



## The 2014 LCIA Rules

The modernized and improved LCIA rules offer greater efficiency and flexibility and include some entirely new provisions.

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## **The 2014 LCIA Rules Enter Into Force**

*The modernized and improved LCIA rules offer greater efficiency and flexibility and include some entirely new provisions.*

By [Philip Clifford](#) and [Alanna Andrew](#)

The 2014 Rules include some completely new provisions, with no equivalent in the previous (1998) Rules, such as an Emergency Arbitrator procedure, ethical guidelines for legal representatives and rules for determining the governing law of the arbitration agreement. However, in many respects they simply represent an improved and modernized version of the previous Rules, having been amended to promote even greater efficiency and flexibility in the arbitral process, or to reflect advances in technology.

This article explains when the 2014 Rules will apply and highlights some of the more interesting changes that have been introduced.

### **When will the 2014 Rules apply?**

The 2014 Rules will apply to arbitrations commenced on or after 1 October 2014, save that, unless the parties agree, the Emergency Arbitrator provisions (discussed below) will not apply where the arbitration agreement was made before 1 October 2014.

### **How does the Emergency Arbitrator procedure work?**

If the need for urgent interim relief arises before a tribunal has been appointed and the procedure is available, a party may apply to the LCIA Court for an Emergency Arbitrator.

The application must be in writing (preferably submitted electronically) and be accompanied by the Request for Arbitration (if made by the Claimant) or Response (if made by a Respondent) and be copied to the other parties. The applicant must confirm that it has paid (or is paying) the £8,000 application fee and £20,000 Emergency Arbitrator's fee.

If the application is granted, an Emergency Arbitrator will be appointed within three days of the application. He or she may call a hearing or decide the request for interim relief without a hearing.

The Emergency Arbitrator's award must be made in writing, with reasons, as soon as possible and within 14 days of his or her appointment. The award is enforceable but may be varied, discharged or revoked by the tribunal subsequently appointed for the arbitration.

### **Governing law of the arbitration agreement**

The 2014 Rules provide that the governing law of the arbitration agreement shall be the law of the seat of the arbitration unless otherwise agreed in writing.

Unless the parties have agreed in writing on another seat before the tribunal is appointed or the tribunal orders otherwise, the seat shall be London. If the parties wish to agree upon a seat after the tribunal has been appointed, they must obtain the tribunal's prior written consent.

### **Ethical Guidelines for Counsel**

For the first time, the 2014 Rules contain "General Guidelines for the Parties' Legal Representatives" (the Guidelines) which are intended to promote a good, uniform, standard of behavior among the parties' legal representatives. The Guidelines have been much anticipated since the need for "self-regulation" was aired at the XX<sup>th</sup> International Council for Commercial Arbitration (ICCA) Congress in Rio de Janeiro in 2010 and are consistent with Guidelines on Party Representation in International Arbitration issued by the International Bar Association in 2013.

The Guidelines prohibit:

- Activities intended unfairly to obstruct the arbitration or jeopardise the award
- Knowingly making false statements to the tribunal or the LCIA Court
- Knowingly using false evidence
- Knowingly concealing documents which are to be produced

- Unilateral communication with any member of the tribunal unless this contact is disclosed to the parties, the tribunal and the registrar

If parties violate the Guidelines, the tribunal may decide whether to give a written reprimand, a written caution or to take any other measure necessary to allow the tribunal to fulfill its duties.

## **How will the Guidelines affect the parties?**

The parties must ensure that their representatives adhere to the Guidelines. If parties do not, their credibility before the tribunal may be damaged, adverse inferences could be drawn in relation to the evidence and they may be penalized in costs.

Wide ranging sanctions for failure to comply with the Guidelines were considered during the consultations on the 2014 Rules, which provoked considerable debate. The most controversial proposal would have given the tribunal the power to report any offending legal representative to his or her regulator. This power was subsequently removed following an outcry from practitioners.

The potential punishments may now appear somewhat weaker but in reality parties who permit or encourage their legal representatives to act contrary to the Guidelines may substantially risk their cases by alienating the tribunal.

## **Consolidation**

Tribunals may now consolidate proceedings commenced under the same or compatible arbitration agreements between the same disputing parties, provided the same tribunal is sitting in both arbitrations or no tribunal has yet been appointed in the other arbitration(s).

## **Efficiency of procedure**

A number of provisions are intended to create a more efficient and streamlined process, and to encourage communication and engagement between the parties at an early stage. For example:

- Arbitrator candidates must provide a statement as to their readiness and ability to devote sufficient time to the arbitration
- The Guidelines stipulate that the parties' legal representatives must not "*engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award*"
- Submitting documents in electronic format is encouraged
- Hearings via telephone or videoconferencing are now specifically provided for
- The tribunal must make its final award "*as soon as reasonably possible*" following the last submission of the parties

## **Conclusion**

The 2014 Rules are in many respects a new and improved version of the previous Rules, although they do contain some specific new provisions to ensure that the LCIA remains competitive with other arbitral institutions and addresses the concerns of its users. The timing of the 2014 Rules has allowed the LCIA to consider the various revisions to the other major international rules (such as the 2010 UNCITRAL Arbitration Rules and the 2012 ICC Rules). We therefore anticipate that the more substantive changes made in the 2014 Rules will strike the right balance for those who adopt them.

