Cuatrecasas
Arbitration Highlights

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1 Our jurisdictions

Our lawyers in Chile, Colombia, Mexico, Peru and Spain explain the most significant court decisions and developments that could affect our clients in the field of international arbitration

Chile – Juan Manuel Rey and Matías González Moris

The Santiago Court of Appeals rejects an appeal to set aside an award against Ecuador and confirms its restrictive nature

On October 18, 2024, the Santiago Court of Appeals dismissed the appeal to set aside an award in the case *Gente Oil Ecuador Pte Ltd. v. República del Ecuador* (Appeal No. 12506-2022).

In this case, ***Gente Oil Ecuador Pte. Ltd.*** (“***Gente Oil***”) initiated arbitration under the **UNCITRAL Rules** against the **Republic of Ecuador** (“Ecuador”), based on the claim that the latter had breached a hydrocarbons exploration and exploitation contract (the “Contract”).

In the international arbitration held in Santiago de Chile, *Gente Oil* argued that: (i) Ecuador had not received the crude oil extracted by Gente Oil from the agreed delivery point; (ii) Ecuador had obstructed the construction of a secondary pipeline to deliver the crude oil to a different delivery point; (iii) Ecuador had initiated tax liability proceedings through the State’s tax authority (*Contraloría General de la República*); and (iv) Ecuador had initiated criminal proceedings against Gente Oil’s representatives through the public ministry (*Contraloría General de la República*).

Gente Oil **requested the early termination of the Contract and compensation for the damages** allegedly caused by the termination and the tax and criminal liability proceedings.

Gente Oil claimed damages for **precontractual liability** due to the obstruction of the construction of the secondary pipeline and moral damages for the proceedings against *Gente Oil*’s representatives.

The arbitration court rejected the request for termination on the grounds that the alleged breaches were not essential, but ordered compensation for damages for the total amount of USD 10,710,768 (the "**Award**").

In the appeal Ecuador, argued that:

(i) the Award had dealt with disputes not foreseen in the arbitration agreement by making a ruling concerning the State’s precontractual liability and awarding moral damages for the actions of the *Contraloría* (a third party with respect to the contract); (ii) the arbitration proceedings had not been conducted according to the agreement between the parties by attributing responsibility to Ecuador for third parties’ actions; and (iii) the Award contravened Chilean public policy by awarding moral damages for acts committed by third parties, thus violating the principles of legality and due process.

The Santiago Court of Appeals rejected the appeal to set aside the Award on the following grounds:

First, contrary to the claimant’s assertion, it stated that the **arbitration court did not overreach its jurisdiction in ruling on the claim for precontractual liability and compensation for moral damages**, which were matters related to the Contract and the arbitration agreement.

Second, it declared that **the arbitration court decided on issues that were within the scope of the arbitration agreement** because (i) the Award only held Ecuador liable and not third parties unrelated to the arbitration agreement; (ii) the arbitrator based his jurisdiction on the Award; and (iii) the arguments of the appeal sought a revision of the merits of the case.

Third, the Court of Appeals concluded that **the Award was not contrary to Chilean public policy** because (i) the Award held Ecuador liable for acts that were attributable to the respondent under the Contract and, therefore, did not infringe the principle of legality; and (ii) the Award was reasoned and, therefore, did not violate the principle of due process.

This decision reaffirms Santiago de Chile’s position as a reliable seat of arbitration, with a judicial system capable of resolving appeals to set aside awards under Chile’s International Commercial Arbitration Law, even with the additional complexity of a state party being among the counterparties.

Colombia – Alberto Zuleta, Juan S. Lombana, Andrés Nossa and María J. Aguirre

The ICSID award of November 12, 2024, addressed the interpretation of fair and equitable treatment (FET) based on the legitimate expectations of the investor

The case between ***Telefónica, S.A. and the Republic of Colombia*** centered on the interpretation and application of concession contracts, which allowed *Telefónica* to provide mobile telephony services in Colombia. *Telefónica* argued that the Colombian government negatively affected its investments through the **Constitutional Court's Ruling C-555 of 2013**, which declared the application of certain legal provisions to concession contracts signed before the entry into force of Law 422 of 1998 and Law 1341 of 2009 unconstitutional. *Telefónica* contended that these measures amounted to violations of the **Agreement between the Government of the Republic of Colombia and the Kingdom of Spain for the Promotion and Reciprocal Protection of Investments** (the "**Treaty**").

