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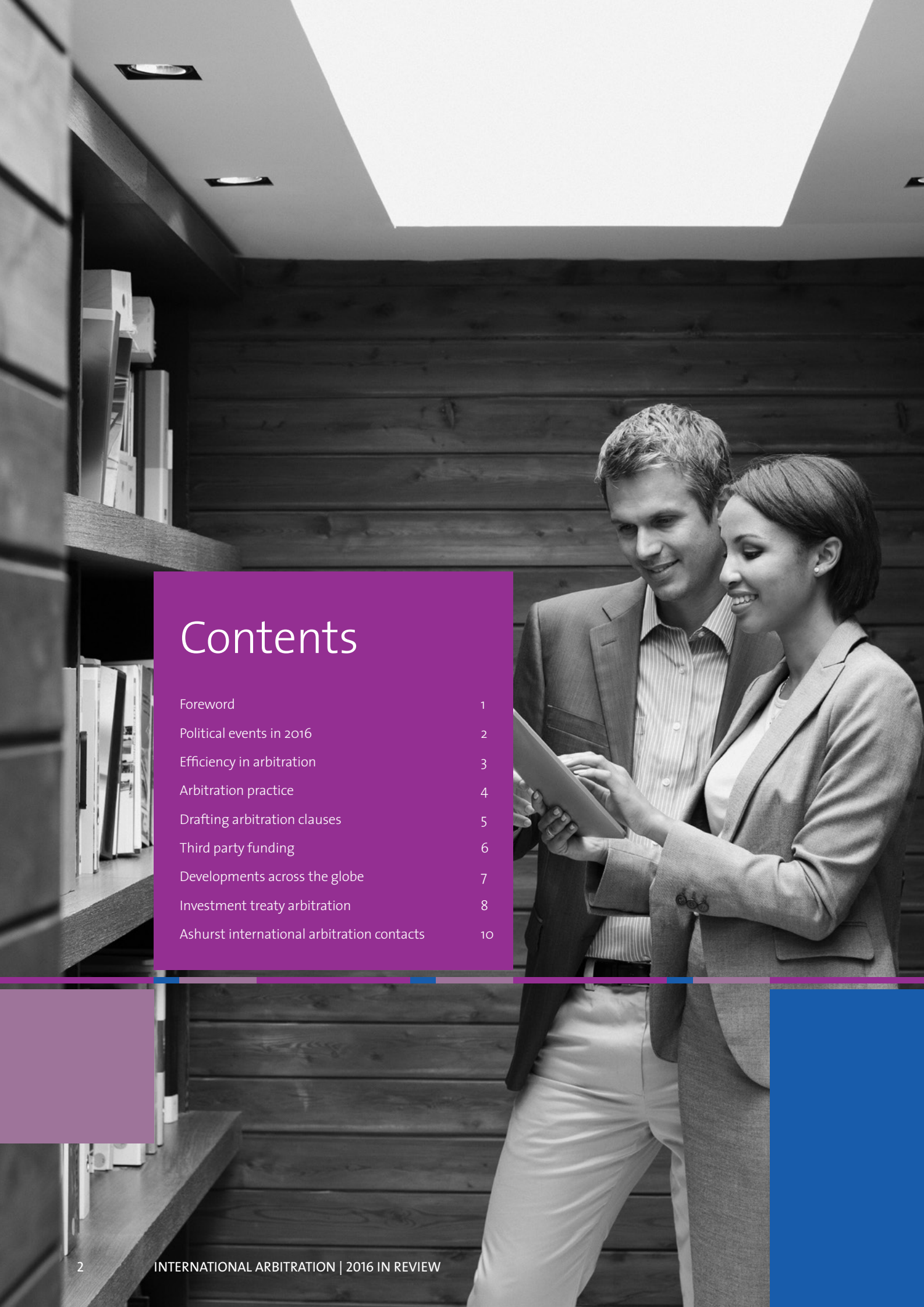
International Arbitration

2016 IN REVIEW



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Foreword

Welcome to the Ashurst review of international arbitration over the past 12 months. In this review we highlight the main developments in international arbitration during 2016 from across the globe.