## **Latham & Watkins Secures Arbitral Award and Judgment When Respondent Fails to Post Full Security for Enforcement Stay**

***James Brandt, Sarah Lightdale, Claudia Salomon and Oliver Browne obtain important victories for Delaware mining company Travis Coal Restructured Holdings in a complex multi-jurisdictional dispute.***

The dispute arose from the sale of a coal mining operation in the United States and a related purchase price guarantee from the purchaser's parent for up to US\$203 million. After the purchaser missed an interest payment to Latham client, Travis Coal, the latter sought full payment of the guarantee and subsequently filed for arbitration under the ICC Arbitration Rules. In March 2014, Latham secured an ICC Award in favor of its client and sought enforcement of the award in the US District Court for the Southern District of New York and in the High Court in England. In the meantime, the High Court in England entered the arbitral award as a judgment in accordance with Section 101 of the English Arbitration Act 1996. The guarantor then applied to the High Court to set aside the English judgment or, alternatively, to adjourn the decision on recognition and enforcement of the arbitral award pending the outcome of the proceedings in the US District Court for the Southern District of New York.

The English court determined that the guarantor had no realistic prospects of establishing any of its grounds of challenge to the award and stated that "the proceedings can properly be described as delaying tactics in the face of what is likely to be held to be an unimpeachable award." As a result, the court concluded that the application to set aside the court's order by which judgment was entered in terms of the award must fail and that an adjournment order would be conditional upon provision of security for the full amount of the award only (Judgment of 24 July 2014, *Travis Coal Restructured Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm)). When the guarantor failed to post the security, the High Court declined to order any adjournment. At that point, Travis also obtained a judgment on the Award in the Cayman Islands, the guarantor's state of incorporation, and defeated applications by the guarantor to adjourn the enforcement of the judgment and to enjoin Travis from proceeding to seek a winding up of the guarantor.

## NEWS IN BRIEF

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### Ukraine Crisis: A Recap of the Latest US and EU Sectoral Sanctions

*The crisis in Eastern Ukraine leads to new sanctions.*

By [Charles Claypoole](#), [William M. McGlone](#), [Les Carnegie](#), [Jeff Lord](#) and Till Lembke

#### New US Sanctions

The US announced “sectoral sanctions” on 16 July 2014 against two Russian banks (Vnesheconombank and Gazprombank) and two Russian energy firms (Rosneft and Novatek). The targeted sanctions, imposed through two “Directives” issued pursuant to [Executive Order 13662](#), bar certain activities by US persons or within the United States involving newly issued debt and equity for the named banks and newly issued debt for the named energy companies, including entities owned 50 percent or more by these firms. Since the announcement, further entities have been added to the new “[Sectoral Sanctions Identifications List](#)” (SSI List), which as of 21 August 2014 contained five Russian banks (the two already mentioned plus Bank of Moscow, Russian Agricultural Bank and VTB Bank) and the two Russian energy firms mentioned above.

US persons or persons within the United States cannot participate in certain activities relating to newly issued debt and equity of the entities listed under [Directive 1](#) (i.e. the five Russian banks). Directive 1 prohibits US persons from “transacting in, providing financing for, or otherwise dealing in new debt of longer than 90 days maturity or new equity for these [banks], their property, or their interests in property.”

[Directive 2](#) applies to named entities operating in Russia’s energy sector. Unlike Directive 1, however, Directive 2 only prohibits certain activities by US persons or within the United States relating to newly issued debt (and not newly issued equity) for firms operating in Russia’s energy sector that are named under the Directive. Specifically, Directive 2 prohibits US persons from “transacting in, providing financing for, or otherwise dealing in new debt of longer than 90 days maturity for these persons, their property, or their interests in property.”

#### Additional OFAC Designations and US Export Restrictions

The US Treasury Department’s Office of Foreign Assets Control (OFAC) added five individuals and 12 entities to the [Specially Designated Nationals](#) (SDN) list. The US Department of Commerce’s Bureau of Industry and Security (BIS) also added the same 12 entities to its [Entity List](#). This action effectively bars exports and reexports of items subject to the Export Administration Regulations to the 12 entities.