The arbitration tribunal found that *Telefónica* had solid grounds to expect that the reversal of the assets would be limited to the radio frequency spectrum, based on Law 422 of 1998 and Law 1341 of 2009, which had been interpreted and applied consistently for over 15 years.

Ruling C-555 of 2013, which declared the application of these laws to concession contracts signed before their entry into force to be unconstitutional, was considered a **radical change in the regulatory framework that undermined the legitimate expectations of *Telefónica*.**

The tribunal also regarded the Colombian State's **lack of transparency and contradictory behavior** to be violations of the FET standard. Moreover, the tribunal examined the **proportionality** of the measures taken by Colombia, concluding that these violated the FET Standard. The requirement to revert all the assets, including those that were not amortized, was regarded to be excessive and **to undermine *Telefónica*'s legitimate expectations**.

Although *Telefónica* did not explicitly allege a denial of justice, the tribunal considered that Ruling C-555 of 2013 may have also violated the Treaty in this sense.

In conclusion, the tribunal found that Colombia **violated the FET standard under Article 2.3 of the Treaty** regarding investments made by *Telefónica* and ordered Colombia to pay it USD 379,804,275.55 for the damages incurred, plus interest.

This award contrasts with the award in the case of *América Móvil v. the Republic of Colombia of May 7, 2021*, which involved a similar situation. *Telefónica* alleged the violation of the FET standard, while *América Móvil* focused on expropriation and the existence of an acquired right. The two cases, although similar, had opposite outcomes: in the *America Móvil* case, the claim was not accepted, whereas in the *Telefónica* case, the Colombian state was found liable.

Spain – Borja Álvarez and Sara Moro

The Constitutional Court confirms an award and annuls Judgment 66/2021 of the Superior Court of Justice of Madrid (Cabify case) that had set aside a CAM award, thus clarifying its case law regarding the scope and limits of judicial review of arbitration awards in matters of material public policy

On December 2, 2024, the Spanish Constitutional Court (the "CC") (rapporteur: Ricardo Enríquez Sancho) upheld constitutional appeal no. 921/2022 filed by Auro New Transport Concept S.L. against the **judgment of the Superior Court of Justice of Madrid ("SCJM")** of October 22, 2021, as it considered that the appellant's right to effective judicial protection had been violated. In the ruling, challenged in an appeal for constitutional protection of fundamental rights, the SCJM had set aside a CAM award due to a violation of material public policy (article 41.1.f of the Arbitration Law ("AL")), as it had detected a manifest error by the arbitrators in their selection of the applicable law (*error iuris*). This, in the opinion of the majority of the SCJM, lead to the (unwarranted) failure to apply Article 101 of the Treaty of the Functioning of the European Union (TFEU), according to the interpretation of this provision made by the Court of Justice of the European Union (CJEU), which led them to apply only article 1 of the Spanish Competition Act.

The CC reiterated its own case law and confirmed that judicial review in proceedings to set aside awards involving an alleged violation of public policy must be limited. This power cannot be overreached and must not lead to a review of the merits of the case. To determine whether the SCJM ruling had violated article 24.1 of the Spanish Constitution, the CC examined whether the superior courts of justice can review arbitrators' application of Article 101 TFEU.

The CC concluded that, in effect, the superior courts of justice have the power to monitor the application of mandatory provisions as well as Article 101 of the TFEU, insofar as these contain rules of public policy (particularly, and as far as the present case is concerned, economically based rules of material public policy).

Despite reaching the above conclusion, in deciding this specific case, the CC considered that (i) the CAM arbitral award had taken into consideration the provisions of Article 101 of the TFEU; and (ii) the SCJM had overreached its jurisdiction by interfering in the debate on the merits of the case and proposing its own selection of applicable laws. Finally, it is noteworthy that the CC clarified that the Spanish legal system does not allow courts in the ordinary jurisdiction to raise a "reasoned discrepancy" against the case law of the CC, thereby omitting to apply it.

On this basis, the CC upheld the appeal for the constitutional protection of fundamental rights and ordered the proceedings to be rolled back to the point before the SCJM rendered its judgment to allow for a ruling to be issued according to the doctrine of the SCC and thus to ensure that the violated fundamental right is respected (article 24 of the Spanish Constitution).

Mexico – René Irra, Elisa Legorreta and Iván Esquivel

Federal Court clarifies the scope of interim measures issued in support of arbitration proceedings

In certain arbitrations held in Mexico, some parties have decided to apply to the Mexican courts for interim measures in support of arbitration proceedings. The aim is to **suspend** the performance of a contract, either partially or in full.