These developments include:

- the impact of Brexit and the election of Donald Trump on international arbitration and investment treaty protection;
- new arbitral institutions, and new rules adopted by several existing arbitral institutions including the SIAC, the DIFC-LCIA, the SCC and the ICC;
- a drive to promote gender diversity in international arbitration;
- the increasing use of third party funding in international arbitration; and
- efforts to improve transparency in both international commercial arbitration and investment treaty arbitration.

2016 was another busy year for Ashurst's international arbitration team. We have again represented clients in major arbitrations throughout the world - in Stockholm, London, Paris and Singapore among other places - and have helped our clients achieve resolution in commercial disputes across many sectors, including oil and gas, renewables, construction, intellectual property and financial services. In addition, among many accolades, we were named Emerging Markets International Arbitration Firm of the Year by *The Asian Lawyer*; while *Who's Who Legal* identified Ronnie King and Ben Giaretta as among the world's leading arbitration practitioners, and Georgia Quick as one of the Future Leaders of Arbitration. Our team also grew in many parts of the globe, in particular in London, where we were joined by Matthew Saunders who was previously head of international arbitration at another global law firm.

We hope you find this review useful and interesting. If you have any questions about anything in it, please get in touch (our contact details are set out on page 10). We wish you a happy and prosperous 2017.

Ashurst International Arbitration Group
January 2017

Political events in 2016

2016 was a year of political change. The United Kingdom voted to leave the European Union. The United States elected Donald Trump as President. While much can be said about the broader implications of these events, it is their impact on international arbitration that we consider here.

BREXIT

After the vote in favour of leaving the European Union on 23 June 2016, the British Government has announced that it will trigger the two-year withdrawal process by the end of March 2017. One of the many areas of the UK legal framework that will be affected is the means by which UK court judgments are enforced in EU states and court judgments from EU states are enforced in the UK (the Brussels Regulation). No announcement has yet been made as to what will replace the Brussels Regulation; and it is not clear when such an announcement will be made.

While it is unlikely that no system will be put in place for the mutual recognition of court judgments between the EU countries and the UK in the future, the shape of that system is still to be established. There is also the risk that it may be held up by the wider political negotiations involved in the re-alignment of the relationship between the EU and the UK.

In the interim, commercial parties from the UK doing business in the EU, and parties from the EU doing business in the UK, may wish to consider specifying international arbitration in their contracts. The legislation under which the New York Convention was brought into force in the UK is unaffected by Brexit. This means that the method of enforcing arbitration awards in the UK and throughout the EU will remain unchanged.

Brexit may also impact investment treaty protection for foreign investors in the UK, and for UK companies doing business elsewhere. The EU has exclusive competence with regard to trade deals that can be entered into between EU states and non-EU states. This will no longer apply to the UK after it has left the EU, meaning that the UK can negotiate its own deals in the future.

US PRESIDENTIAL ELECTION

International trade agreements may be impacted by the election of Donald Trump. The Trans-Pacific Partnership (TPP) was signed by President Obama, although the accession of the US has not yet been ratified by the US Congress. President-elect Trump has said he will pursue withdrawal of the US from the TPP from the start of his presidency. Without the US, the TPP seems dead.

The same appears to be true of the Transatlantic Trade & Investment Partnership (TTIP): there seems little chance of the TTIP negotiations being pursued any further. There must also be doubts over the future of the North American Free Trade Area (NAFTA). That has been in force since January 1994, but during the election campaign Donald Trump described it as "the worst trade deal ever". We will have to see whether this survives, and what other investment treaties the US may now withdraw from or look to renegotiate.

