the global voice of the legal profession

Arbitration News

Publication of the International Bar Association Legal Practice Division

VOL 20 NO 1 MARCH 2015

Publications and Newsletter Editor
Reza Mohtashami
Freshfields Bruckhaus Deringer
London
reza.mohtashami@freshfields.com
Assisted by Hugh Mieghen

Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at editor@int-bar.org.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

Printed in the
United Kingdom
by Hobbs the Printers Ltd
Totton, Hampshire
SO40 3WX
www.hobbs.uk.com

International Bar Association
4th floor, 10 St Bride Street
London EC4A 4AD
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

IN THIS ISSUE

ONE OF THE LARGEST ADR CENTRES IN THE WORLD

klrcA
REGIONAL RESOLUTION GLOBAL SOLUTION

The KLRCA's Bangunan Sulaiman is a 5 floor heritage building which is five times larger than the centre's previous premises. Together with the annex building which houses two large seminar rooms, a garden pavilion and car park, it boasts a total floor space of 16430 square meter.

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

Bangunan Sulaiman
Jalan Sultan Hishamuddin,
50000 Kuala Lumpur

T: **+603 2271 1000**

F: **+603 2271 1010**

STATE-OF-THE-ART FACILITIES:

Extra Large Hearing Room with Court Recording & Transcription System (CRT)
Seating capacity : 50 pax

19 World-Class Hearing Rooms:

- 3 **Large Hearing Rooms**
  seating capacity: 22 pax
  1 large hearing room with CRT
- 10 **Medium Hearing Rooms**
  seating capacity: 14 pax
  1 medium room with CRT
- 6 **Small Hearing Rooms**
  seating capacity: 10 pax

15 Breakout Rooms

Business Centre – A One-Stop Resource Centre

Auditorium (Seating capacity: 182 pax)

Private Dining Room

Outdoor Dining Area

Ample Covered Car Park Spaces

Specialised Alternative Dispute Resolution (ADR) and Construction Law Library

Ultra-modern Video Conferencing Equipment

Well Equipped for Training, Seminars and Conferences

Paul Friedland
White & Case,
New York
pfriedland@
whitecase.com

Eduardo Zuleta
Gomez-Pinzón Zuleta
Abogados, Bogotá
ezuleta@gpzlegal.com

From the 2014 Co-Chairs

2014 was a ground-breaking year for the Arbitration Committee.

The 17th Annual IBA International Arbitration Day, held in Paris in February, attracted 950 registrants, the largest number ever for a one-day international arbitration conference. The title of the conference was Advocates' Duties in International Arbitration: has the time come for a set of norms? Cognisant that the recently issued IBA Guidelines on Party Representation have both supporters and detractors, the Arbitration Day featured a debate on the Guidelines. 'The topics of the sessions were: Anything goes? Do counsel owe a duty of honesty in relation to their submissions, and (if so) when and to whom?', 'The gathering and taking of evidence: should we seek to level the playing field?', 'Arbitrators without powers?', and 'The IBA Guidelines on Party Representation: the right step or a step too far? A debate'.

Of significance not just for our activities in 2014 but, even more so, going forward, during 2014 the leadership of the Arbitration Committee reorganised the Committee's Subcommittees and issued a call for jurisdiction by jurisdiction reporters on issues pertaining to the New York Convention and to the reception of Arbitration Committee soft law products. By so doing, we have set in motion a means to achieve two fundamental objectives. First is to benefit from the unique breadth of the Arbitration Committee membership, which will allow our Subcommittees and task forces to issue empirically-based reports, substantiated in a way that no other international arbitration entity can achieve. Secondly, the reorganisation allows active participation by all willing members of the Arbitration Committee in the Committee's work, curing a longstanding dilemma that saw the Committee's work restricted to a small cadre of officers. We often receive requests for participation in our Committee's work. There is now a way that volunteers can meaningfully do so.

The two Subcommittees for which volunteers have been solicited are the Soft Law Committee Subcommittee and the New York Convention Subcommittee. The New York Convention Subcommittee is chaired by Pascal Hollander, and its objective is to issue a report assessing the varying ways that 'public policy' is understood and applied by national courts and arbitral tribunals. The Soft Law Subcommittee is chaired by Julie Bédard, and its remit is to monitor the use, jurisdiction by jurisdiction, of the IBA Arbitration Committee's soft law products, namely, the IBA Rules on the Taking of Evidence in International Arbitration, the IBA Guidelines on Conflicts of Interest, the IBA Guidelines for Drafting International Arbitration Clauses and the IBA Guidelines on Party Representation.

2014 saw a major development with respect to such soft law. In October, during the IBA Annual Conference in Tokyo, the IBA Council approved the 2014 revision of the IBA Guidelines on Conflicts of Interest in International Arbitration. This marks the end of a multi-year effort by a task force under the leadership of Pierre Bienvenu and Bernard Hanotiau as Co-Chairs and by David Arias and Julie Bedard as Co-Chairs of the corresponding Subcommittee.

The Arbitration Committee presented the following sessions at the IBA Annual Conference in Tokyo in October: 'Crossing the line', 'Conflicts of interest in international arbitration: the new IBA Guidelines,' 'Hot topics in arbitration,' 'Master class: using courtroom litigation to support arbitration in Asia,' 'Arbitration under FIDIC rules and model contracts,' 'On Article v(2) of the New York Convention,' and 'New challenges in arbitration in the Asia Pacific region and Investment arbitration.'

Together with other major arbitral institutions, the Arbitration Committee provided support for events in the Dominican Republic and Peru.

On 29–30 May 2014, the IBA Arbitration Committee with the support of the North American Forum presented a conference in Toronto entitled 'International arbitration today: first principles, current practices, latest trends'. There were more than 100 attendees.

The Arbitration Committee also acted in a supporting role in presenting 'Casablanca Arbitration Days' in Casablanca on 28–29 November 2014. There were more than 200 attendees.

During 2014, the Asia Pacific Arbitration Group ('APAG'), a group formed jointly

by the Arbitration Committee and the Asia Pacific Regional Forum, was very active under the leadership of Dr Eun-Young Park and Sunil Abraham. In 2014, the APAG supported a number of conferences organised by major regional arbitration institutes such as the Singapore International Arbitration Centre (SIAC), Kuala Lumpur Regional Centre for Arbitration (KLRCA) and Arbitrators' and Mediators' Institute of New Zealand (AMINZ) in Singapore, Kuala Lumpur and New Zealand. In addition, with the support of the Japan Federation of Bar Association (JFBA), Japan Association of Arbitrators (JAA) and Japan Commercial Arbitration Association (JCAA), APAG held its inaugural APAG Training Day in Tokyo in September 2014. The APAG has also established two working committees to look into harmonisation of arbitral laws and best practice in international arbitration in the Asia Pacific region. The two working committees hope to have the results from their work finalised in the coming year so as to be encapsulated in a final report that is to be made public.

Equally active during 2014 was the IBA Arb40 Subcommittee co-chaired by Catherine Amirfar and Julien Fouret. The Subcommittee is advised by a Steering Committee of 16 arbitration experts and leaders drawn from diverse sectors and regions across the globe. In 2014, the Subcommittee organised two successful events, each of which was attended by more than 80 delegates. The first took place on the eve of the Arbitration Day in Paris, with a keynote address by Alexis Mourre on the Revolutionaries and reactionaries in International Arbitration followed by a debate of the issues discussed. The second was a Young Practice Symposium held on the eve of the IBA Annual Conference in Tokyo, where Judith Gill offered a keynote presentation on ten steps to a successful cross-examination. Her presentation was followed by four mock cross-examination exercises to illustrate potential approaches and techniques. The Subcommittee is also working on two long-term projects that it will unveil at upcoming IBA events.

We are pleased to announce the formation of the Arbitration Committee's newest undertaking, the Africa Arbitration Group (AAG). The objectives of the AAG are to foster the participation by Sub-Saharan arbitration practitioners in the work of the Committee, and to organise arbitration conferences in Sub-Saharan Africa. A steering committee is being formed. The AAG is, initially, being co-chaired by Paul Friedland and Dorothy Ufot (Lagos, Nigeria).

Looking ahead to 2015, the next IBA Arbitration Day will be in Washington, DC on 27 February 2015 and will be a joint event with the International Centre for Settlement of Investment Disputes (ICSID) to mark the 50th anniversary of the ICSID Convention.

There will be a regional Arbitration Committee conference in Munich on 19 June 2015 on the subject of Costs in international arbitration.

Additional regional conferences are being organised.

The next IBA Annual Conference will be in Vienna in October 2015. The Arbitration Committee has undertaken to present six sessions and to participate in several additional ones.

Finally, we thank all of the Officers of the Arbitration Committee who ended their term on 31 December 2014: Vladimir Khvalei (Baker & McKenzie, Moscow), Fathi Kemicha (Kemicha Legal Consulting, Tunis), Luca Radicati di Brozolo (Arblit, Milan), Vera van Houtte (Brussels) and Sunil Abraham (Zul Rafique & Partners, Kuala Lumpur). We welcome our new officers: Makhdoom Ali Khan (Fazleghani Advocates, Karachi), Hassan Darwish Arab (Al Tamimi & Co, Dubai), Eduardo Silva Romero (Dechert, Paris) and Wendy Miles (Boies, Schiller & Flexner, London). And we extend our gratitude to all of our nearly 3000 members worldwide.

Reza Mohtashami,
Freshfields Bruckhaus Deringer, London
reza.mohtashami@freshfields.com

Editor's note

Welcome to a new edition of *Arbitration News*, which presents commentary on the latest developments in international arbitration from IBA members and colleagues working across the globe. Those readers who missed their double dose of the Arbitration Committee's publication in 2014, can look forward to an extra shot in 2015, as we catch up on developments from 2014 in the current edition and look forward to two further editions in the coming year.

As always, we begin with an update on the Arbitration Committee's activities during the last year from the 2014 Co-Chairs (with a valedictory sign-off from Eduardo Zuleta), followed by four reports from the sessions of the IBA Arbitration Day held in Paris in 2014. Thanks to the diligent dispatches of our reporters, those of you who did not make it to Paris can follow the main points of debate and discussion. Thereafter, we start off with our coverage of investment arbitration, including two Indonesia-related reports and an account of the United Nations Convention on the Law of the Sea (UNCLOS) arbitration arising from the seizure in Ghana of an Argentine naval vessel (the *ARA Libertad*).

Our Asian roundup includes an update on a previously-reported case before the South Korean courts, as well as reports of important decisions from the Georgian and Indian courts relating, respectively, to the courts' powers to order interim measures in support of arbitral proceedings and arbitrators' duties of independence and impartiality. Two enforcement-related contributions follow from the Middle East, dealing with a recent decision of the Qatari courts and a review of judgments from the UAE courts dealing with the public policy ground for setting-aside arbitral awards.

A busy European roundup covers recent developments in: Finland, Italy, Austria, Germany and Luxembourg, and touches on a wide range of subject matters, including sports arbitration, non-signatories of arbitration agreements and arbitrating collective antitrust follow-on actions. Contributions from the Americas include a review of recent annulment decisions from Chile and Brazil, a theme that also covers our US reviews, which deal with the question of enforcing awards annulled at the seat of arbitration, as well as the important judgment of the US Supreme Court in *BG v Argentina*.

Following a brief review of new arbitration rules issued by CPR, the AAA/ICDR and the Portuguese Chamber of Commerce and Industry, we end with announcements in relation to, among others, the Jerusalem Arbitration Center and the International Centre for Energy Arbitration based in Scotland. As always, we look forward to receiving your contributions for inclusion in future editions of *Arbitration News*, especially from those colleagues practising in Africa.

Before signing off, I wish to acknowledge the invaluable assistance and support of Hugh Meighen, as well as the continued guidance and diligence of the members of the editorial board, who make an invaluable contribution to the publication of *Arbitration News*; and while we welcome Sara McBrearty to the editorial board, as one of two members focusing on North American news, we say goodbye to Zia Mody and Funke Adekoya, responsible for covering South Asia and Africa respectively, who step down from the editorial board with the publication of this edition. Finally, many thanks to Rachael Johnson (and her colleagues at the content and production team of the IBA), who has been especially patient during the gestation of this edition.

Committee Officers

Co-Chairs

Paul Friedland
White & Case, New York
Tel: +1 (212) 819 8917
Fax: +1 (212) 354 8113
pfriedland@whitecase.com

Anne Veronique Schlaepfer
Schellenberg Wittmer, Geneva
Tel: +41 (22) 707 8000 - +41 (22) 707 8106
Fax: +41 (22) 707 8001
anne-veronique.schlaepfer@swlegal.ch

Senior Vice-Chair

David Arias
Arias, Madrid
Tel: +34 917 813 550
david.arias@ariasslp.com

Vice Chairs

Makhdoom Ali Khan
Fazleghani Advocates, Karachi
Tel: +92 (21) 3587 9511
Fax: +92 (21) 3587 9521
makhdoom.khan@fazleghani.com

Hassan Arab
Al Tamimi & Company, Dubai
Tel: +971 (4) 364 1641
Fax: +971 (4) 364 1777
h.arab@tamimi.com

Stephen Drymer
Woods, Montreal
Tel: +1 (514) 370 8745
Fax: +1 (514) 284 2046
sdrymer@woods.qc.ca

Eduardo Gonçalves
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados, São Paulo
Tel: +55 (11) 3147 7608
Fax: +55 (11) 3147 7770
goncalves@mattosfilho.com.br

Eun Young Park
Kim & Chang, Seoul
Tel: +82 (2) 3703 1039
Fax: +82 (2) 737 9091
eypark@kimchang.com

John Savage
King & Spalding, Singapore
Tel: +65 6303 6000
Fax: +65 6303 6055
jsavage@kslaw.com

Eduardo Silva Romero
Dechert, Paris
Tel: +33 (1) 5757 8014
Fax: +33 (1) 5757 8081
eduardo.silvaromero@dechert.com

Secretary

Wendy Miles
Boies, Schiller & Flexner London
Tel: +44 (0)207 614 0961
wmiles@bsfllp.com

Conference Quality Officer

Julie Bédard
Skadden Arps Slate Meagher & Flom, New York
Tel: +1 (212) 735 3236
Fax: +1 (917) 777 3236
julie.bedard@skadden.com

Publication and Newsletter Editor

Reza Mohtashami
Freshfields Bruckhaus Deringer, London
Tel: +44 (0)20 7832 7278
reza.mohtashami@freshfields.com

Asia Pacific Forum Liaison Officer

Sunil Abraham
Zul Rafique & Partners, Kuala Lumpur
Tel: +60 (3) 62098281
Fax: +60 (3) 62098373
sunil@zulrafique.com.my

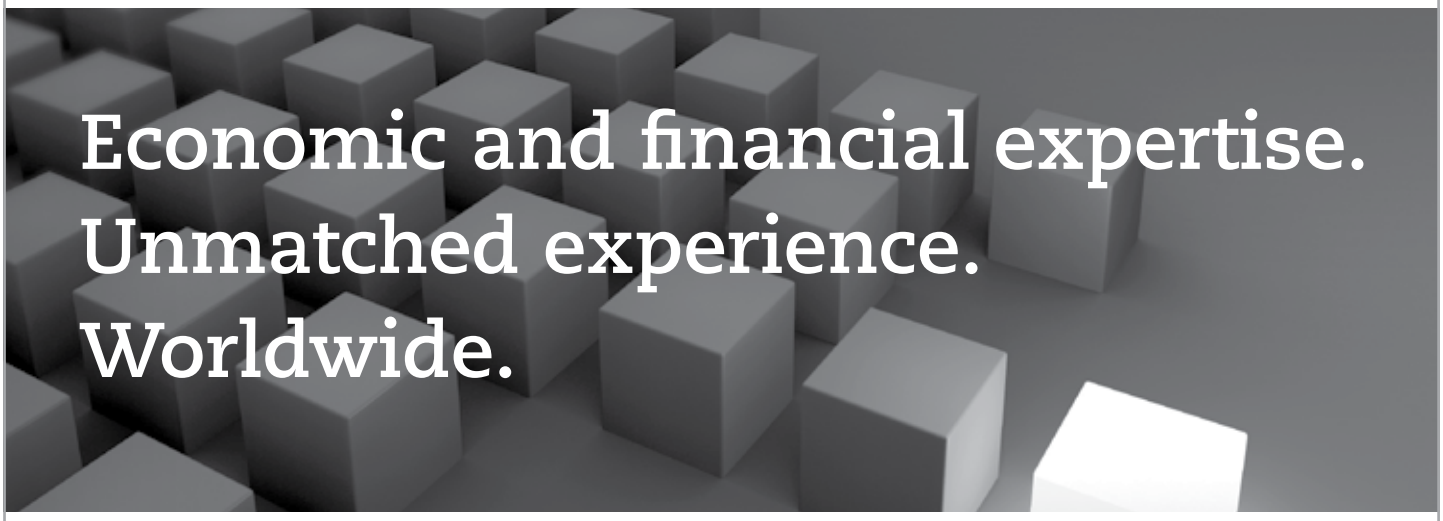
Corporate Counsel Forum Liaison Officer

Tomasz Sikora
Exxon Mobil Corporation, Houston
Tel: +1 713 656-6716
Fax: +1 713 656-5270
tom.j.sikora@exxonmobil.com

Website Officer

Christian Leathley
Herbert Smith Freehills, London
Tel: +44 (0)20 7374 8000
Fax: +44 (0) 20 7374 0888
christian.leathley@hsf.com

NERA
ECONOMIC CONSULTING



Economic and financial expertise. Unmatched experience. Worldwide.

NERA: Bringing insight in economics and financial analysis to international arbitration.

For over half a century, NERA experts have been central to client success in some of the world's highest-profile disputes, regulatory proceedings, and business challenges. NERA's international arbitration economic and accounting experts help clients through all stages of the arbitration process, providing specialized expertise in both commercial and investment treaty arbitrations. Our economists have testified in major arbitration venues around the world. With experts in more than 25 offices across Europe, Asia, and North America, NERA's arbitration team can provide a strong local presence and native language capabilities that enable us to articulate the independent advice and expert testimony needed for successful outcomes across all arbitration venues.

Dr. Chudozie Okongwu
Securities & Finance
London & New York
+44 20 7659 8568

Dr. Richard Hern
Utilities & Regulation
London & Singapore
+44 20 7659 8582

Dr. Fabrizio Hernández
Energy & Environment
Madrid & Rome
+34 91 521 0020

Toni Pincott
Accounting & Damages
London & Singapore
+44 20 7659 8576

Carlos Pabon-Agudelo
Energy & Infrastructure
Washington, DC & Mexico DF
+1 202 466 9238

Dr. Vinita Juneja
Securities & Finance
New York & London
+1 212 345 3148

Dr. Faten Sabry
Securities & Finance
New York & London
+1 212 345 3285

Mark L. Berenblut
Accounting & Damages
Toronto & London
+1 416 868 7311

www.nera.com/arbitration

Insight in Economics™

Conference Reports – 17th Annual IBA International Arbitration Day, Paris, 13–14 February 2014

Sophia von Dewall
Derains & Gharavi, Paris
svondewall@derainsgharavi.com

Anything goes? Do counsel owe a duty of honesty in relation to their submissions, and (if so) when and to whom?

Session Co-Chairs
Cristian Conejero Philippi Yrarrázabal Pulido & Brunner, Santiago
Vera van Houtte Independent arbitrator, Leuven

Speakers
John Beechey ICC International Court of Arbitration, Paris
Professor Pierre Mayer Dechert, Paris
David W Rivkin Debevoise & Plimton, New York and London
Cecil Abraham Zul Rafique & Partners, Malaysia

On 14 February 2014, the 17th Annual IBA International Arbitration Day took place in Paris, France. The day turned around the general topic: 'Advocates' duties in international arbitration: has the time come for a set of norms?' and had the overall object to consider – in light of the recently adopted IBA Guidelines on Party Representation in International Arbitration – whether and how international standards of conduct can improve the fairness and efficiency of the arbitral process.

The first session, entitled 'Anything goes? Do counsel owe a duty of honesty in relation to their submissions, and (if so) when and to whom?', addressed ethical questions, such as whether there is a duty of honesty and the tension that may exist between counsel's ethical duties and the confidentiality that governs the counsel–client relationship. The session was co-chaired by Vera van Houtte and Cristian Conejero.

The session was opened by van Houtte, who emphasised that, generally speaking, skills cannot be separated from honesty where it concerns submissions made by counsel in an international arbitration. However, she recognised that the exact scope, nature and contents of such a 'duty of honesty' may differ from country to country, from jurisdiction to jurisdiction, and may depend on the cultural background of the participants.

Following Van Houtte's introductory remarks, the floor was given to Professor Pierre Mayer, who addressed two questions, namely, whether counsel owe a duty of honesty, and if so, to whom such duty is owed.

As to the first question, Mayer's answer was 'obviously, yes'. According to Mayer, counsel is expected and supposed to act honestly, noting that there is no difference between state courts and arbitration in this respect and that there is nothing specific to international arbitration that would allow counsel to behave dishonestly. In this regard, Mayer first pointed to a general and unwritten, purely moral

duty of honesty that applies irrespective of whether counsel belongs to a professional organisation. In addition, Mayer noted that more specific written rules and principles also may be embodied in, for example, national bar rules.

However, and with respect to the latter category of rules and principles, Mayer noted that the scope and contents of such rules and principles may differ from country to country. In some countries, the duty of honesty is only reflected in very broadly formulated rules. In other countries, the duty of honesty is comprised in a more comprehensive set of rules. In addition, there are countries where the scope of the duty of honesty differs from branch to branch of the legal profession.

By way of example, Mayer referred to England, where the duty of honesty is worded differently for barristers and solicitors. An English solicitor must 'act with integrity', whereas an English barrister must 'act with honesty and integrity.'

In the United States, again a different description of the duty of honesty applies. There, the Model Rules of Professional Conduct enacted by the American Bar Association provide that attorneys must 'avoid engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.'

In contrast with England and the United States, France subjects its *avocats* to a more far-reaching obligation of honesty. A French *avocat* must not only act with 'dignity, conscience, independence, probity and humanity', but must also respect principles of 'honour, loyalty, selflessness, fraternity, scrupulousness, moderation and courtesy'. Yet, unlike the English and US Bar Rules, the French Bar Rules do not contain precise rules as to what the duty of honesty requires counsel to do in specific situations.

Clearly, the differences that exist between the content and scope of rules concerning the duty of honesty may give rise to an imbalance between lawyers and counsel from different jurisdictions, with 'the rules not being the same on both sides' as Mayer put it. Apart from that, the question arises whether these local rules and principles, established by professional bodies, also find application in international arbitration. Here again, no uniform answer exists. Mayer noted that whereas some local rules specifically provide that such rules extend to international arbitration, others are completely silent on the issue or even appear to exclude their application.

Thus, and in concluding on the first question, Mayer noted that whereas the answer as to whether there exists a duty of honesty in international arbitration is undoubtedly 'yes', the question as to what specific obligations this duty entails is more difficult to answer in view of the fact that, in international arbitration, counsel from different parts of the world may be subject to different ethical duties.

As to the second question, namely 'to whom is the duty of honesty owed', Mayer suggested that this duty is owed to the opposing counsel, the professional body to which lawyers belong and – importantly – to justice. In this regard, Mayer specifically drew a distinction between the arbitral tribunal on the one hand, and justice on the other, pointing out that the only duty that is owed to the arbitral tribunal is not a duty of honesty, but a duty towards the accomplishment of the tribunal's mission as imposed by the parties, which is to render justice.

Cecil Abraham spoke next on the question of whether a duty of honesty is owed in international arbitration, with a specific focus on the rules and principles that apply in the Asia Pacific region. Abraham agreed that a duty of honesty exists in international arbitration, noting that honesty should be ingrained in members of the legal profession appearing before tribunals. At the same time, he disagreed with Mayer's view that this duty is owed to justice, as opposed to the tribunal. A comparative study of the rules that apply in the Asia Pacific region led Abraham to conclude that there counsel *do* owe a duty of honesty to the tribunal in making their submissions.

Abraham furthermore recommended, in view of the divergence of national laws relating to the code of professional conduct of lawyers in the Asia Pacific region, that the international arbitration practice in this respect be harmonised. The difficulty, Abraham observed, is how such harmonisation can be achieved. In this respect, he noted that the introduction of soft law rules, such as the IBA Guidelines on Party Representation in International Arbitration, would be a way to achieve this goal, but he at the same time warned that such a measure might not be entirely sufficient as not all jurisdictions in the Asia Pacific region are familiar with the IBA Guidelines. As a result, a significant amount of training to raise awareness in the less sophisticated arbitration jurisdictions in Asia would be necessary.

Abraham welcomed the IBA's initiative to set up the Asia Pacific Arbitration Group (APAG), which he considered a step in the right direction. In concluding, he expressed hope that APAG and the working groups to be established under its umbrella would generate specific recommendations in this respect from local practitioners in the Asia Pacific region.

David Rivkin subsequently addressed prominent questions flowing from the general proposition that 'lawyers may not make false or misleading submissions', such as: 'When is a submission misleading?'; 'What are the obligations of counsel towards the tribunal in case it has made a false or misleading submission?'; and 'Should counsel correct the false or misleading submission?'

In this regard, Rivkin noted that there are more rules addressing these questions available in common law than in civil law systems. As an example, Rivkin referred to the US Code of Civil Procedure, pursuant to which counsel, if and when they become aware of the fact that they have made a false or misleading submission, has to inform the court thereof immediately. He noted that, to the extent the client would withhold its counsel from disclosing this information to the court, counsel should consider ceasing its representation of the client. According to Rivkin, the English Bar Code imposes similar obligations upon counsel to correct false or otherwise misleading submissions.

In contrast, the codes of civil proceedings in civil law countries such as France and Germany do not contain such provisions. Rivkin stated that, nevertheless, counsel should – as a matter of principle – refrain from presenting the client's case on the basis of evidence that he or she knows is false, reminding the audience that it is the job of the tribunal, and not of counsel, to resolve the dispute. In the same vein, counsel should not argue a point that they know to be untrue, on the basis of undisclosed evidence that is in their file. However, counsel is at the same time not obliged to produce voluntarily any evidence that is damaging to the position of their client. Only when the client has been ordered to produce such document in the document production phase should the relevant document be disclosed.

Finally, the discussion turned to the tension between counsel's ethical duties and the confidentiality that governs the counsel–client relationship. John Beechey introduced the topic by referring to the remark by Chief Justice Earl Warren that 'in civilized life, law floats in a sea of ethics', meaning that there is a foundation of ethical values for the law. He furthermore stated that, as is also apparent from Article 27 of the IBA Guidelines on Party Representation in International Arbitration, legal professional secrecy remains one of the cornerstones of the counsel-client relationship. As such, the general premise remains that clients can rely on privilege and secrecy. He nevertheless recognised that the ethical problems faced by lawyers represent certain broader social-political problems facing society.

Beechey further advocated the introduction of a uniform code of ethics in the arbitration rules of arbitral institutions. As to the feasibility of such a uniform code of ethics, Beechey referred to the IBA Guidelines on Party Representation in International Arbitration (in particular Articles 9 to 11 and Articles 22 to 25), remarking that none of the norms contained therein are 'new', but rather seem to reflect an already existing consensus in this respect. In concluding, Beechey noted that the enforcement of such ethical rules, if embodied in the rules of arbitral institutions, could be problematic, as these institutions generally do not have the mandate to exercise disciplinary powers over counsel or the arbitral proceedings.

The gathering and taking of evidence: should we seek to level the playing field?

Alexandre Mazuranic
Schellenberg Wittmer Ltd, Geneva
alexandre.mazuranic@swlegal.ch

Session Co-Chairs
David Arias Arias SLP, Madrid
Luca Radicati di Brozolo ARBLIT – Radicati di Brozolo Sabatini, Milan

Speakers
Louis Degos K&L Gates, Paris
Doug Jones Clayton Utz, Sydney; Atkin Chambers, London
Constantine Partasides Freshfields Bruckhaus Deringer, London
Klaus Reichert Brick Court Chambers, London

The second session of the 17th Annual IBA International Arbitration Day focused on the gathering and taking of evidence and the fact that not all party representatives may have the same understanding or may be submitted to the same duties regarding document production requests or the preparation of witnesses.

Klaus Reichert opened the session by addressing the issue of whether it is the role of the arbitral tribunal to ensure that all parties play by the same rules with respect to the gathering and production of evidence or testimony. He first referred to the principal aims and objectives of the IBA, including the promotion of uniformity in appropriate areas. He noted that the IBA Council ratified the IBA Guidelines, elevating them to the association's formal view, rather than just the understanding of a working committee. As such, the IBA Guidelines represent a standard of behaviour that professionals feel are appropriate, which may well encourage and assist national professional bodies to adapt their own national ethical rules in line with the standard set forth by the IBA Guidelines.

Reichert next addressed the question of a tribunal's power 'to steady a ship' or level the playing field with respect to the taking of evidence. He noted that a tribunal may be at risk for acting as one party's counsel, but added that tribunals cannot sit idly by when the fairness of the proceedings is threatened.

Reichert proposed that the tribunal should determine early on where lawyers are registered and then include in the terms of reference or in an early procedural order the power to exclude counsel in specific circumstances (such as if the appearance of counsel designated after the signature of the terms of reference would force the recusal of an arbitrator). He argued that such language would allow avoiding tactical appointment of counsel at a late stage of the proceedings and perhaps exercising a certain influence on the behaviour of party representatives. Reichert also proposed organising an early dialogue between the parties and the tribunal to understand the expectations of all participants in the process, and to avoid different conceptions of the same or similar principles. The purpose is to ensure that there are no surprises at a later date for the tribunal to manage. Reichert illustrated his suggestion by referring to an article from the *Daily Telegraph* newspaper that discussed the nuances of the English language. For instance, if a British person says 'that is a very brave proposal', they mean 'you are insane', but other English speakers may not understand the intended meaning and instead take the statement at its face value. He advocated that this early dialogue should be more detailed than what parties are used to currently, but this may be necessary to ensure that there is clarity about the standards of conduct expected of all actors in the arbitration.

Reichert concluded by stating that for arbitration to work, participants must trust the system and proposed that the IBA Guidelines could serve to build such trust and therefore should not be dismissed.

Louis Degos next addressed the issue of the preparation of witnesses. His starting point was that it is permissible for lawyers to interview witnesses/experts.[1] This, however, does not mean that everything should be allowed. Counsel cannot overlook professional rules or domestic laws.

Degos first discussed whether it is unethical to prepare witnesses. The problem with this question is that it raises a variety of rules, depending on the place of registration of the lawyer and the seat of the arbitration. These rules do not always provide uniform answers. For example, in the United States a lawyer may and should do whatever is feasible to prepare the witness. In contrast, in England, only limited witness familiarisation with the process is permissible, while coaching of witnesses is prohibited. Witness preparation is authorised in Austria, Sweden, Germany or the Netherlands, whereas it is forbidden in Belgium, France[2] and Switzerland (however the Swiss code of conduct preserves the particular rules of arbitration).[3]

Degos then asked what could be improper in preparing witnesses. The term 'improper' is found, for instance, under Article 4 of the IBA Rules on the Taking of Evidence in International Arbitration, but never defined. He reviewed types of witness preparation and came to the following conclusions: contacting a witness to gather facts and appreciate if their testimony may be helpful or not seems to be accepted everywhere in the world; familiarising the witness with the process does not raise specific problems; and coaching or training the witness, however, raises a double danger if the method is not rightly applied: it could be considered as tantamount to exercising undue influence on the witness and it could lead to criminal sanctions.

Therefore, in order to avoid any misunderstanding as to what counsel may do in terms of witness preparation, Degos suggested, as recommended in the UN Commission on International Trade Law (UNCITRAL) Notes on Organizing Arbitral Proceedings, that the tribunal should address the scope of witness preparation early in the proceedings.[4]

Degos concluded by stating that levelling the playing field between parties of different legal backgrounds should be part of the tribunal's mission.

Doug Jones then addressed more specifically the role of counsel in the preparation of fact and expert witness testimony. Jones identified three major issues when dealing with written factual or expert witness testimony:

- the costs of preparation of factual witness and expert evidence, which represent a significant portion of the parties' overall arbitration costs;
- factual witness statements that are written with the eloquence of advocates and which often turn into an extension of the parties' submissions; these are no longer factual witness statements in the true sense; and
- as a result of the various backgrounds of counsel in arbitration, there are different approaches to the manner in which counsel will prepare witness statements.

He pointed to the contradiction between the rules of conduct imposed by the various jurisdictions and the requirement in arbitration to leave our domestic baggage at the door. He contended that there were already enough international rules and guidelines setting certain commonly accepted principles such as the IBA Guidelines on the Taking of Evidence, the Chartered Institute of Arbitrators Protocol for the Preparation of Expert Testimony by Party-Appointed Experts, or Guidelines 18 to 25 of the IBA Guidelines on Party Representation in International Arbitration, and that these rules or guidelines deal efficiently with the way in which there can be interaction between counsel and witnesses in the preparation of witness evidence.

But Jones added that there was a need to adapt those guidelines to a process of proactive management by the tribunal and suggested a three-stage process. First, there should be an early discussion on what the contested facts are, and expert issues that need to be dealt with in order to avoid every tree 'in the forest being moulded down' and define what needs to be proved. Secondly, counsel and the tribunal should discuss how those facts are to be established (many contested issues are solved with documents and there is no need to have witnesses recite what is already stated in documents). Thirdly, it is important to limit time and cost with an effective process by, for example, limiting the number of witnesses, minimising the rounds of written witness testimony or determining when the witness statements would best be exchanged (simultaneously after all documents have been produced?).

Jones concluded by saying that the guidelines are useful in helping the parties understand how the matter will proceed.

Constantine Partasides addressed the issue of the duties of counsel in ensuring fairness in document production.

Partasides referred to the notion of 'culture clash' which advertises the cultural sensitivity of the users and adds a dramatic edge. He suggested that although this phrase is often an

exaggeration, it may very well be appropriate in the case of document production.

He identified a serious ethical difference in the duties of counsel in relation to document production. Significant proactive duties are imposed on US or United Kingdom-qualified counsel to ensure the integrity of the process. The 2014 UK Bar Standards Board Conduct Code applicable to barristers for instance provides that: 'if you become aware that your client has a document which should be disclosed but has not been disclosed, you cannot continue to act unless your client agrees to the disclosure of the document'.[5] Similarly, US lawyers must certify that a discovery request is not unreasonable nor unduly burdensome or expensive, and they may face sanctions such as paying the other party's reasonable expenses, including attorney's fees.[6]

By contrast, the civil law world provides for less explicit ethical duties associated with document production. For instance, French law provides for a general duty to collaborate with the court,[7] and German law provides for the possibility of negative inferences only.[8]

Partasides insisted on the fact that document production is based primarily on confidence. Often, there is little confidence left between parties involved in a dispute. Hence, it is fundamental that there is confidence between counsel. If confidence in opposing counsel breaks down, then the process will not work because parties will put less effort into the process, fearing rightly or wrongly that the other party may do the same. If the client is convinced that the other side will not allow potentially harmful documents to be produced, it becomes difficult for counsel to insist to their client to produce any harmful documents requested by the opposing party.

Partasides insisted that such guidelines were welcome, as they offered a common basis applicable to all counsel.