In a ruling dated March 23, 2022 (see Gaceta del Semanario Judicial de la Federación. Book 24, April 2023, Volume III, page 2587), a panel of a Circuit Court in Mexico City (interpreting the *lex arbitri*, which is of national scope) unequivocally stated that an interim measure could not have the effect of suspending the performance of a contract.

This precedent originated from a natural gas supply contract. One party sought pre-arbitration interim measures to suspend the effects of certain clauses in the contract, arguing that the other party's interpretation was incorrect, and was causing economic losses.

A federal judge denied the suspension of the contractual clauses requested, arguing that interim measures are conservative in nature and should not alter the existing legal situation. However, he granted certain interim measures to maintain the *status quo* and prevent future harm.

That party then appealed the decision to a Circuit Court panel, which has the authority to set precedent and arrive at a final ruling in the case.

The Federal Court pointed out that the suspension of contractual clauses that have yet to be declared void is at odds with the nature of interim measures since it would entail introducing a right that alters the existing legal situation. Thus, interim measures are conservative in nature and are intended to maintain the situation that currently exists, without establishing new rights or altering the pre-existing legal situation.

The Court acknowledged that two fundamental requirements must be met to grant an interim measure: (i) a *prima facie* case on the merits (*fumus boni iuris*), and (ii) a risk of irreparable harm in the event of delay (*periculum in mora*). Although Mexican judges have full discretion to adopt provisional interim measures in support of arbitration to adapt the proceedings to the specific needs of each case, the principles of rationality, consistency, and proportionality must always be respected.

Consequently, an interim measure seeking to restrict contractual rights agreed between the parties does not point to a *prima facie* case on the merits, since for one to exist, the clauses in question must have been voided.

Peru – Domingo Rivarola, Laia Valdespino and Elody Malpartida

The Second Commercial Court of Lima develops the content of international public policy and the principles governing it in the context of the recognition of ICC partial awards, rejecting an ancillary claim seeking enforcement through recognition proceedings

Through Decision No. 10, dated April 29, 2024 (Case No. 415-2023), the Second Commercial Court of Lima **recognized the validity and legal enforceability in Peru of a foreign partial award** (along with the accompanying partial additional award and addendum), issued in Miami under the administration of the ICC. Two points merit particular attention.

First, the Second Commercial Court examined the content of international public policy. The Peruvian Arbitration Law provides that the recognition of an arbitral award may be denied if it violates international public policy. Public policy is an indeterminate legal concept that varies over time and by place; it refers to the fundamental principles underpinning a particular legal system. To determine whether an award contravenes international public policy, the Second Commercial Court applied three principles of interpretation: **exceptionality, narrow interpretation, and obviousness**.

The principle of **exceptionality** establishes that the ground for denying the recognition of an arbitral award due to violation of public policy should be applied only in very exceptional circumstances. It is based on the need to **respect arbitration awards' *res judicata*** and **limit judicial intervention** in international arbitration.

The principle of **narrow interpretation** aims to prevent the undue expansion of the concept of public policy, which could undermine the purpose of international arbitration. Given that principles of public policy are highly abstract, they must be interpreted narrowly to avoid the inappropriate expansion of their scope by the courts. This principle is crucial to uphold the integrity of international arbitration and to prevent parties from using public policy grounds as a means to evade their contractual obligations.

The principle of **obviousness** establishes that an arbitral award's violation of public policy must be evident and clear, requiring no exhaustive analysis. **The illegality must be so readily apparent to an adjudicator that it becomes evident even from a superficial analysis.**

In this regard, these principles seek to ensure that the grounds for denial based on public policy are used only in extraordinary situations, and that the review of the award is minimal; avoiding an exhaustive review of the merits of the arbitral decision. In the specific case, the court concluded that the arbitral awards did not contravene international public policy and decided to recognize them.

Second, the Commercial Court denied the ancillary request to enforce the partial awards. As an ancillary claim, the petitioner requested that the Commercial Court send official notices to the public registries with the aim of obtaining the registration of the partial awards. The Second Commercial Court rejected the ancillary petition by arguing that **enforcement measures are subsequent to the recognition of the award**. To this end, it preserved the petitioner's right to use the appropriate channel.

Manifesto on the Use of Spanish in International Arbitration – Elia Raboso

On November 8, 2024, Spain's Ministry of Foreign Affairs, European Union and Cooperation, the Spanish and Ibero-American Arbitration Club ("CEIA"), and the Madrid International Arbitration Center – Ibero-American Arbitration Center ("CIAM") signed a *Manifesto on the Use of Spanish in International Arbitration*

The initiative aims to promote the use of Spanish in international arbitration.

