E-LETTER

CONTENTS

WELCOME

Dear Members

We hope you will enjoy this Winter edition of our YIAG e-newsletter, which captures our events and activities since July 2012. As always, we wish first to welcome the 610 new YIAG members who have joined our membership since our last e-newsletter.

A recent YIAG activity included a joint event organised with Y-ADR - for the first time, a Tylney-Hall type symposium with in-house counsel to share their experience. We are also happy to announce that this year's IBA International Arbitration Day will be preceded by a joint YIAG/IBA/ALARB symposium, for those of you lucky enough to make it to Bogota. Finally, we will co-chair our last two Tylney Hall symposia in May and September. Alas, it is time for us to pass the baton. We will soon announce how and when to apply to become the next co-chairs.

In the meantime, we look forward to seeing you all soon and we wish you all a very pleasant year ahead.

Bogotá - 21 February 2013
Tylney Hall - 10 May 2013
Tylney Hall - 20 September 2013

Amir, Andy, Kate and Marie
YIAG co-Chairs



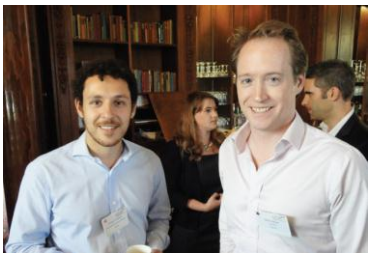

RECENT YIAG EVENTS

YIAG Symposium
Tylney Hall, UK – 14 September 2012

The annual September symposium saw a second visit to Tylney Hall. Fortunately for those who attended, the late autumn weather held up and over 60 attendees enjoyed the lively discussion amidst the beautiful surroundings of Tylney.

YIAG is very grateful to Jayne Bentham (Simmons & Simmons LLP), Kate Brown de Vejar (Curtis Mallet-Prevost Colt & Mosle SC), Mark Beeley (Vinson & Elkins LLP) and Christopher Harris (3 Verulam Buildings) who co-chaired the working sessions along with YIAG co-Chairs Amir Ghaffari and Andy Moody.

The symposium was followed by the now traditional drinks reception where YIAG and LCIA delegates have the opportunity to socialise before dinner.



YIAG Winter Social
The Garrick Club, London - 11 December 2012

The venue for our annual YIAG Winter Social evening in December was the private members' club, The Garrick, situated in the heart of London's West End. Around 70 YIAG members, coming from as far afield as Nigeria and Russia, attended a thoroughly enjoyable evening which was a great way to mark the end of another successful year for our members.

YIAG and Y-ADR Symposium
Eversheds, London – 6 February 2013

On 6 February, over 80 YIAG and Y-ADR members met at Eversheds office in London for a young practitioners and In-House Counsel symposium. In addition to the YIAG co-Chairs and Olivier André (Special Counsel & Director of Dispute Resolution Services at CPR), the co-Chairs for the event included: Matthew Cumberpatch (Lead Counsel, Recovery and Litigation Unit of the Corporate, Recovery and Litigation Team at EBRD), Alasdair Murray (Senior Counsel at BP Legal), Kevin Smith (Senior Legal Counsel at Global Litigation–EMEA at Shell), Tom Spencer (Senior Counsel at GlaxoSmithKline), Felix Weinacht (Head of Industry Litigation at Siemens). John Heaps (Eversheds and Member of the CPR Board of Directors) gave the opening remarks.

The panel discussion was, as ever, lively and inclusive -- with the added zest of views from in-house counsel which shaped many of the topics addressed. Those topics included the following: the perceived advantages (and disadvantages) of arbitration from the in-house view (on which there was broad consensus on the fact that arbitral proceedings take too long, largely as a result of the protracted process of appointment and constitution of the Tribunal and the absence of, or lack of willingness by arbitrators to entertain, summary judgment or like remedies and procedures); the use of escalation clauses (which some in-house counsel considered to be a 'waste of time' from a legal perspective although helpful in fostering a spirit of collaboration between the commercial players at the drafting stage); whether or not arbitral proceedings could be more streamlined by better use of preliminary issues or by doing away with either oral or written witness testimony (and whether in-house counsel would ever be prepared to risk giving up that right); and, finally, what importance in-house teams attach to the question of gender and other diversity (in at least one case, a significant amount).

