, since it was independent from the underlying contract between the parties. According to the Court of Appeals, the factual circumstances of the case showed that claimant knew of the existence of the arbitration agreement before the execution of the contract with Telecom, and therefore

51 Court of Appeals in Commercial Matters, 30 August 2019, *Abre SRL c/ Telecom Personal SA s/ ordinario.*

52 Article 1651 of the NCCC establishes a detailed list of non-arbitrable matters, some of them similar to those excluded from arbitration in comparative legislation. According to this disposition, the following matters cannot be submitted to arbitration: matters referring to the civil status or capacity of persons; family matters; disputes related to the rights of users and consumers; disputes related to adhesion contracts, whatever their purpose could be; and disputes related to labour relations.

- clarification of the state court's jurisdiction to grant measures in preparation for or in aid of arbitration.

Among the main changes is the express election of arbitration as a mechanism to resolve disputes involving direct and indirect public administration entities. Article 1, Paragraph 1 of the Arbitration Act, as amended in 2015, states that 'direct and indirect public administration may use arbitration to resolve conflicts regarding transferable public property rights'. It is worth mentioning that arbitration involving state companies or state-controlled companies must be at law, and not in equity.

In addition to that, the amendment to the Arbitration Act made it clear that any interested party to a contract containing an arbitration clause may resort to the local state court that would have jurisdiction to resolve a dispute had arbitration not been contracted, or to the specific court as elected by the parties in the underlying contract seeking provisional measures of protection and urgent reliefs prior to the constitution of an arbitral tribunal (Article 22-A of the Arbitration Act). In addition, 'once arbitration has been commenced, the arbitrators will have competence for maintaining, modifying or revoking the provisional or urgent measures granted by the Judicial Authority', as stated in Article 22-B of the Arbitration Act.

iv Arbitration legal framework

The Arbitration Act has drawn on several pieces of modern arbitration legislation, and its main sources are the UNCITRAL Model on International Commercial Arbitration and the Spanish Arbitration Law of 1988. The New York Convention and the Panama Convention were also instrumental in the process that culminated in the enactment of the Arbitration Act.

Unlike the UNCITRAL Model Law, however, the Arbitration Act does not establish any difference between international and domestic arbitration, having opted instead to regulate how a foreign arbitral decision is to be recognised and enforced in Brazil after due process of ratification (homologation) before the Superior Court of Justice.

Brazilian law only differs foreign from domestic awards based on the place where they were rendered (Article 34, Sole Paragraph); this territorial approach has been recognised in decisions rendered by the Superior Court of Justice. Therefore, only awards rendered outside the Brazilian territory are considered foreign, in accordance with the provisions of the New York Convention (Article 1).

Arbitration awards rendered in foreign countries need no longer be ratified on the merits by a court there, but must be submitted to the Superior Court of Justice to become enforceable in Brazil.

The recognition process prior to actual enforcement is required by the Constitution. The process of recognition of a foreign award is carried out before the Superior Court of Justice and aims at transforming said award into an enforceable decision within the Brazilian territory, that is, equivalent to any judgment rendered in Brazil.

A defendant cannot raise merits-based defences or any other defences related to the scope of a foreign award. Through the process for recognition of a foreign award, the Superior Court of Justice will solely analyse whether formal requirements under Brazilian law have been satisfied, and whether the foreign award is in accordance with national sovereignty, public policy and the dignity of human beings.

According to recent rulings of the Superior Court of Justice, this means that a foreign award will be recognised and enforced unless it is completely incompatible with the Brazilian

legal system. The mere violation of a dipositive or mandatory rule is not sufficient to deny recognition and enforcement to a foreign award. It is indispensable that the award be entirely irreconcilable with the founding laws of Brazil.

That said, recent statistics have demonstrated that in the vast majority of cases, recognition is granted by the Superior Court of Justice without major setbacks, and subsequent enforcement is allowed upon evidence that a local defendant has been duly served process and given the full opportunity to present his or her case before the arbitrators, thus conforming with public policy.

The Arbitration Act has kept the distinction between an arbitration clause (Article 4) and an arbitration commitment (Article 9). Nevertheless, arbitration commitments are now only required when the parties' contract contains no arbitration clause at all or when the arbitration clause is open or vague, or it fails to provide details on the applicable arbitral rules or on the appointment of arbitrators (pathological, empty or blank arbitration clauses), and the parties want to avoid court interference. Therefore, full arbitration clauses do not require an arbitration commitment to set aside the jurisdiction of the courts. That is the case, for example, when the parties agree on a self-executing procedure for setting in motion arbitral proceedings by referring to the rules of any administering organisation, or to any ad hoc rules (such as the UNCITRAL Rules).

When there is an empty arbitration clause and the parties are unable to agree on an arbitration commitment, Article 7 of the Arbitration Act provides a specific mechanism for mandatory compliance with (or specific performance of) that clause. According to such mechanism, the judiciary is to settle any issues that the parties have either not properly established in the arbitration clause or have failed to agree upon afterwards (Article 6). The judge's ruling will operate as a court-ordered arbitration commitment (Article 7, Paragraph 7), subjecting the parties to arbitration as originally intended. This mechanism is commonly called an Article 7 action, or an action for the enforcement of arbitration proceedings.

In view of the contractual nature of the arbitration agreement, in general any individual with full legal capacity or any legal entity represented by individuals with due powers may enter into an arbitration agreement and will be bound to it. Arbitration agreements must also satisfy the requirements for the validity of any contract under the Brazilian Civil Code, to wit:

a powers and capacity of the parties;
b valid consent;
c lawful and possible subject matter; and
d compliance with the legally prescribed form.

The arbitration clause must be in writing, and may be inserted in the contract itself or in a separate document that refers to it (Article 4, Paragraph 1). A special formality is required in adhesion contracts, where the arbitration clause is only enforceable if the adhering party initiates arbitration or expressly agrees to it, as long as the clause is written in a separate document or in bold type, and is duly signed (Article 4, Paragraph 2).

v Confidentiality

The confidentiality of arbitration proceedings under the Arbitration Act is possible, but not mandatory. Therefore, unless otherwise agreed by the parties, an arbitration will be in principle public. However, the rules of the vast majority of arbitration institutions provide that arbitration proceedings are confidential, which provision the contracting parties

to hear international trade disputes, which include cases related to international arbitration. The CICAP also has jurisdiction to hear appeals of decisions of the International Chamber of the Paris Commercial Court in the first instance. The procedure before this new Chamber is tailored to be adapted to international commerce and to improve the efficiency of proceedings. Thus, exhibits can be submitted without being translated into French and pleadings can be conducted in English. There is also the possibility to hear witnesses and experts in English. However, parties' submissions are still to be drafted in French. While cases related to set aside proceedings and enforcement proceedings were traditionally allocated to the Paris Court of Appeal Pole 1 Chamber 1, as of March 2018, it appears that new cases in these matters are systematically referred to the CICAP (Pole 5 Chamber 16). 2019 was marked by the first decisions rendered by the CICAP.

Judicial activity in France was greatly affected by the covid-19 pandemic in the first semester of 2020. Hearings and the issuances of judgments scheduled before 11 May 2020 before the Paris Court of Appeal in set aside proceedings and appeals on recognition and enforcement matters have been postponed. The affected cases are yet to be rescheduled, from September 2020 onwards. Consequently, the total number of decisions rendered in 2020 will drop significantly.

ii Arbitration developments in local courts

Jurisdiction and admissibility of claims

Jurisdiction is one of the five grounds under Article 1520 CCP to set aside an arbitral award in France.

One of the first decisions of the newly established CICAP concerned the ground of jurisdiction and more specifically the issue of the enforceability of arbitration agreements.[12] The dispute originated in a business relationship dating back to the 1980s between a German company and a French company for the distribution of seeds in France. The French company brought an action before the Paris Court of Appeal, and the defendant raised jurisdictional objections. The question before the Court was whether the arbitration clause stipulated in Article 87.1 of the Rules and Practices of the International Seed Federation, which were referenced in the confirmations of the company's orders, was binding on the French company. Since the orders' confirmations systematically referred to the Rules and Practices of the Federation, a custom that could not be ignored by the French company having been a professional in the field in question for over 30 years, the Court found that it was bound by the arbitration clause incorporated 'by reference'. The Court subsequently recalled that, under Articles 1448 and 1506 of the CCP, in the absence of a finding of the manifest invalidity or unenforceability of an arbitration clause, it is for the arbitrators alone to rule on their own jurisdiction. Here, the existence of a dispute as to the whether the clause required the parties to go to arbitration or simply gave them the faculty to do so did not constitute a ground of manifest nullity or inapplicability of the clause; thus, the Court had no jurisdiction to interpret the clause and concluded that the case fell within the jurisdiction of an arbitral tribunal.

12 CA Paris, Pole 5 – Ch. 16, 11 December 2018, No. 18/17723, *Société PH Petersen Saatzucht Lundsgaard Gmbh c. Sarl Alpha Semences.*

b a prohibition on expropriation without compensation;
c national treatment;
d most-favoured nation treatment;
e freedom of transfer of funds relating to a covered investment; and
f arbitration.

ii Judicial intervention in arbitral proceedings

Unlike other countries, Mexico has no specialised national tribunals whose function is to intervene in arbitral proceedings. Under the Commercial Code, when judicial intervention is required during an arbitral proceeding, the federal judge of first instance or the local judge where an arbitration is taking place shall be the competent judge regarding any action relating to the arbitration.