Spanish is currently the second most widely spoken mother tongue in the world and the fourth most spoken language in terms of total number of speakers, with Spanish speakers potentially totaling more than 600 million—7.5% of the world's population.

Although approximately 20% of the parties to commercial and investment arbitration are Ibero-American, less than 10% of these proceedings are conducted in Spanish.

Lawyers have a fundamental duty of loyalty towards their clients and to ensure the choice of a dispute resolution system and a procedure language that best suits the parties' needs and offers due process guarantees.

They are therefore in a privileged position to promote Spanish as the language of arbitration in proceedings involving Ibero-American parties. By promoting Spanish as the language in arbitration proceedings, not only will effective representation of clients be guaranteed, but it will also contribute to the effectiveness of international arbitration as a method of dispute resolution.

The CEIA provides a form to be filled out if you wish to sign the *Manifesto on the Use of Spanish in International Arbitration*, which can be accessed through the CEIA website.

2 Key cases for our practice

Beyond our own jurisdictions, our team of lawyers highlights the foreign and international judicial decisions with the greatest impact on our international arbitration practice

General Court of the European Union – José Ángel Rueda García

The appeal against the Decision preventing payment of the *Micula v. Romania* award is denied

In its judgment of October 2, 2024, the General Court of the European Union ("**EGC**") denied the appeal filed by the Micula investors against the European Commission's Decision of March 30, 2015, which declared that the payment to the investors of compensation in an arbitral award issued against Romania constituted state aid that was incompatible with the EU internal market.

The award was issued in December 2013 by an ICSID arbitral tribunal set up under the Sweden-Romania bilateral investment treaty signed in 2002. The tribunal stated that Romania's removal of aid given for the development of certain areas of the country—justified by its need to join to the EU in 2007—constituted in any event a violation of the Fair and Equitable Treatment standard set out in the treaty. The Decision blocked the payment of the award and the investors appealed. Although the EGC initially ruled in their favor by vacating the Decision in a ruling dated June 18, 2019, on January 25, 2022, the Court of Justice ruled to set aside the 2019 ruling, thus returning the case to the EGC.

Focusing on arbitration, in the judgment in question the EGC followed the precedent set by the Court of Justice of the European Union (CJEU) in 2022, and indicated that State aid was granted to the investors with the award in 2013. Since at that date both Sweden and Romania were EU members, it understood that the obligation under Article 351 of the Treaty on the Functioning of the European Union (TFEU) to respect the rights of third States arising prior to Romania's accession to the EU does not apply in this case. The EGC added that the treaty was superseded by EU law in relations between Sweden and Romania from 2007, that the award has no legal effects and that it cannot be enforced. The EGC also rejected the argument that the obligation to enforce the award provided for in Article 54 of the ICSID Convention does not create rights in favor of third States that must be respected under Article 351.

France – Santiago Rojas Molina

The Paris *Cour d'Appel* overturns an exequatur order against Libya due to violation of the adversarial principle

On October 1, 2024, the Paris *Cour d'Appel* overturned an exequatur request issued on March 6, 2017, which had declared an arbitral award issued in Tunisia in 2014 to be enforceable in France, in the context of an international arbitration between the Tunisian company *Siba Plast* and the Libyan National Transitional Council (NTC).

The conflict stemmed from *Siba Plast*'s claim concerning the nonpayment of debts arising from five commercial contracts involving the construction of prisons, the training of the Libyan police and other services. The contracts, which had initially been entered into by an Italian company and subsequently assigned to *Siba Plast*, contained an arbitration agreement whereby disputes would be resolved through *ad hoc* arbitration based in Tunisia. On the basis of that agreement, *Siba Plast* commenced arbitral proceedings against the NTC, which was declared in default and sentenced *in absentia*. Subsequently, *Siba Plast* obtained an exequatur for the award in France and began enforcement proceedings. Libya, which claimed that it only became aware of the arbitral proceedings when its bank accounts were attached, subsequently appealed the exequatur order and requested a stay of execution.

In its analysis, the *Cour d'Appel* found that insufficient evidence had been provided to demonstrate that Libya had been duly notified of the proceedings, of the hearings, and of the arguments and evidence submitted by *Siba Plast*. Although the notices had been served to the email addresses specified in the contracts for any "*related correspondence*", the court held that this notice was invalid for the purposes of the arbitration agreement, given that the latter was independent and distinct from the principal contracts. It also noted that the Tunisian arbitration statute did not provide for the possibility of making electronic notices within the framework of arbitration proceedings.