Amir, Andy, Kate and Marie extend their warm thanks both to Y-ADR for co-hosting the event and to the in-house guests who provided such unique and privileged insight.





REPORTS FROM YIAG MEMBERS

As in the past, we have received numerous excellent contributions from YIAG members. We will continue to do our best to include as many as we can in each e-Letter, taking into account the geographical balance and required mix between recent case law and new or amended arbitration legislation. Please send your contributions - consisting of notes of between 4 and 6 paragraphs relating to recent interesting developments in the field of international arbitration in your jurisdiction - to your regional representative or YIAG co-Chair.

[Please note that the reports in this section are not intended to be comprehensive and should not be used as a primary source of legal research. The views expressed in the notes published in the YIAG E-letter are those of the individual authors and are not expressed on behalf of YIAG or the LCIA.]

ARGENTINA

Fabricio Fortese – Stockholm University, Stockholm

Argentina's *State Immunity and* ***the US' Courts***

On July 26, 2001, CMS Gas Transmission Company ("CMS") filed an arbitration claim against Argentina before the ICSID and on May 12, 2005, ICSID tribunal issued a final award in favour of CMS, which was later confirmed by an Annulment Committee in September that same year. Blue Ridge Investment ("Blue Ridge"), a Delaware corporation, is the purchaser and assignee of that Award. On January 2010, Blue Ridge filed a petition with a District Court in the United States[1] to confirm the award and Argentina sought to dismiss such petition relying on different grounds. These were: (a) lack of subject matter jurisdiction, (b) lack of personal jurisdiction and (c) failure to State a claim upon which relief can be granted.

a. Subject Matter Jurisdiction

In its decision rendered on September 12, 2012, the Court held that pursuant to its national legislation[2], a foreign State does not waive its immunity by signing an international agreement that contains no express mention of such a waiver to suit United States courts or even the availability of a cause of action in the United States. However, where a foreign State has chosen to become a contracting State for the purposes of the ICSID Convention, that foreign State clearly anticipates the availability of a cause of action in the United States. This was the case at least with respect to the recognition and enforcement of an ICSID award, because that Convention provides for the automatic recognition and enforcement of awards in contracting States.

The Court remarked that since Argentina and the United States are both signatories of the ICSID Convention, Argentina's agreement to submit its dispute with CMS to arbitration governed by the ICSID Convention constituted a waiver of immunity with respect to the recognition and enforcement of the award. Accordingly, the Court decided that it had subject matter jurisdiction to entertain the petition.

b. Personal Jurisdiction

According to the Court, Argentina merely contended that personal jurisdiction does not exist because the Court lacked subject matter jurisdiction. Because the Court determined that it had subject matter jurisdiction, the Court ruled that it could exercise personal jurisdiction over Argentina.

c. Failure to State a Claim

Argentina argued that (1) as an assignee, Blue Ridge lacked authority to seek recognition and enforcement of the award, (2) the petition was barred by *res judicata*, and (3) the petition was time-barred under New York's one-year statute limitation.

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[1] United States District Court, Southern District Court New York, Case 10 Civ. 153 (PGG),
[2] Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, et seq.

(1) In this respect, the Court concluded that nothing in the applicable legislation suggests that only a party to the ICSID arbitration can seek enforcement of the award. The term "party" as used in Art 54(2) of the ICSID Convention is ambiguous, because it is not reasonably susceptible only one interpretation. It could be understood to mean a "party to the arbitration agreement," or simply (and literally) an individual or entity seeking to enforce an ICSID Convention award.