Mexico's judicial precedents generally make the country an arbitration-friendly jurisdiction, especially since the national courts have largely ruled in favour of the enforcement of national and international arbitral awards, with few exceptions.

National courts can only reject the recognition and enforcement of an arbitral award for the limited reasons established under Article 1462 of the Commercial Code, which echo the grounds found in Article V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Article 36 of the UNCITRAL Model Law.

Such limited reasons do not allow an award to be rejected on grounds relating to the merits of an award, as has been reinforced in judicial criteria issued by Mexican tribunals on various occasions.[3] In other words, Mexican national courts are expressly barred from denying the recognition and enforcement of an arbitral award by alleging that they do not agree with the legal reasoning used by arbitrators.

iii Commonly used arbitration institutions in Mexico

Arbitration agreements that contemplate Mexico as the seat of an arbitration with an international component often include a clause referring to the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution (ICDR) or the London Court of International Arbitration (LCIA). Notably, as per the recent reforms in the Mexican energy sector (2013), the exploration and production agreements entered into by Petróleos Mexicanos (PEMEX) have included arbitration clauses referring to UNCITRAL. Moreover, the *Valle Ruiz and others v. Spain* case initiated in 2018 was the first time Mexican investors have gone before the Permanent Court of Arbitration. Thus, there is a great variety of arbitration institutions available for Mexican nationals and foreigners when initiating an international arbitration.

3 Non-binding judicial criterion: 'Arbitral Award. Its homologation by ordinary judicial authority and its analysis, in *amparo*, does not allow the study of its meaning as to its substance', Ninth Period, Collegiate Circuit Tribunal, published in August 2002 in the Weekly Federal Judicial Gazette, Volume XVI, page 1,317; non-binding judicial criterion: 'Arbitral Award. When legally or materially it is not possible to enforce it, the incidental remedy to demand substitute performance proceeds', Ninth Period, Collegiate Circuit Tribunal, published in September 2008 in the Weekly Federal Judicial Gazette, Volume XXVIII, page 1,309; non-binding judicial criterion: 'Arbitral Award. Denial of its execution. analysis of the updating of the hypothesis indicated in paragraph c) of section I of article 1462 of the Commercial Code', Tenth Period, Collegiate Circuit Tribunal, published in December 2012 in the Weekly Federal Judicial Gazette, Book XV, Take 2, page 1,435.

agreement will be valid and a dispute capable of being submitted to arbitration if the requirements of any one of the following are met: the legal rules chosen by the parties to govern the arbitration agreement, the rules applicable to the merits of the dispute or Spanish law.[18]

II THE YEAR IN REVIEW

i The creation of a unified arbitration court in Madrid

The three main arbitral institutions in Madrid, the Court of Arbitration of the Madrid Chamber of Commerce (CAM), the Madrid-based Civil and Mercantile Court of Arbitration (CIMA) and the Court of Arbitration of the Spanish Chamber of Commerce (CEA), constituted on 16 October 2019 a unified international arbitration court in Madrid (the CIAM). The ICAM Court of Arbitration is expected to also join this new arbitration court in the future.

As of January 2020, the CIAM is competent to administer two types of international arbitration arising from new arbitration agreements (signed as of 1 January 2020): those arising from agreements in which the parties directly designate the CIAM as the administrative court; and those arising from agreements in which the parties agreed to submit to arbitration administered by the CAM, CIMA or CEA. Cases with arbitration agreements signed before 1 January 2020 may also be administered by the CIAM if the parties agree to this.

ii Arbitration developments in local courts

Arbitrability of disputes related to or arising out of agency agreements

The Court of Appeals of Santander ruled, in a decision dated 17 June 2019, that disputes related to or arising out of agency agreements may be subject to arbitration.

The appellant alleged that such disputes could not be heard by an arbitration tribunal, mainly because the rules contained in the Law on Agency Agreements[19] are of mandatory application; and the Law on Agency Agreements provides (in its second additional provision) that jurisdiction to hear actions arising from the agency contract shall lie with the judge of the domicile of the agent, with any agreement to the contrary being null and void.

The Court refused the appellant's arguments, finding that the mandatory regulation of a certain matter does not mean that the contracting parties cannot overcome by negotiation any possible disputes relating to that matter; nor does it mean that they are legally prohibited from ceasing to demand the rights recognised in that rule, or from waiving the claims already arising in their favour. The Court stressed that, in principle, all economic rights are available, and therefore waivable, unless such availability or waiver is contrary to the general interest or public order, or prejudicial to third parties. In addition, the Court reasoned that the second additional provision of the Agency Agreement Act could only refer to territorial submission to the courts and not to submission to arbitration.

Accordingly, where they are brought before the Spanish courts, claims regarding agency agreements must be filed before the court of the territory in which the agent has its domicile. This does not, however, preclude the parties from agreeing to refer to arbitration disputes that may arise out of these contracts.

18 See Article 9.6 of the SAA.

19 Act 12/1992.

to the parties and the arbitrators to determine how arbitrations should be conducted. While the FAA allows for some judicial review of arbitral awards, the grounds upon which an order to vacate the award may be issued are limited and exclusive and, in general, are designed to prevent fraud, excess of jurisdiction or procedural unfairness, rather than to second-guess the merits of a panel's decision.[4]

The FAA's largely hands-off approach reflects US federal policy strongly favouring arbitration as an alternative to sometimes congested, ponderous and inefficient courts.[5] It was this pro-arbitration policy that led the Supreme Court to interpret an arbitration clause expansively to include statutory antitrust claims in *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, allowing arbitrators to enforce federal antitrust law alongside judges.[6] In the international context, this pro-arbitration policy is further evidenced by the implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on International Commercial Arbitration (Panama Convention) in Chapters 2 and 3, respectively, of the FAA.[7]

State law, by comparison, plays a limited role in the regulation of arbitrations in the US. The FAA preempts state law to the extent that it is inconsistent with the FAA and applies in state courts to all transactions that 'affect interstate commerce' – a term that the Supreme Court has interpreted to include all international transactions and many domestic ones.[8] Thus, for international commercial disputes, state arbitration law is relevant only as a gap-filler where the FAA is silent.

iii Distinctions between international and domestic arbitration law in the US

The FAA enacts the New York and Panama Conventions. Thus, as a general matter, there are no significant distinctions at the federal level between international and domestic arbitration law.[9] The FAA gives federal courts an independent basis of jurisdiction over any action or proceeding that falls under the New York Convention, opening the federal courts to international parties who otherwise would have to demonstrate an independent basis for federal jurisdiction.[10] Some states have international arbitration statutes that purport to

4 An arbitral award may be vacated under the FAA where, for example, the parties or arbitrators behaved fraudulently or where the arbitrators exceeded their powers as defined in the arbitration agreement. For a complete list of grounds of *vacatur*, see the FAA at Section 10.

5 See *Moses H Cone Mem'l Hosp v. Mercury Constr Corp*, 460 US 1, 24 (1983) ('Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.').

6 See *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, 473 US 614 (1985).

7 See FAA, 9 USC Sections 201–208, 301–307.

8 See *Allied-Bruce Terminix Cos v. Dobson*, 513 US 265, 281 (1995) (holding that the FAA preempts state policy that would put arbitration agreements on an unequal footing).

9 Some authorities argue that, to the extent manifest disregard exists as a judge-made ground for *vacatur*, it applies only to domestic cases and not to international arbitrations conducted in accordance with the New York Convention. For a more detailed discussion of developments in the case law concerning manifest disregard, see passages on manifest disregard below.

10 The Supreme Court has ruled that the FAA does not provide an independent basis for subject matter jurisdiction over a motion to compel arbitration in potentially arbitrable disputes not governed by the New York Convention. See *Vaden v. Discover Bank*, 556 US 49 (2009).

govern only international arbitrations taking place in those states. As previously mentioned, however, these state statutes are preempted by the FAA to the extent that they are inconsistent with it and are thus of limited relevance to international arbitration.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

Non-signatories

This year, the Supreme Court decided *GE Energy v. Outokumpu*, a case concerning non-signatories to arbitration agreements. The plaintiff, Outokumpu, an operator of a steel plant, had entered into contracts, containing arbitration clauses, with Fives (Outokumpu–Fives contracts) to provide three cold rolling mills (required for the manufacturing and processing of certain steel products). Fives thereafter subcontracted with GE Energy to supply motors in a contract also containing an arbitration clause.