2016 IN NUMBERS

739: *the number of known treaty-based investor-State arbitrations up to 2016, according to UNCTAD. 70 new claims were filed in 2016.*

Efficiency in arbitration

Arbitral institutions continued to look for ways to make their processes more efficient in 2016. There were new rules at the SIAC, the DIFC-LCIA, the SCC and the ICC, and changes at other institutions.

SUMMARY DISPOSAL

Both the SIAC and the SCC have taken the innovative step of introducing a new procedure for summary disposal of claims and defences. The new SIAC Rule 29 provides for summary disposal where claims and defences are "manifestly without legal merit" or "manifestly outside the jurisdiction of the tribunal". The SCC Rules, which came into force on 1 January 2017, allow tribunals to decide by way of summary procedure not only claims and defences as a whole, but also individual issues of facts or law, and without the high bar ("manifestly without legal merit") set by the SIAC Rules. Under both sets of rules the tribunal has to reach a decision within 60 days.

It remains to be seen how these provisions are used in practice. In the hands of robust tribunals, they could prove useful tools to secure cost-effective disposal of disputes.

EXPEDITED PROCEDURES

Institutions such as the HKIAC, the SCC and the SIAC already offer expedited procedures. 2016 saw other institutions join them, including ACICA, whose new Expedited Arbitration Rules entered into force on 1 January 2016.

In December 2016, the ICC announced that it will introduce new rules allowing for "fast track" arbitration, from 1 March 2017. These will automatically apply to all claims below US$2 million, and can be used in other cases if the parties agree. There will be a sole arbitrator and no Terms of Reference; and awards must be made within six months of the initial case management conference.

2016 IN NUMBERS

US$ 30,000: *the SIAC has issued a study showing that most cases under the 2013 SIAC Rules took less than a year and cost less than US$30,000. The HKIAC announced similar figures for cases under its rules.*

The SCAI has unveiled what it describes as "a one-of-a-kind customizable arbitration clause" which allows companies to agree in advance on super-expedited arbitration proceedings. This is a tool on its website that generates a standard arbitration clause based on various options that can be selected by the parties, including faster constitution of the tribunal and receipt of an award within six months.

REDUCING DELAYS TO AWARDS

In 2016, the ICC announced it will impose costs consequences on arbitrators for unjustified delays in submitting draft awards. If tribunals do not submit a draft award within three months of the close of proceedings (two months for sole arbitrators), and the ICC Court considers that the delay is unjustified, it may lower the arbitrators' fees by 5 to 20 per cent. Conversely, it may increase the arbitrators' fees where a tribunal has conducted the arbitration expeditiously. The ICC has also announced that, if there is a delay in its own scrutiny process for a reason not outside the ICC's control, it will reduce its own fees by up to 20 per cent.

Arbitration practice

Two trends stood out in 2016: a drive to improve gender diversity in international arbitration, and efforts by arbitral institutions to increase transparency.

GENDER DIVERSITY

The Equal Representation in Arbitration Pledge was launched at various events across the world during 2016. The Pledge has now attracted over 1,600 signatories (both individuals and organisations), who have committed to improve the profile and representation of women in arbitration, in particular by ensuring that, wherever possible:

- committees, governing bodies and conference panels in the field of arbitration include a fair representation of women;
- lists of potential arbitrators or tribunal chairs provided to or considered by parties, counsel, in-house counsel or otherwise include a fair representation of female candidates;
- states, arbitral institutions and national committees include a fair representation of female candidates on rosters and lists of potential arbitrator appointees, where maintained by them;
- where they have the power to do so, counsel, arbitrators, representatives of corporates, states and arbitral institutions appoint a fair representation of female arbitrators;
- gender statistics for appointments (split by party and other appointment) are collated and made publicly available; and
- senior and experienced arbitration practitioners support, mentor/sponsor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.

For more information, see www.arbitrationpledge.com.