The Court also determined that under New York law[3], a judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred. Given that the award must be treated as a final judgment of a court[4] of general jurisdiction of one of the several States, the Court concluded that nothing in the ICSID Convention, the Congress' legislation implementing the ICSID Convention, or in New York law prevents an assignee from seeking recognition and enforcement of an ICSID Convention award.

(2) The *res judicata* defence. CMS and Blue Ridge had filed two earlier lawsuits seeking the enforcement of the award. However, CMS had filed a notice of voluntary dismissal and Blue Ridge's first attempt of enforcement had been dismissed without prejudice by order of Judge Lynch[5], as the parties had reached a settlement. Because the dismissal order was without prejudice, the Court held that *res judicata* did not apply and thus Argentina's motion to dismiss Blue Ridge's petition on this ground was denied.

(3) The time limitation defence. Since there is no statute of limitations applicable to actions seeking enforcement of ICSID awards, the Court borrowed the most analogous State statute of limitation. Because ICSID awards are to be treated as final judgments of a State court, the most analogous State statute of limitations is that which governs the enforcement of a final money judgment from the court of another State. Therefore, under New York law, awards containing pecuniary obligations - or money judgments - are required to be commenced within twenty years. Consequently, the Court decided that Blue Ridge's action was not time-barred.

[3] New York General Obligations Law § 13-103
[4] ICSID Convention Art 54 (1)
[5] 09 Civ. 2377(GEL), Dkt. No. 3

Ezequiel Héctor Vetulli - University of Buenos Aires, Buenos Aires

Beautiful Landscapes and Investment Claims. Argentina Faces a New ICSID Case

The Republic of Argentina is well known for its beautiful landscapes. However, this is not its only relevant feature, since it is also known for being the State most sued before investment tribunals; and according to recent develoments, this last characteristic seems likely to continue for a while. This is because Argentina could be facing a new ICSID claim, in this opportunity brought by the spanish company, Repsol S.A. (Repsol), which is the majority shareholder of YPF S.A.[1].

Background of the Case

On 3 May 2012 the Argentine Congress passed a national law (Nº 26.741), which was then aproved by the President on 4 May 2012, and entered into force on 7 May 2012[2]. Its first article declares of public interest and a primary objective for the Republic of Argentina the achievement of hydrocarbon self-sufficiency, as well as hydrocarbon exploitation and commercialization, with the purpose of warranting economic development. In order to fulfill the objective of the law, article 7 declares of public utility and subject to expropiation 51% of YPF S.A. shares, owned by Repsol and its controller or controlled companies. It also declares of public utility and subject to expropriation a 51% of Repsol YPF Gas S.A. shares, owned by Repsol Butano S.A., and its controler or controled companies. This situation triggered a dispute between Repsol and Argentina.

The BIT Involved

Repsol´s claim is based on the Bilateral Investment Treaty between Argentina and Spain (*Acuerdo para la Promoción y la Protección Recíproca de Inversiones entre la República Argentina y el Reino de España CITA*), signed on 3 October 1991, which entered into force on 28 September 1992[3]. Under article I.2 of said BIT, shares are expressly considered as an investment. Regarding expropriation, article V states that it should exclusively be done in cases of public utility and it can never be discriminatory. Furthermore, the host State must pay an appropriate compensation, without unjustified delay.

Repsol claims that certain standards of protection have been violated, on the grounds that, no compensation was ever paid, and that the expropriation was discriminatory, since it was the only shareholder whose shares have been affected.

As a preliminary matter, even though it has to be determined whether the jurisdictional requirements contained in article 25 of the ICSID Convention have been met, the main question is whether the jurisdictional requirements, set forth by the BIT, have already been fulfilled. Article X of the BIT states that the parties should try to resolve any dispute amicably, and in case it cannot be resolved in such fashion, after a period of six months, any party may resort to the national courts of the host State. In turn, article IX.3

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[1] *Yacimientos Petrolíferos Federales.*
[2] www.infoleg.gov.ar..
[3] www.cecra.com.ar.

provides that the parties can only resort to arbitration after having litigated for a period of 18 months before the national courts of the host State.