The motors supplied by GE Energy eventually failed. Outokumpu filed suit in federal court against GE Energy, the subcontractor, and GE Energy moved to dismiss and compel arbitration. The district court held that there was a written agreement to arbitrate, because GE Energy and Outokumpu were parties to the Outokumpu–Fives contracts by relying on the definitions of buyer and seller in those contracts, which explicitly included subcontractors.[11]

The Eleventh Circuit Court of Appeals reversed, holding that the New York Convention requires a written agreement between the parties, and GE Energy undeniably was not a signatory to the Outokumpu–Fives contracts.[12]

The Supreme Court reversed, holding that there is no conflict between the New York Convention and domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by non-signatories. The Court reasoned that the New York Convention was simply silent on the issue of non-signatories, and nothing in the Convention could be read to prohibit the application of equitable estoppel doctrines (including because the New York Convention does not state that an arbitration agreement could only be enforced if there is a written agreement). The Court further noted that because the Convention was drafted against the backdrop of domestic law, it would be unnatural to read the Convention to displace domestic doctrines in the absence of such language, particularly given that the Convention contemplates using domestic doctrines to fill gaps in the Convention.[13]

Significant lower court precedents have based a non-signatory's rights and duties in arbitration on doctrines such as estoppel or alter ego. The Ninth Circuit considered non-signatory issues in *Cerner Middle East Ltd v. iCapital, LLC*,[14] upholding an ICC award in which the arbitral tribunal based its jurisdiction over a non-signatory on an alter ego theory. The dispute related to a contract between Cerner and iCapital S/E that contained a provision referring disputes to ICC arbitration in France. Cerner filed a request for arbitration alleging that iCapital S/E had failed to make payments due under the agreement, and that iCapital S/E had been reorganised into iCapital, LLC without Cerner's consent, which Cerner alleged was

11 See *Outokumpu Stainless Steel USA LLC v. Converteam SAS*, civil action No. 16-00378-KD-C (S.D. Ala. 22 December 2016) and *Outokumpu Stainless Steel USA LLC v. Converteam SAS*, civil action No. 16-00378-KD-C, 2016 WL 7423406 (S.D. Ala. 21 November 2016).

12 *Outokumpu Stainless USA LLC v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018).

13 *GE Energy Power Conversion France SAS, Corp v. Outokumpu Stainless USA, LLC*, 590 U.S. __ (2020).

14 *Cerner Middle East v. iCapital, LLC*, 939 F.3d 1016 (9th Cir. 2019).

contrary to the terms of the relevant agreement. This dispute was settled, and the settlement agreement signed by Cerner and iCapital, LLC contained a provision referring disputes to ICC arbitration.

However, Cerner soon initiated a second request for arbitration against iCapital, LLC and Dhaheri (the alleged owner of iCapital, LLC), contending that iCapital had failed to make payments called for by the settlement agreement. The tribunal issued an award determining that it had jurisdiction over both iCapital, LLC and Dhaheri, reasoning that iCapital, LLC had agreed to arbitration by signing the settlement agreement, and that Dhaheri was bound to arbitrate because, among other things, Dhaheri was the alter ego of iCapital. Cerner sought to enforce this award and attach funds belonging to Dhaheri in Oregon. While that case was pending, the Court of Appeal in Paris issued a decision confirming the tribunal's decision that it had jurisdiction over Dhaheri. The Ninth Circuit analysed the Paris Court's decision and concluded that a court of competent jurisdiction had determined that Dhaheri was properly within the jurisdiction of the arbitral tribunal.

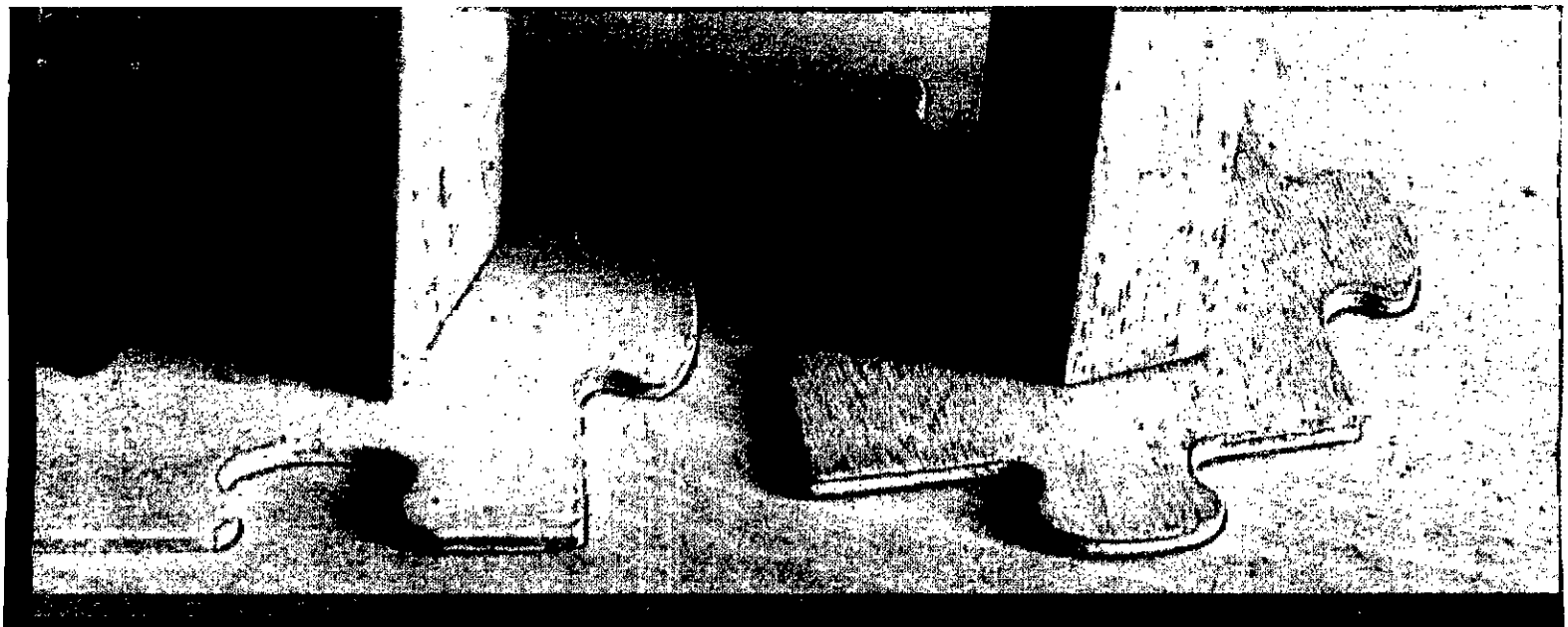
Class arbitration

The perennial question of who decides on the availability of class arbitration was at issue again this year. Previously, six circuit courts (the Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits) had held that the availability of class arbitration is a fundamental question of arbitrability that is presumptively for a court to decide. This year, the Fifth Circuit joined them in *20/20 Communications v. Crawford*,[15] concluding that class arbitrability is a gateway issue for the courts to decide. It noted that class arbitrations differ from individual arbitrations in fundamental ways because class actions increase the size and complexity of the proceeding; class actions raise important due process concerns; and the protection of privacy and confidentiality of parties may be threatened in class actions. The court examined whether the arbitration agreement clearly and unmistakeably agreed to permit the arbitrator to determine the issue and concluded that it did not do so because the arbitration agreement prohibited the arbitrator from consolidating claims into one proceeding, and there would be no reason for parties to prohibit class arbitration but then permit an arbitrator to decide the issue.

This year also saw a further development in the long-running saga of *Jock v. Sterling*. As reported in the 2018 edition of *The International Arbitration Review*, Jock is a putative class action gender discrimination lawsuit that has been pending since 2008. The case was referred to arbitration, in which an arbitrator determined that the agreement permitted class arbitration despite the lack of express language to that effect in the arbitration agreement that each employee signed. This ruling led to a series of decisions from a New York federal district court and the Second Circuit Court of Appeals regarding the role of the courts in reviewing an arbitrator's authority to determine whether the parties agreed to class arbitration.

The arbitrator certified a class of 70,000 members, including several class members who had not consented to join the class arbitration (absent class members). The district court rejected a motion to vacate the arbitrator's certification decision, but the Second Circuit reversed and remanded the case for further consideration of whether the arbitrator had exceeded her authority in certifying a class that contained absent class members.

15 *20/20 Commc'ns v. Crawford*, 930 F.3d 715 (5th Cir. 2019).