Accordingly, the court concluded that Libya had not been given an adequate opportunity to defend itself, which violated the adversarial principle during the arbitration proceedings. Consequently, it overturned the exequatur and ordered *Siba Plast* to pay the State of Libya EUR 140,000 and to cover the costs of the proceedings.

France – Santiago Rojas Molina

The Paris *Cour d'Appel* rejects the intervention of assignees of arbitration awards in enforcement proceedings against India

On September 10, 2024, the Paris *Cour d'Appel* overturned a previous order that had allowed the intervention of three US companies in the enforcement proceedings of two arbitral awards against the Republic of India.

The origin of the dispute dates back to the 2011 rescission of a contract concerning the allocation of the electromagnetic spectrum and the provision of telecommunications services between *Devas Multimedia Private Limited* ("*Devas*") and *Antrix Corporation Ltd*, an Indian public company. This rescission led to arbitration proceedings held before the Permanent Court of Arbitration in The Hague, under the India-Mauritius Bilateral Investment Treaty of 1998, resulting in two arbitral awards in favor of *Devas*'s shareholders, who obtained their exequatur in France on May 25, 2021. Subsequently, on December 24, 2021, *Devas*'s shareholders signed assignment agreements with three US companies linked to *Devas* to transfer their rights under the awards.

On February 13, 2024, the *Conseiller de la mise en état of the Cour d'Appel* admitted the voluntary intervention of the three companies in the proceedings to enforce the awards, a decision that was appealed by India.

In its decision of September 10, the *Cour d'Appel* focused on the contractual nature of arbitration and the autonomy of the rules governing international arbitration. The court found that the intervention of the US companies was inadmissible because they were not the original parties to the arbitration, nor had they been subrogated to the rights of the original parties through the assignment agreement. The court highlighted that the French Code of Civil Procedure does not permit the voluntary intervention of third parties who are not parties to the arbitration, either in the annulment proceedings or in the exequatur proceedings, unless there is an express agreement between the parties. The court therefore rejected the argument that the US companies had a legitimate interest in the enforcement proceedings and declared their interventions inadmissible, ordering them to pay India EUR 80,000 and to bear the costs of the proceedings.

USA – Borja Álvarez

The D.C. Circuit Court of Appeals affirms the lack of jurisdictional immunity for the Kingdom of Spain in enforcing awards issued under the Energy Charter Treaty

On August 16, 2024, the D.C. Circuit Court of Appeals issued its judgment in the joined cases of *NextEr*a, *9REN* and *Blasket* concerning the enforcement of awards issued under the Energy Charter Treaty ("ECT") against the Kingdom of Spain. The Court's decision addresses two main issues: jurisdictional immunity and anti-suit injunctions.

First, regarding jurisdictional immunity, the Court of Appeals confirmed that US courts have jurisdiction to hear actions to enforce ECT arbitration awards against Spain under the arbitration exception of the Foreign Sovereign Immunities Act ("FSIA"). The issues raised before the Court arose from two ICSID awards (*NextEra* and *9REN*) and an UNCITRAL award issued by an arbitration court based in Switzerland (*Blasket*, *PV Investors* case). The Court found that the existence of an arbitration agreement, an arbitral award, and a treaty potentially governing the enforcement of the award, constitute a sufficient basis for conferring jurisdiction to the national court as regards the enforcement measures. The Court relied on the precedents set in *Chevron v. Ecuador* (D.C. Cir. 2015) and *Stileks v. Moldova* (D.C. Cir. 2021), that establish the finding that the existence of such "*jurisdictional facts*" is enough to invoke the FSIA's arbitration exception.

Although Spain upheld that no valid arbitration agreement existed in this case under EU law, the Court of Appeals concluded that this argument raised a question regarding the merits of the case, and not a jurisdictional objection that may be raised under the FSIA.

Second, regarding anti-suit injunctions, the Court overturned the defensive anti-anti-suit injunctions ordered by the district court, preventing Spain from raising, in turn, anti-suit injunctions—prohibitory in nature—before the courts of the Netherlands and Luxembourg. This was to prevent any award creditors from seeking their enforcement in other jurisdictions. The Court considered that these injunctions violated the principle of international comity and that the district court had failed to identify domestic interests of sufficient size and intensity to justify the injunctions. The Court highlighted that concerns regarding comity are particularly important when the injunctions are directed against a foreign sovereign State.