Repsol´s Claim

Repsol sent a letter to the Argentine Government, communicating the existence of a dispute, on May 10, 2012[4]; and it also commenced judicial proceedings before the national courts of Argentina. Recently, on 3 December 2012, Repsol S.A. and Repsol Butano S.A. filed a claim before ICSID against Argentina[5]. In this scenario, and taking into account the legal framework, at first sight it could be said that Repsol has fulfilled the requirements of articles X.1 and 2; nonetheless, it would seem that it has not yet exhausted the litigation period set forth by article X.3, which could prevent ICSID's jurisdiction. In any event, it may be necessary to analyse whether the Most Favorable Nation clause, provided in article VII.2, could be invoked in relation to jurisdictional issues.

In short, in case the parties do not reach an agreement with regard to the price of the expropriated shares, Argentina will be involved in another episode of investment claims, which is likely to involve some interesting jurisdictional issues.

[4] www.repsol.com→accionistas e inversores→hechos relevantes.
[5] www.repsol.com→accionistas e inversores→hechos relevantes.

BRAZIL

Pedro Arcoverde – Sciences Po, Paris and member of the Brazilian Bar

Public Policy and Arbitration in Brazil: whither?

Public policy was once said to be "a very unruly horse."[1] As a concept notoriously hard to define even in purely national cases, where only local elements are in play, public policy deserves special attention in the context of international arbitration. Not by accident, the New York Convention included it amongst the grounds for refusal of recognition and enforcement of foreign arbitral awards (Article V(2)(b)).

Commentators of the Convention are almost unanimous in saying that, in the field of international arbitration, such a broad concept must be narrowly interpreted so as to be consistent with the objectives of the Convention and the very nature of arbitration itself.[2] This approach has been adopted in several countries, such as France[3] and Portugal,[4] whose legislations expressly refer to "international public policy." However, at least for the moment, this is not the case in Brazil.

The Brazilian Arbitration Law (Lei n. 9.307/96) states in article 39, II, that the recognition of a foreign arbitral award will be denied if the court finds that the decision is offensive to "national public policy." Although commentators contend that the expression is equivalent to that found in the New York Convention,[5] the *Superior Tribunal de Justiça* (STJ), the court in charge of recognizing foreign arbitral awards in Brazil, has not yet declared so.

In effect, in some of the cases in which public policy was invoked as a ground for non-recognition of an award, the STJ recognized the award by briefly stating that it found no offense to public policy, without any further explanation of what the concept meant or what was the court's understanding of it.[6] In others cases, the court expressly mentioned "national" or "Brazilian" public policy, but did not put forward a clear delimitation of the concept's scope.[7] In the very few cases in which breach of public policy was effectively recognized as authorizing the refusal of recognition of a foreign arbitral award, the underlying rationale seemed to be the invalidity of the arbitration agreement, which in the court's opinion amounted to an issue of public policy.[8]

In short, the endorsement of the distinction between national and international public policy, as well as the adoption of a narrow reading of the public policy exception, as proposed by the commentators of the New York Convention, has not yet – at least in an express manner – found its place in the Brazilian case law.

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[1] *Richardson v Mellish* [1824-34] All E.R. Rep. 258 *in* ILA, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference, 2002. p35.

[2] BORN, Gary B. *International Commercial Arbitration*. The Hague: Kluwer Law International, 2009, p2829. See also LEW, Julian M.; MISTELIS, Loukas A.; KRÖLL, Stefan Michael. *Comparative International Commercial Arbitration.* The Hague: Kluwer Law International, 2003, p721.

[3] Article 1514 and article 1520 combined with article 1525 of the French *Code de procédure civile*.

[4] Portuguese Code of Civil Procedure, Article 1096(f).