The International Comparative Legal Guide to:

International Arbitration 2019

16th Edition

A practical cross-border insight into international arbitration work

Published by Global Legal Group, in association with CDR, with contributions from:

Al Busaidy, Mansoor Jamal & Co
Barristers & Legal Consultants
Andersen Tax & Legal
Attorneys at law Ratiolex Ltd
Augusta Ventures
Baker McKenzie
BANI Arbitration Centre
BDO LLP
Boga & Associates
Bomchil
Boss & Young, Attorneys-at-Law
Cases & Lacambra
Concern Dialog Law Firm
Costa Tavares Paes Advogados
CRA – Coelho Ribeiro e Associados
Debarliev, Dameski & Kelesoska
Attorneys at Law
Diana Hamade Attorneys at Law in
association with EKP
DLA Piper
Dr. Colin Ong Legal Services
East African Law Chambers
Ellex Raidla Advokaadibüroo OÜ
Eric Silwamba, Jalasi and Linyama
Legal Practitioners
Georgiev, Todorov & Co.
GPKLegal
GrahamThompson
HFW
Hogan Lovells
Homburger
JAŠEK LEGAL
Jung & Sohn
Kachwaha and Partners
Kennedys
Linklaters
Luke and Associates
Lund Elmer Sandager LLP
Marxer & Partner Attorneys at Law
Matheson
Montezuma Abogados
Mori Hamada & Matsumoto
Norburg & Scherp
Paul, Weiss, Rifkind, Wharton & Garrison LLP
PIERRE THIELEN AVOCATS S.à r.l
Portolano Cavallo
PUNUKA Attorneys and Solicitors
Quevedo & Ponce
Russian Arbitration Center at the Russian
Institute of Modern Arbitration
Shearn Delamore & Co.
Stek
Stephenson Harwood
SyCip Salazar Hernandez & Gatmaitan
Taylor Wessing Partnerschaftsgesellschaft mbB
TripleOKLaw, LLP
Weber & Co.
Williams & Connolly LLP
Wilmer Cutler Pickering Hale and Dorr LLP
YKVN

CDR Commercial Dispute Resolution
global legal group

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Pursuant to §606 ACCP, an award must be made in writing and signed by the arbitrators. Unless otherwise agreed by the parties, the award must be signed by at least the majority of members of the arbitral tribunal, provided that the obstacle which prevented the missing signature on the award is noted. The award also has to state the date on which it has been rendered and the seat of the arbitral tribunal.

The award has to be reasoned, unless the parties have agreed otherwise. The reference to the parties' respective agreement will suffice only in the case of an award on agreed terms.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Pursuant to §610 ACCP, the arbitral tribunal may, upon request by either party, (i) correct in the award any errors in computation, any clerical, typographical or errors of similar nature, (ii) explain certain parts of the award, or (iii) render an amended award as to claims asserted in the arbitral proceedings but not disposed of in the award. Arithmetic and spelling mistakes in terms of (i) above may also be corrected by the arbitral tribunal on its own initiative.

The arbitral tribunal shall decide upon the correction within four weeks and upon an amendment within eight weeks. The other party shall be served with the request to clarify, correct or amend the arbitral award and shall be heard before the arbitral tribunal decides upon such request. The correction (or clarification or amendment) of the arbitral award constitutes a part of the (original) arbitral award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Pursuant to §611 ACCP, the arbitral award may be challenged only based on the following grounds:

1. invalid arbitration agreement;
2. violation of the right to be heard;
3. award is beyond the matter in dispute;
4. violation of Austrian arbitration law by the constitution or composition of the arbitral tribunal;
5. violation of the fundamental values of the Austrian legal system by the arbitral procedure (procedural *ordre public*);
6. fulfilment of requirements for an action for revision;
7. lack of arbitrability of the matter in dispute; and
8. violation of public policy (substantive *ordre public*).

The grounds stipulated in numbers 7 and 8 above also have to be observed *ex officio* at all stages of court proceedings.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may not waive the right to challenge the arbitral award or any challenge grounds in advance. The grounds stipulated in numbers 7 and 8 in question 10.1 above cannot be excluded by an agreement between the parties at all as they concern the public interest.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The challenge to set aside an arbitral award is the only recourse against an arbitral award. The list of grounds for the challenge is exhaustive. The parties may not expand the scope of appeal by Austrian national courts.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The action for setting aside an arbitral award must be filed with the Austrian Supreme Court as first and also last instance. The Supreme Court, however, has to apply the same procedural rules as a court of first instance when deciding upon an action for setting aside an award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Austria ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") on 2 May 1961 and the convention entered into force on 31 July 1961. No reservations are currently in place since the initial reservation under Article I(3) of the NYC was withdrawn on 25 February 1988. §614 (2) ACCP explicitly refers to the NYC.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Apart from the NYC, Austria has ratified the following multilateral conventions concerning arbitration: (i) the Geneva Protocol on Arbitration Clauses of 1923; (ii) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927; and (iii) the European Convention on International Commercial Arbitration of 1961. In addition, Austria has entered into several bilateral agreements concerning the recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In general, Austrian national courts have a positive approach towards the recognition and enforcement of domestic or foreign arbitral awards. In particular, they do not review the merits of the arbitral tribunal decision.

The recognition and enforcement of arbitral awards is governed by the Austrian Enforcement Act ("*Exekutionsordnung*"). However,

where applicable, the NYC overrides most of the domestic provisions. Austrian courts consistently apply the NYC with due consideration of its international character, recognising the need for a unified instrument of recognition and enforcement.

The first step to be taken by a party intending to enforce an award is to apply for declaration of enforcement ("*exequatur*"). The applicant must provide the court with the original or a duly certified copy of the award and the arbitration agreement. After the declaration of the enforcement has been granted, the party may apply for enforcement authorisation which will lead to the execution of enforcement.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award has the effect of a legally binding judgment between the parties. The arbitral award's finality and enforceability do not differ from those of binding judgments of national courts. As a result, any issues finally determined by an arbitral tribunal are to be considered *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Refusing enforcement of foreign arbitral awards violating public policy (*ordre public*) is primarily governed by the NYC. The standard for refusing enforcement of a foreign arbitral award refers to fundamental principles of the Austrian jurisdiction, e.g. the mandatory fundamental principles of the constitution or criminal law. Pursuant to several court decisions, this public policy standard is defined very narrowly.

In practice, objections to enforcement based on this ground are fairly common, but very rarely successful.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Austrian law does not provide for the confidentiality of arbitral proceedings sited in Austria. In practice, arbitration proceedings are mostly kept confidential. It is generally accepted that arbitrators have to keep the arbitration proceedings confidential. The arbitration rules agreed upon by the parties may contain provisions relating to confidentiality.

It is advisable to expressly agree on confidentiality as a part of the document when concluding an arbitration agreement.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Unless the parties have agreed otherwise, information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings. In the context of challenge proceedings to set aside an arbitral award, the public may be excluded from the oral hearings upon request of a party.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Austrian arbitration law does not determine limits on the types of remedies available. However, *ordre public* has to be considered. Austrian law does not know punitive damages. While there is no applicable case law, in literature it is argued that the concept of punitive damages could violate Austrian public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under Austrian law, interest is a matter of substantive law. Pursuant to the Austrian Civil Code, the interest rate is determined with a basic percentage of 4% *per annum* and, pursuant to the Austrian Commercial Code, in case of disputes between non-consumers with 9.2% *per annum* above the base interest rate as published by the Austrian National Bank.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Pursuant to §609(1) ACCP, the arbitral tribunal is legally requested to decide on the duty to reimburse the costs of the proceedings upon termination of the arbitration proceedings, unless otherwise agreed by the parties. The arbitral tribunal has wide discretion in taking into account all the circumstances of the case, in particular the outcome of the proceedings. The arbitral tribunal shall decide on reimbursement only upon request by either party if the proceedings are terminated by entering into a settlement.

There is no general practice. The reimbursement of fees and/or costs is decided in each case depending on the individual circumstances.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitral award is not subject to tax. The Austrian Stamp Duty Act provides for stamp duties on out-of-court settlements recorded in writing. If arbitration proceedings are terminated by entering into a settlement, stamp duty may be imposed pursuant to the Austrian Stamp Duty Act. The stamp duty amounts to 1% of the settlement amount.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Pursuant to Austrian substantive law, contingency fees violate the so-called forbidden *pactum de quota litis* and are considered invalid/void. The rules of professional conduct for lawyers expressly forbid contingency fees.

Professional funders are active in the Austrian market. However, for the time being they are mainly active in court litigation.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

If all parties are non-Belgian, they can, before or after the dispute arises, waive their right to initiate proceedings to set aside the award (Article 1718 CCP). This waiver must expressly refer to setting-aside proceedings; a general waiver to invoke "any legal recourse" will not be sufficient in that respect. In case of a valid waiver, the arbitral award will not be subject to any supervision by the Courts of First Instance under Article 1717 CCP. It will then only be subject to supervision by the courts of the country where enforcement of the award is sought.

This option is not open to Belgian parties (Belgian nationals or companies with a registered seat, principal establishment or branch in Belgium).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties cannot validly expand the scope of the judicial review of the arbitral award beyond the grounds for annulment listed in Article 1717 CCP. However, the parties are free to provide for an appeal against the arbitral award and, accordingly, to submit the award to a full review by an appellate arbitral tribunal (Article 1716 CCP).

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Setting-aside proceedings must be initiated within three months of the notification of the award to the parties (Article 1717.4 CCP).

The arbitral tribunal's decision that it has jurisdiction can only be contested in setting-aside proceedings against the final award (Article 1690.4 CCP).

If a request is made under Article 1715 CCP to correct errors in the award or to ask the arbitral tribunal for an interpretation of it, the deadline to initiate setting-aside proceedings starts to run as from the date of notification of the tribunal's decision on the requested corrections/interpretation.