In addition, the BIS announced a new end-use-based licensing requirement, and related license policy, for specific items intended for export, reexport or in-country transfer to support certain energy projects in Russia. Under [Section 746.5 of the EAR](#), a license is required if “you know that the item will be used directly or indirectly in exploration for, or production of, oil or gas in Russian deepwater (greater than 500 feet) or Arctic offshore locations or shale formations in Russia, or are unable to determine whether the item will be used in such projects.” The restricted items include various types of pipes, casing, and tubing used in oil projects, along with items classified under certain Export Control Classification Numbers as specified in Section 746.5.

#### New EU Sanctions and Designations

The EU has continued to add individuals and entities to Annex I of [Council Regulation \(EU\) 269/2014](#) (as amended), further expanding the number of those targeted by asset freeze provisions. The total number of persons or entities placed on the asset freeze list because of events in Ukraine as of 9 October 2014 stands at 164, with 22 individuals listed under [Council Regulation \(EU\) Regulation 208/2014](#) (as amended), and 119 individuals and 23 entities listed under Regulation 269/2014 (as amended).

Significantly, the EU has imposed “sectoral” sanctions of its own. Pursuant to [Council Regulation \(EU\) 692/2014](#) and [Council Regulation \(EU\) 825/2014](#), the EU prohibited the import of goods originating in Crimea or Sevastopol, as well as investments in infrastructure in the transport, telecommunications, and energy sectors, or related to the exploitation of oil and gas and mineral resources, in Crimea or Sevastopol. The EU also prohibited the export of certain key equipment and technology in these sectors to, or for use in, Crimea or Sevastopol.

In addition, [Council Regulation \(EU\) 833/2014](#) (as amended) which entered into force on 1 August 2014, implemented the so-called “Stage 3” sanctions first threatened in March 2014. These were swiftly expanded by Council Regulations [\(EU\) 960/2014](#) and [961/2014](#), which entered into force on 8 September 2014. These sanctions resemble — but in several respects differ from — the enhanced US sanctions. The new sanctions contained in Regulation 833/2014 must be reviewed by the Council of the EU by 31 October 2014, and remain in force until 31 July 2015, unless they are renewed or revoked at an earlier date.

In summary, Regulation 833/2014 restricts exports to the Russian military, exports of certain technologies and services for the oil industry, and the access of certain listed Russian State-owned banks, oil companies and defense companies to EU capital markets. Together with [Council Decision 2014/512/CFSP](#), Regulation 833/2014 imposes an arms embargo on Russia. The Council Decision and Regulation prohibit the export of certain technologies and services related to deep water oil exploration and production, Arctic oil exploration and production and shale oil projects, but does not restrict investment or exports in the gas sector. The restriction on access of certain State-owned banks to EU capital markets is expressed in the prohibition on dealings in transferable securities and money-market instruments with a maturity exceeding 90 days if issued between 1 August and 12 September 2014; and 30 days if issued after 12 September 2014, by five Russian State-owned banks (Sberbank, VTB Bank, Gazprombank Vnesheconombank, and Rosselkhozbank), three Russian oil companies (Rosneft, Transneft and Gazprom Neft) and three Russian defense companies (OPK Oboronprom, United Aircraft Corporation and Uralvagonzavod).

## EU Export Controls

The arms embargo and additional restrictions on the export of certain technologies and equipment mean that exporters must ensure the products they supply to Russia have the necessary export licenses, if such licenses are required. Military items and dual-use items generally require a license for export from the EU, and the licensing regime is stricter when there are concerns related to the end-use of the dual-use item, and if the items are destined for a country subject to an arms embargo.

## Other Countries’ Actions

Other countries have followed suit with the US and the EU, imposing their own sanctions against Russia. On 12 August 2014, Ukraine itself passed legislation that enables the country to impose sanctions against foreign individuals and companies; Ukrainian sanctions against Russia likely will reflect those imposed by the EU. Canada, Norway and Japan have expanded existing sanctions or imposed new sanctions. Switzerland, while not imposing sanctions of its own, has expanded the list of individuals and entities subject to its ordinance of 2 April 2014 to prevent the Swiss territory from being used to circumvent international sanctions.<sup>1</sup>

## Russian Counter-Measures

Russia has retaliated to the previous rounds of sanctions by imposing counter-measures. On 7 August 2014, Russian Prime Minister Dmitry Medvedev [announced](#) that Russia would, for an initial period of 12 months, “completely [ban] the importation of beef, pork, fruits and vegetables, poultry, fish, cheese, milk and dairy products from the European Union, the United States, Australia, Canada and...Norway,” with baby food not affected. Medvedev also stated that Russia is considering measures related to the use of its airspace by European and US airlines, as well as protective measures for certain industries. On 20 August 2014, some of the banned food items were removed from the original blacklist. Russia has indicated that it may enact [new measures](#) in retaliation to the EU sanctions of 8 September 2014, they are expected to target imports of consumer goods and secondhand cars from Western countries. They have not yet been officially implemented.