TRANSPARENCY

It has become common practice for arbitral institutions to issue annual reports detailing the number of arbitrations that have been commenced under their rules. Several institutions went further during 2016, and provided information about costs and duration of arbitrations: the SIAC, the HKIAC and the SCC all did this. Several institutions, such as the SCAI and the LCIA, also produced data on gender statistics (this is one of the commitments in the Equal Representation in Arbitration Pledge).

The ICC also announced it would publish on its website the names of the arbitrators sitting in ICC cases, their nationality, and whether the appointment was made by the ICC Court or the parties.

2016 IN NUMBERS

6%: *out of the total number of arbitrators chosen by parties in SCC arbitration in 2016, only 6 per cent were female. 10 per cent of the arbitrators chosen by co-arbitrators were women, and 27 per cent of the arbitrators chosen by the SCC itself were women.*

Drafting arbitration clauses

Issues surrounding the drafting of arbitration clauses continued to generate satellite court litigation during 2016.

GOVERNING LAW OF THE ARBITRATION AGREEMENT

There was further litigation in 2016 about how to identify the law governing an arbitration clause in the absence of an express choice by the parties. This arises because an arbitration clause in a contract is considered to be separate from the contract in which it resides. In the Singapore case of *BCY -v- BCZ*, there was a dispute as to whether New York law (the law governing the contract as a whole) or Singapore law (the law of the seat of arbitration) applied to the arbitration clause.

The Singapore High Court decided that the governing law of the main contract is a strong indicator of the governing law of the arbitration agreement. The choice of a different jurisdiction as the seat from that of the governing law is not, in itself, sufficient to displace that starting presumption, and if parties intend otherwise, they should make specific provision to this effect. This case is a helpful reminder that parties should expressly identify the governing law of the arbitration clause.

OTHER SIGNIFICANT COURT JUDGMENTS

- The US Court of Appeals for the Second Circuit enforced a US$300 million award against Mexico's national oil company, Pemex, despite it being set aside in the seat of arbitration (Mexico).
- The European Court of Human Rights dismissed a claim that a waiver of the right to challenge an ICC award in the Swiss courts was incompatible with a right to a fair trial.
- The English High Court decided that an arbitrator should be removed because of apparent bias, after he had been appointed 25 times in the previous 3 years by one of the parties.

USING THE WORD "MAY" IN ARBITRATION CLAUSES

It is common for dispute resolution clauses to state that parties "may" refer disputes to arbitration in the event that negotiation or mediation fails. However, the use of "may" can be problematic. Is it sufficient to create a binding arbitration agreement or a right to compel arbitration? Can the parties still take their disputes to litigation?

These questions were raised before the English and Hong Kong courts in 2016. In *Anzen Limited and others (Appellants) -v- Hermes One Limited (Respondent) (British Virgin Islands)*, the Privy Council held that the words "may submit" in the disputes clause allowed either party to submit the dispute to arbitration if a dispute arose, but did not prevent either party from initially submitting the dispute to the competent courts instead. If court proceedings were commenced by Party A, the clause gave Party B the right to apply for a stay of those proceedings and compel Party A to arbitrate. But Party A would not be in breach of the arbitration clause by commencing court proceedings. As such, any costs incurred in seeking a stay of the court proceedings would not be recoverable against Party A.

In contrast, in Hong Kong in *The Incorporated Owners of Wing Fai Building, Shui Wo Street -v- Golden Rise (HK) Project Company Limited*, the Hong Kong District Court ruled that the word "may" should be given its literal meaning, with the result that the parties were not compelled to pursue arbitration and the litigation proceedings could continue. It distinguished *Anzen* on the basis that the arbitration clause in that case was "substantially different" from the clause in the present case.

To avoid this issue, model arbitration clauses usually say that disputes "shall" be referred to arbitration.

Third party funding

THIRD PARTY FUNDING IN HONG KONG AND SINGAPORE

Singapore

Singapore law currently prohibits third party funding on the grounds of illegality, and for being contrary to public policy. Third party funding is also classified as champerty and maintenance, which are common law torts in Singapore.