Setting-aside proceedings must be brought before the Court of First Instance located at the seat of the Court of Appeal in whose jurisdiction the seat of arbitration is situated (Article 1680.6 CCP). A judgment on setting aside cannot be appealed before a court of appeal. It can only be subject to a recourse before the Belgian Supreme Court of Cassation and is limited to points of law and compliance with fundamental procedural rules (Article 1680.5 CCP).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Belgium has signed and ratified the New York Convention. The Convention is directly applicable in the Belgian legal order. Hence, there is no legislation specifically implementing the Convention. It entered into force in Belgium on 16 November 1975.

Belgium made a reservation of reciprocity which provides that Belgium will only apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Belgium is a party to the European Convention on International Commercial Arbitration of 1961. Belgium has also concluded bilateral treaties on the enforcement of arbitral awards with France, Germany, the Netherlands, Italy, Switzerland and Austria.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Belgian courts will generally enforce arbitral awards. The grounds for the refusal of enforcement are narrowly construed. This holds particularly true for the concept of "public policy" (see question 11.5 below). As a result, there are very few precedents in which courts have refused enforcement of an award on the grounds that it was contrary to public policy.

In order to enforce an arbitral award in Belgium, the enforcing party must first obtain a leave to enforce ("*exequatur*") from the Court of First Instance by means of an *ex parte* application (Articles 1719 and 1720.1 CCP). For awards rendered outside Belgium, the relevant Court of First Instance is the one located at the seat of the Court of Appeal in whose jurisdiction the party against whom enforcement is sought has its domicile, residence, registered office, place of business or branch. If the party against whom enforcement is sought does not have its domicile, residence, registered office, place of business or branch in Belgium, the application will have to be brought before the Court of First Instance located at the seat of the Court of Appeal in whose jurisdiction enforcement is sought (Article 1720.2 CCP).

The party seeking enforcement must provide the Court with an original or certified copy of the arbitral award (Article 1720.4 CCP). Only once the *exequatur* has been granted will the opposing party have the opportunity to challenge the decision before the Court in contradictory proceedings.

The limited and exhaustive grounds for refusing the recognition and enforcement of arbitral awards are mentioned in Article 1721.1 CCP. These grounds are similar to those of Article 36 of the UNCITRAL Model Law and Article V of the New York Convention.

If a multilateral or bilateral treaty exists between Belgium and the country where the award was rendered (e.g. the New York Convention or the European Convention on International Commercial Arbitration), the Belgian courts will apply the rules of that treaty (Article 1721.3 CCP). In the absence of any such treaty, the default rules stipulated in Articles 1719 to 1721 CCP will apply.

If one or more treaties apply, the party seeking recognition or enforcement can choose the treaty under whose rules it wants to submit its application (see Article VII.1 of the New York Convention). Belgian legal scholars consider that such choice must be made "*in toto*". This prevents the party seeking recognition or enforcement from "cherry picking", i.e. using a combination of the relevant Belgian and/or international rules.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Article 1713.9 CCP provides that the arbitral award shall have the same effect as a court decision as between the parties. Hence, the award has *res judicata* effect from the moment the parties are notified of the award and provided that the award can no longer be challenged before the arbitral tribunal.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The enforcement of an arbitral award will be refused if it is contrary to public policy (Article 1721.1.b.ii CCP). It is generally accepted that this relates to the concept of "Belgian international public policy", which is narrower than mere public policy.

A foreign award will be considered contrary to international public policy if it is contrary to a principle that is essential to the moral, political or economic order of Belgium. The violation of international public policy can follow from the substantive assessment of the case by the arbitral tribunal or from the infringement of certain procedural rules (e.g. due process requirements).

Given the narrow interpretation of the concept of "public policy", there are very few precedents in which the courts have refused the enforcement of an arbitral award on the basis that it was contrary to public policy. If the courts did so, it was often due to major procedural shortcomings.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Belgian arbitration law does not contain any explicit rules on the confidentiality of arbitral proceedings. However, arbitral proceedings will typically be conducted behind closed doors. The CEPANI rules of arbitration provide that arbitrations conducted under its rules are confidential, except if otherwise agreed (Article 25 of the CEPANI Rules).

If the parties want to guarantee that their arbitration remains confidential and if they did not choose institutional rules providing for it, it is advisable that they include a confidentiality clause in the arbitration agreement or in the terms of reference.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

There is no specific legal provision that prohibits parties from relying upon documents submitted in arbitral proceedings during subsequent court proceedings.

The parties can, however, explicitly agree to keep information and documents exchanged in the arbitration confidential. Yet, in that case, and to the extent necessary, the parties will nonetheless be entitled to refer to or rely on the information and documents disclosed in the arbitration if the follow-on court proceedings concern the arbitration or the arbitral award (e.g. in setting-aside or enforcement proceedings).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The arbitral tribunal must decide on the issues that are presented by the parties and can issue one or several awards in that respect (Article 1713.1 CCP).

With regard to damages, the arbitral tribunal will award damages according to the law applicable to the dispute. If Belgian law is applicable, compensatory damages and liquidated damages can be awarded. Punitive damages, however, cannot be awarded under Belgian law.

Furthermore, arbitral tribunals are allowed to issue anti-suit orders. In contrast to anti-suit injunctions issued by the regular courts, the validity of such orders is not affected by the Brussels I (Recast) Regulation (see CJEU 13 May 2015, Case C-536/13, *Gazprom OAO*). The enforceability of anti-suit orders must be assessed by reference to the New York Convention or, as the case may be, Article 1697 or 1721 CCP.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The arbitral tribunal will award interest according to the law applicable to the dispute.

Under Belgian law, unless otherwise agreed by the parties, amounts that are due but remain unpaid will generate interest (the legal interest rate for the year 2019 is 2%). Interest starts accruing from the date the defaulting party is formally given notice. Compounded interest is allowed, but is subject to the specific rules stipulated in Article 1154 of the Belgian Civil Code. In the event of late payments in commercial transactions, interest will in principle be due automatically at a more favourable rate provided for by the Law of 2 August 2002 on late payment in commercial transactions (8% for the first half of 2019).

Moreover, once the award is rendered, judicial interests (at the legal interest rate) can be due as from the notification of the award.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The parties can agree on the allocation of the costs and fees in the arbitration agreement or in the terms of reference. The rules of the arbitral institution can also provide for guidelines on the allocation of fees and costs between the parties.

Absent any specific rules in this respect, the arbitrators can freely determine in the award how the parties will bear the arbitration costs, including the parties' legal fees and all other expenses arising from the arbitral proceedings (Article 1713.6 CCP).

In general, arbitrators are inclined to decide that the unsuccessful party must pay the prevailing party's costs or part thereof, unless the behaviour of the prevailing party justified another solution.

currently being used in international arbitrations. Written witness statements are another import into German arbitration practice, and are increasingly being used.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Rules on privilege typically correspond to rules on discovery and disclosure. In the absence of those, German procedural law has only rudimentary rules on legal privilege. The client enjoys legal privilege for all communication with counsel; the scope of privilege afforded to communication with in-house counsel used to be unclear. Sec. 53 Code of Criminal Procedure (*Strafprozessordnung*, StPO) now states that, as a general rule, communication with an in-house counsel, even if admitted to the bar, is not subject to legal privilege.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Sec. 1054 ZPO defines the formal requirements: the award must be in writing, in the language of the proceedings, and it should be signed – but not on every page – by all arbitrators; however, the signatures of the majority may suffice. Unless the requirement is waived, the award must give reasons. It shall state the place of arbitration and shall be dated.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Pursuant to Sec. 1058 ZPO, an award may be corrected, either upon an application of a party, or in the tribunal's own initiative, with respect to computation errors, spelling mistakes and other mistakes of such nature. Sec. 1058 ZPO also applies to all other changes to an award, such as corrections, amendments addressing claims that were raised in the proceedings, but not disposed of in the award. Any such changes must observe the form requirements of Sec. 1054 ZPO (see question 9.1).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

The grounds for challenge set out in the ZPO are those that international readers will be familiar with from Article 34 of the Model Law and Article 5 of the New York Convention. Sec. 1059 ZPO allows a challenge to be based on (i) the lack of a valid arbitration agreement, (ii) the lack of proper notification of the appointment of an arbitrator, or of the arbitration proceedings, or a violation of the right to be heard, (iii) the arbitral tribunal exceeding the boundaries of the arbitration agreement, (iv) a violation of an agreement between the parties as to the constitution of the arbitral tribunal, and finally (v) a violation of German public policy or the fact that the matter in dispute was not arbitral under German law.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

As a matter of principle, the right to challenge an award cannot be waived in its entirety. The right to challenge on the grounds that public policy was violated or that the matter is not arbitral under German law can specifically not be waived. All other reasons on which a challenge can be based may be waived once the award has been rendered and the facts on which a challenge could be based are known.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties are not at liberty to extend the statutory grounds for setting aside an award.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The challenge of an award is heard by the Court of Appeal (*Oberlandesgericht*) for the district in which the place of arbitration is located. The challenge must be filed within three months from the receipt of the award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Germany is a party to the New York Convention; it is incorporated into the ZPO through Sec. 1061. Germany has not made any reservations. The original reciprocity requirement was given up in 1999.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Germany is a party to the 1923 Geneva Protocol on Arbitration Clauses, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the 1961 European Convention on International Commercial Arbitration, the 1965 Convention On the Settlement of Investment Disputes between States and Nationals of Other States and, finally, the 1994 Energy Charter Treaty.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The general opinion amongst observers appears to be that German courts take an arbitration-friendly approach, and this includes the recognition and enforcement of foreign arbitral awards. Generally, the grounds for setting aside or denying the recognition and enforcement of an award are construed narrowly. The Court of