Partasides proposed that for the guidelines to constitute a complete solution, the sanctions that they include under Guideline 26 should extend, by way of the catch-all phrase of paragraph d, to sanctions applicable to counsel directly, such as removal from the case or financial penalties. He justified these typical common law sanctions by referring to the common law origins of document production. For Partasides, this is how it will be possible to convince counsel to take the difficult steps that are necessary in a document production process and empower them (vis-à-vis their clients) to be able to do so.

Partasides wrapped up his presentation by stating that the IBA Guidelines were needed to build up trust and to provide for a common written basis to all arbitration practitioners.

Among the valuable interventions from the delegates, it is worth noting the following:

- A delegate argued that it is hard to provide witness statements that are wholly prepared by the witness alone and that it takes time to gather facts from a witness, analyse them and present them in a manner that will be understandable for the arbitrators. He contended that there was nothing wrong in a lawyer ensuring that a witness statement is well written and properly addresses the points in dispute.
- Another delegate argued that there seemed to be resignation towards the role document production should play in international arbitration and that arbitral tribunals are more and more willing to grant broad document production requests. By contrast, the delegate noted that civil law arbitrators seem to take more seriously the notion of 'narrow and specific requested category of Document' under the IBA Rules on the Taking of Evidence, which made the process easier for parties and counsel.

Finally, the moderators conducted an improvised survey among the delegates, which revealed that many cases had apparently been decided on the basis of documents obtained though document production requests.

Notes

1 See s 4.3 of IBA Rules on the Taking of Evidence in International Arbitration and Guideline 24 of the IBA Guidelines on Party Representation in International Arbitration.

2 In France, the Paris Bar took an official position that in international arbitration, the preparation of a witness by a lawyer is not contrary to the code of conduct (decision of the *Conseil de l'Ordre du Barreau de Paris* of 26 February 2008, published in the *Bulletin du Barreau* 2008 No 9).

3 See Art 7 of the Swiss Code of Conduct, available at: www.sav-fsa.ch/fileadmin/user_upload/sav/Ueber%20uns/7229_Schweizerische_Standesregeln_F_22.06.2012.pdf.

4 See the UNCITRAL Notes on Organizing Arbitral Proceedings, 1996, paras 59 and 67 (item 15).

5 See the UK's Bar Standards Board Conduct Rules of January 2014, Guidance Note gC13.

6 See Rule 26(G)(I) and 26(3) of the US Federal Rules of Civil Procedure.

7 See Art 10 of the French Civil Code.

8 See s 427 of the German Code of Civil Procedure.

Ilija Mitrev Penusliski
Shearman & Sterling, Paris
ipenusliski@shearman.com

Arbitrators without powers?

Session Co-Chairs
Robin Oldenstam Mannheimer Swartling, Stockholm
Claus von Wobeser Von Wobeser & Sierra, Mexico City

Speakers
Professor Karl-Heinz Böckstiegel Independent Arbitrator, Bergisch Gladbach
Christine Guerrier Thalès, Paris
Professor Gabrielle Kaufmann-Kohler Lévy Kaufmann-Kohler, Geneva
Professor Alan Scott Rau University of Texas, Austin

This session of the 17th IBA International Arbitration Day considered what powers arbitrators have to address counsel misconduct and the circumstances in which such powers should be exercised.

Professor Karl-Heinz Böckstiegel commenced with a discourse on whether or not arbitrators have powers to address counsel misconduct. He suggested that any such powers would fall within one of three categories: express, implied or inherent powers. While the questions featured in the session's programme suggested that those powers could only be inherent (or, perhaps, implied), an analysis should first be made as to whether express powers to tackle counsel misconduct existed.

According to Böckstiegel, the sources of express powers could be threefold. First, such powers could be found in national laws, for example, section 1042(4) of the German Arbitration Law provides that '[f]ailing an agreement by the parties […], the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate.' Secondly, arbitrators could be provided express powers in treaties, such as the bilateral investment treaties (BITs) or the International Centre for the Settlement of Investment Disputes (ICSID) Convention. For example, pursuant to Article 44 of the ICSID Convention, '[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.' Finally, the source of express powers could be found in arbitration rules. The 2012 ICC Arbitration Rules, for example, stipulate that '[t]he proceedings before the arbitral tribunal shall be governed by the [ICC] Rules and, where the [ICC] Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on […]' (Article 19). Similarly, Article 14(2) of the London Court of International Arbitration (LCIA) Arbitration Rules provides tribunals with significant discretion in deciding on issues before them: '[u]nless otherwise agreed by the parties […], the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable […].'

Böckstiegel noted that one could also speak of implied or inherent powers enabling arbitrators to address counsel misconduct. However, these powers must be limited: (1) to actions of counsel in the proceedings at hand; and (2) by the duty to ensure that the proceedings are fair, efficient, and expeditious.

Böckstiegel mentioned that while, generally, in the cases where he sat as an arbitrator the tribunals very seldom had to intervene to address counsel misconduct, recently this issue appears to have arisen more often. In one example, counsel for one party conducted a cross-examination very aggressively and even intimidated the witness. In these circumstances, the tribunal considered it necessary to intervene so as to secure a testimony that could later be helpful for the tribunal. In another case, documents submitted by one party were proven to be forgeries. Counsel for that party assured the tribunal that it had no knowledge of the forgery and withdrew the documents. Therefore, the tribunal considered that there was no need for it to intervene. However, the credibility of the party that had submitted the forged documents was seriously damaged. Finally, in a case where the tribunal had deliberated on a number of separate issues, on several occasions, shortly after each deliberation, counsel for one party would submit a brief addressing exactly the issue that had been discussed by

members of the tribunal. Evidently, counsel had received confidential information from one of the party-appointed arbitrators. The two remaining arbitrators decided not to start any challenge either against the suspected arbitrator or counsel, on the basis that the outcome of such challenge would cause considerable delay to the proceedings by requiring a rehearing of parts of the case, and there was no guarantee that a replacement party-appointed arbitrator would not engage in the same misconduct.

Böckstiegel concluded that, while tribunals undoubtedly do have powers – whether express, implied or inherent – to address counsel misconduct, the exercise of such powers must be considered with great care and after a diligent analysis of the circumstances of the case, all the while guided by the primary objective of ensuring a fair, efficient and expeditious procedure.

Christine Guerrier also addressed the issue of whether the tribunal has the powers to police situations where counsel engages in misconduct. She noted that arbitration users expect that tribunals will render justice in proceedings that are fair and efficient, with each party having a right to be heard, and that they will actively seek to ensure that the proceedings have these qualities. Given the authority of tribunals to control the proceedings in general, parties expect that tribunals will also have the power to address any disruptions caused by counsel.

Guerrier further noted that while the parties are bound by the arbitration agreement and the result of the arbitration proceedings, counsel are not. Any unaddressed misconduct on the part of counsel could adversely impact the proceedings and their result, to which the parties are in turn bound. Thus, the parties can sustain the effects of counsel misconduct – often without themselves being at fault.

Guerrier spoke of different types of counsel misconduct. She noted that at times, and without the knowledge of the party, counsel engage in dilatory tactics. In other instances, they may disrupt the proceedings due to lack of arbitration experience. In both cases, actions of counsel can lengthen the proceedings and increase the costs incurred by the parties.

For these reasons, Guerrier concluded that arbitrators are bound to maintain the integrity of the arbitral process and police the misconduct of counsel.

Professor Gabrielle Kaufmann-Kohler analysed the measures or remedies available to tribunals when faced with counsel misconduct. She suggested that these depend on the source of the tribunal's powers and its function. The sources of the tribunal's power to address counsel misconduct could, in theory, be found in express rules. However, the legal framework of an arbitration rarely contains rules expressly providing for such powers. The source is therefore more likely to be found in the inherent powers of tribunals. Referring to a decision of the Iran-United States Claims Tribunal, Kaufmann-Kohler noted that the inherent powers of arbitral tribunals 'are those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature'.[1] Accordingly, the remedies to address counsel misconduct would be derived from the very nature of the tribunal as an institution with a judicial nature.

Next, Kaufmann-Kohler noted that the remedies that a tribunal can employ depend on how one views the tribunal's function. Kaufmann-Kohler referred to two schools of thought in this regard. The first is that the function of a tribunal is a private one, limited to the resolution of the particular dispute at hand. From this view, tribunals would possess the powers to police counsel misconduct for the sole purpose of ensuring the smooth conduct of the arbitration. The second view is that, in addition to a private function, tribunals also possess a public function: the proper administration of international justice and the development of legal rules. In this case, while having to address the situation at hand, tribunals would also have the duty of developing a body of law on counsel misconduct.

Bearing these functions in mind, Kaufmann-Kohler looked at existing practice. In this context, she referred to a decision in the *Pope & Talbot v Canada* case where the tribunal faced counsel misconduct.[2] In the course of the proceedings, counsel for Canada inadvertently sent opposing counsel a confidential letter containing legal advice to the client, Canada, in relation to the arbitration. Opposing counsel made the contents of the letter public. The tribunal, which had been seized of the matter, noted that the conduct of the opposing counsel had been 'highly reprehensible' (paragraph 6) and found that the disclosure of the letter to the public was contrary to its

previous procedural orders (paragraph 8). The tribunal ordered the claimant to pay US$10,000 to Canada for its costs associated with that part of the proceeding. The tribunal emphasised that it was the conduct of counsel for the claimant that led to the order and expressed the wish that counsel would 'voluntarily personally assume those costs' (paragraph 12). Finally, the tribunal 'assume[d]' that counsel for the claimant would make the tribunal's decision public, as it had done with previous decisions (paragraph 13).

The result of this ruling, Kaufmann-Kohler continued, was threefold. First, the order was not directed at counsel (over whom the tribunal did not have jurisdiction) but at the party. Secondly, by causing counsel to assume the costs, however, the tribunal sought to ensure that the party did not sustain the negative effects of the ruling. Thirdly, both private and public aspects of the tribunal's functions could be seen in the ruling: on the one hand, the tribunal decided the issue at hand by sanctioning the misconduct and, on the other, it sought to educate both counsel for the claimant and the legal audience at large on what would be considered inappropriate counsel conduct.

Kaufmann-Kohler suggested that in addition to the remedies of apportionment of costs and 'naming and shaming' employed by the *Pope & Talbot* tribunal, other remedies could include the assessment of evidence and disqualification of counsel. She also noted that the tribunal's remedies are subject to important limitations arising from the parties' fundamental procedural rights and the scope of the tribunal's jurisdiction.

In conclusion, Kaufmann-Kohler noted that while tribunals have inherent powers to address counsel misconduct, the nature of these powers depends both on their source and on how one views the function of an arbitral tribunal.

The presentation of Professor Alan Scott Rau was the last of the session and centred on whether or not tribunals have the power to disqualify counsel.

In Rau's view, tribunals undeniably have the power to disqualify counsel. He considered that the basis of this power is the scope of the parties' consent, which confers onto tribunals the power to conduct the proceedings as they see fit.

According to Rau, those who contend that tribunals cannot disqualify counsel do so on the ground that it would amount to professional discipline, regulation of the arbitration bar, which in turn is not a prerogative of arbitral tribunals. To Rau, these arguments are based on an incorrect premise: in arbitration, counsel disqualification has nothing to do with 'deontology'. Rather, the power to disqualify counsel rests with arbitrators because of their role as guardians of both the arbitral process and the parties' rights to a fair hearing.

Rau discussed two situations where disqualification of counsel may principally be relevant. First, this issue could arise in situations of conflict of interests stemming from the relationship of counsel with a member of the tribunal.[3] Rau noted that the IBA Guidelines on Party Representation in International Arbitration directly address this issue (see Guidelines 4–6). He further added that in this context the standards applied to disqualifying counsel and tribunal members should by and large be the same and that the analysis should be one of weighing the costs against the benefits. Secondly, disqualification may be considered in cases where the presence of counsel could constitute a violation of an ethical duty to a client.

Rau emphasised again that in neither of these situations would tribunals be policing issues of professional ethics, the jurisdiction over which belongs to local bar organisations. Nor would the domestic rules on professional responsibility be relevant. Rather, tribunals would be solely concerned with the fair conduct of the proceedings.

Rau concluded that to the extent a corpus of rules on professional responsibility in international arbitration is needed, domestic ethics rules would be inappropriate. Rather, he noted, a set of transnational core standards, divorced from local culture and aimed at ensuring a fair arbitral process, would be more fitting for the international arbitration setting.

Notes

1 *The Islamic Republic of Iran v The United States of America*, Iran-US Claims Tribunal, Cases Nos A3, A8, A9, A14 and B61, Decision No DEC 134-A3/A8/A9/A14/B61-FT of 1 July 2011, para 59.

2 See *Pope & Talbot Inc v The Government of Canada*, Decision by the Arbitral Tribunal of 27 September 2000.

3 This issue arose in both the *Hrvatska* arbitration and the *Rompetrol* case. See *Hrvatska Elektroprivreda, dd v Republic of Slovenia* (ICSID Case No ARB/05/24), Tribunal's ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008; *Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3), Decision of the Tribunal on the Participation of a Counsel, 14 January 2010.

The IBA Guidelines on Party Representation: the right step or a step too far?

Jacob Grierson
McDermott Will & Emery, Paris
jgrierson@mwe.com

Session Chair
Wendy Miles Wilmer Hale, London

Speakers
Eric Schwartz King & Spalding, Paris
Toby Landau Essex Court Chambers, London
Professor Emmanuel Gaillard Shearman & Sterling, Paris
Michael Schneider Lalive, Geneva

As the title suggests, this session of the conference considered whether the IBA Guidelines on Party Representation in International Arbitration, adopted on 25 May 2013 ('Guidelines') were a positive or negative development. Two of the speakers, Eric Schwartz and Professor Emmanuel Gaillard, defended them, while the other two speakers, Toby Landau and Michael Schneider, criticised them. The session was moderated by Wendy Miles.

Schwartz, standing in for his partner Doak Bishop, began his presentation by referring to the presentation that Bishop and Margrete Stevens had made at the International Council for Commercial Arbitration (ICCA) Conference in Rio in 2010. In that presentation, Bishop and Stevens had made a plea for a code of ethics for transparency, integrity and legitimacy. Schwartz reported that Bishop felt that the Guidelines were a good first step, but that they did not go far enough. His proposal had been much more ambitious in scope than the Guidelines. Derived from the Council of Bars and Law Societies of Europe (CCBE) Code of Conduct and the IBA International Code of Ethics, Bishop's and Stevens' proposal had contained five sections: (1) general principles; (2) relations with clients; (3) relations with the tribunal; (4) pleadings and presentation of evidence; and (5) relations between lawyers. The Guidelines only dealt with the third and fourth of these sections.

Nevertheless, Schwartz recognised that the very fact that the Guidelines were being discussed in this conference was a sign of their success. He also recognised that the Guidelines were not supposed to be set in concrete. Consistent with this, they were non-binding, and the IBA preferred to call them 'Guidelines' rather than 'rules' or 'norms'. The intention was that arbitrators should draw inspiration from them – exactly what Bishop and Stevens had had in mind. Schwartz reported that Bishop hoped that arbitral institutions would, in due course, adopt the Guidelines. A solution would thus be found to what Professor Rogers had described as the 'ethical no man's land' of international arbitration. Accordingly, Schwartz agreed with Bishop that the Guidelines were salutary. He considered it undesirable that they be taken out of the context in which they had been formulated. He did not endorse each of the articles in the Guidelines, but commended them as a first try which would undoubtedly be subject to amendment.

Landau referred to the syndrome that he had identified at the ICCA Congress in Singapore in 2012 as 'legislitis'. Jokingly, he suggested that one may need to seek professional advice if one feels the need to put self-evident truths into an A6 booklet. Landau did not take exception with the content of the Guidelines, nor did he disagree that there was a problem with ethics in international arbitration. However, he believed that these should be resolved not by the imposition of a harmonised standard, but rather by way of a more organic local variable solution that would depend on various circumstances. If the IBA wished to continue producing A6 booklets, it would need local support rather than to impose a single solution. He described the way in which the IBA had started out with relatively uncontroversial issues (eg, how to present evidence and how to constitute an arbitral tribunal) but was now moving into more and more minute and unimportant areas. Landau considered that ethics were different from evidence and process, for the following reasons: (1) ethical questions

cannot be answered by reference to costs and efficiency; and (2) ethics is a question of public policy, which is why it is left alone in the New York Convention.

Landau stated that the 'pill' offered to us in the form of the Guidelines had been sugared by everyone with the words 'this is not mandatory'. In his view, this was not good enough because of the official nature such guidelines acquire once they are printed and widely circulated. Landau said that we should be very cautious about the Guidelines for the following reasons:

- The guidelines were a blunt tool to impose a single rule where there were a variety of other legitimate views.
- The Guidelines contain certain bland principles of little or no use. Thus, for example, Guideline 9 ('A party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal') would not prevent those who were of a mindset to tell an untruth from doing so.
- The Guidelines were dangerous because people would invoke them before national courts.
- There would be difficulties in application of the Guidelines, particularly given that this was an area rife with mandatory rules.
- The Guidelines would engender false expectations (ie, that 'you may rely upon these Guidelines').
- There was no guarantee that national courts would respect the Guidelines. This same problem had arisen in relation to the IBA's Guidelines on Conflicts of Interest in International Arbitration.
- According to Landau, this would be an iterative process, and the next version of the Guidelines would be more detailed. Ultimately, this was a slippery slope. Gaillard poked some fun at some of the drafting of the Guidelines, in particular some of the definitions (eg, '"Arbitrator" means an arbitrator in the arbitration'). He said that the Guidelines read as though they were intended to be interpreted as a treaty. However, on the substance, Gaillard said that he had a more nuanced view than Landau. He welcomed the fact that they dealt with what he described as 'dirty trick number 34', namely turning up at a hearing with someone who creates a conflict of interest, in order to create delay. He said that the Guidelines provided a good way to handle this. He placed this in the 'very useful' category. In the 'useful' category he placed the rules on witness preparation, which reflected what was happening already in international arbitration, but could be useful before local bar authorities. He considered that the Guidelines concerning communications with arbitrators could be 'marginally useful'.

Gaillard said that one should never forget that the Guidelines are only guidelines and they should be judged accordingly. In conclusion, he considered that the best argument for the Guidelines is that they had been created with an international approach by the IBA. If they had not been created by the IBA, Gaillard said, 'someone else would have done something worse'.

Schneider reported that there had been intensive discussion within the Swiss Arbitration Association (ASA) as to whether it should take an opposing position to such an authoritative body as the IBA, but that it was decided that ASA should do so. The result was a position paper which was available on ASA's website. Schneider explained that he was, however, here in his personal capacity, not as a representative of ASA.

He referred to a recent decision of the English High Court,[1] which showed some of the problems with this area. In that case, a leading international law firm (the 'Firm') had provided advice on a corporate matter, in the course of which it had obtained confidential information. Subsequently, a dispute arose between parties, one of which was affiliated to the Firm's former client, leading to court proceedings and a London Court of International Arbitration (LCIA) arbitration. There was a risk that the Firm might make use of the confidential information, which led the High Court to issue an injunction to prevent the Firm from acting in the court proceedings. Schneider said that this was not a situation addressed by the Guidelines; the important point was that a competent court in separate proceedings had decided the issue of the professional duties of the Firm. Schneider's position was not that professional ethics cannot be decided by a court or an arbitral tribunal, but rather that they should not be decided by the *same* arbitral tribunal that was dealing with the substantive dispute.

Schneider also referred to Guideline 12, concerning the preservation of evidence. He was concerned that there would now be requests to counsel as to whether they had warned their clients not to destroy evidence. This would result in investigations into issues covered by privilege and have other undesirable consequences.

After those initial comments, Miles then asked the speakers to perform what she described as a 'deeper dive' into some of the issues:

- On the 'litigation hold' (Guideline 12), Schneider said that there would be a particular problem where counsel is acting on a contingency fee basis. This had not been addressed by the Guidelines. Schneider also pointed out that while Guideline 12 placed an obligation on counsel to tell their clients to preserve evidence, there was no actual obligation on *parties* to preserve evidence. He described this as an attempt to introduce a substantive rule by the back door. As a civil lawyer, Schneider did not consider that it was his role to police his clients. Guideline 12 would therefore not help to level the playing field between parties in relation to document production.
- On witness preparation (Guideline 20), Gaillard repeated that the Guidelines merely stated what already happened in practice, but that this could do no harm. Indeed, he stated that it was embarrassing for an arbitrator to discover that the parties were not playing the same game in that respect; and Guideline 20 could help to avoid the risk of parties complaining to local bars about witness preparation. On the other hand, Gaillard considered the practice of mock cross-examination to be 'more borderline', as it led to witnesses being over-prepared, it required very effective cross-examination and it made it more difficult for arbitrators to question witnesses.
- Schwartz responded to Mr Landau's comment that many of the provisions were anodyne by pointing out that the vigorous discussion about some of the provisions showed that they were anything but anodyne, even if they might seem self-evident to certain people. In addition, he reminded the audience that the Guidelines applied not only to counsel but to party representatives generally, many of whom would not be members of a bar and thus not subject to any sanction. Schwartz went on to state that he did not believe that the Guidelines would be invoked before national courts, that any conflict between the Guidelines and local bar rules could be addressed at the beginning of an arbitration and that, in relation to document production, there was a real need to address the major problem of unfairness where only one party's counsel plays the game properly. Equality of arms, and the public's confidence in international arbitration, needed to be restored.
- Landau responded by stressing the difference between creating a *level* playing field and a *single* playing field. He believed that, if the IBA created the latter, it would be killing the whole process that it had set out to create. In relation to the issue of a litigation hold, he stressed that Guideline 12 was not universally accepted and that there was no reason it should be. Landau suggested that the IBA should focus on creating booklets to help interpret 'legal impediment or privilege' for the purposes of Articles 9(2)(b) and 9(3) of the IBA Rules on the Taking of Evidence in International Arbitration. Landau also suggested that the approach adopted by the LCIA, which was inclusive to newcomers and did not provide for a single way forward, was the right way forward.

Members of the audience commended Guideline 8 (concerning communications with an arbitrator for the purpose of selection of the presiding arbitrator) and Guideline 20 (concerning witness preparation) specifically, and commended the Guidelines generally for helping those who are new to the process. Certain delegates suggested that it might have been better to have the specific comments in an annex (in order to emphasise that they are a framework only) and suggested that disciplinary decisions should be taken not by arbitrators but by a separate body (ie, a bar council for the international arbitration community).

Schwartz responded to the last comment from the audience by disagreeing that the remedies in Guidelines 26 and 27 were disciplinary. In his view, they were intended to assist arbitral tribunals to ensure the efficacy of their proceedings. He pointed out that they were not dissimilar to Article 37(5) of the ICC Rules, which provides that an arbitral tribunal can take account of the parties' conduct in deciding on costs.

Landau agreed with the comment from the audience about the annex. This would help to alert people to the issues without imposing a single solution.

Gaillard disagreed with this. He stated that, in practice, this would mean that parties could do whatever they want. He went on to make a separate point: that one of the positive things about the Guidelines was that they showed that common lawyers had come to realise that arbitrators had inherent powers – something that civil lawyers had realised long ago. This had been applied in relation to security for costs, to interim measures and now to counsel conduct.

Note

1 *Georgian American Alloys, Inc and Others v White & Case LLP* [2014] EWHC 94.

Kayla Feld
Norton Rose Fulbright, Singapore
Kayla.Feld@nortonrose fulbright.com

Remco Smorenburg
Norton Rose Fulbright, Amsterdam
Remco.Smorenburg@ nortonrose fulbright.com

Jessica de Rooij
Norton Rose Fulbright, Amsterdam
Jessica.deRooij@ nortonrose fulbright.com

Rick Beckmann
Norton Rose Fulbright, Jakarta
rick.beckmann@ nortonrose fulbright.com

Emir Pohan
Norton Rose Fulbright, Jakarta
emir.pohan@nortonrose fulbright.com

Investment arbitration

BIT by BIT: Indonesia's push-back on foreign investment

Indonesia jumps on the bandwagon

Indonesia has recently joined other states, such as South Africa, Ecuador, Venezuela, Czech Republic and Bolivia, in terminating various bilateral investment treaties (BITs). Most recently, in March 2014, Indonesia announced to the Dutch embassy in Jakarta its intention to terminate its BIT with the Netherlands ('IND-NL BIT'), effective 1 July 2015.

Under the IND-NL BIT 'sunset clause', the provisions of the treaty will remain in force for current investors for a further 15 years from the date of termination, or until 1 July 2030. Nevertheless, shortly after the announcement of the termination, Indonesian Vice President Boediono pledged at a summit in The Hague that Indonesia would negotiate a new BIT with the Netherlands that would be 'adjusted to recent developments'. It is likely that the 'recent developments' to which Vice President Boediono referred included a series of arbitration decisions favouring investors, amendments to various model BIT frameworks, and a growing perception among less-developed nations that tribunals at the International Centre for Settlement of Investment Disputes (ICSID) favour investors, even where the government has attempted to act in the interest of its people.

As the Indonesian Government has indicated that it will terminate all 67 of its BITs, the IND-NL BIT, Indonesia's oldest BIT and the first to fall, is unlikely to be the only casualty of Indonesia's new policy towards foreign investment protections. Indonesia will most likely seek to dismantle its BITs at the end of their respective periods of validity.[1] For example, the IND-NL BIT has a period of validity of ten years and provides that if either contracting party wishes to terminate the BIT, they must denounce the treaty in writing one year before the expiration, which is 1 July 2015. As such, Indonesia's termination of the IND-NL BIT in March 2014, with an effective date of 1 July 2015, is precisely timed to be consistent with the express terms for withdrawing from the existing agreement. The Indonesian Government has not yet revealed its plans on when or whether it would seek to renegotiate its BITs after termination.

Benefits of BITs for investors and host countries

BITs are intended to protect and to promote reciprocal investments in the states party to them. Since the early 1960s, a considerable number of BITs have been concluded between states, resulting in a current worldwide total of more than 2,860.

BITs typically include similar standards of protections for foreign investors, which states agree to uphold. The more general provisions commonly found in BITs concern fair and equitable treatment of investors over governments, (physical) protection and security of investments, and protection from expropriation or nationalisation by the host state. Other key clauses often included in BITs relate to 'national treatment', requiring the host state to treat foreign investors at least as favourably as it treats its own nationals, and a 'most favoured nation' clause, requiring states to treat foreign investors at least as favourably as nationals from any other country.

Vital to the success of BITs as a measure to promote investments are the dispute resolution clauses, which provide investors with an effective tool to enforce their rights. Like many BITs, the IND-NL BIT includes an ICSID arbitration clause. Arbitral awards rendered in ICSID arbitrations can be enforced in all contracting states, and pecuniary obligations in these awards must be treated by contracting states as final judgments of the national courts of the relevant contracting states.

Well-timed termination

The timing of the government's decision to terminate the IND-NL BIT was no accident. Commentators have speculated that the government's eagerness to terminate BITs are linked to three factors: (1) pending elections; (2) the recent implementation of a ban on the export of raw mineral ore; and (3) certain, high-profile investment treaty claims. It is worthwhile to consider these particular factors briefly in turn.

Election season – 'Indonesia cannot be bought'

A surge of nationalism swept Indonesia in the months leading up to the parliamentary and presidential elections of April and July 2014, respectively. Politicians deployed increasingly nationalistic rhetoric in their speeches and economic and resource nationalism were among the topics covered. The presidential front-runners all emphasised the need to reduce dependence on foreign investment and increasing domestic use of Indonesia's minerals so that money from Indonesia's rich natural resources stays within the country rather than flowing out.

Raw mineral ore export ban

In 2009, the government of Indonesia proposed a law that would ban the export of all unprocessed mineral ore. However, on 11 January 2014, the night before the ban was due to come into force, President Susilo Bambang Yudhoyono amended the ban by relaxing it slightly so that mining companies could continue to export unrefined minerals until 2017. These exports must still meet minimum purity levels of 15 per cent and are subject to an escalating tax that will rise from an initial 20 per cent to 60 per cent by the end of 2016. By 2017, all companies are required to have built smelters to process mineral ore domestically.

With the amendment to the regulation, over 60 companies planning to build smelters will now be allowed to continue exporting minerals, including the country's two largest copper producers (both United States-based), which together produce 97 per cent of the copper exported from Indonesia. However, the implementation of the ban was immediately followed by an announcement by one of the two largest mining companies in Indonesia that it would initiate international arbitration against the Indonesian Government. Not surprisingly, the government began to reassess its commitment to various BITs in the face of such significant and widespread claims.

Looming litigation

The prospect of additional BIT-related litigation due to the implementation of the raw mineral ore export ban seems particularly ominous after an ICSID Tribunal rejected Indonesia's jurisdictional challenge and allowed a US$1bn investment treaty arbitration to proceed. In *Churchill Mining Plc v Indonesia*, United Kingdom-listed Churchill Mining initiated an ICSID arbitration against Indonesia in 2012 under the Indonesia-Australia and Indonesia-UK BITs, claiming damages sustained due to the revocation of mining concessions. Indonesia's president has spoken in opposition to these cases, saying that he does not want multinational companies to 'pressure developing countries like Indonesia'. The Tribunal's finding in *Churchill Mining* may add further momentum to Indonesia's current interest in withdrawing from the international BIT framework.

Options for investors

Despite Indonesia's planned withdrawal from various BITs, other protections still exist for foreign investors.

First, under the IND-NL BIT's 'sunset clause', provisions of the treaty will remain in force for current investors for 15 years from the date of termination, or until 1 July 2030. As such, the protection afforded under the IND-NL BIT will not immediately come to an end for existing investors. It is mainly new investors that will be considering their options to protect their investments.

For now, Indonesia appears committed to its multilateral investment treaties, including the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (ACIA). The ACIA came into force on 29 March 2012 and provides ASEAN nations with similar standards of protection to those provided under the BITs with Indonesia.

Therefore, where there is no immediately applicable BIT for a foreign investor, one possible approach would be to structure investments through the ASEAN region or under BITs with Australia, China or South Korea, which are still in force. Whether these

options provide a viable and useful protection depends not only on the provisions of the treaties themselves, but also on the related tax and/or regulatory implications that arise from the strategic structuring of investments.

Predicted outcomes

Predicting Indonesia's next move – renegotiation of the IND-NL BIT, termination of other BITs, or a decision to reverse course on the mineral ore export ban – remains difficult. While growing nationalist sentiment has been evident in the months leading up to the 2014 elections, and may have contributed some of the support needed to terminate the IND-NL BIT, it is uncertain whether this trend will continue after the election season.

In the meantime, new investors may become hesitant when deciding whether to invest in Indonesia or in other nearby countries with similar resources but with a more favourable risk profile. Mahendra Siregar, chairman of Indonesia's investment coordination board, signalled that the government's aim was not to weaken investor protection but to ensure consistency between local and international regulations. However, investors might not be so easily persuaded. Though investors who have missed or will lose coverage by the termination of the IND-NL BIT may be able to obtain similar protections from ACIA or Indonesia's BITs with other countries, most would view Indonesia's threatened dismantling of its BIT framework as signalling increasing risk for foreign investors.

Note

1 Most BITs provide for a period of time during which they are in force, and at the expiry of this period either contracting party may signal to the other its intention to terminate the treaty. If no notice of termination is issued, the BIT will remain in force for a further set period.

Ivo Entchev
Holwell Shuster & Goldberg, New York
ientchev@hsgllp.com

Daniel Madison
Holwell Shuster & Goldberg, New York
dmadison@hsgllp.com

International arbitral tribunal rejects Indonesia's jurisdictional objections and agrees to hear foreign investors' claims

A tribunal of the International Centre for the Settlement of Investment Disputes (ICSID) has accepted jurisdiction over claims against Indonesia by United Kingdom-based Churchill Mining ('Churchill') and its Australian subsidiary, Planet Mining ('Planet'), alleging damages resulting from the revocation of licences for exploration and mining of a massive coal deposit on the island of Kalimantan. The tribunal held that Indonesia had provided advance consent to arbitration of investors' claims under the terms of a bilateral investment treaty between the UK and Indonesia (the 'UK BIT'). The tribunal also accepted jurisdiction over Planet's claims on the grounds that certain regulatory actions by Indonesia constituted a separate further act of consent, which the tribunal determined was required by the Agreement concerning the Promotion and Protection of Investments between Australia and Indonesia (the 'Australia BIT').

The tribunal rejected Indonesia's additional argument that it lacked jurisdiction because the companies' investments had not been admitted in accordance with Indonesian law, as specifically required under the terms of both the Australia and UK BIT.

Background

In 2006, the Indonesian Investment Coordinating Board ('BKPM') approved

the acquisition by Churchill and Planet of a 95 per cent and five per cent stake, respectively, in PT Indonesian Coal Development (PT ICD). Churchill and Planet, through PT ICD, subsequently entered into cooperation agreements with multiple Indonesian companies which had been granted mining licences in connection with the East Kutai Coal Project (EKCP), located in an area containing the world's seventh largest coal deposit.[2] Among other things, the cooperation agreements provided that Churchill-controlled PT ICD would perform mining operations in the EKCP area in exchange for 75 per cent of the revenue generated.[3]

In May 2010, partly because permits covering overlapping areas of the EKCP had apparently already been issued to other companies, the Regent of East Kutai revoked the mining licences of Churchill's and Planet's Indonesian partner companies.

In 2012, Churchill and Planet each filed a request for arbitration with ICSID pursuant to Article 36 of the ICSID Convention, as well as the UK BIT and the Australia BIT, respectively.[4]

Analysis

Does 'shall assent' constitute advance consent?

Under Article 25(1) of the ICSID Convention, consent to arbitration by parties must be expressed in writing. Churchill argued that Indonesia had provided standing written consent to ICSID arbitration under the UK BIT, which states that:

> '[t]he Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent to any request on the part of such national or company to submit, for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any dispute that may arise in connection with the investment.'[5]

The key issue regarding Churchill's claim was whether the phrase 'shall assent to any request' constituted automatic consent by Indonesia to submit to ICSID's jurisdiction. Churchill asserted that 'shall assent' is the functional equivalent of 'hereby consents'.[6] Indonesia argued that it had not provided advance consent, but that rather a separate further act, in response to an investor's specific request, was required on its part before the tribunal could obtain jurisdiction.