This will change after proposed legislative amendments were announced in 2016. The changes, which were enacted in January 2017, include abolishing the common law torts of champerty and maintenance, and providing that in certain prescribed categories of dispute resolution proceedings (including international arbitration), third party funding contracts are not illegal or contrary to public policy.

Hong Kong

Third party funding of litigation is not permitted in Hong Kong under the common law torts of champerty and maintenance. It is unclear, however, whether this also applies to arbitration seated in Hong Kong.

The Hong Kong Law Reform Commission published a report in 2016 recommending that the law should be amended to expressly allow third party funding in arbitration and associated proceedings. It recommended an initial three-year trial period, during which all third party funders would be required to comply with a code of practice. A Bill was issued by the Hong Kong Government on 30 December 2016, to give effect to the Commission's recommendations.

CIETAC's Hong Kong Arbitration Centre also unveiled draft guidelines on third party funding during 2016.

ESSAR –v– NORSCOT

This English High Court case concerning third party funding attracted considerable interest. In an award of costs, the arbitrator had ordered that Essar pay the third party funding fee incurred by Norscot of £1.94 million. The English High Court confirmed that the costs of third party funding are recoverable in principle under both the English Arbitration Act 1996 and the ICC Rules, because both give the arbitrator a broad discretion to award costs – not limited to legal costs, but extending to other reasonable costs.

The circumstances in which an arbitrator will award the costs of third party funding are not clear. The *Essar* case was, in many ways, the "perfect storm", with Essar employing all available means to exert financial and commercial pressure on Norscot. As a consequence, Norscot had no choice but to enter into a funding agreement, and in those circumstances it was appropriate to compel Essar to pay the resulting fee. Whether this power will be exercised in other situations is unclear.

2016 IN NUMBERS

US$1.38 billion: *the amount awarded to Canadian mining company Crystallex in an ICSID arbitration claim against Venezuela about a gold mining project. The claim was funded by a third party funder.*

Developments across the globe

AFRICA

- Angola announced it would accede to the New York Convention. It will become the 157th country to do so.
- The Lagos Chamber of Commerce International Arbitration Centre was launched in November, and the Nairobi Centre for International Arbitration was launched in December.
- A bill to amend the South African Arbitration Act was published. It proposes that international arbitrations in South Africa will be governed by the UNCITRAL Model Law (domestic arbitrations will still be governed by the old law).

ASIA PACIFIC

- In the South China Sea arbitration, the tribunal found that China had violated the Philippines' sovereign rights by interfering with Philippine fishing and petroleum exploration, constructing artificial islands, and failing to prevent Chinese fishermen from fishing in the area. China said that it would not accept or recognise the decision.
- The SIAC and the HKIAC published record statistics for 2015. Both have now established offices in Shanghai, and have been joined there by the ICC.
- The Mumbai Centre for International Arbitration (MCIA) was launched in October 2016. Earlier in the year, LCIA India closed.
- A new arbitration law was introduced in Myanmar, updating the old legislation; and the New Zealand Arbitration Act was revised.
- ACICA launched new arbitration and expedited arbitration rules, with provisions on joinder and consolidation, and counsel conduct.

EUROPE

- The Russian Federation made key changes to its arbitration legislation, including amendments to the procedure for the establishment of arbitral institutions, the arbitrability of corporate disputes, and the status of arbitrators.
- The Russian Arbitration Association also established nine new working groups, tasked with drafting arbitration rules, standard form contracts and commentaries relating to the new arbitration laws.
- The Bucharest International Arbitration Court was launched in November 2016.
- The Ministry of Justice in Sweden has been preparing a bill to amend the Swedish Arbitration Act.