## Legal and Business Considerations

As the list of sanctioned parties grows, and as sanctions begin to touch on specific sectors of the economy, US and EU persons and firms should carefully scrutinize all operations and business relationships that could involve designated persons or targeted sectors. Firms that deal with entities operating in the Russian economy or that are closely aligned with Russian economic interests should closely monitor future designations and developments, and consider contingency plans in the event business partners are blocked by the US or EU sanctions regimes or access to the relevant economic sectors is restricted.

In addition, the extension of sanctions to cover specific sectors of the economy increases the regulatory burden on businesses dealing with and supplying to Russia. Companies may need to apply for export licenses before an export may lawfully proceed, and delays in obtaining the relevant clarifications and licenses should be expected.



## Yukos Shareholders Awarded US\$50 Billion in Largest Ever Investment Treaty Arbitration Award

***An investment treaty tribunal awarded three shareholders in the now-defunct Yukos Oil Company (Yukos) US\$50 billion in damages for breaches by the Russian Federation.<sup>2</sup>***

By [Catriona E. Paterson](#)

The Energy Charter Treaty (ECT) is a multilateral treaty devised to promote energy security by, *inter alia*, strengthening the rule of law on energy issues. One way in which it does so is by protecting foreign investors in the energy sector against wrongful interference by the host State with the investment and according harmed investors a direct right of action against the State by way of international arbitration. 48 States have signed and ratified the ECT, including a number of oil-rich States in Eastern Europe and Central Asia. Russia signed the ECT in 1994 but withdrew from the ECT regime on 20 August 2009.

The thrust of the Yukos shareholders' claims was that the Russian tax authorities and other parts of the State apparatus took a series of measures designed to divest Yukos of its oil-producing assets and place them in the hands of the State-owned gas companies Gazprom and Rosneft. The shareholders alleged that, as a result of the measures described below, Yukos was effectively paralysed and the once powerful oil-giant was forced into bankruptcy. The measures complained of included:

- Tax reassessments, leading to the imposition of hefty tax payments and fines
- Freezing Yukos' shares and assets, the latter of which meant Yukos was unable to generate the income needed to meet its tax burden
- Harassing Yukos' executives, including arresting and imprisoning its CEO and ultimate beneficiary, Mr. Mikhail Khodorkovsky
- Forcing the sale (by way of auction) — allegedly at a significant undervalue — of Yukos' main oil-producing asset

On 18 July 2014, the arbitral tribunal largely sided with the claimants, finding that the State had treated the claimants' investment inequitably and unfairly (in breach of ECT Article 10(1)) and had indirectly expropriated the claimant's investment, an act that served no public purpose and was not carried out under due process of law (in breach of ECT Article 13(1)).

The Yukos award includes two aspects of particular interest for prospective claimants in investment treaty disputes.

First is the tribunal's treatment of the equitable doctrine of "unclean hands" in international law and its impact on the amount of damages awarded to the claimants. In the tribunal's view, Yukos had abused domestic tax incentive programs and a double-taxation agreement between Russia and Cyprus. This conduct gave the Russian authorities the pretext on which they carried out their investigations and tax reassessments. Accordingly, the tribunal considered that Yukos contributed, at least in some measure, to its own downfall and the amount of damages awarded to the claimants was reduced by 25 percent accordingly.

Second, the tribunal discarded the claimants' discounted cash flow (DCF) analysis as unreliable and instead measured the damages to the claimants using the seldomly used "comparable companies" approach. Its use in this case gives some comfort that alternative methods of valuation may be tenable in circumstances where a DCF analysis is not possible or would not give a reliable measure of loss.

On a procedural note, although each of the shareholders brought the claims separately, the parties appointed the same arbitral panel to each case, the proceedings were dealt with in single a process and the awards were issued in largely identical terms.

The dispute between Yukos (and subsequently its shareholders) and Russia has resulted in a multitude of proceedings being brought before a variety of international forums. For example, shortly after the international investment treaty tribunal rendered the arbitral award, the European Court of Human Rights ruled that Russia had violated Yukos' right to property as embodied in Article 1, Protocol 1 of the European Convention on Human Rights, and its right to a fair trial under Article 6. In its largest ever award on damages, the court ordered Russia to pay €1.87 billion to Yukos' former shareholders.

## Achmea v. Slovakia: No Enjoinder Against Expropriatory Measure

***A recent arbitral award found the claimant had failed to show a prima facie cause of action under the applicable bilateral investment treaty (BIT).<sup>3</sup>***

By [Catriona E. Paterson](#)

As part of its accession to the European Union, in 2004 the Slovak Republic opened its health insurance sector to private participants. However, the liberalization of the private health insurance market — and the profits insurance providers appeared to be reaping — was controversial from the outset and remained on the agenda of successive governments. In 2012 and 2013, the Slovakian Government introduced proposals to bring about a unitary, State-led system of health insurance (called the Project Plan). Amongst other things, the Project Plan envisaged a voluntary sale of assets to a State agency. Failing such a sale the State would be able to expropriate private insurance enterprises, as against the payment of compensation.