Appeals (*Oberlandesgerichte*) which is competent to hear applications for the recognition and enforcement of foreign arbitral awards has constituted dedicated senates dealing with arbitration matters. A party seeking the recognition and enforcement of an award must file a respective application with the competent Court of Appeals. The decision of the Court of Appeal on the recognition and enforcement can be challenged, as a matter of right, before the Federal Supreme Court.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Yes, as an arbitral award is deemed to have the same effect *inter partes* as a final and binding judgment of a state court, pursuant to Sec. 1055 ZPO, it has *res judicata* effect.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

German courts typically take a narrow view of the concept of public policy (*ordre public*), and understand it to comprise only the fundamental principles of the German legal order. A mere violation of German mandatory legal provisions in itself does not constitute, *per se*, a violation of public policy, nor does the wrong interpretation of such provisions by the arbitral tribunal.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitration proceedings in Germany are not automatically confidential, for lack of a statutory provision to that effect. Parties must always agree explicitly on confidentiality, be it in the arbitration agreement, or be it by incorporating arbitration rules that provide for, as the DIS Rules do, confidentiality of the proceedings.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

The law is unclear on this issue. Some commentators argue that arbitral proceedings are to be treated as confidential even in the absence of an express agreement. However, there is no case law to that effect, and parties are advised to explicitly agree on confidentiality, if they want to avoid information disclosed in arbitral proceedings to be used outside these proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

From a German law perspective, the types of remedies are not a matter of the applicable arbitration law, but a matter for the applicable substantive law to determine. If the underlying governing law permits punitive damages, an arbitral tribunal would be free, in principle, to grant punitive damages in an arbitral award. However, there are certain limits: an award for punitive damages may not be capable of recognition and enforcement in Germany, as this type of remedy is deemed to be in violation of public policy (*ordre public*).

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under German law, interest is a matter for the substantive law to determine. If German substantive law applies, the BGB stipulates a default rate of interest. In commercial transactions, the rate would be nine percentage points above the base rate of the European Central Bank, and in other transactions, five percentage points above the base rate (Sec. 288 BGB). This provision applies to default interest. Sec. 291 BGB, which provides for interest during the period a claim is pending, does not apply in arbitral proceedings, but only in state court proceedings.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Sec. 1057 (1) ZPO grants arbitral tribunals the power to issue a decision on costs. The tribunal has wide discretion to allocate costs taking into account the circumstances of the case at hand, including, but not limited to, the degree to which a party succeeded in the proceedings. Tribunals typically follow the loser pays principle. Legal fees can be recovered in a time-spent basis. The recovery is not limited, unlike in state court proceedings, to fees calculated in accordance with the statutory legal fees under the Lawyers Remuneration Act (*Rechtsanwaltsvergütungsgesetz*, RVG).

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award does not *per se* trigger any taxes under German law. Whether payments made to a party under an arbitral award are taxable is exclusively a matter for the applicable tax law to decide.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

There are no restrictions on third-party funding under German law. Parties have access to a wide range of professional funders, both in litigation and arbitration. Lawyers may not be able to fund actions they are bringing themselves, as they would violate the prohibition against contingency fees and *quota litis*. Contingency fees are allowed only in very narrow circumstances and, essentially, a party would need to show that without a contingency fee arrangement it would not have access to justice. Since there is an active third-party funding market, this will be very hard to demonstrate.

The NAI Arbitration Rules provide a two-month term for the correction or completion of an award (articles 47 – 48 NAI Arbitration Rules).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties are entitled to challenge a (partial) final arbitral award through *(i)* setting aside, or *(ii)* revocation of the arbitral award (article 1064 DCCP). The arbitral award can also be challenged by an appeal, if the parties agreed so (article 1061a DCCP) and the respective agreement, *inter alia*, meets the requirements of articles 1020 – 1021 DCCP.

The grounds for setting aside are: *(a)* the absence of a valid arbitration agreement; *(b)* the arbitral tribunal being constituted in violation of the applicable rules; *(c)* the arbitral tribunal not complying with its mandate; *(d)* the award not being signed or not containing the reasoning for the decision; and *(e)* the content of the award or the manner in which it was constituted violates public policy (article 1065 DCCP).

Revocation (article 1068 DCCP) is a legal remedy to redress mispresentation by the parties, rather than errors of the arbitrators. The grounds for revocation are: *(i)* fraud; *(ii)* the forgery of documents; and *(iii)* withholding documents.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The Dutch Arbitration Act does not provide the possibility for parties to completely exclude the setting aside or revocation of an arbitral award.

It is, however, possible to limit the setting-aside proceedings to one instance and to exclude proceedings before the Supreme Court.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

In case parties have not provided for the option to submit an appeal against an arbitral award, it is not possible to commence such an action. Parties are allowed to provide for appeal in the arbitration agreement, or separately (article 1061b DCCP), and they are in principle free to determine the procedure of the arbitral appeal proceedings.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

If the parties made no specific arrangements thereon, an appeal has to be lodged *(i)* against final or partial final awards, or if it concerns an appeal against an interim award (except if it entails a decision rendered on the basis of article 1043b (1) DCCP), such an action can only be instituted simultaneously with appeal against the final or partial final award, and *(ii)* within three months after the award was sent to the parties.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The Netherlands is a party to the NYC and made the reservation of reciprocity in accordance with the NYC.

Dutch national enforcement law may be considered to be slightly more favourable than the NYC as it appears to set less stringent formal requirements for an arbitration agreement (as opposed to the agreement in writing required by the NYC). A party requesting enforcement (of an award rendered in another NYC contracting state) may consider to base its request primarily on national enforcement provisions and, alternatively, on the NYC.

The relevant provisions are included in articles 1062 – 1063 DCCP (in relation to awards rendered in Dutch arbitral proceedings) and articles 1075 – 1076 DCCP (in relation to awards rendered in foreign arbitral proceedings). See also question 11.3.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

The Netherlands is, among others, a party to the Belgian Execution Treaty of 1925 (*Stb.* 1929, 405).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Recognition and enforcement of a national arbitral award may only take place after the preliminary relief judge of the competent district court – at the request of one of the parties – grants leave to enforce it. The preliminary relief judge can only refuse to grant leave for enforcement if on the basis of a *prima facie* review it can be assumed that the arbitral award will be annulled on the grounds specified in article 1065 DCCP (provided that the annulment term did not lapse) or revoked on the grounds provided in article 1068 DCCP. The enforcement of a periodic penalty is refused if that measure was imposed in violation of article 1056 DCCP. Leave is, in principle, granted *ex parte*, although a party which expects that a request for enforcement will be made can informally request the preliminary relief judge to be heard before the leave for enforcement is granted.

Article 1075 DCCP provides that a 'foreign' arbitral award is enforceable if a recognition and enforcement treaty is in force between the Netherlands and the foreign state. A request for the recognition and enforcement of a foreign arbitral award has to be filed with the competent Court of Appeal. In these proceedings the opposite party can submit a defence and a hearing of parties is, in principle, held. Article 1076 DCCP contains (similar) rules for the recognition and enforcement of a foreign arbitral award rendered in a country in relation to which no recognition and enforcement treaty is in force.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

In principle, a final award has binding force as from the date on which it is rendered, provided that regular legal remedies can no longer be exercised (such as an appeal). This binding force entails that no new decisions can be made in relation to the same legal relationship between identical parties in other (court) proceedings.

However, these rules do not apply to decisions concerning provisional or interim relief (article 1059 (2) DCCP).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

The preliminary relief judge must refuse leave to enforce a(n) (national) arbitral award if the formation or the content of the award is *prima facie* contrary to public policy – which could, for example, be the case when the dispute is not 'arbitrable', if the principle of fair trial was violated or the reasoning for the decision is lacking. In relation to the enforcement of foreign arbitral awards, the Dutch national courts can apply the international public policy standard, which seems to be more narrow than the national public policy standard.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Confidentiality is considered to be an important principle of (unwritten) arbitration law. However, because confidentiality has not explicitly been provided for in the relevant statutory provisions, it is recommended that the parties explicitly make arrangements thereon. Proceedings before the national courts in connection with arbitration (such as enforcement, annulment and revocation) are, in principle, public.

The NAI Arbitration Rules explicitly provide that all directly or indirectly involved parties are bound to secrecy, unless and to the extent that disclosure is required by law or permitted by an agreement of the parties.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Generally, information can be referred to and/or relied upon in subsequent (court) proceedings; see also question 12.1 above.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Besides the exemption that an arbitral tribunal is not allowed to grant certain protective measures, there are, in principle, no limits on the types of remedies available in arbitration.

Article 1056 DCCP provides that articles 611a – 611h DCCP also apply to the arbitration procedure, which entails that – at the request of one of the parties – the arbitral tribunal can impose periodic penalties (*dwangsommen*).