MIDDLE EAST

- Changes to Article 257 of the Penal Code in the UAE introduced a punishment of imprisonment for arbitrators who fail to "maintain the requirements of integrity and impartiality" in their capacity as arbitrator. This has raised concerns about the potential for disgruntled parties to make unsubstantiated criminal complaints against arbitrators.
- Abu Dhabi Global Market enacted new arbitration regulations based on the UNCITRAL Model Law.
- The DIFC-LCIA Arbitration Centre updated its rules, with new provisions on emergency arbitrators and multi-party disputes, as well as sanctions against counsel for poor conduct.
- The Saudi Center for Commercial Arbitration opened, with arbitration rules based on the UNCITRAL Arbitration Rules.
- A London-seated ICC award was enforced in Saudi Arabia: this is the first-known enforcement of a foreign award since the new Saudi Arbitration Law was enacted in 2012.

THE AMERICAS

- The British Virgin Islands International Arbitration Centre opened in November 2016.
- The Mona International Centre for Arbitration and Mediation (MICAM) was launched in Jamaica in November. A bill has also been issued to replace the Jamaica Arbitration Act (dating from 1900, with amendments in 1969) with the UNCITRAL Model Law.
- The AAA formed a panel of arbitrators to hear disputes relating to aerospace, aviation and national security, as well as defence and cyber-disputes.
- The Court of Arbitration for Sport ruled that the International Olympic Committee breached natural justice when it decided that Russian athletes could not compete if they had been sanctioned for doping in the past.

2016 IN NUMBERS

28: *the number of cases heard by the Court of Arbitration for Sport during the Olympic Games and Paralympic Games in Rio de Janeiro, a record for the Games.*

Investment treaty arbitration

GROWTH AND CRITICISM

Investment treaty arbitration continues to grow, while at the same time attracting criticism.

Growth

- ICSID administered 247 cases in the year to 30 June 2016, the greatest number administered in a single year.
- Nauru became the 161st signatory state of the ICSID Convention.
- The SCC received 12 new investor-state cases in 2015, its highest number in a single year. There have been 85 investor-state cases at the SCC in the past 23 years.
- At the end of 2016, the SIAC issued its first Investment Arbitration Rules.
- The Comprehensive Economic Trade Agreement (CETA) was signed by Canada and the EU.

On the other hand

- President-elect Trump has indicated he will pull the US out of the TPP. The TTIP and NAFTA are also under threat (see page 2).
- Italy withdrew from the Energy Charter Treaty (ECT), with effect from 1 January 2016, citing the cost of membership as the reason for doing so. However, the ECT contains sunset provisions, so the ECT continues to apply to investments made before January 2016 and claims may be brought for a further period of 20 years.
- Poland has threatened to cancel its bilateral investment treaties with other member states of the European Union, with its Government suggesting that such treaties "drive up legal costs" and are used to bring pressure on Poland on economic issues.
- After a permanent investment court system was included in the EU-Vietnam Free Trade Agreement in 2015, a similar system was agreed by Canada and the EU as part of CETA. Disputes will be heard by tribunals composed of three members: one from each of the EU and Canada, and a third party national who will also act as chairperson. The tribunal members will be drawn from a pre-determined list agreed between the EU and Canada.
- A conference took place in December 2016, attended by the EU, Canada and more than 40 other countries, to discuss proposals for a permanent multilateral court to resolve investor-state disputes. The EU and Canada have also indicated that they intend to raise the topic at an informal ministerial meeting at the World Economic Forum annual meeting in Davos in January 2017.
- The European Commission has launched a public consultation on possible options for multilateral reform and the establishment of a permanent multilateral investment court.
- Five European states have proposed a single intra-EU multilateral investment agreement to replace nearly 200 bilateral investment treaties between member states, with disputes subject to arbitration under the auspices of the Permanent Court of Arbitration.

2016 IN NUMBERS

50: *the ICSID Convention entered into force on 14 October 1966, making 2016 its 50th anniversary.*

THE ENERGY CHARTER TREATY

Yukos

The Hague District Court set aside the US$50 billion ECT awards that had been made in favour of the former majority shareholders in the Yukos Oil Company in 2015. The court's judgment is being appealed in 2017.