The tribunal emphasised that the UK BIT should be construed in accordance with the rules for treaty interpretation set forth in the Vienna Convention on the Law of Treaties (VCLT).[7] Accordingly, the tribunal first attempted to interpret 'shall assent' in accordance with the ordinary meaning of the phrase, however, it concluded that two different meanings were possible. Although 'shall' implies an obligation, the tribunal noted that it can also be understood to imply future action. The tribunal also noted that the natural meaning of the longer phrase 'shall assent to any request' provides some support for the position that the treaty contemplated a two-step process, whereby an investor must first file a request, in response to which Indonesia would subsequently 'assent'.[8]

The tribunal determined that a plain language interpretation of the phrase was inconclusive, and next examined it in relation to other provisions of the UK BIT. While it cited the lack of a specified mechanism in the treaty by which Indonesia would provide its assent in response to an investor's request, the tribunal nevertheless concluded that the context surrounding 'shall assent' did not definitively establish Indonesia's advance consent.[9] The tribunal also concluded that the object and purpose of the UK BIT did not resolve the jurisdictional question, noting that the investment treaty's preamble acknowledges both the private interests of the investor and the public interests of the state.[10]

Preparatory materials reveal standing consent

The tribunal noted that where, as in this case, attempts to interpret a term in light of its ordinary meaning leave the term 'ambiguous or obscure', the VCLT allows recourse to supplementary means of interpretation.[11] In particular, the tribunal focused on four types of materials, namely: '(i) doctrinal writings, (ii) case law, (iii) the treaty practice of Indonesia and the United Kingdom with third States, and (iv) the preparatory materials regarding the negotiation of the UK-Indonesia BIT.'[12] The tribunal concluded that doctrinal writings and third party treaty practice were insufficient to establish whether Indonesia had automatically submitted to ICSID's jurisdiction in agreeing to the 'shall assent to any request' language of the UK

BIT. The tribunal was also not persuaded by the reasoning of *Millicom*,[13] a case in which another arbitral tribunal held that a similar jurisdictional provision in the Netherlands-Senegal BIT constituted advance consent by the Netherlands. The *Churchill* tribunal suggested that it was not clear from the decision how the *Millcom* tribunal had followed the process of treaty interpretation prescribed by the VCLT.[14]

Ultimately, the tribunal analysed the treaty's preparatory materials (or *travaux préparatoires*) and determined that the treaty drafters regarded the phrase 'shall assent' as functionally equivalent to 'hereby consents'.[15] Accordingly, the tribunal held that Indonesia had in fact provided advance consent to ICSID arbitration of investment disputes pursuant to the terms of the UK BIT.[16] One reason for the holding was that during the course of treaty negotiations, one of the counterproposals by Indonesia was that '[e]ach Contracting Party hereby irrevocably and anticipatory [sic] gives its consent to submit to conciliation and arbitration.'[17] Although the final version of the treaty did not contain this 'unequivocal formula', the tribunal stated that the Indonesian negotiators' willingness to propose such language was a strong indication that Indonesia 'had no difficulty giving English investors unconditional access to ICSID arbitration'.[18] The tribunal also emphasised that the issues of contention in the drafts of the treaty did not concern the host states' consent, but rather other matters such as compulsory consent to jurisdiction by investors, and the inclusion of conciliation as a dispute settlement option.[19]

The parties did not submit the *travaux* as evidence prior to the arbitral hearing, and instead informed the tribunal that attempts to locate these materials had been unsuccessful. The preparatory materials were instead located as a result of the tribunal's request that Indonesia circulate a copy of the jurisdictional decision in *Rizvi*,[20] the first case concerning the UK-Indonesia BIT, in which it became apparent the *travaux* had been filed by the UK. Through renewed research, Churchill subsequently located this crucial piece of evidence.[21]

Advance consent not provided in the Australia-Indonesia BIT

Whereas the tribunal concluded that Indonesia automatically consented to ICSID arbitration under the UK BIT, it held that Indonesia did not provide standing consent pursuant to the terms of the Australia BIT.[22] Article XI of the treaty provides that, where an investor submits a dispute to ICSID for settlement, 'the other Party shall consent in writing to the submission of the dispute to the Centre within 45 days of receiving such a request from the investor.'[23] In accordance with the VCLT, the tribunal again focused first on interpreting this clause in accordance with its ordinary meaning. Unlike the phrase at issue in the UK BIT, the tribunal concluded that the plain language of the operative clause in the Australia BIT conclusively established that Indonesia did not thereby provide advance consent, but that rather a further act by Indonesia was contemplated by the treaty. The tribunal reasoned that '[i]f the host State "shall consent in writing within 45 days" after the investor's request, it follows that consent cannot be located in the Treaty itself and that a separate act is needed.'[24] The tribunal also noted that it was not unusual in bilateral investment treaties for states to condition the host state's consent to arbitration on the expiration of 'cooling-off periods' during which time a dispute might be resolved.[25]

Indonesia's investment approvals provided consent to arbitration

The tribunal rejected Indonesia's argument that the Australia BIT requires an investor first to submit a request for arbitration before a host state can offer its consent.[26] Construing the 45-day period as simply the latest time by which the host state 'shall' consent, the tribunal found that nothing in the BIT precluded Indonesia from furnishing written consent prior to an investor's request for arbitration. The tribunal noted that '[w]hat matters is not when the State has given its consent, but whether the State did consent.'[27]

The tribunal held that Indonesia had, in fact, previously consented to ICSID jurisdiction of Planet's claims in 2006, when BKPM's approval ('BKPM Approval') was granted to PT ICD, the Indonesian company later acquired by Churchill and Planet.[28] In particular, in the 2005 BKPM Approval, Indonesia agreed to follow the dispute settlement provisions contained in the ICSID convention.[29] Critically, following the acquisition by Churchill and Planet of PT ICD in 2006, the BKPM granted a new investment approval incorporating the content of

the 2005 BKPM Approval, including the provisions pursuant to which Indonesia consented to ICSID arbitration.[30] It should also be noted that the tribunal specifically stated that even if it had not determined that Indonesia submitted to advance ICSID jurisdiction under the UK-Indonesia BIT, it would have nevertheless found that Indonesia had consented pursuant to the BKPM Approvals.[31]

Investments within the scope of BITs

The tribunal also rejected Indonesia's second jurisdictional argument that, notwithstanding any determination that it consented to ICSID jurisdiction as a general matter, the investments of Churchill and Planet fall outside the scope of the UK BIT and the Australia BIT, respectively, and hence were not covered by the treaties. In particular, Indonesia asserted that the investments had not 'been granted admission in accordance with the Foreign Capital Investment Law No 1 of 1967 or any law amending or replacing it', as required by the treaties.[32] However, the tribunal held that the BKPM Approvals granted by Indonesia to PT ICD, in which Churchill and Planet invested, satisfied the 'admitted investment' requirement of the treaties.[33]

Conclusion

In rejecting Indonesia's jurisdictional challenges, the tribunal has allowed Churchill's and Planet's claims to proceed to the merits phase of arbitration. Churchill and Planet assert that the wrongful revocation of their Indonesian partner companies' mining licences resulted in damages exceeding US$1.315bn. Likely in reaction to the significant claims pending under the UK BIT and the Australia BIT, Indonesia recently announced that it will not renew its bilateral investment treaty with the Netherlands, and that it intends to propose an amended investment treaty framework with other nations in an effort to facilitate greater consistency between domestic and international law remedies.

Notes

1 On 24 February 2014, an ICSID tribunal issued jurisdictional decisions in the consolidated cases *Churchill Mining v Republic of Indonesia*, ICSID Case No ARB/12/14 and 12/40, 24 February 2014.
2 *Churchill*, pp 2, 4, 6, paras 7, 24–25.
3 *Ibid*, p 6, para 25.
4 The arbitral proceedings initiated by Churchill and Planet were consolidated in all respects, except for the fact that separate decisions/awards will be rendered, as the parties could not agree on whether the tribunal should issue a joint decision covering both companies. *Ibid*, p 17, para 58.
5 *Ibid*, pp 28–29, para 90.
6 *Ibid*, p 50, para 161.
7 Ibid, pp 46–47, paras 149–53.
8 Ibid, p 51, para 166.
9 Ibid, p 53, paras 173–75.
10 *Ibid*, p 54, para 178.
11 *Ibid*, p 54, para 180.
12 *Ibid*, p 55, para 182.
13 *Millicom International Operations BV and Sentel GSM SA v The Republic of Senegal*, ICSID Case No ARB/08/20.
14 *Churchill*, p 58, para 194.
15 *Ibid*, p 72, para 230.
16 *Ibid*, p 73, para 231.
17 *Ibid*, pp 67, 71, paras 217, 225.
18 *Ibid*, p 71, para 225.
19 *Ibid*, p 71, paras 226–27.
20 *Rafat Ali Rizvi v Republic of Indonesia*, ICSID Case No ARB/11/13.
21 *Churchill*, pp 65–66, paras 208–10.
22 *Planet Mining*, p 71, para 218.
23 *Ibid*, p 27, para 90.
24 *Ibid*, p 51, para 161.
25 *Ibid*, p 50, para 158.
26 *Ibid*, p 66, para 202.
27 *Ibid*.
28 *Ibid*, p 71, para 217.
29 *Ibid*, p 66, para 203.
30 *Ibid*, p 67, para 207.
31 *Churchill*, p 73, para 232.
32 *Ibid*, p 88, para 286; *Planet Mining*, p 83, para 265.
33 *Ibid*, p 90, para 292; *Churchill*, p 94, paras 312–313.

Brian McGarry
Permanent Court of Arbitration, The Hague
bmcgarry@pca-cpa.org

Adjudication and settlement in the *ARA Libertad* dispute

In November 2013, an arbitral tribunal constituted pursuant to the United Nations Convention on the Law of the Sea ('the Convention') ordered the termination of proceedings arising from the seizure of the triple-mast warship ARA Libertad, pursuant to an agreement between the Argentine Republic ('Argentina') and the Republic of Ghana ('Ghana').[1] The case until that point remains a vivid study in multi-fora and multiparty international dispute resolution, involving: (1) a suit brought by a private party before the courts of third-party states; (2) an enforcement action in the courts of the respondent state; and (3) a state's request for provisional measures from a standing international body, the International Tribunal for the Law of the Sea (ITLOS). In this manner, the *ARA Libertad* case provides an opportunity to reflect on the integration and efficacy of the Convention's dispute settlement procedures.

An unprecedented number of investor–state arbitrations have arisen from aspects of the financial crisis that gripped Argentina at the turn of the millennium. In terms of the country's default on external public debt, however, this aspect was largely settled through debt restructuring, whereby acquiescent bondholders received a heavily discounted value of their original investment. United States-based investor NML Capital ('NML') had purchased Argentine sovereign debt at a heavy discount with the intention to reap its original value, and held fast when Argentina in 2005 persuaded most of its creditors to take haircuts.

Instead, NML sued Argentina pursuant to a 1994 agreement granting a bondholder the right to accelerate payment on the bond in the event that the state fails to make regular payments on the principal or interest owed. Notably, this contract also provided Argentina's consent to the jurisdiction of the courts in New York. NML successfully claimed in the federal district court in New York that Argentina could not preferentially pay creditors who consented to restructuring before restoring NML in full.[2] Argentina would ultimately fail in its efforts to have the court's judgment overturned on appeal.

In the meantime, Argentina fared no better across the Atlantic, where NML sought to enforce the judgment against Argentina's United Kingdom-based assets. Following a series of appeals, the UK Supreme Court eventually ruled that Argentina had waived sovereign immunity to the jurisdiction of English courts through its 1994 agreement and the resulting bonds.[3] NML obtained a judgment against Argentina for roughly US$1.33bn.

Upon learning that Argentina had arranged with Ghana a goodwill visit of Argentina's flagship naval frigate ARA Libertad, NML requested an injunction from the High Court of Justice at Accra (Commercial Division) to detain the vessel on 2 October 2012, one day after its official state welcome. Although the High Court considered that Ghanaian domestic maritime law applied (given the vessel's location in internal waters) and granted sovereign immunity to non-commercial vessels owned by foreign governments, it determined that Argentina had consented to the waiver of this protection in the 1994 agreement. The High Court therefore ordered the seizure of the ARA Libertad on 11 October 2012 in satisfaction of the English judgment against Argentina.[4]

By this stage, the dispute had thus already involved the uniform application of sovereign immunity principles by three different courts on three continents; the application of contractual, national and customary international law; and the transformation of a debt dispute with a foreign creditor into a diplomatic crisis with a foreign government. Argentina soon after engaged the Convention.

On 26 October 2012, Argentina deposited with the UN Secretariat a declaration withdrawing (with immediate effect) its previous reservation against the submission of 'military activities by government vessels and aircraft engaged in noncommercial service' to binding dispute settlement under the Convention. While it is debatable

whether this 'military activities' exception applied to the present dispute, Argentina's initiation of arbitration against Ghana only three days later pursuant to the Convention could suggest that the state thought it prudent to eliminate any potential jurisdictional hurdles arising from the non-reciprocity of reservations.[5]

In its Notification of Arbitration of 29 October 2012, Argentina alleged that the detention of the ARA Libertad violated, inter alia, Article 32 of the Convention ('Immunities of warships and other government ships operated for non-commercial purposes') and customary international law. Argentina requested an order that Ghana, inter alia, 'adopt a provisional measure to unconditionally enable the Argentine warship [to leave] the jurisdictional waters of Ghana'.

The next phase of the *ARA Libertad* dispute marked only the fourth time that ITLOS had received such a request for provisional measures in a case submitted to arbitration. Many disputes arising under the Convention proceed to arbitration rather than ITLOS or the International Court of Justice because Article 287 of the Convention establishes ad hoc arbitration as the default method of binding dispute settlement when, as with Argentina and Ghana, the parties have not indicated in their respective declarations a preference for the same institutional alternative. Under Article 290(5) of the Convention, parties awaiting the constitution of an ad hoc arbitral tribunal pursuant to the procedures of Annex VII to the Convention may request ITLOS to prescribe provisional measures, which Argentina did on 14 November 2012.

Whereas Judge Elsa Kelly's historic 2011 election as the first female member of ITLOS ensured Argentine representation on the bench, Ghana appointed to ITLOS Thomas A Mensah to serve as an ad hoc judge in the application for provisional measures. On 15 December 2012, ITLOS unanimously ordered the vessel's release.

In particular, ITLOS noted that Article 32 of the Convention does not specify the geographical scope of its application. Because certain provisions within part II of the Convention may be applicable to all maritime areas (notably Article 29, concerning the definition of warships), ITLOS found that the prospective arbitral tribunal's prima facie jurisdiction could be found in the parties' disagreement as to the interpretation or application of Article 32 of the Convention to the internal waters of Ghana.

In finding that the urgency of the situation required provisional measures, ITLOS noted that the Ghanaian authorities had attempted to board and relocate the ARA Libertad against its commander's will, concluding that 'any act which prevents by force a warship from discharging its mission and duties is a source of conflict that may endanger friendly relations among States' prior to the constitution of an arbitral tribunal.[6]

The constitution of the tribunal did not occur until 4 February 2013, well after the 19 December 2012 release of the ARA Libertad and its remaining skeleton crew pursuant to the ITLOS Order. The arbitral tribunal was composed of H E Judge Awn Shawkat Al-Khasawneh, Judge Elsa Kelly, Judge Thomas A Mensah, Professor Bernard H Oxman, and H E Judge Bruno Simma as President, with the Permanent Court of Arbitration (PCA) acting as registry in the arbitration. This tribunal, however, would not have the opportunity to revisit any of the questions raised during the provisional measures phase. On 20 June 2013, the Supreme Court of Ghana delivered a judgment setting out its view on the applicable Ghanaian law with regard to the arrest of warships and which, in the parties' view, upheld the immunity of warships under customary international law. Having agreed that this and other measures taken by Ghana had 'constitute[d] sufficient satisfaction to discharge any injury occasioned by the injunction', the parties concluded their settlement agreement on 27 September 2013.

The saga of the *ARA Libertad*, when viewed alongside other multi-forum disputes pertaining to the Convention, recalls a number of important principles for international maritime disputes. From the outset, as Judge Wolfrum of ITLOS has stated in reference to the *Swordfish* dispute between Chile and the EU, 'judicial comity among courts and tribunals should encourage them to cooperate and to act rigorously within their own jurisdictional powers' in order to minimise any risks associated with parallel proceedings.[7] This principle remains a sensible guide for international and domestic bodies seized of related matters. Secondly, waiver of immunity before a foreign jurisdiction evokes the *Southern Bluefin Tuna* arbitral tribunal's notion that the Convention may be unable to establish a 'truly comprehensive regime' in the jurisdictional sense.[8]

Thirdly, such waiver by state contract recalls that ITLOS in the *MOX Plant* case confined the exclusivity of the Convention's dispute settlement mechanisms only to those disputes 'concern[ing] the interpretation and application of the Convention and no other agreement'.[9]

The origins of this case also suggest the relevance of non-state actors to inter-state disputes concerning vessel seizures, given the private interests that may be involved in the vessel or, as here, its seizure. ITLOS, fulfilling its role as the standing tribunal for urgent disputes arising from the Convention, has earned praise for reassuring stability and predictability with respect to the immunity of warships. It also received credit for confirming the general obligation of states to act in conformity with international law. Yet the parties themselves also deserve praise for showing by example how an order for provisional measures issued by ITLOS, even when in conflict with the findings of the national courts of one of the parties, can lead to a peaceful settlement of the dispute.

Notes

1 See: www.pca-cpa.org/showfile.asp?fil_id=2413.
2 *NML Capital Ltd v The Republic of Argentina*, United States District Court for the Southern District of New York, 03 Civ 8845, 16 May 2006.
3 *NML Capital Limited v Republic of Argentina*, [2001] UKSC 31, 6 July 2011.
4 In the Superior Court of Judicature, in the High Court of Justice Accra Commercial Division, held on Thursday 11 October 2012, before His Lordship Justice Richard Adjei-Frimpong, Ruling.
5 Philippe Gautier, 'The International Tribunal for the Law of the Sea: Activities in 2012' (2013) 12 Chinese Journal of International Law 613, 618–619.
6 *The 'ARA Libertad' Case (Argentina v Ghana)*, ITLOS Case No 20, Order of 15 December 2012, para 97.
7 Statement by H E Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 29 October 2007, p 8.
8 *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)*, ICSID Arbitral Tribunal, Award on Jurisdiction and Admissibility, 4 August 2000, para 62.
9 *MOX Plant Case (Ireland v UK)*, ITLOS Case No 10, Order of 3 December 2001, para 52.

Regional reports

Richard Menard
Kim & Chang, Seoul
richard.menard@kimchang.com

Enforcement of arbitral awards in South Korea: update on *NDS v KT Skylife*

An article in the February 2014 edition of *Arbitration News* commented on two recent decisions regarding enforcement of international arbitral awards in Korea: (1) *NDS Limited v KT Skylife Company Limited*, 2012 *GaHap* 5979 (31 January 2013) (*NDS v KT Skylife*), in which the Seoul Southern District Court dismissed an application for enforcement of an award against KT Skylife rendered by an arbitral tribunal seated in Seoul; and (2) *LSF-KDIC Investment Company Ltd v Korea Resolution & Collection Corporation*, 2012 *Na* 88930 (16 August 2013), in which the Seoul High Court (the 'High Court') affirmed a district court's decision refusing enforcement of an award against Korea Resolution & Collection Corporation rendered by a tribunal seated in Tokyo. In the latter case, the High Court's decision has been appealed to the Supreme Court of Korea, and the appeal is pending.

As for *NDS v KT Skylife*, on 17 January 2014, the High Court (2013 Na 13506) reversed the district court's decision. The dispute in that case arose out of a contract between NDS

Limited, an encryption software provider in the United Kingdom, and KT Skylife, Korea's monopoly digital satellite broadcaster. Article 14.2 of the contract required KT Skylife, upon termination of the contract, to cease using and return all software, intellectual property and confidential information provided by NDS. The arbitral tribunal declared that the contract had been terminated and directed KT Skylife to comply with Article 14.2. The district court dismissed NDS's application for enforcement on the basis that the award was not sufficiently specific, in that the particular items of software and information at issue were not spelled out in the award (or at any rate not in the dispositif). The court did not rely on Article 38 of the Korean Arbitration Act (the 'Act'), which provides that awards made in Korea 'shall be recognised and enforced unless any ground referred to in Article 36(2) exists', and did not conclude that any of the grounds in Article 36(2) of the Act existed.

On appeal, the High Court agreed with the district court that the award lacked sufficient specificity to be enforced under Korea's Civil Execution Act because the relevant software, intellectual property and confidential information were not detailed in the award. This conclusion was neither affected by 'the parties' awareness of the object of enforcement', nor by the fact that the applicable materials had been identified with particularity in the court proceedings (the lists were annexed to the High Court's judgment). To be enforceable under the Civil Execution Act, an arbitral award must be sufficiently clear and specific that it can be administratively executed without reference to other documents, including the underlying contract.

Nevertheless, the High Court reversed the district court's judgment on the grounds that Articles 38 and 36(2) of the Act prescribe the exclusive grounds for refusal to recognise and enforce an arbitral award made in Korea, and none of the grounds was present in this case. The High Court held that NDS therefore has a cognisable interest in a judgment enforcing the arbitral award, even if the judgment may not be executable in Korea. The court noted that an enforcement judgment, per Article 36(4) of the Act, precludes applications to set aside an arbitral award (and compels the dismissal of a setting-aside application filed before the enforcement judgment). The court also suggested that an enforcement judgment might encourage voluntary compliance because failure to comply 'affects parties' reputation and credibility' – though it could be said that a party moved by such considerations might have complied with the award in the first place. In any event, NDS may obtain a judgment enforcing the arbitral award.

The High Court's decision may be cold comfort to NDS, which has won the right to an enforcement judgment of little practical worth. But it provides a welcome affirmation that Articles 38 and 36(2) of the Act provide the exclusive grounds for refusing recognition or enforcement of an arbitral award made in Korea, and removes the uncertainty created by the district court's reliance on a loose interpretation of Articles 35 and 37 of the Act. The decision also provides important guidance in relation to arbitral awards that may be subject to enforcement in Korea: the relevant rights and obligations should be set out with a high degree of specificity, and the award should be enforceable without reference to any other document, including the underlying contract.

KT Skylife has appealed the High Court's judgment to the Supreme Court of Korea, which was pending at the time this article was written.

Sophie Tkemaladze
ADR Advisor, Judicial Independence and Legal Empowerment Project (JILEP), Tbilisi
stkemaladze@ewmi-jilep.org

The Supreme Court of Georgia affirms the authority of the Georgian courts to issue interim measures in support of foreign arbitral proceedings

On 3 July 2013, the Supreme Court of Georgia (the 'Supreme Court') affirmed the possibility for Georgian courts to issue interim measures in support of foreign arbitral proceedings. The matter before the Supreme Court related to an appeal from the Kutaisi Court of Appeals (the 'Court'), which in its decision of 24 April 2013,[1] rejected a request to create a lien against a ship located in the Port of Poti (Georgia) in support of arbitral proceedings pending in London under the rules of the London Maritime Arbitrators Association (LMAA). The Supreme Court of Georgia vacated the decision of the Court of Appeals and remanded the case for reconsideration, holding that the Law on Arbitration of Georgia passed in 2009 (the 'Law on Arbitration'), in particular Article 23, expressly authorised Georgian courts to issue interim measures in relation to arbitration proceedings irrespective of the place of arbitration.

Factual background

The applicant, a Seychelles-based company, chartered a vessel from a ship-owner, a St Kitts and Nevis-based company, to carry 1531.68 mt of barley from the Russian Port of Eisk to the Georgian Port of Poti. The vessel turned out to be unfit for carriage, which resulted in severe delays in transportation and the deterioration of part of the goods. The applicant commenced arbitration in London pursuant to a dispute resolution clause contained in the charter party. In order to secure enforcement of a potential future arbitral award and to prevent the vessel from leaving the territorial waters of Georgia pending the London arbitration, the applicant also requested the Court to issue an interim measure in the form of a lien against the vessel.

Decision of the Kutaisi Court of Appeals

In its decision, the Court held that the Law on Arbitration regulated issues regarding the constitution of arbitral tribunals and the conduct of arbitral proceedings in Georgia, as well as recognition and enforcement of arbitral awards, including awards made outside of Georgia. The Court reasoned that the Law on Arbitration allowed awards rendered in arbitral proceedings outside of Georgia to be recognised and enforced, however, the rules applicable to other procedural and substantive issues in dispute were subject to the parties' agreement. Since the parties in their contract (the charter party) had chosen English law to govern the dispute and arbitration under the LMAA Rules as a method of dispute resolution, the Court concluded that they had elected English law to govern both the substantive and procedural aspects of their dispute. This choice, in the Court's opinion, meant that the Georgian courts had no authority to order interim relief pursuant to Georgian procedural law.

Decision of the Supreme Court

In its decision,[2] the Supreme Court vacated the decision of the Court and remanded the case for reconsideration. The Supreme Court confirmed that the award of interim measures in support of arbitration fell within the scope of the Law on Arbitration. It noted that Article 23 of the Law on Arbitration expressly authorised Georgian courts to grant interim relief in support of arbitration proceedings irrespective of the place of arbitration. Therefore the provisions of Article 23 are applicable for arbitral proceedings seated both inside and outside of Georgia. In either case, the award of interim relief by a court is to be

regulated by the rules set forth in the relevant part of the Civil Procedure Code of Georgia, with consideration of the specific features of international arbitration. With respect to the choice of law clause in the contract, the Court invoked Article 36 (3) of the Law on Arbitration noting that reference to a national law is to be construed as a reference to the substantive law of that country and not to its procedural or conflict of law rules. It therefore held that the choice of English law was a choice of substantive law, which did not preclude application of Article 23 of the Law on Arbitration by Georgian courts. It therefore remanded the case back to the Court for consideration of whether the preconditions for issuing an interim measure under Georgian procedural law were satisfied.

In a subsequent decision of 29 July 2013 the Court, based on an instruction from the Supreme Court confirming its authority to issue an interim measure over a property located in Georgia in support of foreign arbitral proceedings, found that the applicant's request met the requirements of the law.

Conclusion

This judgment of the Supreme Court is an important step in reinforcing the pro-arbitration approach of Georgian courts. Georgia is keen to secure its place on the map of international arbitration as its recent efforts demonstrate. It has initiated a revision of the Law on Arbitration in order to make Georgia more arbitration-friendly, and has put in place a self-regulatory system by adopting a code of ethics for Georgian arbitrators and facilitated the revival of institutions like the Georgian International Arbitration Centre (GIAC) at the Chamber of Commerce and Industry of Georgia. It is of the utmost importance that Georgian courts demonstrate that they reinforce this trend with an up-to-date and positive attitude towards arbitration. It is hoped that this decision is only a beginning in this regard.

Notes
1 Case No 2/b-352-2013.
2 Case No as-538-511-2013.

Independence and impartiality: key factors for choosing an arbitral tribunal in India

Meenakshi Iyer
Advaya Legal, Mumbai
meenakshi@advayalegal.com

Amrita Iyer
Advaya Legal, Mumbai
amrita@advayalegal.com

The Supreme Court of India (the 'Supreme Court'), in its recent decision on 31 March 2014,[1] has highlighted the need for neutrality, impartiality and independence of arbitrators in international arbitrations. This judgment was rendered by a single judge of the Supreme Court in exercise of jurisdiction vested in the Chief Justice or his delegate under section 11 of the Arbitration and Conciliation Act, 1996 (the 'Act')

The Supreme Court, relying on its earlier decisions in *Malaysian Airlines Systems BHD II v STIC Travels (P) Ltd*[2] and *MSA Nederland BV v Larsen and Toubro Ltd*,[3] reiterated that while section 11 (9) of the Act gives the court discretion to appoint an arbitrator not belonging to the nationality of any party to the dispute, it is not mandatory for the court to do so. The Supreme Court held that when a court is required to appoint the presiding arbitrator, the overarching concern of the court must be to ensure the neutrality, impartiality and independence of the presiding arbitrator. Nevertheless, the Supreme Court also observed that the trend of the presiding arbitrator of a neutral nationality being appointed was now more or less universally accepted under the arbitration laws and rules in different jurisdictions.

Facts

In 1999, the Government of India announced the New Exploration and Licensing Policy (NELP). Under NELP, certain blocks of

hydrocarbon reserves were offered to private contractors for exploration, development and production under the agreements that were akin to production sharing contracts. In 2000, under NELP, Reliance Industries Ltd (RIL), a company incorporated in India, and Niko Resources Limited (NIKO), a company incorporated in the Cayman Islands, jointly entered into a production sharing contract (PSC) with Union of India (UOI) for exploration in the Krishna Godavari river basin ('Block KG-D6'). Subsequently, RIL, upon approval of UOI, assigned 30 per cent of its participating interest in Block KG-D6 to British Petroleum (BP). Differences arose between RIL, NIKO, BP (collectively referred to as the 'Petitioners') and UOI (hereinafter referred to as the 'Respondent') in 2010–2011 regarding the scope and interpretation of the provisions of the PSC, after the Respondent planned to disallow cost recovery of expenditures incurred by the Petitioners.

In order to resolve the dispute between the parties, RIL initiated arbitration under Article 33 of the PSC. The Petitioners and the Respondent both named former chief justices of India as their nominees to the three-member tribunal. The two arbitrators nominated by the parties failed to reach a consensus on the presiding arbitrator, leading the Petitioners to file Arbitration Petition No 27 of 2013 ('Arbitration Petition') before the Supreme Court seeking appointment of the presiding arbitrator.

Arguments of the parties

The Petitioners argued that: (1) in light of the international arbitral proceedings, the Court should act in accordance with the established international practice and appoint an arbitrator belonging to a nationality other than the nationalities of the parties; (2) the United Nations Commission on International Trade Law (UNCITRAL) Rules, which were in force when the PSC was drafted and entered into, recognised that while the appointing authority could appoint an arbitrator of the same nationality as that of the defaulting party (in the event where a party fails to nominate its arbitrator), the presiding arbitrator had to be a national of a country other than that of the parties; and (3) the arbitration agreement provided for a greater degree of neutrality than the UNCITRAL Rules, by stating that in case one of the parties failed to nominate its arbitrator then the arbitrator to be appointed on behalf of the defaulting party must have a neutral nationality.

The Respondent countered that: (1) unlike Article 33.5 of the PSC, Article 33.6 (which dealt with the appointment of the presiding arbitrator) did not require the appointed individual to be a foreign national; (2) the interpretation and execution of the PSC involved intricate and complex questions of law and facts relating to Indian conditions and Indian laws, hence, the omission contained in Article 33.6 of the PSC as regards the appointment of a presiding arbitrator of neutral nationality was deliberate; and (3) since the parties did not agree in appointing a foreign national as the presiding arbitrator under Article 33.6, the parties intentionally chose to proceed under section 11(2) of the Act; (4) the appointment of a foreign national as the presiding arbitrator was not only legally untenable, but was also undesirable, because as Petitioner 2 and Petitioner 3 were multinational companies, with Petitioner 3 having presence/business connections in about 80 countries; and (5) another retired judge of the Supreme Court should be the presiding arbitrator.

Judgment

The Supreme Court rejected the Petitioners' contention that only a foreign national could be appointed as the presiding arbitrator and the Respondent's contention that only an Indian could be the presiding arbitrator. The Supreme Court opined that 'both sides have adopted extreme positions on the pendulum'. The Supreme Court, relying on its earlier judgments (supra), stated that '... ratio in the aforesaid cases cannot be read to mean that in all circumstances, it is not possible to appoint an arbitrator of a nationality other than the parties involved in the litigation.'

The Supreme Court held that even though the seat of arbitration was India and the applicable law was Indian law, it was not required to appoint an Indian national as the presiding arbitrator. The Supreme Court accentuated the need to ensure neutrality, impartiality and independence of the presiding arbitrator. The Supreme Court also held that, while exercising its powers under section 11(6) of the Act, it is not required to take into account the choice of the parties, but it can informally enquire into their preferences. Nevertheless, it is entirely within the court's discretion to accept any of those preferences when appointing the presiding arbitrator. In

making such a choice, the court ought to be guided by the relevant provisions contained in the Act, UNCITRAL Model Laws and the UNCITRAL Rules, which the parties have chosen to apply. The Supreme Court then observed that the trend of appointing the presiding arbitrator of a neutral nationality was now more or less universally accepted under arbitration laws and rules of many different jurisdictions.

The court appointed an eminent Australian jurist as the presiding arbitrator.[4]

Analysis

The main object of arbitration is to facilitate speedy, effective and efficient resolution of disputes. The Act does not prescribe any requirements as to age, experience or qualification that a person must possess to be appointed as an arbitrator. The opening words of section 11 of the Act make it abundantly clear that a person of any nationality can be appointed as an arbitrator. Thus the Act provides the parties to a contract with the freedom to appoint the arbitrator of their choice. Nevertheless, neutrality, impartiality and independence of arbitrators hold great significance in arbitration proceedings. Since parties normally choose the co-arbitrators, and each party may nominate an arbitrator familiar to it, the independence and impartiality of the presiding arbitrator assumes greater significance.

The Supreme Court in the abovementioned *Malaysian Airlines* case held that while nationality of the arbitrator is an important consideration, it does not follow from section 11(9) of the Act that the proposed arbitrator is necessarily disqualified because he/she holds the same nationality as one of the parties. The said position was reiterated in the *MSA Nederland* case. In both these cases, the Supreme Court considered that the use of the word 'may' provided the Supreme Court with discretion in making arbitral appointments. In that case, the Supreme Court held that it was not bound to appoint a sole arbitrator having a neutral nationality and appointed Mr Justice S N Variava, a retired judge of the Supreme Court, who shared the nationality of the respondent party.

The Supreme Court in the present case has reiterated the importance of ensuring that no doubts were cast on the neutrality, impartially and independence of the arbitral tribunal.

Notes

1 *Reliance Industries Ltd and Others v The Union of India*, Arbitration Petition No 27 of 2013.
2 (2001) 1 SCC 509.
3 (2005) 13 SCC 719.
4 The Supreme Court initially appointed James Spigelman AC QC, former Chief Justice and Lieutenant Governor of New South Wales, Australia as the presiding arbitrator. However, on 2 April 2014 the Supreme Court recalled the appointment of Spigelman as he was one of the arbitrators originally suggested by the Petitioners in their list. By its further order dated 29 April 2014 the Court appointed Michael Hudson McHugh, a former Australian high court judge as the presiding arbitrator.

Minas Khatchadourian
Director of the Qatar International Center for Conciliation & Arbitration
khatchadourian@justice.com

The first application of the New York Convention by the Qatari Supreme Court

On 25 March 2014, the Qatari Supreme Court (or Court of Cassation) issued a landmark ruling[1] in respect of the recognition and enforcement of foreign arbitral awards pursuant to the New York Convention[2] in Qatar.

The ruling quashed a judgment of the Doha Court of Appeal dated 15 December 2013, which had upheld a decision rendered by the Doha Court of First Instance on 18 April 2013. The decision of the Court of First Instance had set aside an ICC award on the basis that it was not rendered 'in the name of H H the Emir of Qatar'. The Qatari Supreme Court (the Court) had considered that the absence of this formal opening violated Qatari public policy.[3]

Facts

Following a disagreement on payment terms between a joint venture composed of a Qatari and a foreign partner (the 'Contractor') and a Qatari company (the 'Subcontractor'), the latter decided to initiate arbitral proceedings seated in Doha pursuant to the ICC Arbitration Rules in accordance with the subcontract agreement. The sole arbitrator issued his award on 18 October 2012 in favour of the Subcontractor and dismissed the counterclaim submitted by the Contractor.

The Contractor lodged an action for nullity of the award before the Court of First Instance in accordance with the Qatari Procedural Law.[4] The Contractor relied on an earlier ruling of the Supreme Court of 12 June 2012 (challenge No 64 of 2012) whereby the Court, of *its own motion*, set aside a domestic arbitral award because it was not rendered in the name of the Emir of Qatar, as required by the Qatari Constitution for court judgments.[5]

Both the Court of First Instance and the Court of Appeal followed the 2012 ruling of the Supreme Court and used the same grounds to refer the award back to the arbitrator to address any violations pursuant to Article 209 of the Qatari Procedural Law which states:

> 'The Court having jurisdiction over the request for setting aside may either confirm the award, or set the award aside totally or partially. If the award is totally or partially set aside, the Court may refer the case back to the arbitrators to repair the violations contained in the award, or the Court may decide on the merits of the case itself if it holds that it has jurisdiction to do so.'