In response, Achmea B.V. (Achmea), the Dutch parent of a major Slovakian health insurance provider, instituted arbitration proceedings against the State pursuant to the Netherlands-Slovakia BIT. In a novel move, Achmea sought an order from the tribunal enjoining the State from expropriating Achmea's investment on the terms of the Project Plan or materially similar terms, something that in Achmea's case would breach Article 5 of the BIT on expropriation. However, in its award of 14 May 2014, the arbitral tribunal dismissed Achmea's claim for want of jurisdiction.

The most interesting aspect of the award is the tribunal's finding that a claimant must satisfy a *prima facie* test for jurisdiction, namely that the claims put forward must fall within the relevant BIT's jurisdiction. Turning first to the proper interpretation of Article 5 of the BIT, which deals with expropriation, the tribunal concluded that the BIT followed the position in international law. In other words, Article 5 preserved the State's sovereign right to expropriate property but conditioned the exercise of that right on the expropriation being:

- In the public interest and under due process of law
- Non-discriminatory in nature
- Against the payment of compensation

Next, the tribunal considered whether the claim as articulated by Achmea could fall within the terms of Article 5. In the tribunal's view, the Project Plan was still in its infancy; the Slovakian government had not tabled the legislative framework under which the Project Plan would be implemented. The tribunal viewed the Project Plan as "entirely speculative if, when, and under which conditions the purported expropriation of Achmea's investment is to take place." For this reason, the tribunal concluded that Achmea had not shown a *prima facie* case under Article 5 of the BIT.

Foreign investors can reasonably expect a number of the host State's legislative and regulatory measures to affect their investments. When reforms threaten to impact an investment, an investor may have a number of options available to remedy the situation, including before the domestic courts (for example through an application for judicial review) and in international fora. The decision in *Achmea v. Slovakia* tests, for the first time, the limits of a BIT as a tool to stave off an anticipated measure negatively affecting an investment. While Achmea's attempt was unsuccessful, the tribunal's award leaves open the question of whether circumstances could arise in which a tribunal could enjoin a State from taking expropriatory action.

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## Is a Dispute Concerning Fraud Arbitrable in India?

***In Swiss Timing Limited v. Organizing Committee, Commonwealth Games 2010, Delhi the Supreme Court of India held that disputes over fraud are arbitrable.***

by [Tina Wang](#) and [Chi Ho Kwan](#)

In its earlier decision in *N. Radhakrishnan v. Maestro Engineers & Ors.* (Civil Appeal No. 7019 of 2009) (Maestro Engineers) the court had, however, held that serious allegations pertaining to fraud must be tried in court. While arbitration practitioners in India have welcomed the new *Swiss Timing* decision, the question remains whether allegations of fraud can be referred to arbitration.



## Background Facts of Swiss Timing

The petitioner, Swiss Timing, entered into an agreement (Agreement) with the Organizing Committee of the Delhi Commonwealth Games (Games) to provide timing, score and result systems required to conduct the Games. Under the Agreement, Swiss Timing was to indemnify the Organizing Committee against losses suffered if Swiss Timing engaged in corrupt, fraudulent, collusive or coercive practices. Disputes subsequently arose between the parties, which Swiss Timing sought to refer to arbitration. When the Organizing Committee failed to appoint its nominee to the Arbitral Tribunal, Swiss Timing applied to the Supreme Court for appointment of the arbitrator by the Chief Justice. The Organizing Committee objected on the basis that Swiss Timing failed to make efforts to resolve the dispute by way of negotiations and discussion. The Organizing Committee also contended that the Agreement was void *ab initio* on the basis that Swiss Timing engaged in corrupt, fraudulent, collusive or coercive practices in connection with the Agreement.

## Reasoning of the Supreme Court in Swiss Timing

The Supreme Court rejected the Organizing Committee's contention that Swiss Timing failed to comply with the dispute resolution clause, as documentary evidence indicated that Swiss Timing did make efforts to put a "closure to the agreement" amicably. Furthermore, the Supreme Court viewed the issue of whether the Agreement was void because Swiss Timing violated the Agreement's anti-corruption clause as a matter that should be left to the arbitral tribunal to decide. In arriving at this conclusion, the Supreme Court highlighted the separability of the arbitration agreement from the underlying contract, which has been statutorily recognized by India under section 16 of the Arbitration Act 1996.