13.2 What, if any, interest is available, and how is the rate of interest determined?

Parties are allowed to agree on a contractual interest rate. If they did not make specific arrangements thereon and Dutch (substantive) law is applicable, the legal interest rate for non-commercial transactions is currently two (2) per cent and the legal interest rate for commercial transactions is eight (8) per cent.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

The Dutch Arbitration Act does not provide for the recovery of fees or costs. The parties may, however, provide for the allocation of costs. If such an agreement is lacking, the arbitral tribunal may decide thereon. In practice, the arbitral tribunal will often rule that the losing party has to bear the costs of the arbitration.

Arbitrators are allowed to limit the costs allocation to the extent they deem reasonable, which often occurs in 'national arbitrations' where the prevailing party is generally only able to recover its legal fees to a limited extent. If a party's claim is partly awarded, then the costs are quite often split between the parties.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

If it concerns a national arbitration, VAT is obliged over the arbitrator's fees. In case a cost award is rendered, these fees (including VAT) are incorporated therein.

If it concerns an international arbitration (and parties are entrepreneurs established outside of the Netherlands), the arbitrators are not required to charge VAT and these taxes will not be included in the cost award.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Dutch law does not contain specific rules for the legal relationship between litigation funders, funded parties and their legal counsel. Third parties (such as litigation funders) are therefore, in principle, free to enter into arrangements. There are various professional funders active in the Dutch market, both in litigation and arbitration.

However, Dutch lawyers are restricted with regard to entering into fee arrangements. More in particular, they are allowed to use a fixed-fee or an hourly rate structure, which can be combined with a success fee. Dutch lawyers are, however, required to charge a reasonable minimum fee and they are not allowed to agree to a mere no-cure-no-pay fee arrangement, except for claims based on physical injuries.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

Ordinary appeals, where the parties in domestic arbitration proceedings have agreed on a right of appeal, take place in the Court of Appeal – article 59.1.e of the VAL – within 10 days of service of the arbitral award. Subsequently, and if the subject-matter of the appeal so permits, there may be a further appeal to the Supreme Court of Justice. Where constitutional law issues arise, another appeal to the Constitutional Court can also take place.

Proceedings to set aside an arbitral award, which are commenced on the grounds referred to in question 10.1, must be commenced in the Court of Appeal (article 59.1.g of the VAL) within 60 days of service of the award.

Where there is a right of appeal against the arbitral award and an appeal is lodged, the issue of whether or not the award is null and void can only be considered within the ambit of the appeal (article 46.1 of the VAL).

Proceedings to set aside arbitration awards and appeals against them are governed by the provisions of the Civil Procedure Code.

Where the award is set aside, the arbitration agreement is upheld and the parties may commence further arbitration proceedings.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Portugal ratified the New York Convention in 1994 by Assembly of Republic Resolution No. 37/94, of March 10, 1994, subject to the following provision: "*In accordance with the principle of reciprocity, Portugal will only apply the Convention when the arbitral awards are made in states, which are bound by the Convention.*"

Portuguese law regarding the recognition of foreign judgments (including foreign arbitration awards) is to be found in articles 1094 to 1102 of the Civil Procedure Code.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Portugal is a party to various bilateral conventions and agreements regarding these matters, particularly the International Centre for Settlement of Investment Disputes Convention (ICSID) and the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA).

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Arbitral awards are recognised and enforced and have the same binding effect and enforceability as a court judgment (article 42.7 of the VAL).

According to articles 47 and 59.4 of the VAL, arbitral awards are enforced by a court of first instance, in accordance with the Civil Procedure Code.

A pending action to set aside of an award is not grounds for a stay of the enforcement thereof, although the party seeking the enforcement may be required to provide adequate security if the enforcement proceedings reach the payment phase, before the pending action is decided finally.

If the time limit for the setting aside of an award has expired, the opposing party may raise the grounds therefor in its opposition to the enforcement of the award (article 48 of the VAL).

A foreign arbitral award must be recognised by the Court of Appeal pursuant to articles 55 to 58 of the VAL and the New York Convention before it can be enforced in Portugal.

Articles 55 to 58 of the VAL make express provision for the recognition of foreign arbitration awards.

Without prejudice to the provisions of the New York Convention, awards made in foreign arbitration proceedings are only effective in Portugal, whatever the nationality of the parties, when recognised by the competent Portuguese court, in accordance with the provisions of this chapter of this law (article 55 of the VAL).

The recognition and enforcement of foreign arbitration awards may only be refused in the following cases (article 56 of the VAL):

a) At the instance of the party against whom the award is raised, where that party proves to the competent court to which the application for recognition is made that:
   - One of the parties to the arbitration agreement lacked legal capacity, or the said agreement is invalid in accordance with the law to which the parties subjected it, or in accordance with the law of the country in which the award was made.
   - The party against which the sentence is raised was not given due notice of the appointment of an arbitrator or of the arbitration proceedings.
   - The award decides a dispute outside of the scope of the arbitration agreement or contains decisions that exceed the terms thereof.
   - The creation of the tribunal or the arbitration proceedings were not in accordance with the agreement between the parties or, in the absence of an arbitration agreement, with the law of the country in which the arbitration took place.
   - The award is not yet binding on the parties, or has been annulled, or stayed, by a court of the country in which, or pursuant to the law of which, the award was made.

b) If the court finds that:
   - The subject-matter of the dispute cannot be decided by arbitration, in accordance with Portuguese law.
   - The result of the recognition or enforcement of the award is manifestly incompatible with the international public policy of the Portuguese State.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Article 42.7 of the VAL provides that an arbitral award that has been served on the parties is deemed to be final and binding on the parties, provided it is no longer subject to appeal, or to amendment, pursuant to article 45 of the VAL, and has not annulled. Proceedings to challenge an award do not, *per se*, stay the binding nature of the arbitral award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

According to article 62 of the Peruvian Arbitration Act (D.L. 1071), the arbitral award can only be challenged through the annulment of the arbitral award. In that sense, the only grounds for annulment of the arbitral award are as follows: (a) the arbitration agreement is invalid or non-existent; (b) either party was not notified of the designation of the arbitrator or the arbitration proceedings or there was a violation of the right to be heard; (c) the composition of the arbitration tribunal or the arbitration proceedings violated the rules or the regulations that both parties have agreed upon; (d) the arbitration tribunal has manifestly exceeded its powers; (e) in case of national arbitration, the arbitration tribunal has solved a non-arbitrability legal dispute; (f) non-arbitrability of the legal dispute or, in case of international arbitration, the arbitral award is contrary to the international public policy doctrine; or (g) the legal dispute has been solved after the deadline agreed by both parties or the arbitration tribunal.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Unless the arbitration is an international one, it is not possible for both parties to agree to exclude any basis of challenge against an arbitral award.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The arbitral award is final and not subject to appeal; therefore, both parties cannot agree on additional grounds to expand the scope of appeal.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

In Peru's jurisdiction, the arbitral award cannot be appealed. However, it can be challenged under restricted conditions (see question 10.1).

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Peru ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1988 and has not entered any reservations. The relevant national legislation is the Peruvian Arbitration Act (D.L. 1071) and the Civil Procedure Code (RM N° 10-93 JUS); both contain a favourable regime towards the recognition and enforcement of international arbitral awards.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Apart from the New York Convention, Peru is also a party to the Inter-American Convention on International Commercial Arbitration (Panama Convention) from 1975, which was also ratified in 1988.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In domestic arbitration and according to the Peruvian Arbitration Act (D.L. 1071), at the request of a party and unless public force is not needed, arbitral tribunals are allowed to enforce their awards themselves as long as the parties have agreed to it or if it is established in the applicable set of rules. Moreover, the benefited party may also request the enforcement to the competent national courts, which, in practice, take a positive approach towards the enforcement of arbitral awards.

In the case of the recognition and enforcement of foreign arbitral awards, the Peruvian Arbitration Act (DL. 1071) sets forth that the interested party must file a petition for the recognition of the award to the Superior Court. Furthermore, after the award is partially or fully recognised, the competent First Instance Commercial Court will enforce it according to the provisions stated in article 68.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Article 59 of the Peruvian Arbitration Act (D.L. 1071) explicitly provides that an arbitral award is to be considered *res judicata*. The fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, in order to benefit from the *res judicata* effect, a party has to invoke that an arbitral award has already decided such disputes.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

According to Peruvian law, the enforcement of an arbitral award may be refused on the grounds of international public policy; for example, if there is a violation of due process.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Yes, certainly in the Peruvian jurisdiction, arbitral proceedings are confidential. There is no exception for this rule. The law that governs confidentiality is the Peruvian Arbitration Act (D.L. 1071).

into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable". Finally, as indicated, *see* questions 9.2 and 10.1 *supra*, the FAA does contain procedures to vacate, modify, or correct an award. Under Section 12 of the FAA, 9 U.S.C. § 12, a motion to vacate, modify or correct an arbitral award must be served on the opposing party within three months after the award was filed or delivered. The action must be brought in the district where the award was made. When the challenge to an award is made in federal district court, the moving party must establish that the court has both subject-matter jurisdiction over the dispute, (i.e. the claim exceeds $75,000 and the parties are citizens of different states, or the claim arises under federal law), and also has personal jurisdiction over the parties.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

The United States acceded to the New York Convention in 1970, and implemented its provisions in Chapter 2 of Title 9 of the U.S. Code, with two reservations. First, the United States recognises only awards made in another state that has ratified the Convention. Second, the United States applies the Convention only to matters recognised under domestic law as "commercial". Courts have construed these reservations narrowly. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

In 1990, the United States acceded to the Panama Convention and implemented its provisions in Chapter 3 of Title 9 of the U.S. Code.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The United States has a well-established policy in favour of arbitration, but an arbitration award is not self-executing and generally cannot be executed upon absent some action by a federal or state court.