The Subcontractor appealed to the Supreme Court. The Supreme Court found that the lower courts had misapplied the law and built its reasoning on the provisions of the New York Convention which the state of Qatar ratified in 2002.[6] These provisions became part of Qatari law in 2003.

Analysis of the new position of the Supreme Court

In its ruling, the Court referred at first to the consensual nature of arbitration by stating:

> 'It is evident that arbitration is built on the consent of the parties and their acceptance of it as a means to settle all or some of the disputes which have arisen or which may arise between them in a legal relationship whether contractual or non-contractual. The will of the parties is the source of arbitration and it determines its scope as to the matters submitted to arbitration, the applicable law, the composition of the arbitral tribunal, its authorities, its procedures, etc.'

The Court then turned to the parties' agreement regarding the arbitration and governing law clauses in their contract. It mentioned that:

> 'Clauses 20 and 21 of the disputed subcontract state the agreement of the parties to settle any dispute related to this contract by arbitration in Qatar according to the conciliation and arbitration rules of the ICC, and that the

> interpretation of the contract clauses and its terms and conditions shall be subject to the Qatari Laws.'

The Court also concluded:

> '[T]hat the parties have decided by their will on the applicable law which is the rules of the Paris commercial chamber and to hold the arbitration in Qatar and that the contract shall not be subject to its laws except in the interpretation of its clauses and terms.'

More importantly, the Court stressed the applicability of the New York Convention by affirming:

> '[T]hat according to Articles I and II of the New York Convention – to which Qatar adhered by virtue of the Emiri Decree No. 29 of 2003 and which became applicable on 15 March 2003 – each Signatory State should recognise and enforce the foreign arbitral awards according to its national or internal rules of procedure, that the said Convention did not stipulate any provisions regarding the form of the award or any particular elements, that any foreign award is subject to the Qatari Procedural Law at its enforcement phase only.'

The Court overturned the ruling of the Court of Appeal and declared:

> 'The said arbitral award is not subject to the provisions of the Qatari Procedural Law except its provisions on enforcement. Therefore, the ruling is erroneous and should be quashed for this reason and without examining the other arguments of the petition.'

Finally, in the dispositive part, the Court ordered: 'the challenged ruling is quashed, and the case has to be referred again to the Court of Appeal'.

Analysis

It is difficult to determine the basis on which the ICC award was considered as a foreign award by the Supreme Court. Though the ICC award was issued in English, the arbitration was seated in Doha, involved Qatari companies, a contract paid in Qatari currency and a project situated in Qatar, and with enforcement expected to be in Qatar.

The Supreme Court of Qatar may have been anxious to overturn the judgment of the Court of Appeal after facing criticism from arbitration commentators and practitioners for its previous positions and arbitration-unfriendly rulings. The application of the New York Convention may have been a means to avoid applying the grounds of nullity under Qatari Procedural Law.

While the decision raises a number of important questions about the future of arbitration in Qatar, a few general observations are worthy of highlighting:

- This award appears, on its face, to be a domestic award rendered in Qatar under the auspices of the ICC and likely should not have been be subject to the New York Convention for purposes of enforcement unless there is an exceptional expansion of the Convention's scope of application as set out in Article I(1): '[the Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'.
- Without fully appreciating whether the award was 'domestic' or 'foreign', it remains uncertain whether the Qatari arbitration provisions (Articles 190–210 of the Qatari Procedural Law) apply without distinction between domestic and foreign arbitrations.
- If the award was 'domestic' then the Qatari courts would appear to apply the same grounds for setting aside and refusing enforcement of domestic and foreign awards, as Qatar did not make any adjustments to its arbitration law after its ratification to the New York Convention.
- There is some confusion or ambiguity in the ruling regarding the distinction between the governing law of a contract and the applicable procedural arbitration rules. The parties can choose to apply both sets of laws but their scope of application is entirely different. The Court referred to the 'applicable law which are the rules of the Paris commercial chamber'.
- The Court drew a distinction – despite some errors – between the set of rules applicable to domestic awards and the ones applicable to foreign awards. The latter ones shall be subject to the New York Convention through Article III (and not Article II as mentioned in the ruling) which refers to the national procedural rules.[7]

Finally, as the Supreme Court decided to remit the case back to the Court of Appeal, there will be a further wait for the first successful enforcement action of a foreign award issued by a Qatari court.

Conclusion

In light of this first application of the New York Convention by the Qatari judges, it is

important to salute this positive step towards the enforcement of foreign arbitral awards. Although the Court of Cassation decided to send the case back to the Court of Appeal, the judiciary has received a clear message that the previous magistrates misapplied Qatari law (including the international conventions to which Qatar has acceded and which form part of its law). The Court of Appeal is expected to issue its first judgment enforcing a foreign award in Qatar after a long saga of unfortunate rulings regarding arbitration in Qatar.

This encouraging development in Qatari jurisprudence coincides with the anticipated promulgation of a new arbitration law, which recently received approval of its final draft by the relevant Advisory Council (*Shoura Council*). The new law, which is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, is intended to replace the current chapter 13 of the Qatari Procedural Law. The expectation is that the new law will substantially improve the prospects for arbitration in Qatar by bringing it into line with international standards for arbitration.

Notes

1 Qatar Court of Cassation, Second Civil Circuit – Petitions 45 & 49 of 2014.

2 Qatar adhered to the New York Convention in 2002, which became applicable on 15 March 2003 by virtue of Emiri Decree No 29 of 2003.

3 In several unfortunate judgments rendered in 2012 and 2013, the Qatari courts relied on Articles 190–210 of the 1990 Qatari Civil Procedural Law (the 'Qatari Procedural Law') and considered that 'the legislator characterized the decision of the arbitrator as a *judgment*, insisting on its binding effect on the parties and the authority of the Court to issue an execution order to implement and enforce its terms. Therefore, by virtue of Article 204 of the Qatari Procedural Law, the arbitrator's judgment (award) should be issued in the name of H H The Emir of Qatar'.

4 Article 207 of the Qatari Procedural Law.

5 The Qatari Constitution of 2004 states that: 'Judicial Authority shall be vested in the Courts in the manner prescribed in this Constitution and Judgments shall be issued in the name of the Emir' (Art 63).

6 Given that Qatar is a civil law country, the Supreme Court is considered the highest court in the Qatari judicial system. However, the Supreme Court is not a court of third instance after the Court of Appeal and the Court of First Instance. Its purpose is not to rule on the merits, but to state whether the law has been correctly applied on the basis of facts that have already been definitively assessed by the lower courts.

7 Article III of the New York Convention states: 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.'

Hassan Arab
Al Tamimi & Company, Dubai
h.arab@tamimi.com

Ground-breaking ruling on public policy by the Abu Dhabi Court of First Instance

The Abu Dhabi Court of First Instance, 4th Commercial Circuit (Full Bench) has issued a ground-breaking ruling in an enforcement action. The ruling provided clarification as to the concept and aim of the public policy ground for non-enforcement of arbitral awards, as well as examples of matters that would violate public policy, particularly regarding the circulation of wealth and the rules of individual ownership within the scope of Article 3 of the Civil Transactions Law (the 'Civil Code').[1]

Readers may recall rulings of the Dubai Court of Cassation and the Abu Dhabi Court of Cassation setting aside arbitral awards issued in property cases where contracts for the sale and purchase of off-plan property units were declared invalid because they had not been registered on the property register. The courts held that such matters were not arbitrable as they were not capable of conciliation and raised issues of public policy. The courts therefore set aside the arbitral awards issued in those matters and refused to recognise them.[2]

The above argument was raised before the Abu Dhabi Court of First Instance (the 'Court') in the case under consideration but, fortunately, the Court departed from the previous line of case law and held that the termination of a contract was an arbitrable issue under United Arab Emirates (UAE) law because it related to the rights of private parties, rather than the independent issue of registration of a property interest with the public authorities.

Background

The claimant brought an action to ratify and enforce an arbitral award issued under the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) rules. The claimant had obtained the award in June 2013 which held that a sale and purchase contract for a residential unit be terminated and that the defendant must refund, to the claimant, all payments received towards the purchase of the unit as well as pay AED 300,000 in damages, with interest, along with court fees and costs. The purchase price of the unit was paid in two installments on two dates.

Following the issuance of the arbitral award, the claimant filed an action before the Abu Dhabi Court of First Instance to ratify the award and enclosed the required documents. The defendant filed a counterclaim seeking, in the main action, that the action be dismissed, with costs, and that the ADCCAC arbitral award be set aside, with court fees, costs and counsel fees.

The defendant submitted that the subject matter of the arbitration agreement raised issues of public policy and was not capable of conciliation and, therefore, of settlement by arbitration. According to the defendant, the subject matter of the arbitration concerned the validity of a contract for the purchase of an off-plan property unit which is a public policy matter involving the circulation of wealth and the rules of individual ownership. It therefore fell outside the realm of arbitration and within the domain of the courts.

Court's opinion: on public policy and its scope

It is established that according to Article 216 of the UAE Civil Procedure Law, parties may, whilst the action for ratification is pending before the court, seek to have an award set aside under one of the grounds for annulment outlined therein.

The court's jurisdiction does not extend to reviewing the merits of the arbitral award or addressing the extent of its conformity with the law. Nevertheless, when the arbitrator has exceeded the scope of their jurisdiction and decided on an issue of public policy that is outside the realm of conciliation, the court must intervene to investigate any irregularity in light of the rules of law in its jurisdiction even if the irregularity is not one of the grounds for setting aside the arbitral award under Article 216.

Public policy is the fundamental set of guidelines that must be respected when issuing awards that are of fundamental concern to society and the basis for the social, political, economic or ethical order of the state. However, where a mandatory rule of law does not relate to public policy, within the above context, or when its purpose is the protection of private rights and interests, there would be no justification for invoking a public policy exception.[3]

It is clear from the language of Article 3 of the Civil Transactions Law and its location at the beginning of the law that the purpose of the article is to draw a link between the concept of public policy and the rules and principles of Islamic Sharia, since the article stipulates that public policy rules should not conflict with the definitive provisions and fundamental principles of Islamic Sharia.

The Civil Transactions Law provides examples of matters of public policy including the circulation of wealth, the rules of individual ownership, and other fundamental rules upon which society is based. Given that the article is worded very generally, the public policy exception cannot be applied to all aspects of circulation of wealth and rules of individual ownership. The matters listed in Article 3 are intended to be examples of issues relating to public policy. The precise matters of non-derogable and non-arbitrable public policy are identified in supplementary laws and decisions, for example, Article 14 of Law No (3) of 2005[4] as well as in UAE case law. Hence, matters relating to property are arbitrable in principle, unless the dispute concerns the rules and regulations governing property registration, right of freehold ownership in the Emirate of Abu Dhabi and the disposal and transfer of land which have been specifically identified as non-arbitrable.

The combined effect of Article 203(4) of the Civil Procedure Law and Articles 725

and 733 of the Civil Transactions Law is that arbitration is not permissible in areas that cannot be subject to conciliation. A matter can be settled by conciliation if the subject of such conciliation is something that may be exchanged for consideration, even if non-monetary (if it involves delivery and receipt), provided that none of the impediments to conciliation[5] listed in Article 733 are present.[6]

Taken together, the above provisions confirm that a disputed right may be arbitrable whether the right is civil, commercial or administrative. The key requirement is that the dispute involves a legal relationship of a monetary nature whether it relates to a right in personam (personal property) or a right in rem (real property). The source of the right does not matter. It can be a contract, an illegal act or other source of obligation.

The autonomy of the parties is at the very heart of arbitration as a dispute resolution mechanism. However, the requirement to comply with public policy ensures that the dispute is not resolved in a manner incompatible with the requirements of protecting the interests of society. The parties are entitled to defend their own interests and there would be no violation of public policy in referring disputes over such interests to arbitration instead of national courts, provided that the arbitral tribunal does not issue an award violating public policy. It is worth noting that even if an arbitral award is set aside as contrary to public policy, the arbitration agreement would still remain valid.

It is settled that a contract for the sale of property or creation of a right in rem is a consensual contract that is formed by an offer and acceptance and that comes into force when the sale is concluded, subject to any registration requirement. Registration is neither a constituent element of the contract nor a pre-condition to its formation or a special form that a contract must take. Registration is simply a formality required by law for the performance of the seller's obligation to transfer title to the property.

The Court noted that it was not disputed that the arbitration involved an application to set aside the sale and purchase contract and to recover: (1) payments made by the purchaser; and (2) damages for the alleged breach by the seller. The claimant's application essentially sought to terminate the contract, which is the subject matter of the arbitration, rather than to have it declared invalid. It concluded that the sale contract is a consensual contract and its termination does not fall within the scope of public policy as it does not relate to the rules and regulations which govern property registration or the disposal and transfer of land. Commercial transactions are based on the premise that everything is permissible unless it is expressly prohibited. If the legislator had intended to make all disputes relating to the sale and purchase of property units non-arbitrable, it would have explicitly set that position out in the law. Moreover, the matter does not relate to a public interest of a political, social or economic nature concerning society as a whole, but rather to the private interests of the parties. Accordingly, the Court declared that the contention that the award is void for contravention of the rules of individual ownership and the circulation of wealth had no sound basis in fact or in law and dismissed the action to annul the award.

The ruling in context

The above ruling provides a welcome clarification on the meaning of public policy and its relationship with the interests of society as a whole. It clearly excludes civil or commercial contracts that do not have a public interest aspect from the list of matters which could constitute a violation of public policy.

The ruling of the Abu Dhabi Court of First Instance comes on the heels of a recent ruling by the Dubai Court of Cassation[7] that upheld the decision of the lower courts to recognise an arbitral award that declared a sale and purchase agreement (16 units in a property development whose completion was delayed) terminated and confirmed the claimant's entitlement to claim payments made to the defendant with interest, compensation and arbitration costs.

These recent rulings can be construed as a positive development that indicates a shift in the courts' approach to arbitration agreements in property matters. Prior to these rulings, property matters were deemed non-arbitrable due to considerations of public policy after a spate of rulings issued in Dubai and Abu Dhabi. However, the courts are beginning to provide more clarity on the meaning of public policy.

In light of the former negative rulings and the recent more positive rulings, the following questions remain:

- Would an arbitrator's mandate extend to declaring a sale and purchase agreement

for property invalid (whether a sectional title or off-plan sale) or is it limited to declaring the agreement rescinded/terminated only?
- Would the courts exercise a supervisory role by reframing the parties' requests before an arbitrator in an arbitration and, for example, treating an invalidity request as a request for rescission? Alternatively, would this supervisory role be regarded as an invalid encroachment into the merits of a case?
- Would an award finding that a sale and purchase contract was invalid violate public policy for deciding a matter that cannot be the subject of any conciliation?

Irrespective of the recent rulings, it remains to be seen whether future judgments of the UAE judiciary will provide clear answers to these questions.

Notes

1 Art 3 of Law No 5 of 1985 (Civil Transactions Law), as amended by Law No 1 of 1987 provides: 'Public policy shall be deemed to include matters relating to personal status such as marriage, inheritance, and lineage, and matters relating to systems of government, freedom of trade, circulation of wealth, rules of individual ownership and the other rules and foundations upon which society is based, in such a manner as to not conflict with the definitive provisions and fundamental principles of Islamic Shari'a.'

2 Dubai Court of Cassation: Property Appeal No 180-2011 dated 12 February 2012 and Property Appeal No 14-2012 dated 16 September 2012; and Abu Dhabi Court of Cassation: Commercial Appeal No 663-2012 dated 28 March 2013.

3 Abu Dhabi Court of Cassation – Commercial Appeal No 663-2012 dated 28 March 2013.

4 Art 14 of Law No (3) of 2005 regulating property registration in Abu Dhabi provides: 'Any disposition made contrary to this Law and its implementing laws, regulations, and decisions shall be void. The head of the relevant authority shall issue the decisions necessary to implement the provisions of this Law.'

5 Art 725 of Law No 5 of 1985 (Civil Transactions Law), as amended by Law No 1 of 1987 provides: 'The matter in respect of which the accord is made must be such that an exchange may be taken in consideration of it, even if it is not property, and must be ascertained if it involves delivery and receipt.'

6 It shall not be permissible to enter into an accord if it includes any of the following impediments: (1) the cancellation of a debt by another debt; (2) the sale of food by way of commutative contract prior to delivery; (3) the deferred exchange of gold against silver and vice-versa; (4) *riba al-nasia* (usurious interest in consideration of the deferment of the payment of a debt; (5) reducing part of a deferred debt owed by a debtor in consideration of accelerating the date of payment; (6) reducing the amount of a guarantee on a deferred debt owed by a debtor in consideration of accelerated payment with an increase; and (7) an advance involving a benefit.

7 Appeal No 216-2012 dated 10 February 2013.

The Italian Supreme Court affirms jurisdictional nature of arbitration

Luigi Cascone
Ughi e Nunziante, Rome
l.cascone@unlaw.it

Introduction

What is the legal nature of arbitration? This is probably one of the most debated subjects of arbitration law. It is not purely academic: characterising arbitration as a contractual or jurisdictional – or mixed or autonomous – legal institution may have important procedural consequences.

This is at least the case in Italy, where courts have frequently expressed their view on the subject, often with different results.

After a brief illustration of the previous case law, this article presents the change of position on this subject adopted by the joint divisions of the Italian Supreme Court (the 'Supreme Court') in a procedural order rendered in October 2013.

The previous case law (before 2000)

The Supreme Court frequently faced the problem of the legal nature of arbitral proceedings, mainly in relation to cases where the jurisdiction of a state court was disputed on the basis of an arbitration agreement. In such cases, the question of the correct legal remedy available to the party invoking the arbitration clause arises. The answer given to this question by the Supreme Court depended on whether the relevant arbitration agreement provided for domestic or foreign arbitration. According to the majority of the case law before 2000, in the case of domestic arbitration, the remedy was to be the same as that applicable to a conflict of competence between different civil state courts.[1] By contrast, where the seat of

arbitration was located abroad, the remedy would be the same as for conflicts between Italian and foreign courts. In such cases, one typical remedy would be applicable: a preliminary and direct recourse before the Court of Cassation.[2] Both these procedural solutions were generally based on the assumption that arbitration is the expression of a power of the state delegated to private judges and, therefore, shares the same jurisdictional nature as state courts.[3]

The reversal of 2000

In a famous judgment of 2000,[4] the Supreme Court overruled its precedents and affirmed that the applicability of an arbitration agreement raised before a state court should be considered as an issue of the merits of the dispute and, as such, could not be settled through the typical procedural remedies applicable in cases of conflicts of jurisdiction between courts. This conclusion, which was further confirmed and developed by many other judgments issued in the first decade of the new millennium,[5] was based on the assumption that arbitration is a product of the parties' contractual will, which gave the arbitrators and their decisions a contractual power. Accordingly, the Supreme Court found that arbitrators do not have the same jurisdictional power as state courts and that their relationship with the latter cannot be governed by the same procedural rules. The Supreme Court determined that the mere fact that an arbitration award features the same functional elements as a court decision is not sufficient evidence of a jurisdictional power delegated to the arbitrators. Arbitration was considered in this perspective as the 'opposite of jurisdiction' and the option for such dispute resolution method was deemed, in the opinion of the Supreme Court, as a complete waiver of any kind of recourse to court jurisdiction, be it domestic or foreign.

The new reversal of 2013

In a decision of October 2013,[6] the joint divisions of the Supreme Court decided that the former contractual approach to arbitration should be fundamentally reviewed 'also in the light of the recent legislative changes', referring to the recent reform of Italian arbitration law in 2006.[7]

What prompted this review was, again, a procedural issue of admissibility of a direct recourse to the Supreme Court concerning jurisdiction in the presence of an arbitration agreement referring to arbitration in a foreign seat.[8]

On this occasion, the Supreme Court examined the arguments that had been put forward in support of the contractual nature of arbitration. One of these arguments was the potential incompatibility of arbitration with the constitutional principle of the state courts' monopoly on jurisdiction and the prohibition against establishing special courts. The Supreme Court rejected the validity of this argument, considering that such principle is preserved as long as the recourse to arbitration is not mandatory. The Supreme Court concluded that: 'as a rule, the jurisdictional functions to decide on personal rights is exercised before state courts, it being however allowed to the parties, in their exercise of a free and independent option, to depart from such rules having recourse for the protection of their rights before private judges, acknowledged as such by the law, and in presence of certain guarantees. The party's autonomy is here expressed not (as it would be the case for purely contractual arbitration)[9] as an act of disposition of a right, but as an act affecting the power of judicial action that is connected to such right'.

The Supreme Court also considered that recourse to arbitration is legitimate only if: (1) the dispute that the parties agree to refer to arbitration is among the disputes that can be submitted to a civil state court; (2) the arbitral proceedings are governed by rules of law that ensure the respect of procedural guarantees, not only concerning the impartiality of the arbitral tribunal, but also the right to a fair process; and (3) there is a right to challenge the award before the state courts (within the limits provided by the law).

According to the Supreme Court's reasoning, the jurisdictional nature of arbitration is revealed by a number of legal provisions now in force following the major reforms of arbitration law implemented in 1994 and, more recently, in 2006. Of particular importance in this respect are those provisions of the Code of Civil Procedure (CCP) granting to arbitration awards some executory effects regardless of any further court filing or exequatur, for instance Articles 827[10] and 824-*bis*.[11]

The mere contractual nature of arbitration is also excluded, in the view of the court, by all those provisions that affect the position of third parties with respect to arbitration. It

is the case, for example, of Article 827 CCP (allowing third-party challenge of the award) or Article 816 *quinquies* CCP (allowing, in some cases, third parties to intervene in the proceedings), and of Articles 2652 and 2653 of the Civil Code, which extend the system of publicity of legal actions affecting real estate properties to arbitration, according to which the outcome of such disputes can be enforced against third parties.

The use of the word 'competence' in the new Article 819-*ter* CCP (which was introduced in 2006) to characterise the relationship between the arbitral tribunal and state courts is also a confirmation of the clear intention of the legislator to put arbitral tribunals and state courts on the (almost) same level.

A further and important argument to support the Supreme Court's reasoning can be found in a recent judgment of the Constitutional Court.[12] The Court had to decide on the validity of the last paragraph of Article 819-*ter* CCP, which expressly excludes, in the relationship between court and arbitral proceedings, the applicability of Article 50 CCP, a norm allowing the 'transfer' of the *same* proceedings (*translatio judicii*) from the wrongly seized court to the competent court. This exclusion was in fact likely to have serious legal consequences in all those situations where the filing of a lawsuit is the only remedy to interrupt applicable time limits under the applicable substantive or procedural law.

The Constitutional Court, in finding that such exclusion was against Italian fundamental law, affirmed that '[i]n a legal system that expressly acknowledges that the parties may seek protection of the rights also by way of recourse to arbitrators whose decision (taken in compliance with the provisions of the code of civil procedure) has the same effect as court decisions, the error of the claimant in the identification of the competent court instead of the competent arbitrator should not jeopardize the possibility to obtain from the actually competent body, a decision on the merits of the dispute'.[13]

With its decision of October 2013, the Supreme Court also explained why the jurisdictional nature of arbitration also applies to foreign arbitration proceedings, irrespective of the legal theory preferred by the relevant *lex arbitri*. Pursuant to the Italian statute of private international law, the jurisdiction of Italian courts may be contracted out by the parties in favour 'of a foreign judge or a foreign arbitration'[14] if such derogation is evidenced in writing and the dispute concerns disposable rights. The decision on jurisdiction is always unilateral, that is, it is final and binding only if the court positively affirms its own jurisdiction. As a consequence, should the exception of the existence of an arbitration clause providing for a foreign arbitration be considered as an issue of the merits of the dispute – as argued by the partisans of the contractual nature of arbitration – then the decision of an Italian court on the validity of such clause would constitute a *res judicata* on the merits, which implies that the judge should first establish their own jurisdiction. This result is clearly contradictory.

According to the Supreme Court, considering the question of validity of the arbitration clause as an issue on the merits of the dispute would be against the provisions of the New York Convention of 1958 (the 'Convention'), and in particular against Article 2.3, according to which any court of a contracting state shall examine the validity and effectiveness of an arbitration agreement and, in the case of a positive outcome of such examination – and if requested by one party – 'shall refer the parties to arbitration'. This decision is preliminary to any decision regarding jurisdiction and, of course, on the merits. In other words, according to the Convention, the court of a contracting state may not refuse to examine the arbitration agreement first. While the judge will often apply substantial rules when considering the validity of the arbitration agreement, such verification is only preliminary and procedural in nature, since it does not preclude the arbitrators from rendering a decision on the validity of the arbitration clause or on the merits, if they find that they have jurisdiction.[15]

Conclusion

The Supreme Court decision of October 2013, and its theoretical implications, remain under the close scrutiny of scholars and will certainly be criticised. It is, however, undeniable that the reasoning of the Supreme Court confirms a general favourable trend of Italian courts towards arbitration.

Along with this strong (re)affirmation of the jurisdictional nature of arbitration, the Supreme Court and the Constitutional Court have provided some helpful practical

responses to the expectations of arbitration practitioners. These responses are likely to increase the effectiveness and legal security of recourse to arbitration in Italy. It is may be too soon to foresee how far-reaching the consequences of this approach will be, but the hope is that it the will be supported by further legislative interventions in the same direction, such as the repeal of the anachronistic, though persistent, prohibition for arbitrators to issue interim measures (under Article 818 Civil Code of Procedure).

Notes

1 Italian Court of Cassation, Judgments No 2149 of 2 Apil 1984; No 5568 of 25 October 1982; No 4360 of 4 July 1981; No 242 of 11 January 1980; No 1303 of 7 February1987; and No 3767 of 2 June1988.
2 Italian Court of Cassation, Judgment No 5397 of 17 May 1995.
3 Italian Court of Cassation, Judgment No 4360 of 4 July 1981.
4 Italian Court of Cassation, Judgment No 527 of 3 August 2000.
5 Italian Court of Cassation, Judgments No 35 of 5 May 2007; No 1735 of 28 January 2005; No 6349 of 18 April 2003; No 10723 of 22 July 2002; No 10896 of 10 July 2003; and No 22236 of 21 October 2009.
6 Order No 24153 of 8 October 2013 (published on 25 October 2014).
7 Law Decree No 40 of 2 February 2006.
8 The Italian company Swaili Diffusioni Srl obtained from the Court of Florence an ex parte payment order ('*decreto ingiuntivo*') against the Swiss company Luxury Goods International SA. The Swiss Company challenged the payment order and filed with the Supreme Court a request for preliminary decision on jurisdiction, claiming the existence of an arbitration agreement providing for arbitration in Switzerland.
9 The so called '*arbitrato irrituale*' or '*arbitrato libero*'.
10 This provision now clearly states that an award may be challenged regardless of a previous filing of the award with the court.
11 This provision establishes that from the date of the last signature, an award has the same effect as a judgment of a state court.
12 Italian Constitutional Court, Judgment No 223 of 19 July 2013.
13 *Ibid.*
14 Art 4, para 2 of the Law No 218 of 31 May 1995.
15 To support such interpretation, the Court also referred to the judgment rendered by the European Court of Justice on 10 February 2009 in case C-185/07 (*Allianz Spa and Generali Assicurazioni v West Tankers Inc*) according to which, in the system set forth by EC Regulation 44/2001, a national court cannot be prevented (in that case by an antisuit injunction) from deciding upon a preliminary issue such as the validity and applicability of an arbitration agreement.

Marko Hentunen
Castrén & Snellman Attorneys Ltd, Helsinki
marko.hentunen@castren.fi

Markus Muurman
Castrén & Snellman Attorneys Ltd, Helsinki
markus.muurman@castren.fi

Third-party beneficiary obliged to arbitrate according to the Supreme Court of Finland

In the February 2013 issue of *IBA Arbitration News*, Markus Kokko, Tero Kovanen and Heidi Merikalla-Teir wrote about an interesting Finnish arbitration-related decision rendered by the Vaasa Court of Appeal in October 2011.[1] In its decision, the Court of Appeal found that a third-party beneficiary was bound by an arbitration clause contained in a shareholders' agreement that the third party had not signed. At the time of the publication of Kokko, Kovanen and Merikalla-Teir's article, the Supreme Court of Finland had granted leave to appeal the Court of Appeal's decision.

The Supreme Court has now rendered its decision (KKO 2013:84) upholding the Court of Appeal's decision and finding that the arbitration clause bound the third-party beneficiary. The Supreme Court's decision is a welcome addition to the Finnish Supreme Court's jurisprudence, as there have been only a few decisions in Finland that have touched upon the subject of an arbitration clause's scope in relation to third parties.

The facts of the case as well as the decisions of the lower courts in the matter are set out in detail in the February 2013 article. Accordingly, following a brief summary of the facts, the focus of this article will be on the Supreme Court's decision.

The Supreme Court's decision

The case concerned a situation where two companies, Jakaja Oy ('Jakaja') and MAK-tekniikka Oy ('MAK'), had concluded a shareholders' agreement that contained an arbitration clause. In their agreement, the

companies had granted Mr Onnela the right to redeem the shares that Jakaja owned in MAK within a certain time limit. Onnela was not a party to the agreement and had not signed it. After Jakaja sold the shares to another company, Onnela filed a claim for damages against Jakaja in the District Court, claiming that Jakaja had breached the shareholders' agreement by selling the shares in spite of Onnela's redemption right. Jakaja requested the claim to be dismissed on jurisdictional grounds. Jakaja claimed that the District Court lacked jurisdiction, since Onnela was bound by the arbitration clause contained in the shareholders' agreement.

Jakaja presented two main arguments in support of its claim. First, Jakaja asserted that Onnela could not be granted a better right in the manner in which the dispute was to be resolved than that of the contracting parties. Since Onnela based his claim entirely on the shareholders' agreement, Onnela was bound by the arbitration clause that also bound Jakaja and MAK. Second, Jakaja claimed that the arbitration clause bound Onnela on the basis of section 4 of the Finnish Arbitration Act (967/1992). According to this provision, an arbitration clause in a will, deed of gift, bill of lading or a similar document shall have the same effect as a mutually binding arbitration agreement provided that the parties or the person against whom a claim is made are bound by said arbitration clause. According to Jakaja, the contract term regarding Onnela's redemption right was a unilateral act and therefore similar to the aforementioned documents referred to in section 4 of the Arbitration Act.

Onnela disputed Jakaja's claim and asserted that he was not bound by the arbitration clause. Onnela based his argumentation on section 3 of the Arbitration Act, which provides that an arbitration agreement shall be in writing. According to the wording of the Arbitration Act, the written form requirement is met, for example, if the arbitration agreement is contained in a document *signed by the parties* or in an exchange of letters *between the parties*. Onnela claimed that since he had not signed the shareholders' agreement, he could not be bound by its arbitration clause. Onnela asserted that, in any case, for the arbitration clause to be binding on him, the shareholders' agreement should have expressly stated that the redemption right also entailed an obligation to arbitrate. Furthermore, Onnela contended that section 4 of the Arbitration Act was not applicable to the shareholders' agreement.

The Supreme Court acknowledged that there were factors supporting Onnela's position. Onnela was not a party to the shareholders' agreement, and Onnela had not concluded a written arbitration agreement as referred to in section 3 of the Arbitration Act. Moreover, the Supreme Court noted that Onnela had not become a party to the shareholders' agreement by way of succession, neither in the capacity of an assignee nor by virtue of law. The Supreme Court also held that section 4 of the Arbitration Act was not applicable to the shareholders' agreement.

While there were factors in favour of Onnela's position, the Supreme Court nevertheless found that Onnela was bound by the arbitration clause and ruled that Onnela's claim was inadmissible as the state courts lacked jurisdiction over the case. The Supreme Court referred to one of its existing precedents (KKO 2007:18) in which it had held that a third-party beneficiary was bound by an arbitration clause included in a deed of sale of a parcel of real estate that granted the third party a right of first refusal to the parcel. The Supreme Court considered that the third party was bound by the arbitration clause due to the fact that the third party based its claim on the deed of sale. The Supreme Court considered Onnela's claim to be based on the shareholders' agreement, as Onnela had claimed compensation for damages on the basis of Jakaja's alleged breach of the shareholders' agreement. The Supreme Court stated that the assessment of the damages claim required the application and interpretation of the shareholders' agreement. Therefore, the dispute arose from the shareholders' agreement and was to be settled by way of arbitration as stipulated in the arbitration clause.

Assessment of the decision

As arbitration is consensual by nature, a party can, as a rule, only be obliged to arbitrate if it has consented to arbitration. The starting point for valid consent is a written arbitration agreement, as section 3 of the Finnish Arbitration Act provides that an arbitration agreement shall be in writing. Furthermore, due to the principle of *privity of contract*, an arbitration agreement, as a rule, binds only its parties and not others.

These main rules are not, however, without exception. In certain situations the effects

of an arbitration agreement can also extend to a non-signatory that is not a party to the agreement. In Finland, it is generally accepted, for example, that in cases of universal succession – such as mergers – the successor is bound by an arbitration agreement that was binding on the succeeded party. In addition, assignments and other transfers of rights have often been discussed in Finnish legal literature. If a right set out in a contract containing an arbitration clause has been transferred to a transferee, the transferee is, as a rule, bound by said arbitration clause. On the other hand, if the transferee has undertaken an obligation, there has been a tendency to require the transferee's implied or express consent to arbitrate, or at least an acknowledgement of the arbitration agreement, in order for the transferee to be obliged to arbitrate. For example, a non-signatory guarantor has been held as being bound by an arbitration agreement concluded between the creditor and the debtor if the arbitration agreement was concluded either prior to or at the same time as the guarantee was given, and provided that the guarantor was aware of or ought to have been aware of the arbitration agreement.[2]

Situations involving third-party beneficiaries, such as in the case at hand, have not been given particular attention in Finnish jurisprudence. However, the issue has been discussed in international legal literature, where it has generally been held that, if a non-signatory invokes a contract term that grants the non-signatory a beneficiary right, the non-signatory is bound by the contract's arbitration clause.[3] Thus, Supreme Court decision KKO 2013:84 is in line with current international doctrine.

It appears that the Supreme Court did not approach the case from the perspective of the parties' intent or Onnela's consent, but rather construed that Onnela's obligation to arbitrate existed on the basis of the scope of the arbitration clause. For example, the Court of Appeal interpreted the provision concerning Onnela's redemption right and the shareholders' agreement as a whole to mean that Jakaja and MAK had intended for Onnela's redemption right to be conditional upon Onnela's acceptance of the arbitration clause. On the basis of this interpretation, the Court of Appeal considered Onnela to be bound by the arbitration clause. However, the Supreme Court did not address this argument. The relevant question in the Supreme Court's reasoning seems to have been to which parties or disputes the arbitration clause extended its effects. In line with its previous decision (KKO 2007:18), the Supreme Court considered that Onnela was obliged to arbitrate because his claim was based on the shareholders' agreement that contained an arbitration clause, according to which disputes arising from said agreement were to be settled by way of arbitration.

Conclusion

The Supreme Court decision KKO 2013:84 is in line with the Supreme Court's previous decisions and clarifies the legal situation with regards to the scope of arbitration agreements in Finland. The decision can also be seen as a confirmation that the written form requirement set out in section 3 of the Arbitration Act is not to be interpreted too restrictively and that an arbitration agreement can extend its effects beyond its formal signatories in certain situations.