Finally, on December 2, 2024, the Court of Appeals dismissed Spain's request to reconsider this decision through a rehearing en banc by the Court of Appeals. Therefore, the only option open to Spain—as debtor of the awards to be enforced—would be a writ of certiorari before the US Supreme Court.

United Kingdom – Santiago Rojas Molina

The Court of Appeals of England and Wales confirms that Contracting States cannot rely on their sovereign immunity to oppose the registration of ICSID awards against them

On October 22, 2024, the Court of Appeals of England and Wales jointly resolved the appeals submitted by the Kingdom of Spain and the Republic of Zimbabwe against decisions enabling registration in the UK of separate ICSID awards against them, alleging that such registration was precluded by their sovereign immunity. Both States invoked the provisions of the UK's State Immunity Act of 1978 (the "1978 SIA") to support their claims. The 1978 SIA establishes the sovereign immunity of foreign States from the jurisdiction of British courts, except for the exceptions provided in the Act.

In its decision, the Court relied on the regulatory framework of the 1978 SIA to determine whether, under the 1965 Washington Convention established by the ICSID (the "ICSID Convention") and the UK's 1966 Arbitration (International Investment Disputes) Act (the "1966 Arbitration Act"), it was permissible for States to invoke sovereign immunity to oppose the registration of ICSID awards against them.

In its analysis, the Court focused on the interpretation of articles 53 and 54 of the ICSID Convention, that oblige Contracting States to recognize and enforce ICSID awards as if they were final judgments of their own courts. The Court concluded that, in acceding to the ICSID Convention, Contracting States had submitted to the jurisdiction of the courts of other Contracting States in relation to the recognition and enforcement of ICSID awards. Contrary to the position of Spain and Zimbabwe, the Court held that article 54 of the ICSID Convention contained a "*prior submission in writing*" to the jurisdiction of foreign courts: one of the exceptions to sovereign immunity established in the 1978 SIA.

Therefore, the Court found that article 54 of the ICSID Convention contained an agreement between the Contracting States—including Spain and Zimbabwe—in which they waived their sovereign immunity and submitted to the jurisdiction of the courts of other Contracting States, including those of the UK.

In this sense, the Court rejected the argument that submission to the jurisdiction must be explicit and specific for each dispute. The interpretation of the ordinary meaning of the ICSID Convention and the 1966 Arbitration Act, together with international practice and settled case law from other jurisdictions (including Australia, France, Malaysia, New Zealand, and the USA) supported the conclusion that the waiver of sovereign immunity and submission to the jurisdiction of the national courts under article 54 of the ICSID Convention were sufficiently clear and binding.

In conclusion, the Court ruled that neither Spain nor Zimbabwe could rely on their sovereign immunity to oppose the registration of the ICSID awards against them. This decision reinforces the obligation of the Contracting States of the ICSID Convention to comply with the arbitral awards and facilitate their recognition and enforcement, thereby promoting legal security and confidence in the foreign investment arbitration system.

Paraguay – Fernanda Montes y Mateo Verdías

Court of Appeal of Asunción annuls Arbitral Award on grounds of "Public Policy," which differs from the concept of "International Public Policy"

On December 8, 2023, the final award was rendered in case CPA No. 2020-14, followed by a supplementary award on February 2, 2024. The awards were made in the framework of the arbitration proceedings initiated by *Mota-Engil*, in which a claim was made to the Republic of Paraguay for compensation for the damages caused by the State due to the breach of a contract for the construction of the metrobus system in the city of Asunción. In its award, the arbitration court, set up under the UNCITRAL Rules, ordered the Republic of Paraguay to pay over USD 16,000,000.

Subsequently, on October 22, 2024, the Court of Appeals of Asunción (third chamber of the civil and commercial jurisdiction) issued a judgment whereby it partially annulled the arbitral award of December 8, 2023, and fully annulled the supplementary arbitral award of February 2, 2024.

In so doing, the Court relied on the literal wording from point b) of article 40 of Act No. 1879/2002 "On Arbitration and Mediation" in Paraguay. This rule states that "*arbitral awards may only be annulled when (...) b) the Court establishes that, under Paraguayan law, the subject matter of the dispute is not arbitrable or that the award is contrary to international or Paraguayan public policy*". Analyzing this provision, the Court found that the public policy referred to included the fundamental principles of law of the Paraguayan legal system. On this basis, the court ruled that the Award "*obviously and clearly*" contravened Paraguayan public policy and could be annulled.