[5] ALMEIDA, Ricardo Ramalho. *Arbitragem Comercial Internacional e Ordem Pública*. Rio de Janeiro: Renovar, 2005, p379.

[6] E.g., STJ, SEC n. 760 (2006), SEC n. 1.210 (2007) and SEC n. 839 (2007). For an account of these judgments, cf. the comprehensive report prepared by the CBAr and the FGV (Pesquisa FGV-CBAr: "Arbitragem e Poder Judiciário", Relatório do tema: "Homologação de Sentença Arbitral Estrangeira").

[7] E.g., STJ, SEC n. 874 (2006) and SEC n. 507 (2007).

[8] E.g., STJ, SEC n. 967 (2003) and SEC n. 866 (2006).

It is true that arbitration has substantially evolved in Brazil in the last few years, leading experts such as the Dutch professor and arbitrator Albert van den Berg to praise such progress.[9] Moreover, the hosting of international events of the magnitude of the FIFA World Cup in 2014 and the Olympics in 2016 will represent a great opportunity to further develop the practice of international arbitration in the country. In view of this, a clearer definition of public policy by the courts is called for. Such a broad concept shall not constitute an escape clause for national judges to apply parochial standards and refuse to enforce foreign awards; it needs to be interpreted in a manner which is consistent with the international practice and in accordance with the Convention's objectives. As put by an English judge, "[w]ith a good man in the saddle, the unruly horse can be kept in control."[10] And, considering STJ's recent practice, we have every reason to believe that it is capable of doing so.

[9] "*In praise of Brazilian enforcement*", Global Arbitration Review - Alison Ross (Wednesday, 28 March 2012). Available at: http://www.newyorkconvention.org/news/in-praise-of-brazilian-enforcement

[10] Lord Denning MR in *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch. 591 at 606.


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The submission of new shareholders to the companies' By-laws' arbitration clause

Although the Brazilian Arbitration Act (Law No. 9.307/96) has been sponsoring an extremely respectful promotion of arbitration in Brazil since its enactment, this act does not contain a specific provision dealing with one of Brazilian's presently most discussed issues: the adoption of arbitration for the resolution of corporate matters.

Nevertheless, given the perfect balance between the arbitration features and the companies' ordinary needs to solve its conflicts internally and discreetly, the Law No. 10.303/01[3] expressly inserted in the Brazilian Corporation Act the possibility of solving conflicts between shareholders and the company, or between the controlling shareholders and the minority shareholders through arbitration by including an arbitration clause in the companies' By-laws[4].

Despite the legal provision, it must be noted that the effects of the arbitration clause provided in the By-laws over the company's shareholders is a sensitive subject on which the Brazilian doctrine and case law have not yet found common ground. This still alive uncertainty is the reason for the question to which most of Brazilian lawyers are acquainted to: "What are the effects of statutory arbitration clauses' over companies' shareholders?"

In simple terms, it can be summarized that the discussion arises from two legal segments of Brazilian law. The first of them is Constitutional, once it is understood that the acceptance to submit itself to an arbitration clause has to be expressly manifested[5]. Latter, and on the other hand, the Corporative law provides that the companies' decisions will be approved by a quorum and the decision majority approved will bind all the shareholders.[6]

Initially, it is fair to state that the arbitration clause inserted in a company's By-laws at the time of its foundation binds all of the founding members. It is evident and practicable that in the event of no common and unanimous agreement with the provisions of the By-laws - including the arbitral clause -, the dissenting partner would not even formalize its participation in that particular company.[7]

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3 The Law No. 10.303, of 31 October 2001, alters and adds provisions to Law No. 6.404/96 which governs Corporations and to Law No. 6.385/76 which governs the securities market and creates the Brazilian Securities Commission.

4 Law No. 6.404, of 15 December 1976, Article 109, § 3 amended by the Law No. 10.303/01: "The company's bylaws may provide that any disputes between the shareholders and the company, or between the controlling shareholders and the minority shareholders, may be resolved by arbitration under the terms specified therein."