We find the Supreme Court's decision to be a good one. In its decision, the Supreme Court adopted a pro-arbitration approach that is in line with current international practice. Based on this decision, it can be concluded that if a third party invokes a beneficiary right on the basis of a contract that includes an arbitration clause, the third party is bound by the arbitration clause even though it is not a party to the contract and has not signed a written arbitration agreement.

Notes

1 Markus Kokko, Tero Kovanen and Heidi Merikalla-Teir, 'The Supreme Court of Finland to decide on whether a third-party beneficiary of a contract can be compelled to arbitrate' (2013) 18(1) IBA Arbitration News 86–88.

2 Gustaf Möller, *Välimiesmenettelyn perusteet* (1997) 21–25; Risto Ovaska, *Välimiesmenettely – kansallinen ja kansainvälinen riidanratkaisukeino* (2007) 64–66; Risto Koulu, *Välityssopimus välimiesmenettelyn perustana* (2008) 106–109 and 116–121.

3 Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions* (2006) 13–17 and 19–28; Stavros Brekoulakis, *Third Parties in International Commercial Arbitration* (2010) 62–65; Gary Born, *International Commercial Arbitration* (second edition, 2014) 1454–1458 and 1471–1476.

Court of Appeals of Helsinki rules on the validity and operation of optional arbitration clauses

Markus Kokko
Attorneys at law
Borenius Ltd, Helsinki
markus.kokko@borenius.com

Tero Kovanen
Attorneys at law
Borenius Ltd, Helsinki
tero.kovanen@borenius.com

If asked to provide a legal definition of arbitration clauses, most lawyers will probably instinctively attach to the definition an element suggesting that such clauses are of a mandatory nature. In other words, that an arbitration clause excludes the parties' resort to other available dispute resolution methods. *Black's Law Dictionary* offers a glaring example by defining an arbitration clause as a 'clause inserted in a contract providing for *compulsory* arbitration in case of dispute as to rights or liabilities under'.[1]

However, closer scrutiny will reveal that this supposed mandatory element might not be as intrinsic to an arbitration clause as first thought. Instead, optional arbitration clauses are becoming increasingly more common.

Optional arbitration clauses give one or all of the parties to a contract the option to submit a dispute to arbitration, but do not mandate arbitration. A unilateral arbitration clause is usually an arbitration clause exercisable at the option of one of the parties to the contract.

At first glance, optional arbitration clauses seem to offer certain advantages. This is particularly so if the underlying contract might generate many types of unpredictable disputes. For example, if a claimant is only seeking a formal basis for enforcement after a payment default, it might make sense, from a time and cost perspective, to opt for summary proceedings in the local courts rather than constituting a three-member international arbitral tribunal. By contrast, in the case of more complex disputes, for example if the validity of a transaction is at stake, it might be reassuring for the parties to know that they can rely on the expertise of a three-member arbitral tribunal.

As every litigator however knows, what may at first be perceived as advantages of complex dispute resolution clauses are often lost in practice due to parties' opportunistic behaviour when an actual dispute arises. Complex dispute resolution clauses often bring with them many problems as to their validity and operation, offering fertile ground for jurisdictional objections.

In the past, due to the hostility of some local courts towards arbitration, optional arbitration clauses have been found to be unenforceable. Some courts – and even some notable commentators – took the view that optional arbitration clauses are 'pathological' and contrary to the basic nature of arbitration.[2] Those favouring this approach tended to put a lot of emphasis on the semantics of certain international treaties. The assumption that arbitration clauses are, by nature, mandatory was rarely questioned. This assumption was rather taken as granted.

The current consensus in many notable jurisdictions often serving as the seat of arbitration seems to favour the validity of optional arbitration clauses.[3] This approach is in line with party autonomy, one of the guiding principles of international arbitration. As emphasised by Justice Morison in *NB Three Shipping Ltd v Harebell Shipping Ltd*,[4] it is up to the parties to agree the manner in which they wish to dispose of any disputes which may arise between them. The agreement of the parties is to be honoured, unless there are compelling reasons not to do so.

As explained in more detail below, in December 2013, the Court of Appeals of Helsinki rendered a judgment in a case dealing with many of the problems that may arise with respect to the validity and operation of optional arbitration clauses.

Background

The relevant facts of the case were as follows: a Finnish manufacturer of high-tech equipment ('Company A') had entered into an agency agreement with an American company ('Company B').

The agency agreement included two dispute resolution clauses. Clause 18 of the agency agreement was an arbitration clause entitling both parties to bring their claims in arbitration under the auspices of the International Chamber of Commerce, while clause 19 stated that all disputes were to be resolved in the courts of Finland.

In January 2013, Company B filed an application for a summons with the District Court of Helsinki claiming, inter alia, payment of allegedly outstanding commissions.

Company B's interpretation of the agency agreement was that clause 18 was an optional arbitration clause giving the plaintiff the right to opt for arbitration. Company B further asserted that, as the plaintiff, it did not wish to exercise the option granted by clause 18. Thus, Company B considered that it could rely on the jurisdiction clause (clause 19) and that, accordingly, the Helsinki District Court had jurisdiction to adjudicate its claim.

Company B further contended that the right to bring a claim in the local court is a fundamental right that cannot be excluded except by the most clear and explicit words. Company B viewed clause 18 to be insufficiently clear to exclude the jurisdiction of the state courts.

Company A responded by raising a jurisdictional objection. First, Company A asserted that clause 18 was not optional but rather mandatory, and that clause 19 was only meant to come into play if both parties first waived the right to arbitration. According to Company A, clause 19 was only inserted into the agency agreement to allow Company B to swiftly enforce an uncontested claim against Company A through summary proceedings. Company A considered that in such a case, arbitration would not be in the interest of either party and clause 18 could be waived.

Company A, however, emphasised that the claim at hand was both contested and unfounded. Accordingly, the claim had to be submitted to arbitration, since Company A did not agree to waive clause 18. Company A added that even if it prevailed in the court proceedings, enforcing any Finnish judgment in the United States would be difficult, giving Company B a first bite of the apple without the possibility of future litigation in the US in the event of an unfavourable judgment.

In support of its position, Company A relied on the parties' intention when they drafted the agency agreement. Further, Company A produced case law supporting its position that arbitration clauses are presumed to be mandatory and should not be interpreted to be optional unless there is clear evidence to support this.

As an alternative argument, in case the court considered the wording of the agency agreement to be ambiguous in terms of which dispute resolution clause prevailed, Company A relied on certain doctrines of contractual interpretation, including *in dubio contra proferentem* and the primacy of the individually negotiated clauses over generally formulated ones.

Academically, the most interesting feature of the case was not the question of which dispute resolution clause was primary; rather, it was the alternative argument of Company A, namely, that even if clause 18 was only optional, Company A had nevertheless exercised the option for arbitration before the filing of Company B's application with the state court.

Before the filing of this application, Company A and Company B had exchanged correspondence. In this correspondence, Company A had notified Company B that it required the dispute to be resolved through arbitration in accordance with clause 18.

Company B did not dispute the receipt of this notice. Company B, however, argued that such a free-form notice was irrelevant, and that it was the plaintiff who had the right to choose between the two different dispute resolution methods. The choice for state court proceedings was made by Company B when it filed its application with the state court.

Decision of the Helsinki Court of Appeals

The Helsinki District Court handed down its decision on 27 August 2013. It dismissed Company B's claims without hearing them on the merits based on the arbitration clause. The Court of Appeals of Helsinki, on 31 December 2013, reaffirmed the decision to dismiss.

In the reasoning of the decision, the Helsinki District Court first considered the argument that clause 18 was primary and concluded, based on the wording and numbering of the relevant clauses, that clause 18 in fact was the primary dispute resolution clause. The parties could only opt for court litigation under the secondary clause 19 if both parties first waived the primary clause 18.

The Helsinki District Court did not assess the parties' intention, nor discussed other potentially applicable rules of contractual interpretation, due in part to the lack of

supporting evidence and in part due to a lack of relevance.

In addition, the Helsinki District Court held that optional arbitration clauses are valid and give parties the choice between court litigation and arbitration.[5]

Most importantly, the Helsinki District Court ruled that if an optional arbitration clause is silent as to how the selection between the different dispute resolution methods is to be made, a free-form notice by either party is sufficient to make that selection. Such a post-dispute notice binds the recipient, provided of course that the dispute resolution method specified in the notice is one of the optional forums allowed in the underlying agreement. The recipient is not permitted to bring a claim in any other fora except that specified in the notice. If he or she attempts to start proceedings in another forum, such proceedings will be deemed to have been initiated in a wrong forum and thus have to be dismissed. Basically, whoever takes the first shot, wins.

The Helsinki District Court noted that it was not disputed that Company A had notified Company B, in two letters, that it wished the dispute to be resolved in arbitration before Company B had made any competing selection or initiated any proceedings.

Therefore, the Helsinki District Court concluded that regardless of whether clause 18 was primary or only optional, the claims of Company B were to be dismissed.

A bit disappointingly, while the Court of Appeals of Helsinki reaffirmed the decision of the Helsinki District Court, its ruling relied only on clause 18 being primary. The reasoning no longer included the more interesting observations as to the validity and operation of optional arbitration clauses.

Commentary

Although the reasoning of the Helsinki Court of Appeals left out, arguably, the most interesting feature of the Helsinki District Court's decision, one can assume that even that part of the reasoning was not erroneous and will have some precedential value in the future. This part of the reasoning was more likely left out due to the fact that it was, strictly speaking, irrelevant. Given that clause 18 was deemed to be primary and binding, it was not necessary to opine on clause 18 as an optional arbitration clause.

Regardless, in the authors' opinion, two encouraging conclusions can be drawn from the case.

First, the Finnish courts have now appeared particularly dismissive of the view that arbitration clauses are surprising ousters of state jurisdiction of the state courts. Also in the case at hand, arbitration clauses were viewed as customary features of international transactions and, apart from the standard rules of contract law, no special requirements of clarity are applicable to them.

Secondly, the case confirms that there are no obstacles to parties agreeing to optional arbitration clauses. This is line with the authors' opinion that contractual provisions should be given the meaning that corresponds to the intention of the parties. If the parties wished to include an optional arbitration clause into their contract, that is their choice. Courts should avoid giving a clause a meaning that is contrary to the parties' intention, even if the court itself views the clause as unusual. Any other approach risks accidentally distorting the contractual balance agreed upon by the parties, as the court may have not learned all the reasons behind a particular solution adopted by the parties.

Notes

1 See *Black's Law Dictionary* (Second Online Edition).
2 See, for example, W L Craig, W Park and J Paulsson, *International Chamber of Commerce Arbitration* (1990) 158.
3 For an overview of different jurisdictions, see Deyan Draguiev, *Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability* (2014) 24.
4 See *NB Three Shipping Ltd v Harebell Shipping Ltd*, [2004] EWHC 2001.
5 Helsinki District Court cited Risto Koulu, *Välityssopimus välimiesmenettelyn perustana* (2008) 54.

Fabio Trevisan
Bonn Steichen & Partners, Luxembourg
ftrevisan@bsp.lu

Laure-Hélène Gaicio
Bonn Steichen & Partners, Luxembourg
lhgaicio@bsp.lu

Luxembourg considers the enforcement of annulled awards

The annulment of an arbitral award by national courts raises complex issues. In the past few years, courts in several European countries have decided whether to enforce an annulled arbitral award. However, this question has only recently been submitted for the first time (as far as we are aware) to the courts in Luxembourg. The question before the courts is as follows: can an arbitral award, annulled in its home country, serve as a valid title to justify the temporary freezing of a defendant's assets located in Luxembourg, pending the outcome of the exequatur proceedings in respect of the annulled award? The Court of Appeal of Luxembourg[1] held that it could not.

Case background

In 2009, an arbitral award was rendered in a foreign state following a contractual dispute between the parties to a contract. This arbitral award was challenged and, in 2011, was annulled by the state courts of the place of arbitration. The annulment was based on the decision that the issue at stake should not have been submitted to an arbitral tribunal as it fell within the sole competence of national courts.

Despite the annulment of the award, the party benefiting from the arbitral award decided to pursue its enforcement in different jurisdictions, including in Luxembourg.

The decisions of the Tribunal d'arrondissement

In early 2013, a request for authorisation to serve a freezing order ('*saisie-arrêt*') was filed ex parte with the President of the *Tribunal d'arrondissement* (District Court) in Luxembourg. The plaintiff alleged a debt of the defendant to justify the freezing order. The debt was supported by the annulled arbitral award, which ordered the defendant to pay a certain amount to the plaintiff. The request filed by the plaintiff did not mention that the arbitral award had been challenged and annulled. The President of the *Tribunal d'arrondissement* granted the freezing order, which was then served on the defendant.

The defendant disputed the freezing order before the same judge who had granted the ex parte measure. It argued that the plaintiff had deliberately hidden from the President of the *Tribunal d'arrondissement* the fact that the arbitral award had been annulled. In doing so, the plaintiff had not provided a clear and full picture of the situation. The defendant also argued that as the arbitral award had been annulled, there was no debt of the defendant towards the plaintiff.

The *Tribunal d'arrondissement* did not accept these arguments. Instead, the judge considered that the issue submitted to him was to determine the likelihood that the Luxembourg exequatur order, which the President of the *Tribunal d'arrondissement* had granted between the request for the freezing order and the hearing of the challenge, would ultimately be annulled.

The *Tribunal d'arrondissement* rejected the challenge, on the basis that the annulment of an arbitral award would not constitute a sufficient ground to refuse the exequatur (the court based its reasoning on French law). Accordingly, it found that a debt existed, at least sufficiently so to justify the issuance of a provisional freezing order.

The decision of the Court of Appeal

The defendant appealed the decision of the *Tribunal d'arrondissement*, raising before the Court of Appeal the same arguments advanced in the first instance. The defendant insisted that the key issue was whether, at the time the freezing order had been granted, an annulled arbitral award could justify a freezing order, based upon a *fumus boni juris*, that is, the reasonable proof of credit shown by the plaintiff. It argued that the exequatur order, which was issued after the freezing order, was irrelevant and should not have been taken into consideration as the judge should have considered the existence of the debt as of the day the freezing order had been issued.

The Court of Appeal granted the appeal. It emphasised that the plaintiff, in its request, had claimed that the arbitral award was final and that it had a certain, liquid and due debt on the basis of this award. Yet, at the date of the request, the arbitral award had been annulled in the jurisdiction where it had been issued. Furthermore, the Court of Appeal opined that the request filed to obtain the exequatur was again supported by the annulled arbitral award, a fact that had not been mentioned by the plaintiff in its ex parte submission. It found that the President of the *Tribunal d'arrondissement* ought to have been informed that the title supporting the authorisation to freeze assets (the arbitral award) had been annulled.

The Court of Appeal also considered that the annulment of the award prevented its recognition and enforcement in Luxembourg. Consequently, it quashed the freezing order issued on the basis of the award by the *Tribunal d'arrondissement*.

The reasoning of the Court of Appeal is supported by law and policy

In our view, the decision by the Court of Appeal is consistent with both Luxembourg law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] (the 'New York Convention'). Indeed, according to Luxembourg law, the judge hearing the challenge must consider the facts as they were on the date the request for a freezing order was filed.

In the case at hand, the arbitral award had been annulled by the state courts. As such, the plaintiff could not establish the existence, nor even the possibility of existence, of a debt owed by the defendant. The same would apply if a creditor invoked a state court decision which had been overturned by the Court of Appeal. As such, the decision of the Court of Appeal is in line with the case law and the legislation of Luxembourg.

Despite this finding, there may be valid arguments in favour of enforcing awards (or orders arising from those awards) despite the fact that it has been set aside in the jurisdiction where it was issued. We now examine some of those arguments.

Basic notions of justice

Relying on the basic notions of justice, it is reasonable to argue that the prevailing party should be entitled to enforce an arbitral award even if it is later annulled. The prevailing party had been under the belief that the dispute was finally decided by arbitration, and an annulment of the award would counter this reasonable expectation. In such a situation, Article 6 of the European Convention on Human Rights and the principle of protection of legitimate expectations would be relevant.

On the other hand, the interests of protecting legitimate expectations must be counter-balanced by the principle of legal certainty. The award had been annulled by the competent courts and, consequently, may no longer be enforceable. This situation can be compared to litigation before national courts: if a court of appeal (or the highest court) overturns the decision of a lower court, that first decision can no longer be enforced. Basic legal principles therefore support the Court of Appeal's reasoning.

Grounds for denying recognition and enforcement

A more compelling argument perhaps relates to the fact that the New York Convention exhaustively enumerates the grounds for refusal of an exequatur. Article V(1)(e) of the Convention allows courts to deny recognition and enforcement of an award that has been annulled or suspended by the competent authorities of the country in which, or under the laws of which, the award had been made.

One could argue, as was done by the *Tribunal d'arrondissement*, that the annulment of the arbitral award in its home country does not, *ipso facto*, mean it cannot be enforced in other countries. Article VII of the New York Convention allows parties to avail themselves of the most favourable regime between the New York Convention and national law. It could be considered, as the *Tribunal d'arrondissement* did, that an exequatur can only be refused on the grounds listed cumulatively by the New York Convention and the applicable national law. In Luxembourg, the law applicable to enforcement of arbitral awards is Article 1251 of the New Code of Civil Procedure, which does not include the annulment of the award as a ground for refusal of the exequatur. Under this reasoning, an annulled award might nevertheless constitute a ground for refusal of exequatur by virtue of the specific wording of the New York Convention.

However, such reasoning could lead to results that go against Article III of the

New York Convention, which provides that the same regime should apply to arbitral awards regardless of where they were made.[3] In Luxembourg, Article 1251 3° of the New Code of Civil Procedure provides that exequatur should be refused if it is proven that there are grounds for the annulment of the award. A domestic award, even if not yet annulled, would therefore not be recognised and enforced if there are arguments that would lead to its annulment. Consequently, a domestic award rendered then annulled by the national courts of Luxembourg would not be enforceable in Luxembourg.

There is no reason for Article VII of the New York Convention to take precedence over Article III. On the contrary, this would lead to an absurd situation whereby domestic arbitral awards that have been annulled would not be enforceable in Luxembourg but foreign annulled awards might be. The decision of the Court of Appeal forecloses that prospect and therefore the court's decision is consistent with both the applicable international conventions and domestic law.

Practical effects of recognising annulled awards

Finally, practical considerations favour the Court of Appeal's reasoning. Under both Luxembourg law[4] and the New York Convention,[5] only the courts of the country in which, or under the laws of which, the award was made may annul an arbitral award. We therefore wonder what use it is for a party to request the annulment of an arbitral award if the award could still be enforced notwithstanding the annulment.

In addition, a position such as that taken by the *Tribunal d'arrondissement* is likely to lead to an undesirable race for the recognition and enforcement of arbitral awards. Each party would request the enforcement of the result that favours it (either the award itself or the annulment), a process that would undermine the principle of legal certainty.

Conclusion

In view of the above, we believe that the same regime should apply to domestic and foreign arbitral awards that have been annulled at the seat of the arbitration. We agree with the Court of Appeals that annulled awards should not be enforced in Luxembourg.

It should be noted that the Court of Appeal's decision has recently been challenged before the Luxembourg Cour de Cassation (Supreme Court) on several points of law. It remains to be seen how the Cour de Cassation will treat the appeal.

Notes

1 Cour d'appel, 18 December 2013, Rôles No 40.145 and 40.147.

2 See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

3 Art 3 of the New York Convention provides that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.'

4 See Art 1244 of the Luxembourg New Code of Civil Procedure.

5 See Art V(1)(e) of the New York Convention.

German Regional Court of Munich holds arbitration agreement between athletes' union and athlete to be invalid

Stephan Wilske
Gleiss Lutz, Stuttgart
stephan.wilske@gleisslutz.com

Claudia Krapfl
Gleiss Lutz, Stuttgart
claudia.krapfl@gleisslutz.com

In a decision dated 26 February 2014, the Regional Court of Munich (the 'Court'), seized with a request by the German ice speed skater Claudia Pechstein to overturn a doping ban, held that arbitration agreements between Pechstein and the athletes' unions were invalid because the athlete had been forced to conclude them and therefore had not voluntarily agreed to arbitration. The Court therefore did not dismiss Pechstein's claim on jurisdictional grounds. It nonetheless dismissed the case on the merits, finding in this respect that the arbitral award of the Court of Arbitration for Sport (CAS) was binding and thereby confirming Pechstein's doping ban in 2009.

Factual background: long-raging legal battle of speed skater Claudia Pechstein against doping ban

In 2009, the Disciplinary Commission of the International Skating Union (ISU) had banned German speed skater Claudia Pechstein from competing for two years after she was found guilty of doping. Since then, Pechstein, an accomplished Olympic gold medalist, has fought on a number of fronts to have this ban revoked in order to be able to participate in international competitions.

Initially, Pechstein challenged the doping ban before a CAS arbitral tribunal under the arbitration agreement in her ISU Membership Agreement. The arbitral tribunal rejected her claim and upheld the doping ban. Pechstein challenged the award before the Swiss Supreme Court and requested in two separate proceedings that the award be set aside. This application, however, was unsuccessful.[1] She has also filed an action before the European Court of Human Rights, which is pending.

In her latest move, Pechstein requested a declaration that the doping ban had been unlawful and damages in an amount of €4m from the ISU and the German Skating Union, in proceedings before the German Regional Court of Munich.

Regional Court of Munich: arbitration agreements with athlete invalid

The Regional Court of Munich dismissed the claims raised by Pechstein in relation to her doping ban that had been confirmed by the CAS award. However, the Court did not dismiss the action as impermissible. It held the claim for damages to be permissible despite the fact that Pechstein had concluded arbitration agreements with the ISU and the German Skating Union and had previously arbitrated the doping ban dispute.

The Court concluded that the underlying arbitration agreements were invalid because Pechstein as an athlete had had no option but to agree to conclude these arbitration agreements in order to be able to participate in international skating competitions. The Court held that she had not voluntarily agreed to arbitrate such disputes.

Indeed, it is typical for the various athletes' unions to insist that individual athletes agree to arbitrate any potential disputes. Otherwise, the athletes' union will refuse to issue the necessary licences or nominations for participation in international competitions. The individual athlete therefore has no choice but to agree to arbitration in order to be able to take part in competitions.

The question whether such agreements to arbitrate are valid has been under discussion in recent years. The prevailing opinion is supportive of the validity of such agreements. However, there appears to have been no serious discussion of the question whether they can be seen as having been entered into voluntarily. There are: (1) authors who simply assume that the athletes' unions' practice

still fulfills the requirements of a voluntary agreement; (2) authors who attempt to water down the requirements for a voluntary agreement; and (3) authors who deny the necessity for a voluntary agreement altogether.[2]

Criticism of the athletes' unions' practice has been rare. Without a doubt, however, it is a necessary prerequisite for a valid arbitration agreement according to section 1029 ZPO (*Zivilprozessordnung*, Code of Civil Procedure)[3] that the parties have voluntarily agreed to waive their right to take disputes to state courts.[4]

This view has now been confirmed by the Court, which stated clearly that the athlete had not voluntarily agreed to arbitrate disputes. The Court reasoned that at the time the arbitration agreement was concluded there was a structural imbalance between Pechstein and the skating unions, because the national and international skating unions had a monopoly position. If Pechstein had declined to sign the arbitration agreements, she would not have been able to participate in any national or international competitions and would therefore not have been able to be active in her profession. The Court furthermore referred to the right of access to justice, which was not safeguarded if a party is forced to arbitrate, thereby losing its right to public proceedings and the right to request legal aid. It explicitly found that the benefit for the sports industry of having an internationally accepted forum for sports disputes did not justify the detriment to the individual athlete.

However, in a second step, the Court held that Pechstein's claim to have the doping ban declared unlawful was bound to fail because of the *res judicata* effect of the CAS arbitral award. It found that, despite holding the arbitration agreements to be invalid, it was nevertheless bound to take into account the *res judicata* effect of the arbitral award because Pechstein had not objected to the jurisdiction of the arbitral tribunal in the course of the arbitral proceedings. Accordingly, the Court held that the damage claims were permissible but without merit because any damages claim was excluded due to the binding decision reached in the CAS arbitration confirming the doping ban.

National athletes' unions in uproar

The Secretary General of the German Olympic Sports Confederation (DOSB) issued a statement on the same day the judgment was published explaining that while views on the validity of arbitration agreements in athletes' agreements might differ, the Court's decision was not in line with the prevailing opinion on the matter. He emphasised that there was no alternative to international arbitration in doping questions to ensure that such questions are treated in the same manner worldwide.[5]

On 4 April 2014, the Secretary General issued a letter to athletes' unions prompting them to ignore the decision by the Court and to continue with their previous practice ensuring that all athletes sign arbitration agreements. This has incited further discussion and reactions from representatives of the athletes. They are demanding the athletes' unions to offer the athletes a choice between arbitration and the courts.[6]

Way forward: convince athletes of benefits of arbitration?

There are obvious benefits to arbitration in sports-related disputes, which may also serve to convince athletes that it is in their best interest to conclude such arbitration agreements with the athletes' unions. First and foremost, sports arbitration serves to ensure that sports-related questions are treated similarly for all athletes regardless of where they are from, separating such disputes from the national arena and moving them to an international forum. Furthermore, the arbitrators available in sports-related disputes have extensive experience with such disputes, which is not the case with the local judges to whom athletes would otherwise have to refer their disputes.[7]

It remains to be seen whether athletes will be convinced by these arguments when arbitration appears costly and time-consuming. If not, it seems likely that a large number of disputes will now have to address the preliminary question of whether the arbitration agreement with the athlete is valid. This will affect countries other than Germany, since athletes' unions and athletes worldwide have followed Pechstein's legal saga.

If an athlete initiates court proceedings because he or she does not feel bound by an arbitration agreement, the athletes' union may object on the basis of an arbitration agreement. The court will then have to decide on the validity of the arbitration agreement (in Germany, according to section 1032 ZPO). On the other hand, if the athletes' union

initiates arbitration proceedings, and the athlete wishes to object to arbitration, that athlete must raise such an objection no later than in the statement of defence (in Germany, according to section 1040(2) ZPO). Otherwise, the athlete will be barred from raising the objection later on (in Germany, according to section 1027 ZPO), including in subsequent annulment proceedings.[8]

If a large number of athletes were to proceed in this manner, there would soon be a large body of case law on the question of the validity of arbitration agreements with athletes. It remains to be seen if this in fact occurs.

Conclusion: what will become of Claudia Pechstein?

Without a doubt, Pechstein has an impressive row of athletic accomplishments to look back on, having won gold at the 1994, 1998, 2002 and 2006 Winter Olympic Games. Since her ban has expired, she has returned to speed skating, winning bronze medals at the last three World Speed Skating Championship competitions. However, she did not win a medal at the 2014 Winter Olympics in Sochi. Nevertheless, she has certainly won fame in the legal arena. It is possible that her name in the long run will become synonymous with a changing tack in the treatment of athletes when concluding arbitration agreements.[9] The reactions of the German athletes' unions makes clear their wish to avoid at all costs a development that would provide athletes an alternative to arbitration.

However, it will be up to the courts to decide whether they follow the Court in holding that such arbitration agreements are not concluded voluntarily; or whether they will continue to ignore doubts as to voluntariness in these cases. At the very least, Pechstein has brought this subject back on the table. Apparently, she has appealed the Court decision insofar as the court declined to award damages against the ISU. The Higher Regional Court of Munich may therefore deal with these questions on appeal. Should further courts declare such arbitration agreements to be invalid, it may become necessary for the legislator to intervene to ensure that sports-related disputes, particularly in relation to doping issues, continue to be decided in an international arbitration forum. Already, there is talk of the German legislature considering such measures for an anti-doping law, currently under discussion.[10]

Notes

1 *Claudia Pechstein v International Skating Union und Deutsche Eisschnelllauf Gemeinschaft eV*, Swiss Federal Supreme Court, Decision, 4A_612/2009, 10 February 2010, ASA Bull 3/2010, 612; Swiss Federal Supreme Court, Decision 4A_144/2010, 28 September 2010, ASA Bull 1/2011, 147.
2 See overview in *Heermann*, SchiedsVZ 2014, 66 *et seq.*
3 See generally on the requirements under section 1029 ZPO, Trittmann and Hanefeld in Böckstiegel, Nacimiento and Kröll (eds), *Arbitration in Germany* (2007) s 1029 (new edition forthcoming in 2014).
4 *Steiner*, SchiedsVZ 2013, 15.
5 See reference in *Heermann*, SchiedsVZ 2014, 66, 75.
6 'Der Preis des Rechtsstaates?' (16 April 2014) *Frankfurter Allgemeine Zeitung* 28.
7 *Heermann*, SchiedsVZ 2014, 66, 67.
8 For an overview of these options under German arbitration law and practice, see Rützel, Wegen and Wilske, *Commercial Dispute Resolution in Germany* (Munich, CH Beck, 2005) 111 *et seq.*
9 Similar to Jean-Marc Bosman, the Belgian soccer professional who has become synonymous with the right of professional players in the European Union to move freely to another club at the end of their term of contract; see European Court of Justice, *Union royale belge des sociétés de football association ASBL et al v Jean-Marc Bosman*, Case C-415/93, European Court Reports 1995, I-04921.
10 See n6 above.

Dr Johannes P Willheim
Willheim Müller, Vienna
j.willheim@wmlaw.at

Austria: Dealing with antitrust damages actions in collective arbitration

It is a long-established principle that victims of infringements of European Union antitrust law, such as the prohibition of anti-competitive agreements or the prohibition to abuse a dominant position, are entitled to compensation for any harm suffered as a result. In spring 2014, the European Parliament adopted a proposal for an EU Directive aimed at facilitating the enforcement of damages claims by victims of antitrust violations (the 'Proposal for a Directive on Antitrust Damages Actions').[1] The Council of Ministers is expected to adopt the proposal in the near future.

The Proposal for a Directive on Antitrust Damages Actions formally introduces the notion of follow-on actions, which refers to antitrust damages actions that are initiated subsequent to an infringement decision[2] of a competition authority.[3]

The Court of Justice of the European Union has repeatedly emphasised the right to pursue private claims stemming from an infringement of EU antitrust rules as one of the main pillars of effective enforcement of EU antitrust law.[4] To date, however, few such claims have arisen. The European Commission has identified several explanations, chief among them being the lack of adequate rules governing this type of damages actions in the EU Member States.[5] More specifically, it has identified the following obstacles to the initiation of such claims: (1) the difficulties faced by victims in obtaining evidence to prove an infringement of antitrust rules; (2) the lack of collective redress mechanisms, especially for consumers and SMEs; (3) the absence of clear rules on the passing-on defence;[6] (4) the absence of a clear probative value for the decisions of a national competition authority; (5) the difficulties in bringing an action for damages after a competition authority has found an infringement; and (6) the difficulties in quantifying antitrust damages (including the high costs relating thereto).[7] The Proposal for a Directive on Antitrust Actions seeks to overcome these difficulties.[8]

Special rules for consensual dispute resolution

The European Commission and the European Parliament have recognised that consensual dispute resolution can sometimes be a more efficient and less costly way to resolve disputes and to obtain compensation.[9] An entire chapter of the Proposal for a Directive on Antitrust Damages Actions is therefore dedicated to consensual dispute resolution.[10] As an incentive for parties to use consensual dispute resolution methods, the proposed Directive: (1) suspends limitation periods and allows national courts to suspend proceedings before them involving the same claim in order to give the parties time to reach a consensual settlement;[11] (2) provides that payments resulting from a consensual settlement prior to the imposition of a fine may be considered as a mitigating factor;[12] and (3) limits the joint and several liability of a party which made damages payments on the basis of a consensual dispute resolution process.[13]

The special rules for consensual dispute resolution also apply to arbitration

Consensual dispute resolution is defined in the Proposal for a Directive on Antitrust Damages Action as 'any mechanism enabling the parties to reach an out-of-court resolution of a dispute concerning compensation for harm'.[14] Arbitration is a means of resolving disputes, including disputes concerning compensation for harm, in a final manner outside of the courts. It thus falls squarely within the Proposal's definition of consensual dispute resolution. Moreover, arbitration is expressly mentioned in consideration 43 of the Proposal, together with mediation and conciliation.

Arbitration addresses many of the identified procedural obstacles

Arbitration may in fact already remedy some of the procedural obstacles for effective follow-on actions, even without the adoption

and implementation by Member States of the Proposal for a Directive on Antitrust Damages Actions. This has been widely overlooked, likely because the relevant protagonists, in particular the European Commission and the victims of antitrust violations, as well as the undertakings that may be exposed to follow-on actions, are not sufficiently familiar with arbitration.

The availability of collective arbitration, which allows a large number of individuals to assert their claims in the same proceeding, is often unknown to potential parties. The first collective arbitration proceedings arose in the United States in the early 1980s. In 2003, the ability of parties to consent to collective arbitration in the US was implicitly recognised by the US Supreme Court in *Green Tree Financial Corp v Brazzle*.[15] Collective arbitration has also been recognised and used in Europe, where some arbitral institutions, such as the German Institution for Arbitration (DIS), provide special procedural rules to govern such proceedings.[16] Collective arbitration is also available to parties even absent procedural provisions that expressly allow it. Thus, arbitration already provides a collective redress mechanism outside of the realm of the court systems of the EU Member States.

Arbitration proceedings provide additional benefits that may not be easily matched by the courts of the Member States, even if national legislatures introduce collective redress mechanisms for the enforcement of follow-on actions in order to implement their obligations under the Proposal for a Directive on Antitrust Damages Actions. In particular, the flexibility of arbitration proceedings provides a good framework for the quantification of harm suffered as a consequence of an antitrust violation. As the various measures foreseen in the Proposal (such as the recognition of the probative value of decisions of competition authorities) are implemented in the Member States, the focus of follow-on actions will be on whether a party claiming damages actually suffered any harm caused by an antitrust violation and, if so, on quantifying that harm. The quantification of harm caused by an antitrust violation is not a straightforward exercise, but rather requires highly specialised expertise. Very frequently, especially when the victims of an antitrust violation are consumers or small and medium-sized enterprises (SMEs) , the costs and efforts involved in quantifying the harm are far higher than the potential claim that the victims may ultimately be able to enforce.

Collective arbitration allows parties to avoid this. In collective arbitration, the early stages of the proceedings can be exclusively dedicated to the determination of the most appropriate methodology for quantifying harm suffered as a consequence of the very specific antitrust violation in question. The respondents (ie, the undertakings that allegedly committed an antitrust violation) as well as the claimants (ie, the alleged victims of the antitrust violation) may (collectively) present their positions regarding the methodology for the quantification of harm during this phase of the proceedings. In determining the methodology that will ultimately be applied, arbitral tribunals may have recourse to all the procedural techniques commonly used in international arbitration for resolving expert issues, such as expert witness presentations, expert witness conferencing, and the appointment by the arbitral tribunal of its own expert witness. Once an arbitral tribunal has decided how the harm caused by a specific antitrust violation will be quantified, the remainder of the proceedings can focus on whether or not the individual respondents are in fact victims of the antitrust violation in question and on quantifying the compensation to which each of them is entitled according to a pre-determined method.