At least as to domestic arbitration awards, and international arbitration awards rendered in the United States (non-domestic awards), the award must be "confirmed" before it can be enforced. The FAA, which governs confirmation in federal courts, requires the filing of a petition to confirm along with certain supporting documents (*e.g.*, a copy of the agreement and a copy of the award). 9 U.S.C. §§ 9, 13. A petition to confirm a domestic award "may" be filed "at any time within one year after the award is made". 9 U.S.C. § 9. Notice of the petition must be filed on the adverse party. *Id.* "[T]he burden of proof necessary to avoid confirmation of an arbitration award is very high, and the district court will enforce the award so long as there is a barely colorable justification for the outcome reached". *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 103-04 (2d Cir. 2013).

In *CBF Industria de Gusa/S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.), *cert. denied*, 138 S. Ct. 557 (2017), the Second Circuit held that, as to foreign arbitral awards rendered by tribunals seated *outside* the United States, there is no requirement to "confirm" the award in accordance with the procedures set forth in the FAA. Rather, the party wishing to enforce the award can bring a single action. The court explained that "confirmation", as used in the FAA sections enabling the New York Convention, "is the equivalent of 'recognition and enforcement' as used in the New York Convention for the purposes of foreign arbitral awards". *Id.* at 72.

Where parties to an arbitration agreement provide for New York State as the place of arbitration, they consent to the jurisdiction of New York federal and state courts to enforce the arbitration award. *See, e.g., D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006). Where foreign and out-of-state awards are concerned, and where the parties have not consented to New York jurisdiction, personal jurisdiction over the award debtor (or *in rem* or *quasi-in-rem* jurisdiction), as well as proper venue, must be established, and any *forum non conveniens* defence must be overcome. *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F. 3d 221 (2d Cir. 2014). The rules governing the enforcement of foreign arbitration *judgments* (as opposed to awards) are less clear. There is a split in the New York decisional law as to whether a party seeking to enforce a foreign judgment in New York courts must establish personal jurisdiction over the judgment debtor. *Compare Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S. 2d 285, 291 (4th Dep't 2001) (no personal jurisdiction requirement) *with Albaniabeg Ambient Shpk v. Engel S.p.A.*, 160 A.D. 3d 93 (1st Dep't 2018) (jurisdiction over the defendant or defendant's property required where the defendant is asserting substantive defences to the recognition of the foreign judgment).

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

A valid and final arbitral award has the same effect under the principles of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) as the judgment of a court. See *Pinnacle Env't Sys., Inc. v. Cannon Bldg. of Troy Assocs.*, 760 N.Y.S. 2d 253 (App. Div. 2003) (under New York law, arbitration awards, even those not judicially confirmed, have the same preclusive effect on subsequent litigation as final court judgments). In New York, the doctrine prevents relitigation of issues that were, or could have been, litigated in a prior action. In addition, under Section 13 of the FAA, 9 U.S.C. § 13, once a court judgment is entered confirming the award, that judgment has "the same force and effect" as any other court judgment entered in an action, which necessarily includes its preclusive effects.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Violation of public policy is not one of the FAA's listed grounds for vacating an award but the courts have nonetheless recognised a public policy exception. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987) (refusing to enforce an arbitration award on public policy grounds is a "specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy").

The Supreme Court's ruling in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), has resulted in some uncertainty in this area, but courts continue to apply the exception. *See, e.g., Immersion Corp. v. Sony Computer Entertainment*, 188 F. Supp. 3d 960, 969 (N.D. Cal. 2016) ("[t]he court is not aware of any authority in this circuit suggesting that the judicially-created public policy defense is unavailable after *Hall Street*"); *Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016) (physician-patient arbitration agreement adopting arbitration provisions of state Medical Malpractice Act but eliminating patient-friendly terms void as against public policy), *cert. denied*, 138 S. Ct. 132 (2017). In addition, Art. V (2) (b) of the New York Convention provides that recognition may be denied where it would be contrary to the public policy of the country where recognition and enforcement are sought.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

The FAA has no provision expressly addressing confidentiality, and there is no case law establishing a general duty of confidentiality in arbitrations. Parties can, however, provide for confidentiality in their arbitration agreement. Institutional arbitral rules also typically recognise arbitrators to issue orders protecting the confidentiality of materials. CPR Arbitration Rule 20, for example, requires the parties, the arbitrators and the CPR to treat proceedings, related document disclosure, and tribunal decisions as confidential, subject to limited exceptions. Many state laws recognise the authority of the tribunal to issue protective orders and confidentiality orders. Publicly held companies, however, may be required by U.S. securities law to disclose the arbitration proceeding if it is material to the company's financial condition or performance. And post-award judicial proceedings to confirm or vacate will likely make the award public.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information from an arbitral proceeding may be voluntarily disclosed by a party unless prohibited by the parties' agreement, institutional arbitral rules, or confidentiality orders issued by the arbitrators. However, upon making the appropriate showing, third parties may obtain arbitral records by subpoena. *Gotham Holdings, LP v. Health Grades, Inc.*, 580 F.3d 664, 665-66 (7th Cir. 2009); *but see Fireman's Fund Ins. v. Cunningham Lindsey Claims Mgmt., Inc.*, Nos. 03CV0531 (DLI) (MLO), 03CV1625 (MLO), 2005 WL 1522783, at *3-4 (E.D.N.Y. Jun. 28, 2005) (rejecting a third party's request for a copy of a confidential award based on a strong public interest in honouring the arbitrating parties' expectation of confidentiality and the absence of extraordinary circumstances).

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The FAA does not limit the remedies available in arbitration. Subject to the parties' agreement, arbitrators may award any type of relief, including damages, specific performance, injunctions, interest, costs and attorney's fees. On the other hand, an arbitration agreement that expressly eliminates certain relief will be enforced. *Henry Schein, Inc. v.* Archer and White Sales, Inc., 139 S.Ct. 524 (recognising that an agreement that eliminated injunctive relief as an available remedy was enforceable). The Supreme Court has held that under the FAA arbitrators may award punitive damages unless the parties' agreement expressly prohibits such relief. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 60-61 (1995). The AAA Arbitration Rules permit any relief deemed "just and equitable" and within the scope of the parties' agreement. Rule R-47(a).

13.2 What, if any, interest is available, and how is the rate of interest determined?

The FAA does not address interest. Whether interest is permitted, and at what rate, will depend on the agreement of the parties, the applicable institutional rules, and the substantive law governing the contract. AAA Arbitration Rule R-47(d)(i), for example, permits the inclusion of interest in the award "from such date as the arbitrator(s) may deem appropriate". *See Bergheim v. Sirona Dental Sys., Inc.*, 2017 WL 354182, at *4 (S.D.N.Y. Jan. 24, 2017). ("There is a presumption in favor of awarding pre-judgment interest running from the time of the award through the court's judgment confirming the award, at a rate prescribed by the state statutory law governing the contract.")

Federal law controls post-judgment interest in federal cases, including cases based on diversity of citizenship. Under federal law, once a court judgment confirming the award is entered, the award is merged into the judgment and the interest rate is governed by the federal post-judgment interest rate statute, 28 U.S.C. § 1961. *See Bayer Cropscience AG v. Dow Agrosciences LLC*, 680 Fed App'x 985, 1000 (Fed. Cir. 2017). ("[N]umerous circuits have concluded that once a federal court confirms an arbitral award, the award merges into the judgment and the federal rate for post-judgment interest presumptively applies"); *Tricon Energy Ltd. v. Vinmar Int'l Ltd.*, 718 F.3d 448, 456-60 (5th Cir. 2013) (same). The parties may contract around the statute if they clearly and expressly agree on a different post-judgment interest rate, and that rate is consistent with state usury laws. Or they can agree to submit the question of post-judgment interest to arbitration. *Tricon Energy*, 718 F.3d at 457.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Arbitrators may award fees and costs subject to the parties' agreement. The general practice in U.S. courts is for the parties to bear their own costs and fees. The parties are free, however, to agree on a different rule of cost allocation in their arbitration agreement, including by adopting institutional arbitral rules that give arbitrators the authority to grant such relief. AAA Arbitration Rule R-47(c), for example, provides that the arbitrator, in the final award, shall assess fees, expenses and compensation and that the award may include attorneys' fees if all parties have requested such an award or it is authorised by law or an arbitration agreement. CPR Arbitration Rule 19.1 provides that the tribunal shall fix the costs of arbitration in its award, including fees.