Specifically, the Judgment concluded that determining that Paraguay had to pay compound interest (the formula contractually agreed on by the parties) was contrary to Paraguayan public policy. This is because it contravened the Paraguayan Civil Code and the Central Bank of Paraguay's Organic Law, both of which are imperative in nature, prevailing over the free will of the parties.

It should be noted that this decision is not aligned with the trend followed by other courts in comparative law. On the contrary, the grounds to annul an award due to a contravention of public policy must be analyzed from an international public policy perspective and not a domestic one.

Additionally, although this borders on an *ex novo* review of the merits of the Award, the judgment criticized the way in which the awards would have considered the claims for consequential damages to be proven, stating that "*consequential damages were awarded with absolutely no evidence*". The Court concluded that the fact that a judgment is based on unilateral assertions of one of the parties goes against the elementary notions of justice that prevail in Paraguayan law.

The decision of the Court of Appeals of Asunción, that differs from the practice in comparative case law, will become a key element that foreign investors must consider in Paraguay when drafting the dispute resolution clause of their commercial or investment agreements.

3 In the spotlight

Our team of lawyers explain recent developments that will continue to impact our international arbitration practice in the future

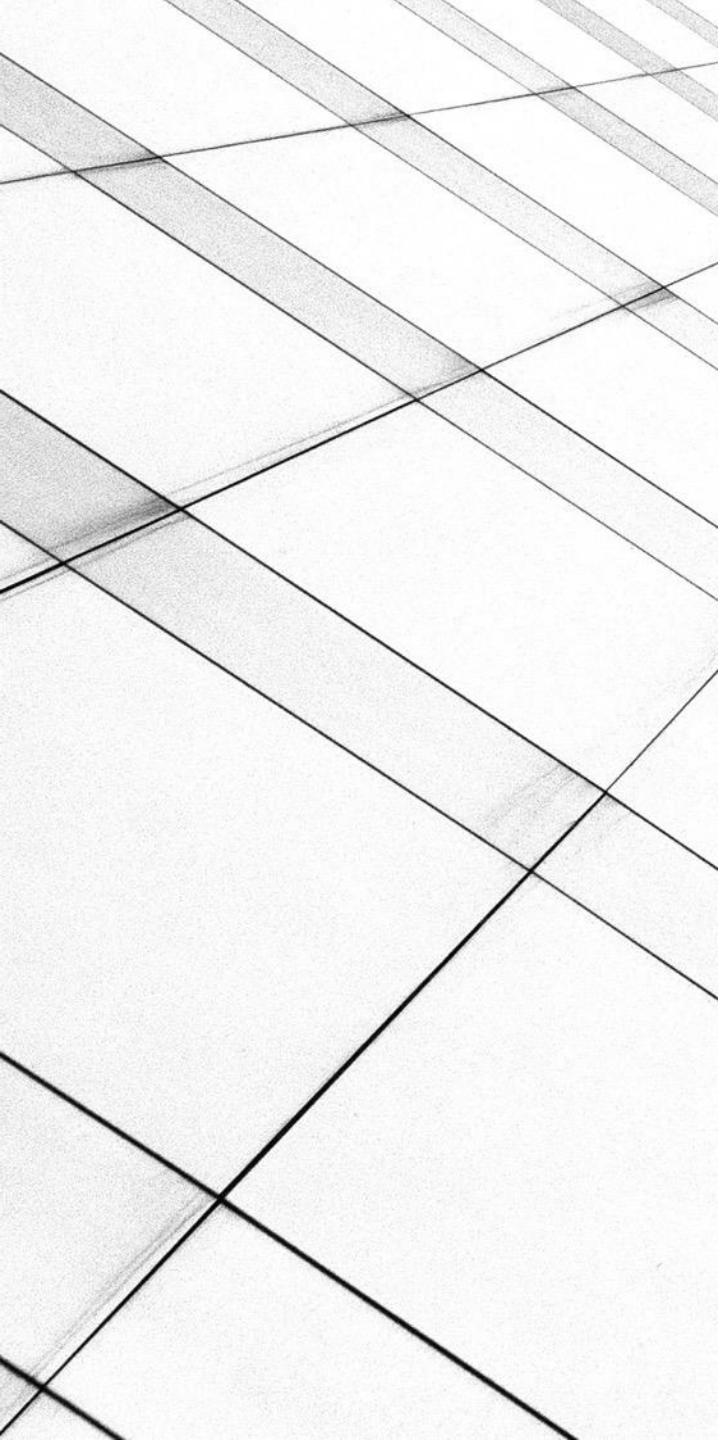
The Energy Charter Conference approves amendments to Energy Charter Treaty – José Ángel Rueda García

On December 3, 2024, the Energy Charter Conference adopted amendments to the Energy Charter Treaty ("ECT") and approved modifications and changes to its appendices and to the understandings, declarations, and decisions of the Contracting Parties to the Treaty. This concluded the process embarked upon in 2017 to modernize the ECT within the Conference, primarily to align it with the international legal commitments acquired by the Contracting Parties to fight against climate change as reflected in the 2015 Paris Agreement.