The fact that parties to arbitration generally have significant influence on the appointment and composition of arbitral tribunals is another advantage of arbitration making it well-suited to the resolution of follow-on actions. Resolving antitrust cases or civil law cases that turn on the outcome of issues of antitrust law requires highly specialised skills that go well beyond general legal skills, such as quantitative skills and a solid understanding of modern industrial economics. Over the last decade, arbitration cases involving competition law issues have increased considerably. With this development, it is not only the academic interest in the subject that has grown, but also the number of practitioners throughout the EU who are well placed to adjudicate follow-on actions competently as arbitrators.

International arbitration practitioners are also generally used to managing large cases involving parties from several jurisdictions, a vast number of issues, documents and information (submissions, briefs, expert reports, etc), and technical and empirical data. Many of them have access to the infrastructure necessary to handle such cases in a timely and efficient manner. The

emergence of modern and increasingly technological case management techniques in international arbitration contributes substantially to the efficiency of the process. By comparison, national courts are often much more constrained in terms of available or permissible resources. It is therefore difficult to see how national courts would be able to deal as efficiently with collective follow-on cases, especially when they involve large numbers of parties from several jurisdictions. The implementation in the Member States of the Proposal for a Directive on Antitrust Damages Actions would need to be accompanied by training and resources for national courts dealing with such cases.

The aforementioned advantages of collective arbitration for the resolution of follow-on actions serve the interests of both the claimants and the undertakings that are exposed to the claims. For the respondents, the availability of collective arbitration allows them to concentrate their resources in single proceedings. For the alleged victims, collective arbitration often provides the only option for sharing the costs and other burdens of pursuing a follow-on action, at least as long as collective redress is not available in all Member States of the EU. The flexibility of arbitration proceedings also provides both sides with an ideal platform to present their positions on quantification of the harm. Finally, the possibility of nominating arbitrators that are well-equipped for the task at hand ensures a competent and timely resolution of follow-on actions.

Bringing follow-on actions into arbitration is simple

The fact that arbitration requires an arbitration agreement is not a burdensome obstacle for the resolution of follow-on actions through collective arbitration. Indeed, all that is required is an offer by the undertakings that are the objects of an antitrust investigation (including leniency applicants) to resolve follow-on claims through arbitration and the acceptance of such an offer by the potential victims that seek to enforce follow-on actions. If the potential victims are numerous and not known to the undertakings that may be exposed to follow-on actions, the arbitration agreement can be based on an open offer to arbitrate declared through a suitable public statement (published in relevant industry media, for instance) and aimed at a generically-described group of potential victims (such as all buyers of a specific product).

Outlook

Until now, undertakings exposed to follow-on actions had little or no incentive to agree with the parties seeking to enforce claims against them on the suitable forum for the resolution of such claims. In addition, many of the obstacles to the enforcement of follow-on actions have worked in the favour of those who may otherwise have been exposed to these claims. This will likely change when the measures currently proposed by the European Commission and Parliament become EU law and are implemented in the Member States. The fact that (1) the Proposal for a Directive on Antitrust Damages Actions foresees arbitration as a means to resolve disputes relating to follow-on claims on a consensual basis; and (2) (collective) arbitration provides clear advantages for follow-on claims should make (collective) arbitration the preferred mechanism of both the undertakings that are exposed to follow-on actions and the potential victims of antitrust violations that may have suffered damage. The international arbitration community is called upon to secure its proper place in the new system for the enforcement of follow-on claims.

Notes

1 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11 June 2013.
2 An infringement decision is a decision of a competition authority or review court that finds an infringement of competition law, Art 4(10) Proposal for a Directive on Antitrust Damages Actions.
3 Commission Staff Working Document Impact Assessment Damages Actions for Breach of EU Antitrust Rules accompanying the Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union (the 'Commission Staff Working Paper on Antitrust Damages Actions'), para 30.
4 See Case C-453/99, *Courage and Crehan,* [2001] ECR I-6297, para 26; Joined Cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619; Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161; and Case C-199/11 *European Community v Otis NV and others*, [2012] ECR I-0000.
5 Commission Staff Working Paper on Antitrust Damages Actions.
6 The passing-on defence allows undertakings accused of violating antitrust rules to claim that the direct customer suffered no damage as a result of the excessive price charged because they passed this overcharge to subsequent customers.
7 Commission staff working paper accompanying the white paper on damages actions for breach of the EC antitrust rules.

8 Proposal for a Directive on Antitrust Damages Actions, 2 *et seq*.
9 Considerations 42 *et seq* of the Proposal.
10 Chapter VI.
11 Art 18(1) and (2) of the Proposal.
12 Art 18(4) of the Proposal.
13 Art 19 of the Proposal.
14 Art 4(21) of the Proposal.
15 *Green Tree Fin Corp v Bazzle*, 539 US 444, 451–52 (2003).
16 *DIS-Ergänzende Regeln für gesellschaftsrechtliche Streitkeiten 09* (ERGes). These rules, however, only apply to shareholder disputes. For an example of how major arbitral institutions deal with multiple parties or claims, see, for example, Arts 7(1) and 10(b) of the ICC Rules of Arbitration.

Chile's favourable track record in international arbitration is growing

Andrés Jana L
Bofill Mir & Alvarez Jana, Santiago de Chile
ajana@bmaj.cl

Rodrigo Gil L
Bofill Mir & Alvarez Jana, Santiago de Chile
rgil@bmaj.cl

In September 2014, the Chilean International Commercial Arbitration Law No 19.971 (ICAL) reached its tenth year in force. Its application by Chilean courts has rendered mostly positive results. In 2013, we reported on one encouraging Supreme Court decision in particular, which held that a 'recourse of complaint' (*recurso de queja*) was inadmissible against the Court of Appeals' earlier rejection of a request to set aside an arbitral award.[1]

Since then, Chile's favourable track record in international commercial arbitration has continued to grow. This growth is evidenced by the Santiago Court of Appeals rejecting four requests for annulment of arbitral awards.[2] Two of these decisions[3] were also subject to recourses of complaint before the Supreme Court. In those cases, the Supreme Court reaffirmed the inadmissibility of such challenges within the regulatory regime established by the ICAL. Bofill Mir & Alvarez Jana was involved in the two other annulment proceedings, and the outcome of those cases will be discussed below.

In the case *Constructora Emex Limitada con Organización Europea para la Investigación Astronómica en el Hemisferio Sur*, the requesting party sought to set aside the arbitral award, alleging the violation of public policy for a number of reasons. The Court of Appeals rejected all allegations. Among the issues discussed in that decision, one is particularly relevant for the future development of international commercial arbitration in Chile: the Supreme Court found that foreign attorneys may participate in international arbitrations seated in Chile. This issue has attracted considerable attention, including as early as during the approval of the ICAL. The discussion emerged in light of section 527 of the Chilean Code of Judicial Organisation (*Código Orgánico de Tribunales*) that requires parties before Chilean courts to be represented by a lawyer admitted to practise in Chile.

The Court of Appeals noted that representation by a lawyer not admitted to practise in Chile could prejudice the party that relied on such representation. However, the relevant party did not question the engagement of foreign attorneys. On the contrary, it validated their representation.

The Court of Appeals further held: 'The provisions the requesting party relies upon are fully applicable to proceedings before Chilean courts, [a quality that an arbitral tribunal lacks].' The Court of Appeals thus identified a distinction between international arbitral tribunals and domestic Chilean tribunals. The distinction is particularly relevant under Chilean jurisprudence where domestic arbitrators are equal to state judges and thus subject to the Supreme Court's disciplinary oversight by way of recourse of complaint.

The Court of Appeals continued, stating that 'the dispute concerned the contract, while the substantive Chilean law was applicable only subsidiarily to its terms. Insofar as [the law] was known by the legal representatives, nothing could impede their involvement in the proceedings. It should be added anyway that the requesting party had accepted the participation of those

representatives in arbitration without any objection. It is not proper to expect the award to be annulled for that reason, which as said before, did not harm that party in anyway.' The Court's ruling finally dispels doubts on the matter that had existed for years, which strengthens Chile's aspirations to remain an attractive seat for international arbitration.

In another judgment, the Santiago Court of Appeals reinforced the liberal approach it had adopted in previous annulment proceedings. It recognised the wide discretion enjoyed by tribunals while conducting arbitral proceedings. The requesting party had claimed that the tribunal's decision not to nominate a tribunal-designated expert violated Chilean public policy. The Court of Appeals noted that pursuant to the Chilean Code of Civil Procedure (CCP) and section 26 of the ICAL, the appointment of an expert is a matter of evidence that is left to the tribunal's discretion. The Court concluded that the tribunal did not consider another expert's testimony to be required as it was satisfied with the expert reports previously submitted by party-appointed experts. The Court said: 'There can be no offense to public policy if the law itself supports the tribunal's decision.'

The requesting party also claimed that the tribunal's decision on costs violated public policy. In its decision, the Court of Appeals defined public policy as a 'conjunction of norms intended to protect the general or public interest of the country, [which] observance is necessary or mandatory.' The definition played a key role in the Court's decision not to set aside the tribunal's decision on costs.

The arbitration agreement entered into by the parties authorised the arbitral tribunal to rule on costs. The claimant in the arbitral proceeding was ordered to bear the respondent's costs because the latter prevailed. However, one member of the tribunal issued a dissenting opinion, supporting the claimant's demands and opposing the majority's decision on costs. The dissenting arbitrator pointed to section 146 of the Chilean CCP, which provides that a losing party cannot be ordered to bear the costs of the proceedings if one or more members of the tribunal issue a dissenting opinion in its favour.

The Court of Appeals held that it was 'hard to understand that an issue of economic nature that concerns the parties only, […] can be deemed to be of general interest and therefore a matter of public policy. Even when the arbitral tribunal is under the obligation to issue a decision on costs, nothing prevents the parties from reaching an agreement on the issue according to their interests as in the present case.' The Court highlighted that the arbitral tribunal issued a [reasoned] decision on costs acting within its powers.

The Court reached the final conclusion that Chilean public policy was not violated during the arbitral proceedings nor by the award that followed, and that the claimant's request for annulment simply reflected its dissatisfaction with the award. The request to set aside the arbitral award was rejected and for the first time in Chilean jurisprudence, the costs incurred by the defending party during the annulment proceedings were allocated to the party that challenged the award.

Shortly after the aforementioned decision, the Court of Appeals issued its ruling on the annulment proceedings in the case *Productos Naturales de la Sabana SA con Corte Internacional de Arbitraje de la Cámara de Comercio Internacional*. The Court's non-interventionist approach to the annulment of arbitral awards was reaffirmed once again.

The respondent was ordered to bear the claimant's court fees as well as 50 per cent of its legal expenses. The respondent requested that the arbitral tribunal's decision on court fees and expenses be set aside. It argued that the arbitration agreement entered into by the parties provided for each party to bear its own costs.

During arbitration, the parties' legal representatives had authorised the arbitral tribunal to rule on costs by including the issue in the terms of reference and in the various written and oral pleadings submitted to the tribunal. The requesting party contended that those claims and pleadings amounted to a contract amendment. It further claimed that those amendments violated a contractual stipulation that provided for a formal procedure in order to validly amend the contract.

The request for annulment was based upon section 34.2.a.iii of the ICAL. That is, the arbitral tribunal's decision on costs allegedly dealt 'with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration'.

The Santiago Court of Appeals reviewed at great length the parties' stance on costs during arbitration. It paid attention to the fact that the parties signed the terms

of reference that expressly included cost allocation among the issues to be decided by the arbitral tribunal. It reviewed numerous parties' written submissions requesting the tribunal to order the opposing party to bear its costs.

In the annulment proceedings, the Colombian defendant asserted that it had always asked for the claimant to be ordered to bear its costs, subject to the provisions of the arbitration agreement, which stipulated that each party was to bear its own costs. The Court rejected this argument as inherently contradictory.

In addition, the Court of Appeals pointed to the fact that the requesting party had not questioned the arbitral tribunal's jurisdiction to rule on court fees and expenses during the arbitration. Therefore, according to sections 4 and 16 of the ICAL, the requesting party is deemed to have waived its right to object to the arbitral tribunal's jurisdiction to rule on court fees and expenses.

The Court of Appeals further rejected the claimant's argument that there had been an illegal modification of the content of the arbitration clause regarding costs during the arbitral proceedings. The Court concluded that the formal procedure for contract amendment was binding upon the parties during the performance of the contract. However, the procedure did not apply after the contract was terminated and during the ultimate dispute resolution proceedings. The Court concluded that in the course of the arbitration the parties had authorised the arbitral tribunal to rule on costs and that, therefore, the decision on cost allocation was within the tribunal's discretion and not susceptible to annulment.

Finally, the Court of Appeals emphasised that the conduct of the parties' legal representatives is directly attributable to the party represented. The Court strongly rejected the idea that parties are not responsible for absurd claims invoked by their legal representatives. Rather, the Court found that legal counsel acting outside the client's instructions may incur professional liability towards their client.

This last case has the particularity of being the first annulment proceeding before Chilean courts that involved only foreign parties. It is also the first attempt to obtain a partial annulment of an arbitral award.

Both decisions are noteworthy because of their reliance on section 4 of the ICAL that prohibits a party from extemporaneously invoking a purported violation. This reinforces the requirement for coherent and transparent conduct of the parties in international arbitral proceedings. In the end, it strengthens the efficiency of international arbitration as a mechanism for dispute resolution to the benefit of all of its users.

The recent case law, as discussed above, has clarified that in Chile: (1) international arbitral tribunals are not to be treated in the same manner as domestic tribunals and, as a result, domestic mandatory procedural rules are not binding upon them; (2) because international arbitral tribunals are different from domestic tribunals, foreign lawyers can act in international arbitrations seated in Chile; (3) an arbitral tribunal's decision not to appoint an expert falls within its discretion; (4) an arbitral tribunal's decision on the allocation of costs is a private matter that concerns only the parties and does not affect public policy; and (5) an arbitral tribunal is competent to decide on an issue expressly raised by the parties in their submissions.

Notes

1 See 'An important domino falls: the Supreme Court of Chile confirms the denial to set aside an arbitral award' (2013) 18(2) Arbitration News.

2 *Vergara Varas Pedro Pablo con Costa Ramírez Vasco*, Case No 1971-2012, 9 September 2013; *Sánchez Arriagada Tomás Eduardo, Meza Swett Juan Carlos, Sarroca Villalón Antonio Javier con Cavendish Square Holding BV*, Case No 7278-2012, 28 August 2013; *Constructora Emex Limitada con Organización Europea para la Investigación Astronómica en el Hemisferio Sur*, Case No 9211-2012, 10 April 2014; and *Productos Naturales de la Sabana SA con Corte Internacional de Arbitraje de la Cámara de Comercio Internacional*, Case No 6975-2012, 29 April 2014.

3 *Sánchez Arriagada Tomás Eduardo, Meza Swett Juan Carlos, Sarroca Villalón Antonio Javier con Cavendish Square Holding BV*, Case No 6648-2013, 9 September 2013; *Empresas Río Bonito SA*, Case No 7341-2013, 16 December 2013.

Olympio J M L de Carvalho e Silva
Castro, Barros, Sobral, Gomes Advogados, Rio de Janeiro
olympio.carvalho@cbsg.com.br

Camilla Queiroz Werneck
Castro, Barros, Sobral, Gomes Advogados, Rio de Janeiro
camilla.werneck@cbsg.com.br

Brazil: Foreign judgment referring parties to arbitration is recognised, despite local judgment that the arbitration is null and void

The Brazilian Superior Court of Justice[1] has recently reaffirmed its pro-arbitration stance in *GE Medical Systems Information Technologies Inc* ('GEMS IT') v *Paramedics Electromedicina Comercial Ltda* ('Tecnimed') *et al*,[2] by recognising a foreign judgment that compelled parties to proceed to arbitration notwithstanding the Brazilian courts' previous declaration that the arbitration agreement was null and void under Brazilian law.

Background

GEMS IT and Tecnimed were parties to a sales and services agreement and a distribution agreement, related to the sale and distribution of GEMS IT products in Brazil. Both agreements provided for arbitration in accordance with the rules of the Inter-American Commercial Arbitration Commission (IACAC). After a dispute arose under the contracts, GEMS IT filed a notice and request for arbitration with the IACAC.

Tecnimed, in turn, brought a suit before the Court of Porto Alegre, Brazil, and, later, another suit before the New York State Court – which was later moved to the Federal District Court for the Southern District of New York. In both lawsuits, Tecnimed claimed that the contracts had expired and that, as a result, the disputes between the parties were no longer subject to arbitration. It also petitioned the New York Court for a permanent stay of the pending arbitral proceedings. GEMS IT counterclaimed for an order to compel arbitration and for an antisuit injunction to halt the Porto Alegre action.

The arbitral tribunal then decided that the arbitration agreements were valid and that the tribunal had jurisdiction over the dispute, including all claims asserted by Tecnimed in the Porto Alegre action.

A few months later, the New York Court also found that the arbitration agreements were valid and that all of GEMS IT's and Tecnimed's claims were arbitrable. It therefore granted GEMS IT's motion to compel arbitration and the antisuit injunction, so ordering Tecnimed to immediately take all necessary steps for the withdrawal of the Porto Alegre action. As the order was not complied with, the New York Court imposed a sanction on Tecnimed of US$1,000 until dismissal of the case in Brazil, among other sanctions.

Meanwhile, the Court of Porto Alegre found that the arbitration agreements were null and void under Brazilian law, since they did not comply with specific requirements for arbitration agreements related to adhesion contracts under the Brazilian Arbitration Act.

Recognition proceedings before the Superior Court of Justice and the Office of the Public Prosecutor's opinion

A foreign court judgment or arbitral award can only be enforced in Brazil, or even be taken into consideration by the Brazilian courts for any other purposes, after it is recognised by the Superior Court of Justice, which has its seat in Brasília and jurisdiction over the whole country.

Hence, a motion for recognition of the New York Court judgment was brought by GEMS IT before the Superior Court of Justice.

Under the rules that govern such proceedings, the Public Prosecutor's Office is entitled to provide the Superior Court of Justice with its opinion on the matter before

a decision on the recognition of the New York Court's judgment or arbitral award is issued. The Public Prosecutor's Office opined that the judgment should not be recognised on the grounds that it was against public policy, since the antisuit injunction granted by the New York Court ordered Tecnimed to waive its constitutional right of access to justice, especially in a case that fell under the jurisdiction of both the New York Court and the Court of Porto Alegre (concurrent jurisdiction).

However, it failed to address the other issues involved, namely, the validity of the arbitration clause and the order compelling the parties to arbitration.

The judgment of the Superior Court of Justice

In October 2013, the Superior Court of Justice heard the case. The New York Court's recognised the part of the foreign judgment declaring the arbitration agreements to be valid and compelling the parties to arbitrate their dispute, but denied recognition of the antisuit injunction and of the sanctions imposed by the New York Court.[3]

The Superior Court addressed the fact that the Court of Porto Alegre had previously declared the arbitration agreements to be null and void under Brazilian law. However, it held that even though the prior Brazilian judgment had already become final at that point (*res judicata*), the foreign judgment should prevail since it was the first to become final.

The Superior Court also reaffirmed the mandatory nature of arbitration agreements under Brazilian law when voluntarily executed by the parties. To support this reasoning, it cited the 2003 precedent of the Supreme Court of Brazil,[4] according to which arbitration does not violate parties' constitutional rights of access to justice.

Finally, the Superior Court found that recognising the arbitration agreements would better preserve the arbitration clauses governed by foreign law (implying that the Court of Porto Alegre erred when it declared them to be null and void due to Brazilian law requirements, although this was not a matter under discussion by the Superior Court in the recognition proceeding), the principle of competence-competence (it found that the New York Court had decided in accordance with this principle and implied that the Court of Porto Alegre had wrongly not done so) and, in general, arbitration proceedings involving Brazilian companies. It held that denying recognition in this case would encourage recalcitrant parties to bring vexatious objections to jurisdiction in Brazil as a way to delay foreign arbitral proceedings.

However, the Superior Court found that the antisuit injunction and the sanctions imposed by the New York Court were against public policy and, in this case, the constitutional principle of access to justice. It therefore refused to recognise these parts of the foreign judgment.

Conclusion

Brazilian courts have been developing a pro-arbitration approach for more than ten years and this precedent is another development of that trend.

This case is also an important Brazilian precedent for the recognition of foreign judgments or arbitral awards more generally. It clearly states that a foreign judgment or award should prevail in relation to a Brazilian judgment that only became final after the foreign judgment or award, which is an issue that had not been previously settled by the Superior court of Justice.

A different decision on the recognition of the IACAC Arbitral Award relating to this dispute, brought in a separate motion,[5] is still before the Superior Court pending the resolution of various procedural issues. With further arbitration-friendly judgments present in Brazilian jurisprudence, there is hope that this case and others will be resolved efficiently, and future disputes will not endure similar delays.

Notes

1 *Superior Tribunal de Justiça*, which is a federal superior court with its seat in Brasília that has jurisdiction to recognise and allow enforcement of foreign court judgments and arbitral awards in Brazil. After recognition, enforcement may be sought before a first instance court and any court in Brazil will have to take the foreign judgment or award into consideration (with the same weight of *res judicata as a* Brazilian court judgment) in its decisions.

2 SEC 854-US.

3 A majority of eight justices recognised the foreign judgment in part, as mentioned above, and one justice had a dissenting vote that denied recognition. The other two votes for the partial recognition were handed in 2006 and 2007, but the Court later decided not to take them into consideration.

4 SE-AGR No 5206 – Espanha. The Supreme Court (*Supremo Tribunal Federal*) is the highest court in Brazil for constitutional matters, hearing appeals from decisions of any other appellate court (including the Superior Court of Justice).

5 SEC 853-US.

Viren Mascarenhas
King & Spalding, New York
vmascarenhas@kslaw.com

The relationship between foreign set-aside proceedings and US enforcement of an arbitral award

The widespread ratification of the New York Convention on the Recognition and Enforcement of Arbitral Awards (the 'New York Convention' or the 'Convention') is a cornerstone of international arbitration and its capacity effectively to resolve cross-border disputes. The New York Convention carefully defines the grounds upon which a court of a ratifying state may refuse enforcement; the burden of proving their applicability rests upon the party opposing enforcement. Statistical studies suggest that losing parties in international arbitrations comply with the award in the majority of cases. But, if they do not, the prevailing party may use the New York Convention as a gateway mechanism to transport the arbitral award to any jurisdiction where the losing party's assets are located for judicial enforcement.

But there is a limit to the international harmony brought by the New York Convention. While section V defines the grounds for non-enforcement, the Convention is silent on the bases for annulment of an award by the courts of the seat of the arbitration. Recently, the United States federal courts in the districts of Columbia and New York have had to grapple with whether to enforce an international arbitral award that has been annulled by the court of a primary set-aside jurisdiction. This article discusses the approaches taken by these courts.

After receiving an adverse arbitral award, the losing party may seek its annulment in the courts of the seat of the arbitration. Under Article VI of the New York Convention, recognition and enforcement of an award may be suspended if an action to set the award aside has commenced. What if the party seeking annulment of the award is successful? Will the courts worldwide that have ratified the New York Convention necessarily give *res judicata* effect to the annulment order, and refuse to enforce the award in their respective jurisdictions? Article V(1)(e) of the New York Convention grants enforcing courts the discretion to enforce an award that has been annulled by the courts of the seat of arbitration. Article V(1)(e) provides that recognition and enforcement 'may' be refused if: 'The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'

Chromalloy v Egypt (DDC 1996)

How have US courts gone about exercising this discretion? The District Court of the District of Columbia addressed the issue in the US for the first time in 1996. In *Chromalloy Aeroservices v Arab Republic of Egypt*, the DC District Court considered whether to enforce an arbitral award rendered by an arbitral tribunal seated in Cairo after the Cairo courts annulled the award. The procedural background of the case is as follows: Chromalloy Aeroservices, Inc ('CAS'), a US corporation, entered into a military procurement contract with Egypt. Egyptian law governed the contract and the parties chose Cairo as the seat of arbitration. The relationship soured. CAS prevailed in an arbitration seated in Cairo. Subsequently, CAS sought to enforce the award in the US. Shortly after CAS initiated the US enforcement proceeding, Egypt successfully petitioned the Egyptian judiciary to annul the award. Thereafter, Egypt asked the DC District Court to grant *res judicata* effect to the order of the Egyptian Court of Appeal nullifying the award, thereby dismissing CAS's enforcement petition.

The *Chromalloy* court declined to do so, relying on US public policy in favour of

final and binding arbitration of commercial disputes. Likely, the *Chromalloy* court was motivated by the fact that Egypt filed the annulment proceeding only after CAS initiated the US enforcement proceeding, suggesting that potential enforcement in the US motivated Egypt to seek annulment in Cairo. Furthermore, there may have been some concerns that the US corporation had been subject to bias before the Egyptian judiciary, given that the subject of the dispute was a military procurement contract entered into with the state.

Baker Marine v Chevron (2d Cir 1999)

Three years later, the Second Circuit addressed the issue for the first time in *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd* (2d Cir 1999). Here is an overview of the relevant procedural history: Baker Marine contracted with Danos and Chevron to provide barge services and logistical support for Chevron's oil activities in Nigeria. Nigerian law governed the contracts, and the parties chose to resolve their disputes in ad hoc arbitral proceedings seated in Lagos, Nigeria and pursuant to the UNCITRAL arbitration rules. Baker Marine prevailed before the arbitral tribunal, and sought enforcement in the Nigerian courts. But the Nigerian court set aside the arbitration awards on the grounds that the arbitrators had improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole evidence, and that there had been insufficient evidence to support the tribunal's findings. Subsequently, Baker Marine sought to enforce the awards in the US.

The Second Circuit affirmed the district court's orders denying enforcement. Specifically, the Second Circuit noted that there was no indication that the Nigerian courts had acted contrary to Nigerian law, which governed the contracts. The Second Circuit also rejected Baker Marine's argument that the Nigerian courts had set aside the awards for reasons that would not be recognised under US law as valid grounds for vacating an arbitral award. According to the Second Circuit, US law did not apply to the set aside proceedings in Nigeria; rather, Nigerian law exclusively provided the bases for such annulment.

Baker Marine may be distinguished from *Chromalloy* on at least two grounds. First, *Baker Marine* involved private corporations (Nigerian subsidiary entities) in a commercial arbitration dispute. Absent a respondent state actor, there was no reason to suspect improper deference on the part of the judiciary toward the government actor. Secondly, in *Chromalloy*, Egypt initiated the annulment proceeding in Egypt only after CAS filed the US enforcement proceeding, suggesting that Egypt was trying to game the system and avoid enforcement in the US by obtaining annulment in Cairo. By contrast, Baker Marine initiated the US enforcement proceeding only after it received an adverse outcome in the Nigerian courts, suggesting that Baker Marine was seeking a second bite at the apple.

TermoRio SA v Electranta SP (DC Cir 2007)

The DC Circuit Court of Appeals addressed this procedural issue eight years later, in 2007. In this case, TermoRio, a Colombian corporation, entered into a power purchase agreement with Electrificadora del Atlantico SA ('Electranta'), a Colombian state-owned public utility. Colombian law governed the arbitration, which provided for ICC arbitration seated in Colombia. The relationship between the parties soured. TermoRio prevailed in the arbitration. Electranta initiated set-aside proceedings in Colombia and, ultimately, the Consejo del Estado, Colombia's highest administrative court, annulled the award on the ground that the arbitration clause was invalid since at the time the parties entered into the contract, Colombian law did not expressly permit the use of ICC procedural rules in arbitration. TermoRio subsequently sought to enforce the award in the US.

The DC Circuit Court affirmed the district court's decision to deny enforcement of the award. Having reviewed the proceedings before the Colombian court, the DC Circuit Court noted: 'Because there is nothing in the record here indicating that the proceedings before the Consejo del Estado were tainted or that the judgment of that court is other than authentic, the District Court was, as it held, obliged to respect it.' Furthermore, the *TermoRio* court observed that the matter was 'a peculiarly Colombian affair', since the contract was entered into between Colombian parties for services rendered in Colombia, and the contract was governed by Colombian law with arbitration seated in Colombia.

Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración y Producción (SDNY 2013)

In August 2013, the District Court for the Southern District of New York (SDNY) issued the next decision on this subject. A private company, COMMISA, entered into contracts with Petroleós Mexicanos ('PEP'), a state agency that controlled Mexican hydrocarbons. The contracts were governed by Mexican law, and provided for arbitration as well as administrative rescission by PEP. The relationship between the parties soured. PEP initiated administrative rescission of the contracts, and the parties initiated arbitration to resolve the contractual disputes. COMMISA prevailed in an arbitration seated in Mexico City. COMMISA sought enforcement of the award before the SDNY shortly thereafter, PEP initiated annulment proceedings before the Mexican courts. The US court granted COMMISA's petition. Subsequently, the Mexican courts annulled the award. The question then became whether the District Court should vacate its previous order confirming the award.

The District Court decided not to vacate the prior order. Judge Hellerstein adopted the standard of the *TermoRio* court that a US court need not respect the foreign court's order if it violated 'basic notions of justice'. Judge Hellerstein found that the decisions rendered by the Mexican judiciary violated 'basic notions of justice' because the Mexican courts retroactively applied Mexican statutory law that was not in effect at the time the parties entered into the contracts. In addition, the application left COMMISA without recourse in Mexico since apparently it could not arbitrate the merits of the dispute with PEP, but the statute of limitations had also expired for it to be able to initiate court litigation in Mexico. Judge Hellerstein concluded that the decisions violated 'basic notions of justice' since the retroactive application of a law was improper, and the net result was that COMMISA would have no forum to pursue a remedy.

Thai-Lao Lignite (Thail) Co, Ltd v Gov't of the Lao People's Democratic Republic (SDNY 2014)

In February 2014, the District Court for the Southern District of New York issued the latest decision on this subject. With respect to this case, in 1994, two private corporations entered into an agreement with the Government of Laos, and agreed to arbitrate all disputes through an arbitration seated in Kuala Lumpur. Following the initiation of arbitral proceedings, the arbitral tribunal found in favour of the two private corporations (the claimants). In June 2010, the claimants petitioned the US court to confirm the award. In October 2010, Laos filed a motion to dismiss the confirmation proceeding, and initiated set aside proceedings in the High Court of Malaysia in Kuala Lumpur. While those foreign proceedings were pending, the US District Court confirmed the arbitral award in 2011. Subsequently, in 2013, the Malaysian judiciary set aside the arbitral award on the ground that the arbitrators had exceeded their jurisdiction by deciding on matters beyond the scope of the arbitration agreement. The Malaysian High Court ordered re-arbitration of the dispute before a new panel of arbitrators. Thereafter, Laos requested the US District Court to vacate the original order confirming the arbitral award.

The *Thai-Lao Lignite* court granted Laos' request. The court held that the claimants had not demonstrated that 'extraordinary circumstances' justified enforcement of the award notwithstanding its annulment by the courts of the seat of arbitration. The court concluded that the decision rendered by the Malaysian judiciary did not violate 'basic notions of justice' and the decision was consistent with Malaysian law. The court also rejected the argument that the Malaysian courts should have given *res judicata* effect to the SDNY order confirming the arbitral award, noting that the Malaysian courts had primary jurisdiction to entertain the set-aside application given that the arbitration was seated in Kuala Lumpur.

Based on this overview of the current case law, the reasonable conclusion is that, if the courts follow the lead of the *TermoRio* and *COMMISA* courts, a US district court will not enforce an award that has been nullified by the foreign court of the seat of arbitration, unless the order violates 'basic notions of justice' or something in the judicial record indicates that the proceedings or judgment were somehow tainted or unauthentic.

US court holds that Mexican annulment of arbitral award violates basic notions of justice

James Graham
DeForest, Mexico City
graham@deforestglobal.com

Leonel Pereznieto Castro
Jáuregui, Navarrete y Del Valle, Mexico City
pereznieto@jnabogados.com.mx

In a recent United States court decision,[1] a harsh debate unfolded about arbitration under Mexican law and the way Mexican tribunals consider the arbitrability of disputes involving state instrumentalities. At the centre of the debate was a US federal district court decision confirming an arbitral award that had been annulled in 2011 by a Mexican court.

Facts

In October 1997, the *Corporación Mexicana de Mantenimiento Integral, S de RL de CV* ('COMMISA') entered into a contract with *PEMEX-Exploración y Producción* ('PEP'), an instrumentality of the Mexican state and a subsidiary of PEMEX, for COMMISA to build and install two offshore natural gas platforms in the Gulf of Mexico. On 29 March 2004, after each party charged the other with breaching contractual obligations, PEP notified COMMISA that it intended to administratively rescind the contract.

First proceedings

COMMISA responded by filing a petition for a constitutional challenge ('*amparo*'), alleging that PEP's administrative rescission was untimely and that the statutes on which it was based were unconstitutional and inapplicable to the parties' dispute. The Fourteenth District Court held that the administrative rescission by PEP was not an act of public authority and thus an *amparo* was not the proper procedure to challenge the rescission.[2]

On appeal, the Sixth Collegiate Court on Administrative Matters of the First Circuit reversed, holding that PEP's administrative rescission was an act of public authority, and that an *amparo* proceeding was a proper way to challenge it.[3] Then the Supreme Court ruled that the federal courts had jurisdiction to hear and resolve contractual disputes arising from administrative rescissions, but it did not discuss whether arbitrators could hear issues of administrative rescission if the parties' contracts provided that all disputes arising from the contract should be resolved by arbitration.[4]

On remand, the Sixth Collegiate Court held that PEP had properly followed the administrative rescission statutes and that the rescission was timely. Consequently, the Court dismissed COMMISA's petition for an *amparo* against PEP's issuance of an administrative rescission.[5]

The arbitration proceeding

While these *amparo* proceedings unfolded, an ICC tribunal was formed pursuant to COMMISA's demand for arbitration issued in December 2004.

PEP objected to the arbitral proceedings, arguing that the administrative rescission was an 'act of authority' and could not be arbitrated 'since these matters are not subject to arbitration.' The tribunal disagreed and, on 12 November 2007, issued an order that it could hear the merits, subject to a ruling on the issue of jurisdiction in its final award. PEP, noting its objection, continued to participate in the arbitration proceedings. PEP did not seek to challenge the preliminary award or the subsequent rulings of the arbitration tribunal, even though PEP had the right to do so under Article 1432 of Mexico's Commercial Code. Finally, on 16 December 2009, the tribunal issued an award of almost US$350m (with interest) in favour of COMMISA.

The annulment proceeding

PEP then sought to annul the award in the Fifth District Court on Civil Matters for the Federal District (the 'Fifth District Court') in Mexico City. The Fifth District Court dismissed that action on 25 June 2010, partially on substantive grounds. The Fifth District Court held that PEP had waived its argument of non-arbitrability by failing to raise a timely objection to the tribunal's

preliminary award. As an alternative ground of dismissal, the Fifth District Court held that the award did not violate public policy: it 'in no way affect[ed] public peace or the interests and principles governing the national community' but involved only 'individual interests arising from a commercial relationship existing between the parties.'[6]

The *amparo* proceeding

PEP then filed a petition for an indirect *amparo* in the Tenth District Court on Civil Matters in the Federal District (the 'Tenth District Court') to challenge the decision of the Fifth District Court. Again, PEP failed. On 27 October 2010, the Tenth District Court dismissed PEP's action. The Tenth District Court agreed with the Fifth District Court that the parties' contractual agreement contained a broad arbitration clause that covered all claims of damages arising from both the breach of contract and from the administrative rescission. The Tenth District Court ruled that the organic law that established PEMEX authorised it and its subsidiaries (including PEP) to arbitrate its disputes, and 'an Arbitral Tribunal indeed has powers to address the grounds, context and contract effects of a rescission for they are private in nature.'[7]

The Eleventh Collegiate Court's final ruling

PEP appealed to the Eleventh Collegiate Court for the Federal District. This time it succeeded. On 25 August 2011, a three-judge panel of the Eleventh Collegiate Court reversed COMMISA's arbitral award, and ordered *amparo* relief in favour of PEP. Its 486-page opinion, issued on 21 September 2011, held that public policy was implicated because administrative rescissions are 'issued to safeguard financial resources' of the state. The second argument relied on by the Eleventh Collegiate Court was a 1994 decision of the Mexican Supreme Court.[8] That decision, which did not discuss arbitration, had described administrative rescissions as 'acts of authority'.