5 Article 5th, item XXXV, of the 1988 Brazilian Federal Constitution provides that the law cannot prevent the courts from judging any injury or threat to rights.

6 Law No. 6.404, of 15 December 1976, Article 129: "The resolutions of the general meeting, subject to the exceptions provided by law, shall be taken by majority vote, not including blank votes."

7 This situation is easily elucidated by the scenario where the inclusion of the arbitration clause becomes a controversy in the company's foundation meeting. In that event, the corporate practice demonstrates that the founding members would postpone the decision making in regards to the arbitration clause for after of the constitution of the company.

In that sense, those who purchase the shares of a company with By-laws that provides an arbitration clause are also subject to its effects without any need of express declaration of consent. In fact, the mere acquisition of that particular company's shares demonstrates an entire acceptance and ratification of the By-laws' provisions by the acquirer.[8]

In effect, the opposite could not be admitted into the Brazilian legal system as the doctrine states that all shareholders are bound to the statutory clauses deliberated and approved according to the principle of the majority decision, regardless of their individual position. It is worth noting that is exactly the same as the understanding in regards to deliberations for the insertion of the arbitration clause in the company's By-laws in which a shareholder was absent, remained silent or voted against the arbitration agreement clause. [9]

However, it is important to mention that there is a different inclination within the Brazilian precedents and doctrine that understands that the shareholders who were silent or absent in the vote must subscribe the statutory provisions by signing an Adhesion Instrument[10] complying with the formalities established on the Brazilian Arbitration Act. [11]

This inclination reveals that neither the Brazilian precedents nor the doctrine are in complete consistency with the national legal order applicable to corporations and companies since the principle of the majority decision has not been appreciated in its role of responsibility for the company's interests and will[12] by not allowing any interference of a shareholder individual's vicissitudes.

In that sense, it is only logical that the deliberation to decide about the insertion of an arbitration clause be submitted to the corporate principle of majority decision since there is no exception legally provisioned, nor is it deliberation subject to approval by a quorum higher than absolute majority - requirement which would only be plausible if it had been expressly present in the text of the Law No. 10.303/01, along with the permission to elect arbitration in By-laws.

Consequently, it is compatible with the Brazilian legal system to bind new shareholders to the statutory arbitration clause inserted in the By-laws prior to their entry into the company regardless of their express consent. The clear fact is that the requirement of unanimous voting for the election of arbitration in companies' By-laws would detract the Brazilian legal corporative principles and, worse, subject the corporation's future to the deviations of a single shareholder.

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8 This was even the understanding held by the Federal Justice Counsel when approving the Outline 16 of the I Commercial Law Jorney proposed by the Brazilian lawyer and professor Mr. Francisco José Cahali: "*The purchaser of quotas or shares adheres to the Articles of Association or By-laws regarding the arbitration clause provided therein; so, the arbitral jurisdiction will bind the acquirers of shares or quotas regardless their express consent or specific declaration of will*".

9 Please see L. FLAKS, A Arbitragem na Reforma da Lei das S/A, *Revista de Direito Mercantil – Industrial, Econômico e Financeiro*, n. 131. São Paulo, Malheiros, 2003, pg. 103; MARTINS, Pedro A. Batista. A Arbitragem nas Sociedades de Responsabilidade Limitada. *Revista de Direito Mercantil – Industrial, Econômico e Financeiro*, n. 126. April-June, 2002, pg. 73; and VILELA, Marcelo Dias Gonçalves. *Arbitragem no Direito Societário*. Belo Horizonte: Mandamentos, 2004, pg. 192-193.

10 In that sense, please see CANTIDIANO, Luiz Leonardo. Reforma da Lei das S.A Comentada. Rio de Janeiro: Renovar, 2002, p. 120.