In relation to the protection of foreign investments in the energy sector, several provisions inspired by other treaties have been incorporated into Parts III and IV of the ECT. These provisions acknowledge the right of the Contracting Parties to regulate to achieve legitimate policy objectives, such as the protection of the environment or essential interests, or measures to mitigate and adapt to climate change, without resulting in a breach of standards for the protection of investments. Specific content has been given to the Fair and Equitable Treatment standard, including a limited scope for the legitimate expectations that can be invoked by foreign investors. Furthermore, the protection of investments in fossil fuels by certain Contracting Parties was excluded from the agreement.

Regarding the regulation of investment arbitration under the ECT, Part V includes the requirement that proceedings adhere to UNCITRAL Rules on Transparency. It also establishes a mechanism to expedite the processing of frivolous claims; and allows the defending Contracting Party to request the investor to post a guarantee for costs. Importantly, a disconnection clause has been added, stipulating that an investor from an EU Member State cannot initiate investment arbitration against the Member State housing the investments.

The amendments will apply provisionally as of September 3, 2025. A Contracting Party can object to the provisional application if it notifies its objection before March 3, 2025.



The Stockholm Chamber of Commerce will not establish the seat of arbitration in the EU in intra-EU investment arbitration cases to ensure enforcement of award – Elia Raboso

The Stockholm Chamber of Commerce adopts a new policy for choosing the seat of arbitration in intra-EU investment arbitrations

On November 5, 2024, the Arbitration Court of the Stockholm Chamber of Commerce ("**SCC**") published a new policy clarifying the SCC board's authority to establish the seat of arbitration in investment treaty arbitrations between EU investors and EU Member States ("intra-EU arbitrations"). This applies in the absence of an agreement between the parties.

In investment treaty arbitrations between EU-based parties or a State that is a candidate or potential candidate for EU membership, the board has agreed that it will not establish Stockholm, any other city or court district within the EU or within a state that is a candidate or potential EU candidate, as the seat of arbitration. In such cases, the board will decide on a place outside the EU, different from those listed as candidates or potential EU candidates.

The SCC has reached this decision while being aware of its obligation to ensure—as far as possible—that an arbitral award issued under SCC rules is legally enforceable, and the fact that awards in intra-EU investment treaty arbitrations seated in the EU will generally not be enforceable within the EU.

In any case, when agreeing a seat for arbitration, all relevant circumstances will be considered, including the nationality of the parties, practical aspects, cost-effectiveness and the legitimate expectations of the parties when drafting the arbitration agreement.

Madrid as a seat of arbitration: Regulations of the Court of Arbitration of Madrid in 2025 – Elia Raboso

On November 25, 2024, the Court of Arbitration of the Madrid Chamber of Commerce ("CAM") approved its new regulations. These regulations aim to enhance synergy with the Madrid International Arbitration Center – Ibero-American Arbitration Center ("CIAM-CIAR")

On November 25, 2024, the CAM approved its new regulations, which came into effect on January 1, 2025.

The most significant amendments are (i) changes in the procedure to provide greater freedom to the parties and to arbitrators to conduct the proceeding according to their needs; (ii) the development of a section on third-party intervention and joinder of parties; (iii) changes to the procedures for nominating, confirming, and appointing arbitrators; (iv) the incorporation of a hyper-abridged procedure; and (v) an optional procedure to challenge the award.

One of the objectives of this new CAM Regulation has been to harmonize it with the CIAM-CIAR Regulation, which we reported on in our last Cuatrecasas Arbitration Highlights publication.

The aim was to facilitate the referral of national and international matters between the CAM and the CIAM-CIAR, and to provide users and arbitrators the opportunity to benefit from the similarities between both sets of rules, reducing operational complexities and offering a more consistent and accessible regulatory framework.

With these new Regulations, Madrid's position as a venue for arbitrations—both national and international—is reinforced.

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