Under the statute that took effect in December 2007, litigation relating to issues of compliance with the requirements of public contracts was to be litigated in the special administrative court that had been established to hear tax and financial matters. Taking into account that 'acts of authority' should not be arbitrated, the Eleventh Collegiate Court held that the ICC arbitral tribunal was without jurisdiction. As to the organic law by which PEMEX was organised and which authorised it to enter into arbitrations, the Eleventh Collegiate Court ruled that since PEMEX could have arbitrated the case if it had not declared an administrative rescission, there was no conflict between its decision and the organic law. Furthermore, it held that the issues arising from PEP's administrative rescission and COMMISA's claims for breach of contract were intertwined and inseparable. Since the ICC tribunal lacked jurisdiction to hear the issues arising from the administrative rescission, it was also barred from hearing the issues arising from the breach of contract.

The US District Court's ruling

After the Eleventh Collegiate Court ruled in favour of PEP, COMMISA filed an action in the District Court for the Southern District of New York to confirm the ICC tribunal's award. The District Court rejected the Mexican annulment decision and confirmed the award.

The Court found that when COMMISA initiated arbitration, it had every reason to believe that its dispute with PEP could be arbitrated. Twice PEP had signed an agreement stating that disputes related to the gas platforms contracts would be arbitrated. PEP had the authority to enter into such an arbitration provision, as the organic law that gave PEP its existence specifically authorised it to resolve commercial disputes by arbitration. Indeed, it was not until the 2007 statute that there was any source of law that supported the argument that the parties' dispute was not arbitrable.

Judge Hellerstein opined that the purpose of the 2007 law, according to the Eleventh Collegiate Court, was 'to protect the economy and public expenditure by abandoning the practices that were aimed at granting more participation to private parties than to the State.' It therefore followed that it 'would be contrary to public policy' to allow PEP, an entity that was an important source of public revenue, to be subject to private dispute resolution procedures. The Eleventh Collegiate Court stated that it was not applying the law retroactively, but only as a 'guiding principle' and that a 1994 Mexican Supreme Court decision supported its conclusion. However, the 1994 decision did not mention anything about arbitration.

Thus, the District Court concluded that retroactive application of laws and the unfairness associated with such application forced it to reject the Mexican annulment decision:

> 'Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal. In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.'

Conclusion

There is no doubt that Judge Hellerstein's ruling is 'fair', but the reasoning may be incorrect. The *ordre public* must be scrutinised at the moment of the annulment proceeding, because its role is to prevent an 'illegal' award from entering the legal system. If, at the time of the annulment proceeding, the award was contrary to public policy, there is no retroactive application of the law, even if at the moment of the arbitration the matter was not contrary to the *ordre public*.

There is no clear definition of the *ordre public* in Mexico.[9] The District Court and the Collegiate Court agreed that the concept of public policy applied in its international dimension, but they disagreed on whether an arbitration involving an administrative rescission does or does not violate the fundamental sovereignty of the Mexican state. It should be left to the state to determine whether the administrative rescission in question is or is not an act of authority.

In our opinion, there is no doubt that the rescission is an act of authority and we agree with Francisco Gonzalez de Cossio, expert witness for PEP, that the Mexican courts had long held that administrative rescissions were acts of authority, and that such acts of authority cannot be arbitrated. As to the PEMEX organic law, which gives PEMEX and its subsidiaries authority to engage in arbitrations, the law gives them the authority to engage in arbitrations in some circumstances, but it does not require them to arbitrate when such arbitration is contrary to public policy. There is no doubt that when signing the arbitration clause, COMMISA's counsel was not aware of this privilege held by Mexican instrumentalities (which also exists in other countries, such as France).[10]

Notes

1 District Court for the Southern District of New York, *Corporación Mexicana de Mantenimiento Integral, S de RL de CV* ('COMMISA') *v PEMEX-Exploración y Producción* ('PEP'), Opinion and Order granting Petitioner's Motion to Confirm Arbitration Award and Denying Respondent's Motion to dismiss Petition, 10 Civ 206 (AKH), 27 August 2013.
2 23 August 2005.
3 17 May 2006.
4 23 June 2006.
5 23 February 2007.
6 Ex 80 at 21.
7 Ex 56 at 29.
8 In the ruling, the decision is only mentioned by its year without any other reference.
9 Leonel Pereznieto Castro and James Graham, 'Public policy in Mexican arbitration law: still an undefined and misunderstood concept' (2012) 17(2) IBA Arbitration News 87.
10 See France's official statement on administrative rescissions: www.economie.gouv.fr/files/directions_services/daj/marches_publics/conseil_acheteurs/fiches-techniques/execution-marches/resiliation.pdf.

Alexandra Dosman
New York International Arbitration Center, New York
adosman@nyiac.org

Personal jurisdiction revisited: the Second Circuit's decision in *Sonera v Çukurova*

The Second Circuit Court of Appeals recently rendered a decision that provides key guidance for practitioners seeking to enforce foreign arbitral awards in the United States. In *Sonera Holding BV v Çukurova Holdings AS*,[1] the Second Circuit reversed a lower court decision that had enforced an ICC award rendered in Switzerland on the basis that New York courts lacked general personal jurisdiction over the award-debtor.

Sonera should not affect enforcement when: (1) an award-debtor has assets in New York (in which case jurisdiction may be based on a *quasi in rem* theory); (2) where there is a basis for specific personal jurisdiction against the award-debtor; or (3) when the award-debtor has consented to personal jurisdiction. It will, however, restrict the use of New York courts for their discovery and injunctive powers when specific personal jurisdiction is absent and an award-debtor has neither assets nor its corporate home in New York.

Background

The arbitral award

The dispute in *Sonera* arose out of a failed share purchase transaction in 2005 that would have transferred a controlling interest in Turkcell, Turkey's largest mobile telephone company, from Çukurova Holding AS ('Cukurova'), a Turkish company, to Sonera Holding BV ('Sonera'), a holding company affiliated with the Swedish-Finnish telecom TeliaSonera.

Cukurova failed to deliver the Turkcell shares, and Sonera commenced arbitration proceedings pursuant to a letter agreement between the parties. The arbitration agreement provided for arbitration in Geneva under the ICC Rules. The Tribunal – composed of Michael Schneider (chair), Dr Pierre Karrer and Dr Christian Rumpf – found that it had jurisdiction over the dispute and issued two partial awards in Sonera's favour. In 2011, the Tribunal issued a final award, ordering Cukurova to pay Sonera US$932m in damages.

Sonera began proceedings to confirm the final award in several jurisdictions, including the British Virgin Islands, the Netherlands, Curaçao and New York.

The Alfa dispute

Having declined to complete the share transfer to Sonera in 2005, Çukurova pledged shares in Turkcell to a member of the Alfa Group of companies in return for a US$1.35bn loan. In 2007, asserting a default on the loan, the Alfa entity redeemed the Turkcell shares. Çukurova sued in the courts of the British Virgin Islands, seeking relief from the redemption and the power to repurchase the Turkcell shares. In 2013, the Privy Council (sitting as an appeals board) held that Çukurova would be allowed to reclaim the Turkcell shares. However, as discussed below, the repurchase window was delayed due to a worldwide injunction against the transfer of Çukurova assets issued by a New York court.

Proceedings in New York

Confirmation of the final award in the District Court

Sonera brought proceedings to confirm the Final Award against Çukurova in the Southern District of New York in December 2011. Çukurova opposed confirmation on several grounds, including the fact that the New York Court lacked general personal jurisdiction over it (Sonera did not argue that the court had specific personal jurisdiction over Çukurova).

A New York court must have personal jurisdiction over an award-debtor in order to confirm an arbitral award, including an award subject to the New York Convention.[2] Personal jurisdiction may either be specific

(derived from conduct that forms the basis of the controversy) or general (subject to jurisdiction on all matters). In order to establish *general* personal jurisdiction in New York, a plaintiff must show both that: (1) the defendant is subject to jurisdiction according to New York law; and (2) the Court's exercise of jurisdiction over the defendant would comply with the due process clause of the US Constitution.[3]

In September 2012, the New York District Court confirmed the final award.[4] The court based its finding of general personal jurisdiction on New York's 'long arm' statute and the business dealings of affiliates of Çukurova within the state. Judge Denise Cote concluded that the activities of Çukurova affiliates 'taken together […] reflect the continuous use of New York as the forum for Çukurova to conduct its substantial business with the United States.'[5] The court did not perform a separate constitutional due process analysis, writing that because the requirements for jurisdiction under New York law 'are more restrictive than those under the federal constitution', due process had necessarily been satisfied.[6]

Broad injunctive relief against Çukurova

The District Court proceeded to order post-judgment discovery in aid of satisfying the judgment against Çukurova. Sonera served subpoenas for information and depositions on Çukurova. Çukurova refused to comply with the discovery orders, and the Court held it in contempt and imposed fines.

Sonera also sought and obtained an order enjoining Çukurova from engaging in property or asset transfers, including the transaction to reclaim the Turkcell shares from Alfa. The injunction issued by the New York court was broad, enjoining Çukurova or any persons acting in concert with it from 'selling, transferring, assigning, hypothecating or pledging Çukurova's funds and property in an amount sufficient to satisfy the judgment entered by the Court […] confirming an arbitral award in favor of Sonera.'[7] In imposing a preliminary injunction, the District Court noted that 'allowing Çukurova to execute the [Alfa] transaction would presumably allow Çukurova to continue ignoring its discovery obligations, contempt fines, and the judgment it owes to Sonera.'[8]

Çukurova appealed the Court's decision to confirm the final award as well as its post-judgment orders for discovery and injunctive relief.

Reversal in the Second Circuit

Çukurova's appeal to the Second Circuit turned on the issue of whether it was proper for a New York court to assert *general* personal jurisdiction over Çukurova.

The US Supreme Court recently clarified the standard for satisfying due process when asserting general personal jurisdiction against a foreign corporation. In *Daimler AG v Bauman*,[9] the Supreme Court found due process requires that a corporation be 'at home' in a state in order for a court to assert general personal jurisdiction based on business dealings within the state.

Daimler proved fatal to Sonera's case. As the Second Circuit noted, the Supreme Court's decisions 'make clear that even a company's "engage[ment] in a substantial, continuous, and systematic course of business" is alone insufficient to render it at home in a forum.'[10] In the *Sonera* decision, the Second Circuit held that even assuming that all of the alleged Çukurova affiliates' contacts were imputed to Cukurova, their contacts with New York 'do not come close to making [Çukurova] "at home"' in New York.[11]

What about consent?

A New York court may also establish personal jurisdiction over an award-debtor by consent. Before the Second Circuit Court of Appeals, Sonera argued that Çukurova had consented to personal jurisdiction in any New York Convention state by virtue of the language in their agreement to arbitrate.

The parties had agreed by contract that: 'Any award of the arbitral tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties.'[12] The Second Circuit construed the clause narrowly and found that it 'does not speak to personal jurisdiction'. Rather, in the Court's view, the clause 'appears to be a standard entry-of-judgment clause designed to clarify that, following any arbitration award, *a court of the arbitral venue or in any jurisdiction in which the parties' persons or assets are located* would have jurisdiction to enter judgment on that award' [emphasis added].[13]

The Second Circuit vacated the District Court orders confirming the final award, ordering post-judgment discovery, and granting injunctive relief to Sonera. As a result, Çukurova was no longer enjoined from

engaging in the transaction with Alfa or any other financial transactions.

Sonera sought leave to appeal to the US Supreme Court, which was denied on 30 June 2014.

The personal jurisdiction landscape

Lack of personal jurisdiction does not appear in the list of permitted defences to enforcement in the New York Convention, and commentators have argued that allowing the defence puts the US in violation of its treaty obligations. Nonetheless, *Sonera* demonstrates that, in the Second Circuit, personal jurisdiction is required even in New York Convention cases.[14]

The personal jurisdiction requirement is least problematic when parties have consented in their arbitration agreement to the jurisdiction of New York courts for confirmation and enforcement purposes. Such consent should be clear. Under *Sonera*, reference to 'jurisdiction over the award' is not sufficiently specific to waive a potential defence against enforcement of a New York Convention award based on lack of general personal jurisdiction over the award-debtor.

Following the Supreme Court's ruling in *Daimler*, obtaining personal jurisdiction over a foreign corporation on the basis of local business dealings will be difficult if the corporation is not also 'at home' there. However, award-creditors should take comfort from the New York courts' recognition of *quasi in rem* jurisdiction, whereby the presence of assets of the award-debtor in the forum state establishes the court's jurisdiction over those assets in satisfaction of the award.[15] *Daimler* does not alter the standard for establishing specific personal jurisdiction against foreign defendants in US courts.

Notes

1 *Sonera Holding BV v Cukurova Holdings AS*, No 12-4280-c, 25 April 2014 (2d Cir).
2 *Frontera Res Azer Corp v State Oil Co of Azer Republic*, 582 F 3d 393, 397 (2d Cir 2009).
3 *Licci ex rel Licci v Lebanese Canadian Bank, SAL*, 732 F 3d 161, 168 (2d Cir 2013).
4 *Sonera Holding BV v Cukurova Holding AS*, 11 Civ 8909, Opinion and Order dated 10 September 2012 (SDNY) [Dkt 24].
5 *Ibid*, at 11.
6 *Ibid*, at 7.
7 *Sonera Holding BV v Cukurova Holding AS*, 11 Civ 8909, Order dated 18 April 2013 (SDNY) [Dkt 97].
8 *Sonera Holding BV v Cukurova Holding AS*, 11 Civ 8909, Opinion and Order dated 10 May 2013 (SDNY) at 6 [Dkt 131].
9 *Daimler AG v Bauman*, 134 S Ct 746 (2014).
10 *Sonera Holding BV v Cukurova Holdings AS*, No 12-4280-c, 25 April 2014 (2d Cir) at 11–12.
11 *Ibid*, at 10.
12 *Ibid*, at 12.
13 *Ibid*, at 13.
14 *Frontera Res Azer Corp v State Oil Co of Azer Republic*, 582 F 3d 393, 397 (2d Cir 2009) ('Article V's exclusivity […] does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought').
15 James M. Carter and John Fellas, eds., *International Commercial Arbitration in New York* (Oxford University Press 2013) at 376 (citing *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 398 (2d Cir. 2009)).

Bruce G Paulsen[1]
Seward & Kissel, New York
paulsen@sewkis.com

Jeffrey M Dine
Seward & Kissel, New York
dine@sewkis.com

BG Group v Argentina: US Supreme Court upholds arbitrators' authority

On 5 March 2014, the United States Supreme Court ('SCOTUS') issued its decision in *BG Group PLC v Republic of Argentina*,[2] reversing a decision of the US Court of Appeals for the District of Columbia Circuit that had vacated a US$185m arbitration award against Argentina. The arbitration had been conducted pursuant to the United Kingdom Argentina bilateral investment treaty (BIT)[3] under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

Argentina sought to set aside the award, arguing that the dispute was not arbitrable, as BG Group had failed to comply with the BIT's requirement that claimants must litigate their

claims for 18 months in Argentine courts prior to commencing arbitral proceedings under the BIT. Although the award was rendered pursuant to a BIT, the SCOTUS analysis did not treat the award any differently from a commercial arbitration award. Instead, the SCOTUS relied on its developed (and still developing) jurisprudence on arbitrability to find that Argentina's challenge to the arbitration was for the arbitrators – and not a court – to decide.

Factual background

The arbitration was one of many that came out of Argentina's economic reforms of the early to mid-1990s and the financial crisis that began in 2001. In about 1993, around the same time that the BIT took effect, Argentina privatised its state-owned gas transportation and distribution company, breaking it into ten different companies. BG Group acquired a substantial direct and indirect interest in one of those companies, MetroGAS, which held a 35-year exclusive licence for natural gas distribution in Buenos Aires.[4]

In early 2002, Argentina implemented a series of emergency measures, including currency devaluation and contractual changes reducing MetroGAS's value, as well as a mandatory renegotiation of public service contracts. In particular, under a policy of 'pesification', gas tariffs that had been calculated in US dollars were changed to pesos on a one-to-one basis, although the value of the peso relative to the dollar was closer to three-to-one. As the SCOTUS noted, with that change, 'MetroGAS' profits were quickly transformed into losses.'[5]

As part of the legislation implementing the emergency measures, Argentina barred companies that filed lawsuits in Argentine courts from the 'renegotiation process' (which would put them at even greater risk). From March to September 2002, Argentina also stayed compliance with injunctions and execution on final judgments in lawsuits related to its response to the financial crisis.[6]

BG Group arbitrates

In 2003, BG Group commenced arbitration. It claimed that Argentina's actions breached the BIT's requirement of 'fair and equitable treatment' of investors from the other country and constituted expropriation of its investments.[7]

The controversy over the timeliness of BG Group's claim arose by virtue of Article 8(2)(a) of the BIT that provides:

> '(a) if one of the Parties so requests, in any of the following circumstances:
> (i) where, *after a period of eighteen months has elapsed* from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision[...].'[8]

BG Group did not attempt to seek relief in the Argentine courts before commencing arbitration under the BIT. As a result, Argentina argued before the arbitrators that, among other things, the 'failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible.'[9] However, in late 2007, the Tribunal found that Argentina's acts, both in staying execution of local courts' judgments and injunctions, and precluding litigating investors from participating in the renegotiation process, so hindered local litigation that the 'Treaty implicitly excused compliance with the local litigation requirement.'[10] The Tribunal also found that Argentina had denied BG Group fair and equal treatment, and rendered its award in favour of BG Group.[11]

Argentina and BG Group fight over confirmation and vacatur

BG Group moved to confirm the award as a judgment under chapter 2 of the Federal Arbitration Act (FAA). Argentina sought to vacate the award under section 10(a)(4) of the FAA.[12] The District Court confirmed the award. The Court of Appeals, however, vacated it. The Court held that the litigation requirement was for the court to decide *de novo*, without deferring to the arbitrators, and that BG Group's non-compliance with the pre-arbitration litigation requirement was sufficient grounds on which to set aside the award.[13] BG Group sought leave for appeal before the SCOTUS, which was granted.

The Supreme Court reverses

The dispositive question before the SCOTUS was whether BG Group's failure to litigate the claim in Argentine courts for 18 months vitiated the agreement to arbitrate under the BIT and whether BG Group's conduct was a question of compliance with an existing arbitration agreement. If the question related

to the existence of an agreement to arbitrate, then the question would be for a court to decide. If the issue was a matter of compliance with the dispute resolution clause, then it would be left to the arbitrators (and thus subject only to very limited review).[14]

The Supreme Court initially reviewed the arbitration provisions of the BIT 'as if it were an ordinary contract between private parties.'[15] The Supreme Court began its review from the US law position that parties are presumed to intend to have courts decide issues of arbitrability, in the sense of whether the parties are bound by an arbitration clause or whether the clause applies to a particular controversy.[16]

'On the other hand', the Supreme Court noted, 'courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration'.[17] Issues such as waiver or delay, time limits, notice or other conditions precedent are typical of such preconditions.[18]

The Supreme Court found, in a seven-to-two decision by Justice Breyer (with Justice Sotomayor concurring and Justices Roberts and Kennedy dissenting) that Article 8(2) of the BIT raises an issue of compliance with the terms of the arbitration agreement. According to the majority, the requirement of pursuing arbitration after 'a period of eighteen months has elapsed' following submission of the dispute to the Argentine courts 'determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all.'[19] Notably, the BIT presumes no significance of the litigation itself. Thus, '[t]he litigation provision is consequently a purely procedural requirement – a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute.'[20] The Supreme Court compared the provision to time limits for notice or pre-arbitration grievance procedures that it had previously found to be procedural determinations for the arbitrator.

The Supreme Court interprets the treaty as a contract

Having evaluated the BIT in the manner of a contract, the Supreme Court considered whether its nature as a treaty made any difference to the analysis, and concluded that it did not. The US Solicitor General, representing the government, had argued that the pre-arbitration litigation provision could be a condition of Argentina's consent to enter into an arbitration agreement. That is, the government argued that the arbitration agreement between Argentina and the investor did not form until after the litigation requirement was satisfied.[21]

The SCOTUS thoroughly rejected this argument. Treaties, the Supreme Court said, are to be interpreted as contracts, and treaty arbitrations are to be treated as other arbitrations under the New York Convention, which provides in Article V(1)(e) that awards are subject to review under the law of the seat of the arbitration.[22] Moreover, the BIT does not state that the pre-arbitration litigation requirement is a condition of consent.

Going beyond the language of the treaty, the majority went so far as to say that even an express 'condition of consent' in a treaty would not necessarily rise to the level of a requirement for the formation of an agreement to arbitrate that would be subject to judicial review.[23] The Supreme Court additionally noted that the incorporation of arbitral rules (such as the International Centre for Settlement of Investment Disputes (ICSID) or UNCITRAL) that give the arbitrators competence to determine their own jurisdiction is evidence that the contracting states intended to leave such issues to the arbitrators.[24] The Supreme Court admitted that this discussion was dicta, however, 'leav[ing] for another day' the interpretation of such a treaty provision.

The Supreme Court's focus on these issues may be a concerted effort to enforce the scope of arbitrators' authority over matters not clearly related to the formation of the agreement to arbitrate.[25] Indeed, Justice Sotomayor's concurrence is directed solely at this issue.[26] She argues that a condition of consent, even under the Supreme Court's non-treaty precedent, might well be conclusive of whether the parties intended judicial resolution of the question. Because the BIT does not contain that language, the fact that an Argentine court looked at an investor's claim should have no effect on the arbitration. Since Argentina participated throughout the arbitration, Justice Sotomayor agreed that compliance with the pre-arbitration litigation requirement was a matter for the arbitrators.

The chief justice dissents

Chief Justice Roberts, along with Justice Kennedy, dissented. His view (echoing the Court of Appeals and the Solicitor General)

is that investors are not themselves 'parties' to the BIT, only the UK and Argentina are. Rather, the treaty is a unilateral offer to arbitrate that must be accepted by the investor through compliance with its prerequisites.[27] On this view, the issue is Argentina's consent to arbitrate with any purportedly aggrieved investor, and the majority has conflated the state parties' agreement to the BIT with their agreements to arbitrate with individual investors. The dissent notes that there are three routes to arbitration under the BIT: (1) after 18 months of unresolved litigation; (2) after an unsatisfactory judicial resolution; or (3) by agreement of Argentina and the investor. On the dissent's view, absent agreement simpliciter, 'an investor has no choice but to litigate in the Contracting Party's courts for at least some period.'[28] Moreover, the dissent observes that the pre-arbitration litigation requirement is not similar to other requirements that the SCOTUS has found to be procedural (and thus for the arbitrators) such as matters regulating the timing of arbitration or *non-judicial* dispute resolution.

Conclusion

The SCOTUS has recently addressed arbitration in several cases, handing down at least 15 decisions since 2008. As it represents the first time that the SCOTUS has considered investment treaty arbitration, the *BG Group* decision is a significant assurance that the usual rules of arbitration apply to non-ICSID treaty arbitrations.

Within the usual rules of arbitration, the decision can also be viewed as another step in a long line of decisions that parse the difficult line between arbitrability questions that are for the court versus arbitrability decisions that are left to the arbitrators. Although the distinction can be stated plainly, the appearance of simplicity is often, as here, deceptive. As the dissent notes:

> 'The distinction between questions concerning consent to arbitrate and mere procedural requirements under an existing arbitration agreement can at times seem elusive. Even the most mundane procedural requirement can be recast as a condition on consent as a matter of technical logic.'[29]

This case is the latest in a long line exploring these knotty issues, and it is unlikely to be the last.

Notes

1 Celinda Metro, an associate at Seward & Kissel, assisted in the research and preparation of this article.
2 134 S Ct 1198 (2014).
3 Agreement for the Promotion and Protection of Investments, 11 December 1990, 1765 UNTS 38.
4 134 S Ct at 1204.
5 *Ibid*, at 1204.
6 See *ibid*, at 1205.
7 *Ibid*, at 1204.
8 Argentina-UK BIT Art 8(2)(a) [emphasis added].
9 134 S Ct at 1204.
10 *Ibid*, at 1205.
11 *Ibid*.
12 9 USC s 10(a)(4). Awards in international arbitration rendered in the US are subject to the defences both of the New York Convention and s 10 of the FAA. See, for example, *Yusuf Ahmed Alghanim & Sons, WLL v Toys 'R' Us, Inc*, 126 F 3d 15, 21 (2d Cir 1997).
13 134 S Ct at 1205 (citing *Republic of Argentina v BG Group PLC*, 665 F 3d 1363 (DC Cir 2012).
14 *Ibid*, at 1206.
15 *Ibid*.
16 *Ibid*.
17 *Ibid*, at 1207.
18 *Ibid*.
19 *Ibid* [emphasis in original].
20 *Ibid*.
21 *Ibid*, at 1208.
22 *Ibid*.
23 *Ibid*, at 1209.
24 *Ibid*, at 1210.
25 *Compare Granite Rock Co v Int'l Brotherhood of Teamsters*, 561 US 287, 130 S Ct 2847 (2010) *with Rent-A-Center, West, Inc v Jackson*, 561 US 63, 130 S Ct 2772 (2010).
26 134 S Ct at 1213–15.
27 *Ibid*, at 1216.
28 *Ibid*, at 1217.
29 *Ibid*, at 1222.

Institutions, associations and procedure

Michael Peer
KPMG, Prague
mpeer@kpmg.com

The independence and impartiality of arbitrators: How much disclosure is enough?

Introduction

The issue of arbitrator independence and impartiality has recently been the subject of considerable debate and controversy. As these principles sit at the apex of the arbitration profession, it is important that there be an appropriate balance of confidentiality and disclosure in arbitral appointments. The future of the profession depends on users maintaining trust in the arbitration process and the legitimacy of the outcome. This article discusses the prevalence of potential conflicts, the need for transparency, and the challenges involved in identifying potential conflicts, by specifically analysing the manner in which accountants have considered these issues.

Conflicts, constraints and concerns

Prevalence of conflicts

Total impartiality is virtually impossible to achieve. There is always a tendency towards personal preferences, at least subconsciously, and an inability to prevent prior experiences and knowledge from impacting our future decisions. To manage these proclivities, arbitrators must consciously counterbalance their influence on our decision-making processes. Moreover, it is generally accepted that an arbitrator must disclose any relevant existing personal knowledge that may affect his or her impartiality, allowing the parties to comment upon the information held by the arbitrator. The topic of prior knowledge and views was recently considered in an International Centre for Settlement of Investment Disputes (ICSID) case in which it was found that information obtained by an arbitrator during a prior case and the award granted in that case were sufficient to call into question the arbitrator's ability to assess the current case impartially.[1]

While prior knowledge and personal views can give rise to concerns over impartiality, a perceived interest in the outcome of the case gives rise to concerns over independence. While an arbitrator with an actual financial interest in the outcome of a dispute would normally be obliged to decline an appointment, more nuanced potential conflicts of interest have appeared in recent cases. For example, there is ongoing legitimate debate regarding the number of times an arbitrator can reasonably be appointed by the same party before a perceived conflict of interest develops. One angle for assessing this particular scenario is by viewing the conflict caused by multiple appointments as a dimension of the 'financial stake' conflict; in other words, individuals have a financial interest in obtaining multiple appointments, thereby creating doubts as to the 'impartiality' (or personal bias) of the nominated arbitrator on the basis of arguments relating to his or her 'independence' (or financial stake in the outcome).

Need for disclosure v confidentiality concerns

To protect the integrity of the arbitral system, there needs to be clear guidance on when an arbitrator might be conflicted. Identifying conflicts requires a full understanding of the arbitrator's prior appointments, knowledge and opinions. In a legal regime that places a high premium on confidentiality, that

information can be difficult to obtain, even with due diligence. Some awards become public due to subsequent court cases involving the award, while others become public following publication by the parties with the necessary redactions. Save for these scenarios, determining what issues an individual, in whatever capacity, has previously considered is not readily available. While there are notable exceptions, particularly in the realm of investor-state arbitration, the reality is that the vast majority of cases remain confidential and inaccessible to the general public. These circumstances make it difficult for a party to obtain sufficient information to investigate potential conflicts and satisfy themselves that the arbitrators in the case are not legally conflicted.

The arbitrator is under competing pressures: confidentiality undertakings set out in contractual terms and, in some jurisdictions, those imposed by legislation prevent disclosure versus full disclosure. Although the IBA Guidelines on Conflicts of Interest in International Arbitration offer some assistance in identifying when disclosure would be appropriate, there is little in the way of guidance available about precisely what information and how much information ought to be disclosed. While complete disclosure of all relevant prior cases, including those where an arbitrator has acted as counsel might be ideal for some, this approach would jeopardise the confidentiality of past arbitrations. Clearly, the fine balance between disclosure and breach of confidentiality needs to be maintained.

Conflicts caused by multiple appointments

In cases of multiple appointments, there is a legitimate issue surrounding the point at which an arbitrator becomes sufficiently economically dependent upon an entity to give rise to a perception of a conflict. A series of low-value arbitrations over simplistic issues that generates relatively no income is unlikely to give rise to the perception of a conflict, although the number of appointments might. Conversely, a single appointment involving a sufficiently large fee could do so from the perspective of the parties to the arbitration. A discussion about an individual's income is a notoriously thorny issue at the outset of arbitral proceedings, potentially undermining the necessary transparency regarding fees earned by an arbitrator from parties and multiple arbitrations.

The question therefore becomes how to satisfy the parties that the views of an arbitrator are not being unduly influenced by the remuneration, both past and present, received by the arbitrator. The question involves consideration of the relationship between a party and the institution with which the appointed arbitrator may work.

The transparency balancing test: how do accounting firms address this issue?

Greater transparency is a reliable means to engender greater trust in any system. For conflicts in arbitral appointments, this entails the disclosure of sufficient details about prior engagements, prior cases, or existing financial arrangements that might lead an arbitrator to have pre-determined views on the subject matter to be heard. Given the range of arbitration institutions and arbitration laws in the world, it does not seem feasible to attempt to implement a single disclosure regime through the institutions, even if this would be the easiest solution in terms of oversight, enforcement and consistency. Equally, given the personal nature of the economic interests of the arbitrator, institutionalised disclosure or management of conflicts would not be practical. The onus must therefore remain on the arbitrator to personally disclose cases or relationships that might lead to a potential conflict.

However, identifying what might constitute a potential conflict in the eyes of a party is not always straightforward. Arbitrators are often employees or partners of large firms with large dockets of international work. Whereas conglomerates can have less than transparent organisational structures with subsidiaries located in multiple jurisdictions. Disputes can involve more than one party, particularly with the introduction of third-party funding in an increasing number of cases.

Identifying all potential economic interests requires the identification of all relevant stakeholders (and their related entities) to the arbitration. As the decision over appointments may involve not only the party making the appointment but potentially also third-party funders, it is necessary to identify the relationship between each of the entities and the nominated arbitrator. The process continues with an identification of parties related to these stakeholders, such as an ultimate holding company, an identifiable group of shareholders exercising control

when the entity is publicly listed, or the ultimate majority shareholder(s). It is then incumbent on the arbitrator to identify what other cases, if any, he or she has adjudicated where the same parties were involved. This process requires that the arbitrator obtain sufficient disclosures from the parties to be able to track and identify potential conflicts.

Most accounting firms provide guidance for managing the issue of conflict. Accounting firms often comprise separate legal entities covering a specific geographical area that do not share profits across the entities but do track conflicts of interest across the entire group of legal entities operating under the brand name. Furthermore, to counter personal bias or interests that arise when considering the perception of conflicts, accounting firms have a system in place so that ideally an individual with no vested interest in the outcome of the decision assesses the conflict. Again, a balance must be struck inside a firm, this time between the seniority of an independent conflict resolver with sufficient access to confidential engagement details and the lack of financial interest in the outcome. As more senior individuals are often compensated on the entity's performance as a whole, this bias is desirable to remove. This system has evolved and, just like arbitrators, accountants often disclose relevant prior relationships to parties so they can evaluate potential conflicts from their perspective.

Conclusion

Clearly anything less than complete disclosure will not satisfy some (ab)users of the system. As additional disclosure is not as easy or straightforward as noted above, there must continue to be a mechanism by which individuals can appeal the views of the arbitrators regarding their own conflicts or those of their fellow arbitrators. As the ultimate decider in such cases will likely be the national courts of the seat of the arbitration, future court decisions will indicate if judges agree with our perceptions of what constitutes a conflict.

In an age where potential arbitration users are learning that arbitration is not necessarily quicker or cheaper than litigation, maintaining overall confidence in the integrity of the process is paramount. Full disclosure of an arbitrator's past case-history is not desirable, but forced resignations or removals of arbitrators due to perceived conflicts of either a financial nature or prejudice is equally damaging. A regulatory imposed disclosure regime would likely be painful; therefore, the profession must proactively resolve the matter itself. Drawing upon the examples provided by other professions is one place to begin.

Note

1 ICSID Case No ARB/13/13.

Pedro Sousa Uva
Miranda Correia Amendoeira e Associados, Lisbon
Pedro.Uva@mirandalawfirm.com

Sofia Martins
Miranda Correia Amendoeira e Associados, Lisbon
Sofia.Martins@mirandalawfirm.com

Portuguese Chamber of Commerce and Industry Arbitration Centre approves new institutional rules

Arbitration in Portugal has taken another significant step forward with the enactment of the 2014 Rules of Arbitration ('Rules of Arbitration') of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry ('Arbitration Centre'), Portugal's principal arbitral institution. Following the entry into force of the 2011 Portuguese Law on Voluntary Arbitration, the Arbitration Centre revised its Rules of Arbitration in order to make them more efficient and

user-friendly, with the aim of making them more likely to be considered for use in the resolution of international disputes. The inclusion of emergency arbitrator provisions in the Rules of Arbitration and the retention of various universal standards regarding ethical conduct will encourage parties and counsel to consider Portugal when negotiating the seat of arbitration.

Portugal is certainly among those states classified as 'arbitration friendly'. Indeed, in the last few years, a growing community of arbitration lawyers in Portugal has witnessed a steadily increasing number of institutional arbitrations seated in the country.[1] Portugal enacted a modern arbitration law for voluntary arbitration in late 2011,[2] a recently revised Code of Ethics for Arbitrators drafted by the Associação Portuguesa de Arbitragem (Portuguese Arbitration Association),[3] and now a new set of Rules of Arbitration.[4] This article focuses on this new set of rules.