## Inconsistent with *Maestro Engineers*?

As mentioned above, the Supreme Court in *Maestro Engineers* held that serious allegations pertaining to fraud must be tried in court because an "arbitrator could not be competent to deal with such matters which involved an elaborate production of evidence to establish the claims relating to fraud and criminal misappropriation." The Supreme Court in *Swiss Timing* found that *Maestro Engineers* did not necessarily bind the court because the case was *per incuriam*. In particular, *Maestro Engineers* failed to consider or distinguish certain earlier Supreme Court judgments, and that section 16 of the Arbitration Act 1996 (which provides that the arbitral tribunal may rule on its own jurisdiction, including on any objection with regard to the existence or validity of the arbitration agreement) was not drawn to the court's attention.

Notwithstanding the above, one should not view *Swiss Timing* as overruling *Maestro Engineers*. A single judge rendered *Swiss Timing*, while two judges pronounced *Maestro Engineers*. In India the judgment of a larger bench is binding on a smaller bench, and the most that a single judge can do, when he doubts the decision of a larger bench, is to refer the matter to the chief justice. As such, the *Swiss Timing* decision should be treated with caution and *Maestro Engineers* should be viewed as good law in India until an appropriate bench of the Supreme Court considers the case further.

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## German Federal Court of Justice Confirms Restrictive Standard for Examination of Arbitral Awards

***A recent decision confirmed that an arbitral award must only be denied enforcement if the enforcement would be "manifestly" incompatible with essential principles of German law.***

By [Jan Erik Spangenberg](#)

In its decision of 28 January 2014 (Case No. III ZB 40/13), the German Federal Court of Justice upheld a decision of the Celle Court of Appeals ordering the enforcement of an arbitral award. The Celle Court of Appeals had rejected an application for annulment of an arbitral award for public policy (*ordre public*) reasons. In reaching its decision, the Court of Appeals addressed Section 1059(2) No. 2(b) of the German Code of Civil Procedure (*Zivilprozessordnung*), which allows for the annulment of an arbitral award, "if the court determines that [...] the recognition or enforcement of the arbitration award will lead to a result contrary to public order." The Court of Appeals found that under this standard only, "manifest" violations of essential principles of German law constitute an *ordre public*-violation. Such violations would therefore exist only in "extreme and exceptional cases."

The appeal to the Federal Court of Justice argued that the standard the Celle Court of Appeals applied was too restrictive, pointing to prior decisions of the Federal Court of Justice which had not discussed the requirement of “manifest” violations, but merely examined whether a violation of “public policy” existed in the first place.

In its recent decision, the Federal Court of Justice rejected this argument and clarified that its older jurisprudence had been based on the old German Code of Civil Procedure. Until 1986, Section 1041(1) No. 2 of the German Code of Civil Procedure allowed for the annulment of an arbitral award if the recognition and enforcement would violate public policy, without further qualifying this standard. In 1986, the legislature reformed the law so that recognition and enforcement of an arbitral award could only be rejected if the award would “manifestly” violate “essential principles of German law.” The legislature intended to ensure only “core” principles of German law could be used to avoid enforcement. On this basis, the Federal Court of Justice has held numerous times that minor violations of substantive or procedural German law would not suffice to challenge an arbitral award.

In 1997, the further reforms of the German arbitration law removed the reference to “manifest” violation of “essential principles” of German law from Section 1059(2) No. 2(b) of the German Code of Civil Procedure. Instead, the provision reverted to the pre-1986 wording, which merely required a violation of public policy (*ordre public*), without qualification. These legislative changes, however, caused a degree of uncertainty as to whether the legal standard had (again) changed.

The Federal Court of Justice’s recent decision clarifies that the legal standard had not changed, notwithstanding the changes to the wording used in the German Code of Civil Procedure. A *révision au fond* of the arbitral award remains excluded. Apparently, the new wording was chosen simply for “linguistic reasons.” A different interpretation would also violate the legislature’s clear intention to establish arbitration as an “alternative to State courts” which “offers, in principle, legal protection equal to that of the State courts.”

As a result, the annulment of arbitral awards for public policy violations in Germany continues to require “manifest” violations of “essential principles” of German law. In this regard, the Federal Court of Justice’s most recent decision once more underlines the arbitration-friendly nature of the German legal system.

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## Germany: Extension of Arbitral Clause to Non-signatory Third Party Not in Violation of Public Policy

***The German Federal Court of Justice has held that a third party who is not a signatory to an arbitration agreement may nonetheless be bound by it under foreign law.***

By [Jan Erik Spangenberg](#)

In the underlying dispute, a Danish claimant filed a lawsuit in the Braunschweig District Court in Germany for alleged breaches of European and German patents. The claim was based on the alleged assignment of claims from the original patent holder — who also was the claimant’s CEO — and an exclusive license agreement for the German territory. The Indian respondent objected to the jurisdiction of the court, and argued that under the arbitration agreement included in a prior licensing agreement between it and the original patent holder the case was to be referred to arbitration in New Dehli. Under the “group of companies doctrine” recognized in Indian law the arbitration agreement applied to the claimant, because it belonged to the same group of companies.