11 Law No. 9.307, of 23 September 1996, Article 4, § 2: "In adhesion contracts, the arbitration clause will have effect only if the participant take the initiative to institute arbitration or agree expressly to their institution, provided that written in the attached document or in bold, with the signature or seen especially to this clause." It must be noted, however, that this provision was inserted in light of a typical adhesion with parties' imbalance conditions as provided by the Brazilian Consumer Defence Code and it is essential to emphasize that it is not yet set in stone if an acquisition of company's shares can be legally classified as one.

12 Please see LOBO, Carlos Augusto da Silveira Lobo. A cláusula compromissória estatutária, in Revista de Arbitragem e Mediação published on Revista dos Tribunais online, vol. 22, p. 11, p. 4., M. BERTOLDI, Reforma da Lei das Sociedades Anônimas – Comentários à Lei No. 10.303, de 31.10.2001. 2nd ed. (coord.). São Paulo: *Revista dos Tribunais*, 2002, p. 81; MAKANT, Barbara. A Arbitrabilidade Subjetiva nas Sociedades Anônimas, *in* Revista dos Tribunais online. Revista de Arbitragem e Mediação, vol. 4, p. 82, p.2; and CARVALHOSA, Modesto; EIZIRIK, Nelson. A Nova Lei das S/A. São Paulo: Editora Saraiva, 2002, p.183. As Brazilian Courts' precendents, please see Interlocutory Appeal No. 9035710-89.2004.8.26.0000 (373.141-4/4-00), Reporting Judge Sérgio Gomes, ruled on 22 February 2005, State Court of São Paulo and Writ of Mandamus No. 0607775-77.2008.8.26.0053, 7th Court of Treasury of São Paulo, Judge Dr. Afonso de Barros Junior Faro, judged in 21.1.2009.


Mariana Ribeiro – Wambier & Arruda Alvim Wambier, Curitiba and
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Arbitration and the New Brazilian Code of Civil Procedure

The New Code of Civil Procedure ("NCPC") is expected to be approved by the Brazilian National Congress in early 2013. Its drafters believe that the NCPC will make the Brazilian legal system more efficient, by both narrowing the possibilities to appeal and extinguishing procedural steps that have been used as delaying tactics in litigation proceedings. Among the many substantial modifications, the NCPC directs special attention towards arbitration.

The current Code of Civil Procedure ("CPC") has been in force since 1973. At that time, methods of alternative dispute resolution were rather exceptional. This context has clearly evolved. Brazil enacted its Arbitration Act in 1996; and its constitutionality was confirmed by the Supreme Court in 2001. In addition, Brazil became a signatory of the New York Convention in 2002. The path to arbitration has been paved[1] and the NCPC is designed to strengthen this. The new guidance expressly provides for the parties' right to choose to submit a dispute to arbitration.[2]

The NCPC will also institute the arbitral letter (*carta arbitral*).[3] This will be the instrument used by an arbitral tribunal to request assistance from a national court. For instance, if a party does not comply with an interim measure, the tribunal will issue an arbitral letter requesting the national court to enforce the measure through its innate coercive power. The instrument is important for three reasons. First, it will formalise and establish a channel of communication between tribunals and the national courts. Second, it affirms the national court's duty to support and cooperate with arbitration proceedings. Third, the national court will be required to execute and enforce any request made by a tribunal in a valid arbitral letter, without reviewing the merits of the request. In addition, if parties have agreed on a confidential arbitration, the national court shall treat the arbitral letter with confidentiality as well.[4]

Another significant modification introduced by the NCPC puts an end to a long discussion regarding the dismissal of court proceedings subject to an arbitration agreement. According to the NCPC, the defendant shall object to the national court's jurisdiction by demonstrating the existence of either an arbitration clause[5] or a submission to arbitration.[6] This challenge will be required to be made in the first statement of defence, otherwise it may be implied that the arbitration agreement was revoked. The current CPC states that cases involving a submission to arbitration shall not be dismissed *ex officio* (by the judge's own initiative). Thus, at the moment, it is not clear if the same applies to an arbitration clause, or if the legislator intended to, in fact, grant a special treatment to this kind of agreement.