The primary and original purpose for revising the Rules of the Arbitration Centre was to adapt the former rules to the new Portuguese Law on Voluntary Arbitration enacted in late 2011, which came into force in March 2012. However, the Arbitration Centre saw an opportunity to go further with the new rules and introduced several changes to bring institutional arbitration in Portugal in line with the highest international standards. The incorporation of the Arbitrator's Code of Ethics into the Rules of Arbitration was an important step towards enhancing the prestige, credibility and effectiveness of arbitration as an alternative method for resolving disputes in Portugal.

What makes these Rules of Arbitration such an important step forward?

First, the Rules of Arbitration allow for provisional relief prior to the constitution of the arbitral tribunal by means of an emergency arbitrator, chosen by the President of the Arbitration Centre.[5] The provisions for an emergency arbitrator were inspired by existing institutional arbitral rules[6] which similarly allow parties in arbitration to seek interim relief in a swift manner before an emergency arbitrator, instead of waiting for the constitution of the arbitral tribunal or applying to state courts. However, the procedure for the emergency arbitrator only applies in cases where the arbitration agreement has been concluded after the revised Rules of Arbitration came into force.[7]

Secondly, the Rules of Arbitration strengthen ethical standards applicable to tribunals. The Rules of Arbitration reinforce the duty of disclosure regarding the independence, impartiality and availability of arbitrators 'from the parties' perspective' and introduce an Arbitrator's Code of Ethics.[8] The Code of Ethics is to be interpreted and applied bearing in mind the IBA Guidelines on Conflicts of Interest in International Arbitration.[9] This is a major step towards advancing Portugal as a potentially attractive seat for international arbitrations with foreign parties seeking guidelines with which they are familiar. The Rules of Arbitration also make it clear that the disclosure of any circumstances that may give rise to reasonable doubts as to the independence, impartiality or availability of the arbitrator does not in itself constitute a reason to challenge the appointment.[10] In fact, the Rules of Arbitration clarify that the process of considering a challenge involves an independent and objective reflection of the disclosed circumstances. Be that as it may, the Arbitration Centre may itself (albeit, in exceptional circumstances) officially refuse the appointment of an arbitrator in the event of a well-founded suspicion of a serious lack of independence or impartiality.[11]

Thirdly, the Rules of Arbitration introduce greater flexibility and efficiency in relation to: (1) the choice of place for the arbitration,[12] which may now be freely selected by the parties, thereby assuring the international character of the Arbitration Centre; (2) the language of the arbitration,[13] with parties now being expressly entitled to choose freely the language or languages of arbitration; and (3) the rules of procedure,[14] with the arbitral tribunal having the discretion to conduct the arbitration in the manner it deems adequate, with due regard for swiftness, efficiency, reasonable opportunity to present the parties' cases, equality and due process ('*contraditório*') essential to the proper conduct of the proceedings.

Fourthly, the Rules of Arbitration introduce changes regarding objections to the jurisdiction of the arbitral tribunal. Specifically, if an objection that the arbitral tribunal lacks jurisdiction is raised in the answer, the opposing party may reply within 30 days,[15] without prejudice to the possibility of raising the issue in a later written statement, provided that the request for arbitration does not allow for an immediate reaction.

Fifthly, regarding the preliminary hearing, the Rules of Arbitration introduce greater

flexibility and efficiency in the conduct of proceedings. Specifically, the arbitral tribunal shall define the issues to be decided, the provisional procedural calendar, including the dates for the hearings (and their length), the number of pleadings to be presented, the means of evidence and time limits for producing them, the rules applicable to the hearings, closing arguments and the value of the arbitration.[16] Also, regarding the taking and preservation of evidence,[17] the arbitral tribunal shall determine the admissibility, relevance and value of the evidence produced or to be produced.

Sixthly, concerning the time limit for concluding the proceedings, which is set at one year from the date on which the arbitral tribunal is considered to have been constituted,[18] the new Rules of Arbitration (in accordance with the recently enacted arbitration law) allow the Chairman of the Arbitration Centre to extend the time limit for the arbitration. Regarding the applicable rules of law, in the absence of any choice, the arbitral tribunal shall now apply the law of the state with which the subject-matter of the dispute has the closest connection.[19] Lastly, partial arbitral awards are now expressly admitted.[20]

Finally, the following aspects of the Rules of Arbitration are worth highlighting: (1) it is expressly provided that the arbitral tribunal may correct material errors or interpret any obscure or ambiguous point in the award, *sua sponte* or upon request by any of the parties submitted within 30 days of the notification of the arbitral award;[21] and (2) arbitral awards involving states or other public legal persons are considered public, unless the parties decide otherwise.[22] Further, unless a party objects, all other arbitral awards are considered similarly public once they are sanitised of elements identifying the parties. This innovation aims to ensure transparency as a factor to legitimise and give credibility to arbitration when public entities are involved.

These are just some of the modern and promising precepts of the Rules of Arbitration, which aim to make Portugal a more natural seat for international arbitrations. Much has already been done to create the right environment for international arbitration in Portugal. It is now time for international lawyers and arbitrators to contemplate new friendly venues with the capacity to host complex arbitral disputes, with affordable prices and good infrastructure. It remains to be seen whether these new Rules of Arbitration will lead practitioners to the conclusion that Portugal is indeed a good option.

Notes

1 Statistics of *Direcção Geral de Política da Justiça*, available at: www.siej.dgpj.mj.pt.
2 Available, in English, at: www.centrodearbitragem.pt/.
3 Available at: http://arbitragem.pt/projectos/cda/ (English version to be uploaded in due course).
4 An English version of the Rules is available at: www.centrodearbitragem.pt/.
5 Art 5 of the Rules and Appendix I thereto.
6 Such as the ICC Rules of Arbitration, the Stockholm Chamber of Commerce Rules, the Swiss Chambers Rules and the CEPANI Rules.
7 Art 57(2) of the Rules.
8 This Code was inspired by the Code of Ethics of APA – 'Associação Portuguesa de Arbitragem'; Arts 7 and 8 of the Rules and Code of Ethics attached thereto.
9 Art 1(3) of the Arbitrator's Code of Ethics.
10 Art 11(4) of the Rules.
11 Art 12(5) of the Rules.
12 Art 15 of the Rules.
13 Art 16 of the Rules.
14 Art 18 of the Rules.
15 Art 22(1) of the Rules.
16 Art 30 of the Rules.
17 Art 31 of the Rules.
18 Art 33 of the Rules.
19 Art 36 of the Rules.
20 Art 39 of the Rules.
21 Art 40 of the Rules.
22 Art 41 of the Rules.

Recent changes to commercial arbitration rules reflect noteworthy trends

David J Levy
Morgan, Lewis & Bockius, Houston
dlevy@morganlewis.com

Denton Nichols
Morgan, Lewis & Bockius, Houston
dnichols@morganlewis.com

Recently, the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), and the International Institute for Conflict Prevention & Resolution (CPR) issued significant rule changes that will impact both United States and international arbitrations administered under their auspices.

- The AAA made key revisions to its widely-used Commercial Arbitration Rules that generally empower arbitrators to exert greater control over the proceedings and – it is hoped – to reduce costs. ICDR, the AAA's international division, also issued revised International Dispute Resolution Procedures reflecting similar priorities. In addition, new Optional Appellate Arbitration Rules were released to enable appellate review of awards within the AAA and ICDR regimes.
- CPR built upon its Non-Administered Arbitration Rules – a framework for ad hoc arbitrations – to design Administered Arbitration Rules whereby CPR directly administers arbitrations yet the parties retain a level of control over CPR's involvement in the proceeding.

This article will focus on five significant areas of evolution in the new AAA, ICDR and CPR rules: (1) discovery; (2) emergency relief; (3) consolidation; (4) mediation; and (5) appellate review. The implications for international arbitrations are examined in particular.

Revised AAA Commercial Arbitration Rules and ICDR International Dispute Resolution Procedures

Discovery

A common complaint is that aggressive discovery practices have made arbitration as costly and time-consuming as litigation. The AAA's revised Commercial Arbitration Rules (effective 1 October 2013) take into account this complaint, admonishing that 'procedures from court systems […] may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.'[1] The revised ICDR Procedures (effective 1 June 2014) likewise caution that '[d]epositions, interrogatories, and requests to admit as developed for use in United States court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.'[2]

The revised AAA Rules now expressly define the scope of discovery as (1) documents on which the parties 'intend to rely'; and (2) documents that are 'relevant and material to the outcome of disputed issues.'[3] Similarly, the revised ICDR Procedures: (1) require 'exchange of all documents upon which each [party] intends to rely'; and (2) authorise the arbitrators to require exchange of documents 'relevant and material to the outcome of the case.'[4]

This range of discovery under the AAA Rules and ICDR Procedures is considerably narrower than what is normally authorised by American rules of civil procedure, under which parties may usually obtain documents 'relevant to any party's claim or defense' regardless of materiality or even admissibility.[5] By contrast, the revised AAA Rules and ICDR Procedures more closely resemble the more limited 'standard disclosure' practice of the United Kingdom.[6]

Emergency relief

The revised AAA Rules and ICDR Procedures provide an avenue to obtain emergency relief within the arbitral system.[7] However, the judicial route for emergency relief remains open as both sets of rules declare that a request for interim measures directed to a judicial authority is not deemed incompatible with the AAA/ICDR emergency procedures or a waiver of the right to arbitrate.[8]

The AAA Rules and ICDR Procedures provide that upon receipt of a proper application, the arbitral institution shall appoint a single emergency arbitrator within one business day, who may issue an interim award or order.[9] Under the AAA Rules, the emergency arbitrator

must be satisfied that the applicant faces 'immediate and irreparable loss or damage' and is 'entitled' to the emergency relief.[10] By contrast, the ICDR Procedures do not state an express standard other than the emergency arbitrator's conclusion that such relief is 'necessary'.[11]

Consolidation

Under the revised ICDR Procedures, any party may also ask the ICDR to appoint a 'consolidation arbitrator' with the power to consolidate multiple arbitrations pending under the ICDR or the AAA.[12] The arbitrator may order consolidation when the parties have expressly agreed to it, when all claims and counterclaims are made under the same arbitration agreement, or when despite multiple arbitration agreements the claims are 'comparable', arise from the 'same legal relationship' and involve the 'same parties'. If the 'consolidation arbitrator' decides to order consolidation, they may choose the makeup of the new tribunal from the former tribunals.[13]

The revised AAA Rules do not provide any consolidation procedures. That said, the suggested list of items to be discussed at a preliminary hearing includes 'consolidation of the claims or counterclaims with another arbitration', suggesting that consolidation is permitted under the revised Rules, but without the assistance of a 'consolidation arbitrator'.[14]

Mediation

The revised AAA Rules contain an automatic mediation step stating that parties 'shall' submit their dispute to mediation when a claim or counterclaim exceeds US$75,000.[15] To avoid mediation being used for mere obstruction, the revised AAA Rules provide that the mediation shall take place concurrently with the arbitration.[16] The mediation requirement is not as mandatory as it seems, however, because any party may unilaterally opt out of it.[17]

Although the revised ICDR Procedures do not provide for a default mediation step, they authorise the ICDR administrator to invite the parties to mediation after the time for submission of an answer.[18] Like the AAA Rules, the ICDR Procedures recognise that mediation should not be used to obstruct the arbitration proceeding and must proceed concurrently with arbitration.[19]

Appeals

In the US, recent Supreme Court decisions have cast doubt on agreements purporting to expand the bases for judicial review of an arbitral award beyond those specifically enumerated in the Federal Arbitration Act and the New York Convention.[20] To give parties the option of a merits-based review within the arbitration system, the AAA/ICDR Optional Appellate Arbitration Rules (effective 1 November 2013) provide appellate review based on either 'an error of law that is material and prejudicial' or 'determinations of fact that are clearly erroneous'.[21] Because an additional stage of appellate review tends to undermine efficiency and finality in arbitration, the Appellate Rules are likely more attractive in large, complex disputes where the correctness of an award is especially important.[22] If the parties' contractual arbitration agreement does not provide for appeal under the Appellate Rules, the parties may nonetheless invoke the Appellate Rules 'by stipulation'.[23]

The appellate arbitrators are selected from the AAA's Appellate Panel or, if the dispute is an 'international dispute', from the International Appellate Panel.[24] In the event that the parties cannot agree on the makeup of the appellate tribunal, the AAA selects the appellate arbitrators with input from the parties.[25] Although the Appellate Rules ostensibly toll the period for commencing judicial proceedings to modify, enforce, correct or vacate an award,[26] practitioners should consult the law of the relevant jurisdiction on whether such tolling by private agreement is allowed.

CPR Administered Arbitration Rules

Discovery

The CPR's Administered Arbitration Rules leave much open to interpretation regarding discovery: 'The Tribunal may require and facilitate such discovery as it shall determine is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making discovery expeditious and cost-effective.'[27] To give parameters to the arbitrators' discovery powers, the CPR previously promulgated a protocol on discovery.[28] Although the protocol is non-binding (unless adopted by agreement), the preamble specifically calls on arbitrators to 'direct the attention of the parties to this Protocol at the outset of the arbitration and to draw upon it in organizing and managing the proceeding.'[29]

The protocol declares that 'arbitration is not the place for an approach of "leave no stone unturned", and that zealous advocacy in arbitration must be tempered by an appreciation for the need for speed and efficiency.'[30] For disclosure of documents, the Protocol provides a sliding scale of four 'modes' of discovery of progressively greater reach, ranging from only those 'documents that each side will present in support of its case' to 'documents regarding non-privileged matters that are relevant to any party's claim or defense, subject to limitations of reasonableness, duplication and undue burden.'[31]

Emergency relief

Like the AAA's revised Commercial Arbitration Rules, the CPR's Administered Arbitration Rules provide a mechanism for appointing a 'special arbitrator' to entertain an application for emergency relief (called 'interim measures').[32] If the parties cannot agree on who that should be, the CPR will appoint the special arbitrator within one business day of receiving a request.[33] The special arbitrator may grant emergency relief deemed 'necessary'.[34]

Consolidation

Like the AAA Rules, the CPR's Administered Arbitration Rules do not contain an express procedure for consolidation, although they do suggest that parties discuss at the initial pre-hearing conference 'the desirability and practicability of consolidating the arbitration with any other proceeding.'[35]

Mediation

The CPR's Administered Rules do not provide an automatic mediation step. That said, the possibility of a mediated settlement negotiation is expressly listed among the matters that should be considered at the initial pre-hearing conference.[36]

If a settlement agreement is achieved through mediation, the arbitrators must terminate the arbitration.[37] Upon the parties' request, the arbitrators 'may record the settlement in the form of an award made by consent of the parties' that is in turn issued by the CPR.[38]

Appeals

The new Administered Arbitration Rules do not provide for an appellate mechanism, except insofar that any party 'may request the Tribunal to clarify the award; to correct any clerical, typographical or computational errors, or any errors of a similar nature in the award; or to make an additional award as to claims or counterclaims presented in the arbitration but not determined in the award.'[39] If the parties wish to have a fuller appellate review, they must agree in writing that a party may appeal under the CPR's arbitration appeal procedure, pursuant to which the CPR will, with input from the parties, appoint an appellate tribunal consisting of former US federal judges.[40] The appellate tribunal may modify or set aside an award if it contains errors of law lacking 'any appropriate legal basis', has 'clearly unsupported' factual findings, or is subject to the Federal Arbitration Act's grounds for vacating awards.[41]

(Anticipated) International Administered Arbitration Rules

The CPR notes that its Administered Arbitration Rules can be adapted for cross-border disputes.[42] That said, the CPR is also in the process of developing a specific set of rules to govern international disputes,[43] which are expected to build upon the CPR's existing Rules for Non-Administered Arbitration of International Disputes by introducing administrative mechanisms similar to those found in its Administered Rules.

Conclusion

The recently released AAA, ICDR and CPR rules reflect several noteworthy trends in US and international arbitrations favouring stricter limits on discovery, increased availability of emergency relief, availability of and procedures for consolidating arbitrations, greater emphasis on mediation, and new avenues for appellate review. On balance, it is expected that such rule changes will encourage commercial parties to use the AAA, ICDR or CPR to administer their arbitrations.

Notes

1 AAA, Commercial Arbitration Rules and Mediation Procedures, effective 1 October 2013 ('AAA Commercial Rules' or 'AAA Rules'), P-1(b).
2 ICDR, International Dispute Resolution Procedures, effective 1 June 2014 ('ICDR Procedures'), Art 21.10.
3 AAA Commercial Rules, R-22(b).
4 ICDR Procedures, Art 21.3–21.4.
5 Fed R Civ P 26(b)(1).
6 Ministry of Justice (UK), Civil Procedure Rules, 31.6.
7 AAA Commercial Rules, R-38; ICDR Procedures Art 6.
8 AAA Commercial Rules, R-38(h); ICDR Procedures, Art 6.7.

9 AAA Commercial Rules, R-38(c); ICDR Procedures, Art 6.2.
10 AAA Commercial Rules, R-38(e).
11 ICDR Procedures, Art 6.4.
12 *Ibid*, Art 8.1.
13 *Ibid*, Art 8.6.
14 AAA Commercial Rules, P-2(a)(vi)(c).
15 *Ibid*, R-9.
16 *Ibid*.
17 *Ibid*.
18 ICDR Procedures, Art 5.
19 *Ibid*.
20 For example, *Hall Street Assocs, LLC v Mattel, Inc*, 552 US 576, 128 S Ct 1396 (2008).
21 AAA/ICDR, Optional Appellate Rules, A-10.
22 AAA, 'New Optional Appellate Arbitration Rules From the AAA and ICDR Provide Further Arbitration Flexibility' (1 November 2013) AAA News Alert.
23 AAA Appellate Rules, A-1.
24 *Ibid*, A-4(a).
25 *Ibid*, A-5(b).
26 *Ibid*, A-2(a).
27 CPR, Administered Arbitration Rules, effective 1 July 2013 (hereafter 'CPR Administered Rules'), Rule 11.
28 CPR, Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (2009).
29 *Ibid*, 'Preamble.'
30 *Ibid*, s 1(a).
31 *Ibid*, Sched 1.
32 CPR Administered Rules, Rule 14.
33 *Ibid*, Rule 14.5.
34 *Ibid*, Rule 14.9.
35 *Ibid*, Rule 9.3(a).
36 *Ibid*, Rule 9.3(e).
37 *Ibid*, Rule 21.4.
38 *Ibid*.
39 *Ibid*, Rule 15.6.
40 CPR, Arbitration Appeal Procedure (2007), Rules 1.1-.1, 4.1-.2.
41 *Ibid*, Rule 8.2.
42 CPR, 'CPR Announces New Administered Arbitration Rules Effective July 1, 2013' (1 July 2013) CPR Media Alert.
43 *Ibid*.

Announcements

Sergejs Dilevka*
MENA Chambers, Brussels
s.dilevka@menachambers.com

Jerusalem Arbitration Center launched

Introduction

On 18 November 2013, the Jerusalem Arbitration Center (JAC) was inaugurated in Jerusalem by way of signing the JAC Cooperation Agreement (the 'Agreement') between the Paris-based International Chambers of Commerce (ICC), ICC Palestine and ICC Israel. The initial version of the Agreement was signed between ICC Palestine and ICC Israel on 27 March 2013 after several years of intense discussions, negotiations and preparations.

JAC is an arbitration institution established with the specific aim of resolving commercial disputes between Israeli and Palestinian businesses.

According to the Agreement, the JAC comprises of: (1) a board of members responsible for overseeing all activities of the JAC (the 'JAC Governing Board'); (2) a court that is an independent arbitration body ('JAC Court'); (3) a secretariat responsible for administration of arbitral proceedings before arbitral tribunals and the JAC Court (the 'JAC Court Secretariat'); and (4) a JAC General Manager, should the JAC Governing Board decide to establish such a position, who will be responsible for administration of JAC affairs.

This brief note attempts to identify issues concerning the JAC that might be of interest to the reader, including highlighting some of the unique provisions of the JAC Arbitration Rules (the 'JAC Rules'), which raise a few jurisdictional and institutional questions of interest.

Some highlights of the JAC Rules[1]

Unique provisions for a unique institution

The JAC Rules contain certain unique provisions set up to offer pacific means of settling business disputes between Israelis and Palestinians. Only a few of these provisions may be highlighted in this short contribution:

- Article 1(6) provides that '[t]he JAC shall be located in the JAC Hearing Center in East Jerusalem and shall have two representative offices, one in Tel Aviv and the other in Ramallah, which shall serve as alternative addresses for the submission of documents to the Secretariat in accordance with the Rules.'
- Article 4(5) provides that '[i]n the event that the Secretary General is of the opinion that the dispute, as set out in the Request, exceeds the monetary jurisdiction of the JAC […] the Secretary General may refer this issue to the immediate decision of the Court. In the event that the Court finds that the monetary

jurisdiction is exceeded in the Request, it shall transfer the dispute to the ICA [International Court of Arbitration] […]' (for monetary jurisdiction's limit, see the last bullet point below).

- Article 6(3)(iv) provides that, in certain cases, 'the Court may decide, if it believes that special circumstances so warrant, to seek a specific approval from the ICA for the JAC to nevertheless administer the arbitration. […]'
- Article 9(8) provides that '[t]he Court may decide, in accordance with its discretion, […], to refer the appointment of one or more arbitrators to the ICA. […]'
- Article 15(1)(ii) provides that '[u]nless the parties agree otherwise, the parties shall be deemed to have agreed that the seat of arbitration shall be Paris, France […]' (footnote omitted).
- Article 15(2) provides that '[t]he place of the hearings shall be the JAC Hearing Center in East Jerusalem, unless otherwise agreed by the parties.'
- Article 15(3) provides that '[t]he arbitral tribunal may decide, in exceptional circumstances and after consultation with the parties, to conduct some or all of the hearings via video conferencing […]'
- Article 26(1) provides that '[t]he time limit within which the arbitral tribunal must render its final award is twelve months. […]'
- Appendix VI, entitled 'Monetary Jurisdiction of the JAC' states that '[f]or the initial years of its operation, the JAC's monetary jurisdiction shall be limited to Requests valued at up to seven million United States Dollars ($7,000,000) […]'.

Four conditions

According to Article 6(3)(ii), in order for an arbitration to proceed, the JAC Court must be satisfied that four cumulative conditions have been met. These four conditions are as follows:

> '(a) the Request does not exceed the monetary jurisdiction of the JAC, as set out in Appendix IV;
> (b) the issue under dispute is a business dispute;
> (c) the business dispute is related to Israel, the West Bank and the Gaza Strip, including East Jerusalem; and
> (d) it is prima facie satisfied that a JAC arbitration agreement under the Rules may exist.'

These four conditions mentioned above raise a number of interesting issues. Generally speaking, Article 6(3)(ii) appears to consider it necessary to confer wide discretion on the JAC Court, for example, to determine whether: (1) a dispute is of a business nature; (2) the business dispute actually relates to the prescribed territories; and (3) a partially quantified claim for less than US$7m does not exceed the monetary jurisdiction of the JAC. Notwithstanding the four conditions set out in Article 6(3)(ii):

- There are no guidelines to determine the nexus between a dispute and the prescribed territories. It remains to be seen how the JAC Court will interpret this condition.
- It is possible for claimants to circumvent the monetary jurisdiction limit by submitting a request for arbitration (the 'Request') for less than US$7m and, after the JAC Court's confirmation, increasing the claim to the actual amount in dispute at a later stage;
- The condition creates an imbalance between the parties as the monetary jurisdiction only appears to relate to the Request, but not the potential counterclaim(s). Additionally, if the monetary jurisdiction is only relevant for the purposes of the Request, the overall effectiveness of such a monetary limit is questionable.
- Most importantly, insofar as the JAC Rules consider it necessary for the JAC Court to determine that the conditions are satisfied, this appears to be contradicted by Article 6(3)(iii))(c), which theoretically allows parties to bypass the first three conditions in Article 6(3)(ii)(a)-(c) by agreement.
- As such, it is possible that the final condition set out in Article 6(3)(ii)(d) would have to serve as a tool of last resort to prevent the disputing parties from proceeding with their arbitration under the auspices of the JAC.

Seat of arbitration and place of hearings

One innovative aspect of the JAC Rules is the separation, in Article 15, between (1) Paris as the default seat of arbitration; and (2) the JAC Hearing Center in East Jerusalem as the default place of hearings.

With respect to Article 15(1)(ii), as far as the enforcement of JAC awards in Israel is concerned, it is reasonable to suggest that if the seat of arbitration is outside Israel, for the purposes of the New York Convention, the award would be considered as a foreign award. Therefore, even if the hearings take place in Israel or in the Palestinian territories, the rendered JAC award will be subject to the New York Convention's international standards of recognition and enforcement rather than domestic arbitration standards in Israel.

At the time of writing, Palestine is not a party to the New York Convention. Hence, enforcement in Palestine will have to comply with its domestic standards notwithstanding the seat of arbitration. Furthermore, an on-going process of (proposed) reforms to the Palestinian Arbitration Law brings about additional uncertainty.

Relationship between the ICC and the JAC

Another potentially problematic issue is the level of the ICC's involvement in the JAC. Two points are worth mentioning in this regard.

First, a novelty yet to be tested is the requirement for the JAC Court to transfer a dispute to the ICC's ICA if the JAC Court finds that one or more of the conditions set out in Article 6(3)(ii)(a)-(c) are not met. In effect, by concluding a JAC arbitration agreement, the parties agree on resolving their dispute(s) by one of the two arbitration institutions: the JAC or the ICC. The two institutions have similar yet different sets of rules and considerably different fee levels. The ICC's arbitration fees are approximately two-and-a-half times more expensive. It remains to be seen how smoothly the JAC Court and its Secretariat would be able to transfer cases to the ICC and the parties' reaction to such a transfer.

Secondly, Article 1(1) of the JAC Rules makes it clear that it 'is an independent arbitration institution' and that the JAC Court 'is an independent arbitration body of the JAC'. However, according to Article 3 of Appendix I (Statutes of the Court of the Jerusalem Arbitration Center), all members of the JAC Court may be appointed only with the 'consent of the ICA'. Furthermore, Article 3.3 of the JAC Cooperation Agreement provides '[a]ll [amendments to the JAC Rules] shall require the prior approval of the ICC', and Article 5.2 of the same Agreement provides the following: 'JAC's cooperation with regional or international arbitration bodies must fully reflect and safeguard the special relationship between the JAC and the ICC.' In light of the above examples, the level of actual independence of the JAC vis-à-vis ICC at this stage is not certain.

JAC court members

The JAC Court, which held its first meeting in Jerusalem on 20 May 2014, consists of nine members: two recommended by ICC Palestine, two recommended by ICC Israel and five international members (including the President and Vice-President of the JAC Court).

Mr Yves Derains, the founding partner of Derains & Gharavi, has been appointed as the President of the JAC Court. The remaining members of the JAC Court are:

Recommended by ICC Israel:

- Maya Steinitz, associate professor of law at the University of Iowa; and
- Zvi Bar-Nathan, partner at Goldfarb Seligman in Tel Aviv.

Recommended by ICC Palestine:

- Gary Born, partner at WilmerHale in London and Berlin; and
- Catherine Rogers, professor of law at Pennsylvania State University.

Four international members (recommended by the President):

- Adnan Amkhan Bayno, head of MENA Chambers in Brussels;
- Vera van Houtte, sole arbitration practitioner based in Leuven;
- Simon Greenberg, partner at Clifford Chance in Paris (Vice-President of the JAC Court); and
- Eduardo Silva Romero, partner at Dechert in Paris.

Nadia Darwazeh, counsel at Curtis, Mallet-Prevost, Colt & Mosle in Paris, is the JAC's first Secretary General.

Conclusion

The JAC was established with the clear aim of resolving commercial disputes between Israeli and Palestinian businesses under the ICC's guidance. The Secretary General, as a former counsel at ICA, is without doubt competent in her role and the JAC Court members are extremely experienced practitioners and academics of the highest standing amongst their peers. The JAC Rules are based on the world renowned ICC Arbitration Rules with specific provisions designed in response to the potential region-specific challenges. Consequently, the chief ingredients for a successful arbitration centre are undeniably present. However, the challenges are also monumental for a newly established institution amidst constant tensions and sporadic conflicts. It is hoped that the JAC will rise to the challenges and live up to the highest standards set by the ICC as truly 'Merchants of Peace'.

Notes

* **Sergejs Dilevka** is a member of MENA Chambers specialising in international arbitration and all aspect of international dispute settlement.
The views expressed in this note are of the author's and do not necessarily represent the views of MENA Chambers or any of its members. The author takes full responsibility for any errors or omissions.

1 Unless stated otherwise, all references to Articles are references to the Articles of the JAC Rules. For a copy of the JAC Rules, please visit the JAC's official website: www.jac-adr.org. For more information on the JAC, please see Nadia Darwazeh, 'The Jerusalem Arbitration Centre: From Tradition to Innovation' (2014) 31(2) Journal of International Arbitration 121–138.

Do we need special rules for energy disputes?

Peter D Cameron
University of Dundee and ICEA, Dundee
p.d.cameron@dundee.ac.uk

Andrew Mackenzie
Scottish Arbitration Centre, Edinburgh
<Email>

Brandon Malone
Scottish Arbitration Centre and ICEA, Edinburgh
brandon@scottisharbitrationcentre.org

Many arbitrators will have experience of disputes involving different kinds of energy resources and infrastructure. Few would deny that this field often involves a combination of delicate non-legal issues, such as a high degree of state participation or regulation, its overlap with economic or geopolitical strategies, and the high level of public interest owing to the involvement of significant amounts of state-owned resources or infrastructure. Finally, and perhaps most obviously of all to a lawyer, energy disputes often involve considerable amounts of money.

These issues have led to the exploration of whether arbitral disputes for the energy sector (understood in the widest sense to include fossil fuels, renewables and the infrastructure required to manage them) would benefit from having a specialised set of rules for arbitration. This is the first task of a new centre jointly established in 2013 by the Scottish Arbitration Centre and the Centre for Energy, Petroleum and Mineral Law and Policy at Dundee (United Kingdom). The International Centre for Energy Arbitration (ICEA) has initiated an information gathering exercise, involving a questionnaire addressed to its contact base of several thousand parties, including many corporate users. The exercise has already attracted interest internationally, not least from bodies such as the Energy Charter Treaty secretariat and the African Development Bank. Once analysed, the results of this exercise will be made publicly available and will hopefully be of wider interest to the international arbitration community.

Two drivers

At its most basic level, there are two drivers making this exercise worthwhile. First, like all regional and national arbitral centres, the Scottish Arbitration Centre looks closely to its base to ascertain its strengths given that London is an established and world-leading centre for the settlement of commercial disputes. Energy is the focal point of an institution based in Scotland. Apart from North Sea oil and gas, Scotland also generates substantial electricity from renewable energy, nuclear and water sources. Moreover, Edinburgh is the second financial centre in the UK and has historically been the centre of various kinds of investment institutions with prominent roles in the global economy. Energy concerns therefore featured prominently in the reflections of the drafters of Scotland's Arbitration Act of 2010.

A second driver was the existence of a specialist energy educational centre at the University of Dundee. The Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP) has a network of almost 100 practitioners in its global faculty, which (like other academic institutions in the UK and abroad) has conducted its arbitration research by partnering with law firms and/or accounting practices.

The drivers have come together to initiate this project. The collaboration between practitioners and universities has been particularly fruitful. On a conservative view, this collaboration might comprise the essential activity of teaching a new generation of lawyers; but the innovation and dynamics of international arbitration are generating enough questions to make this type of work highly appropriate, worthwhile and exciting (as learning should be).

Prominence of energy disputes

Arbitrators and counsel need not be specialists to experience disputes arising from one or other aspect of the energy businesses. At the international level, there have been many claims lodged by investors against states in investment disputes in the oil, gas or mining industries, sometimes generically referred to as the 'extractive industries'.

For many commercial disputes, case statistics are hard to obtain owing to the relative

confidentiality of arbitral proceedings. However, from barely double-digit numbers of cases before ICSID, disputes arising from the extractive industries have grown over the past decade to comprise a large percentage of cases before ICSID, the ICC and the LCIA. In the scale of claims filed, energy disputes are almost in a class of their own. Individual claims have exceeded the GDP of many countries in some disputes and the number of claims has mushroomed across the globe. If we expand the category to include claims involving infrastructure, such as pipelines or wind farms, the number would be greater. For a long time, disputes involving renewable energy were very few, involving mostly planning or construction issues. However, there has been a recent surge of cases under the Energy Charter Treaty involving investments in renewable energy affected by government subsidies, underlining how quickly a new series of questions can arise in this field. The same may happen with respect to unconventional sources of energy in the near future.

Phase one of the ICEA research

Phase one of the ICEA research involves a questionnaire and a multiple choice form as part of a consultation period. The longer term aim is to use the findings to draft dispute resolution rules tailored to the energy sector, if deemed desirable and appropriate. Among the respondents to the questionnaire are exploration and production companies, construction and engineering firms, energy traders and service companies, transportation and logistics specialists, and providers of legal services to the sector.

The questionnaire focuses on community knowledge and awareness of contractual provisions for mandatory cooling off periods, high level negotiation and mediation, attachment of sanctions (such as restrictions on the recoverability of costs when mandatory pre-action procedures are not followed) and user priorities. In the last category, the ICEA is seeking to determine the importance of factors such as: (1) the expertise of the decision-maker; (2) neutrality; (3) confidentiality; (4) the enforceability of the decision; (5) flexibility of the procedure; (6) speed; (7) cost; (8) recoverability of expenses; and (9) the finality of the decision.

Specifically with respect to arbitration, users are expected to share their priorities about factors they consider as important when choosing a seat. The list of priorities includes: (1) the reputation of local courts for probity and incorruptibility; (2) the attitude of local courts towards arbitration; (3) suitability of local arbitration statutes; (4) transport links; (5) appropriate venues for arbitration hearings; (6) availability and reputation of local arbitrators; (7) reputation of local lawyers; (8) availability of local expert witnesses and cost; (9) party to the New York Convention; and (10) experience of local counsel with arbitration.

In moving forward with the design of a dedicated set of rules, the research will draw upon: (1) user feedback regarding the nationality of arbitrators; (2) the ability of the parties to nominate an arbitrator to the tribunal; (3) fixed time-scales for the delivery of an award; and (4) the procedures for the expedited appointment of a tribunal. In investigating these aspects of the arbitral process, we shall be looking to identify specific features that are unique to, or unusually important in, energy disputes.

Private parties, rather than governments, are the initial target audience. Nevertheless, governments are frequent respondents in arbitral proceedings and the ICEA is keen to take this into account. Perhaps no other economic sector provides such fertile ground for tensions between states and foreign investors. Energy resources are owned by nation states and are often deemed to have a strategic character for the economies concerned, leading to a variety of restrictions imposed by states on their use and development, along with extensive regulation. Yet, the significant capital investment required to find and extract those resources requires many states to rely upon the capital and expertise of foreign and domestic investors. A number of governments have demonstrated their frustration with the current conduct of international arbitration. For the most part, this frustration arises from much-publicised claims made by investors under bilateral investment treaties. A question that does arise is whether the procedures are ones that put governments – and not only ones in developing countries – at a disadvantage.

This is one of the subjects that encourages the ICEA in its research project that it hopes will yield opportunities and outcomes that will be of interest to all colleagues in the global arbitration community.

ENYO LAW

DISPUTES. NO CONFLICTS.

Enyo Law LLP, 11 Pilgrim Street, London, EC4V 6RN

020 3837 1700 | www.enyolaw.com