This has impacted efforts to enforce the awards: in the US, a court in Washington DC stayed an application to enforce the awards until after the appeal has been heard. However, the enforcement process continues in France: a Paris court rejected Russia's request for the release of attachments made over assets in France, on the basis that, under French law, the setting aside of an award at the seat of arbitration has no impact on enforcement in France.

Claims relating to renewable energy subsidies

A tribunal found that Spain's reforms of subsidies in the renewable energy sector did not breach the investor's legitimate expectations under the fair and equitable treatment provisions of the ECT (*Charanne BV and Construction Investments SARL -v- The Kingdom of Spain*). However, there are currently over 20 ECT claims still pending against Spain, and most of them concern later legislative reforms which are more far-reaching than the ones challenged in *Charanne*. Claims arising out of renewable (mainly solar) energy subsidy reforms are also pending against other EU member states, including Italy and the Czech Republic.

TRANSPARENCY IN INVESTMENT ARBITRATION

Canada became the second country, following Mauritius, to ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (known as the Mauritius Convention on Transparency). The Convention was adopted by the UN General Assembly in December 2014. It aims to extend the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to all investment treaty arbitrations (subject to reservations and exclusions by each signatory state). The rules provide a procedural framework for making information on investor-state arbitrations public, and also provide for submissions from interested third parties. The Convention needs three ratifications to come into force.

OTHER INVESTMENT TREATY ARBITRATION NEWS

- Argentina settled a number of claims brought against it, including paying US$1.35 billion to settle the first mass claim in ICSID arbitration, to clear the way for it to return to the international capital markets.
- Calgary-based energy company TransCanada has commenced a US$15 billion NAFTA claim against the United States over the refusal to approve the expansion of an international oil pipeline.
- An UNCITRAL tribunal has been formed to hear the first investment treaty claim by a Ukrainian state entity arising from Russia's 2014 annexation of Crimea.
- An ICSID tribunal dismissed a US$1.3 billion claim that had been brought by Churchill Mining against Indonesia, after concluding that the licences underpinning its investment had probably been forged by a local business partner.
- An ICSID tribunal has ordered Zimbabwe to restore agricultural estates seized as part of President Robert Mugabe's "racially discriminatory" land reform programme, or pay US$196 million in compensation.

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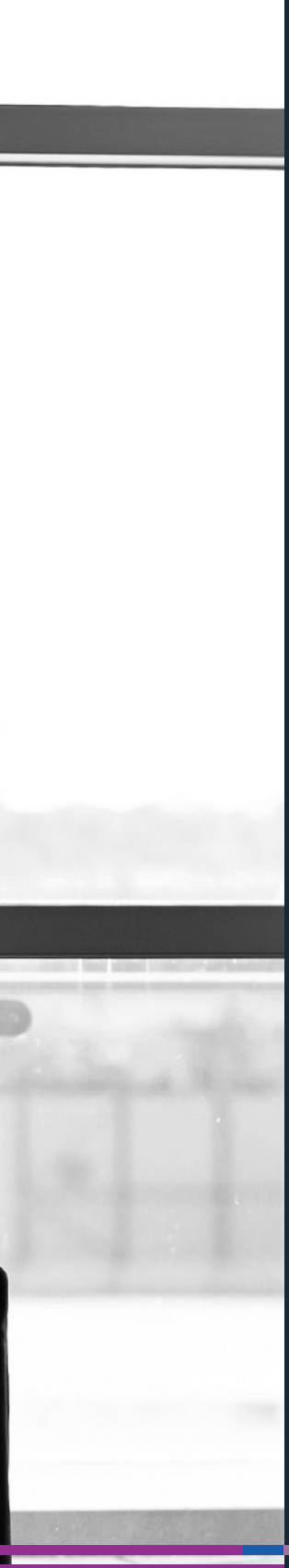

Ashurst arbitration publications

We have published a range of articles about international arbitration in 2016. These are available at www.ashurst.com/iahub.

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