In its judgment of 8 May 2015 (Case No. III ZR 371/12), the German Federal Court of Justice set aside the Court of Appeal’s decision, which had found that the court of first instance had jurisdiction, and remanded the case to the Court of Appeals for further fact-finding.

The Federal Court of Justice rejected the Court of Appeal’s reasoning which had held that the lower court need not examine whether the arbitration agreement related to the claims at hand because, in any event, the agreement could not extend to the claimant who was not a signatory to the agreement. In the Court of Appeal’s view, the application of the “group of companies doctrine” would violate German public policy (*ordre public*) which mandated that no one was deprived of access to the State courts, unless that person had voluntarily surrendered to arbitration.

Instead, the Federal Court of Justice held that a possible violation of public policy must be determined in each individual case and cannot be found to exist on the basis of abstract concerns towards foreign law. Moreover, the Federal Court of Justice reasoned that no evidence demonstrated that enforcing an arbitration agreement against a non-signatory on the basis of the “group of companies doctrine” would violate German public policy. The public

policy exception in Section 6 of the Introductory Act to the German Civil Code only protected “essential principles” of German law. Under this standard, foreign law could not be enforced only if such enforcement would be “contrary to the essential principles of German laws and the underlying concept of justice and therefore appear unbearable.” The fact that a German judge would have to reach a different result when applying German law, therefore, did not suffice to constitute such violation of public policy. In this regard, the Federal Court of Justice referred to its earlier decision of 28 January 2014 (Case No. III ZB 40/13), which confirmed that public policy violations could only apply in “extreme and exceptional cases.”

The Federal Court of Justice’s decision clarifies that the enforcement of arbitration agreements on the basis of foreign law and the “group of companies doctrine” will need to be carefully considered on a case-by-case basis. However, depending on the individual circumstances, the court’s decision means that enforcing an arbitration agreement against non-signatory third parties in the German courts may be possible.

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## **EU Adopts Conduct and Financial Distribution Regulations for Future EU Investment Arbitrations**

***New regulation addresses the consequences of the EU’s competence for foreign direct investment under Article 207(2) of the Treaty on the Functioning of the European Union.***

By [Jan Erik Spangenberg](#)

The EU has adopted Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014. The regulation establishes a framework for managing investor-state disputes arising under international agreements to which the EU is party and the corresponding financial responsibility for the costs of arbitrations and resulting awards or settlements.<sup>4</sup> The need for such regulation arises as a consequence of the EU’s new competence to conclude investment agreements. Presently, the EU is negotiating trade agreements that include investment protection regulations with the United States (the Transatlantic Trade and Investment Partnership), Canada (Canada Europe Trade Agreement), Singapore, Thailand, Japan, India, Morocco, Vietnam and China. To the extent that these agreements will include investor-state dispute resolution mechanisms, questions arise as to how to conduct investment arbitrations and how to share the responsibility for the resulting costs and awards or settlements. The Regulation attempts to address these issues.

The Regulation’s central principle asserts that financial responsibility arising out of breaches of investment treaty protections should rest with the actor that has afforded the treatment of the investors in question. In this regard, the Commission envisages three different scenarios. First, if the treatment is afforded by one or several of the EU’s own institutions, the EU itself should act as the respondent in the arbitration and bear full financial responsibility, both for the costs of conducting the proceedings as well as for settling an award against the EU, if any (Articles 3(1)(a) and 4). Second, if the treatment in question is afforded by the Member State, the Member State should act as the respondent and bear all financial responsibility arising out of the dispute (Articles, 3(1)(b), 5 *et seq.*). The Member State would still be required to keep the Commission informed of all significant procedural steps, however, and upon request, enter into consultations with the Commission on particular issues addressed by the Commission in a non-binding written analysis provided to the Member State (Article 10). Third, if the treatment was afforded by a Member State, the EU may nevertheless act as respondent if the Member State decided that it does not intend to act as the respondent (Article 9(1)(b)). The Commission may also decide that the EU is to act as the respondent if the EU would bear at least part of the financial responsibility arising from the dispute or the dispute also concerns treatment afforded by EU institutions, bodies, offices or agencies (Article 9(1)(a) and (2)).

As an exception to the general rule that the actor of the treatment afforded shall bear the financial responsibility for the costs of arbitrations and any resulting award in damages that may be awarded in a claimant’s favor, the EU shall bear responsibility if the treatment afforded by a Member State was required by European law (Article 3(1)(c)). If the Member State’s action became necessary, however, to eliminate an existing inconsistency with EU law, responsibility towards the claimant remains with the Member State, unless the remedied previous law or action had also been required by EU law (Article 3(1)).

While the central organizing principle of the draft Regulation — which essentially requires the costs to be borne by the party that caused the harm — appears sensible, the application of the proposed regulation to future arbitration still poses a number of open questions. Article 9(1)(a), for instance, allows the Commission to decide within a period of 45 days, whether it shall act as respondent in a case. If and how this provision is to be synced with the dispute resolution

clauses and applicable arbitration rules in future EU investment agreements remains unclear. Under Article 4 of the UNCITRAL Arbitration Rules, a response to a notice of arbitration is required within 30 days. Depending on whether parties agree to a three member tribunal, such notice must also contain an arbitrator appointment. The Commission therefore must either negotiate longer procedural schedules in its investment treaties or, as a matter of fact, reach a decision on the respondent role well before the 45-day deadline. Otherwise the ability to effectively defend against claims brought against the EU or its Member States could ultimately suffer.

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## English Court Grants Post-award Interest on an Arbitration Award Annulled by Foreign Courts

***The English High Court has held that an arbitral award annulled by a foreign court may be enforced and may, in principle, carry post-award interest.***

By [Catriona E. Paterson](#)

In *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm) (03 July 2014), the English High Court concluded that, in certain circumstances, the annulment of an award by the supervisory courts of the seat of arbitration should not prevent the English court from giving effect to that award.

On 19 September 2006, arbitral tribunals seated in Russia awarded Yukos Capital RUB12,9 billion (at the then exchange rate, in excess of US\$400 million) and US\$857,507 in four separate awards in disputes against Rosneft Oil Company (Rosneft). The awards did not contain any provision for the payment of interest. The Moscow *Arbitrazh* court set aside these awards on 23 May 2007 (a decision that was upheld on appeal). This notwithstanding, Yukos Capital subsequently applied to the Dutch courts for enforcement of the original awards; the Dutch court of first instance ordered payment of the awarded amounts, a decision that was subsequently upheld by the Amsterdam Court of Appeal and Dutch Supreme Court. Rosneft paid the principal sums due by June 2010, but as the awards did not provide for interest, Rosneft paid none.

Yukos Capital subsequently applied to the English High Court seeking recovery of interest that Yukos alleged had accrued between 2006 and the date of payment of the principal.

Yukos Capital argued that Rosneft had breached its obligation to honor the awards, was liable in debt, and interest was consequently payable under both English and Russian law. Rosneft argued that there could not be a debt, as the awards were no longer valid or binding. No interest could be payable on awards that did not have any legal existence (on Rosneft's case, this derived from the principle *ex nihilo nil fit*, 'nothing comes of nothing').

In determining whether the English courts should give effect to the awards, the High Court noted that if parties have agreed to arbitrate according to the laws of a particular country, a decision by the supervisory courts of that country should ordinarily bind the parties. Nevertheless, "it is open to a party to contend that the decisions of the foreign court should not be recognised," if, for example "the judgments were obtained by fraud...or...obtained in breach of the rules of natural justice." The High Court similarly held that a court could recognize a decision of a lower foreign court set aside on appeal, if recognition of the appellate decision would be contrary to public policy. It considered that if Yukos Capital's allegations were proven — *i.e.* that the decision of the Moscow *Arbitrazh* court was "contrary to natural justice," "tainted by bias," in violation of the right to a fair trial and "part of an illegitimate campaign of commercial harassment" — then the principle *ex nihilo nil fit* would not apply to preclude enforcement of the award and payment of interest.

The English High Court then considered whether interest was payable under Russian and/or English law on the arbitral awards. Having heard expert evidence from both parties, the court found that interest was not payable under Russian law until such a time as the award was enforced. As a consequence of the *Arbitrazh* court decision, Yukos Capital was not entitled to interest under Russian law. The position under English law, however, was that the court had discretion to award statutory interest accruing from the moment that the principal sum fell due. The High Court found no bar to the granting of interest.

The implications of this decision are significant. In circumstances where a foreign supervisory court sets aside an award, an English court following the High Court's approach may nevertheless decline to uphold the supervisory court decision and instead enforce the underlying award, if to do otherwise would offend public policy or contradict natural justice. Similarly, this decision paves the way for the English courts to provide for post-award interest, even if an arbitral tribunal has failed to do so.

## Endnotes

- <sup>1</sup> See <http://www.admin.ch/opc/de/classified-compilation/20140853/index.html> for a German language version of the ordinance, and <http://www.seco.admin.ch/themen/00513/00620/00622/05405/index.html?lang=de> for a German language version of the consolidated list of persons and entities. The documents are also available in French and Italian.
- <sup>2</sup> *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, Final Awards of 18 July 2014.
- <sup>3</sup> *Achmea B.V. v. The Slovak Republic*, PCA Case No. 2008-13 (Number 2), Award on Jurisdiction and Admissibility dated 20 May 2014.
- <sup>4</sup> The Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 is available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.257.01.0121.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.257.01.0121.01.ENG).

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