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[1] Brazilian nationals are ranked fifth in the list of parties using ICC arbitration. ICC International Court of Arbitration Bulletin, Vol. 22/No. 1, 2011.
[2] Art. 3 and art. 42 of the NCPC.
[3] Art. 206, IV of the NCPC.
[4] Art. 164, IV of the NCPC.
[5] Brazilian Arbitration Act. Art. 4. The arbitration clause is the agreement whereby contracting parties oblige themselves to settle through arbitration all disputes that may arise relating to the contract.
[6] Brazilian Arbitration Act. Art. 9. The submission to arbitration is the judicial or extrajudicial agreement through which parties submit an existing dispute to arbitration. (*Authors' note: the submission agreement requires additional requisites of form when compared to the arbitration clause*).

Moreover, the NCPC allows for the interlocutory appeal (*agravo de instrumento*)[7] against a court decision that rejects the allegation of an arbitration agreement. This is a noteworthy advance in the area, considering that it allows parties to immediately raise the issue before the higher courts, and challenge the national court's jurisdiction, instead of waiting until the conclusion of the proceedings to do it via an ordinary appeal.

The NCPC also addresses the recognition of foreign decisions. And this may be the most interesting innovation. According to the latest NCPC provisions, any foreign decision, both from courts or tribunals seated abroad, either interlocutory or final, can be recognized in Brazil. This will impact positively on the recognition of interim measures, emergency arbitrator's decisions, and partial or interim awards.[8] The particular provisions go further and allow the Superior Court of Justice ("STJ"),[9] in cases where haste is essential to guarantee the effectiveness of the decision, to take actions of enforcement prior to the conclusion of the recognition proceedings. To date, there has been only one case in which the STJ determined the attachment of shares before reaching a decision to recognise an arbitral award.[10] However, that has been granted for a case involving a final award, not a tribunal's order or interlocutory decision. Therefore, the NCPC opens a fresh range of procedural possibilities.

The arbitration provisions in the NCPC are welcome for businesses in Brazil and abroad who wish to use arbitration. In parallel, the Brazilian Senate has nominated on 22/11/2012 the commission in charge of reviewing the Brazilian Arbitration Act. As mentioned above, the particular statute dates from 1996 and, according to the Superior Court of Justice Minister Luis Felipe Salomão, a modern Act will reaffirm the importance of arbitration even further. The commission comprises prominent scholars and practitioners, including members of the Brazilian Arbitration Committee ("CBAr").[11] Judging by the efforts made by the CBAr to develop arbitration in Brazil, any reforms which may result from the commission's work promise to align the country with the most developed arbitration jurisdictions in the world.

[7] Art. 969, III of the NCPC.
[8] Art. 914, § 1º; and art. 915 of the NCPC.
[9] The Superior Court of Justice is the Brazilian national court which is competent for the recognition of foreign court judgments and foreign arbitral awards.
[10] Superior Court of Justice, SE no. 5692-US, *Newedge USA LLC v Manoel Fernando Garcia*.
[11] Ato do Presidente no. 36 de 2012.

CANADA

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Fair and Equitable Treatment under NAFTA

Article 1105 of the *North American Free Trade Agreement* ("NAFTA")[1] is one of the provisions relied upon most frequently by investors bringing claims under Chapter Eleven of the NAFTA. Entitled the "minimum standard of treatment" it reads, in relevant part, "(e)ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." In the most recent consideration of the standard, the tribunal in *Mobil Investments Canada Inc. & Murphy Oil Corporation v Canada*[2] ("*Mobil*") emphasized that the default basis for fair and equitable treatment is the minimum standard of treatment under customary international law. Though a NAFTA breach was found to exist under another provision, the tribunal rejected the allegation that there was a breach of the minimum standard of treatment provided for under article 1105. While the decision takes a fairly narrow view of the article 1105 obligation,[3] certain tribunal comments appear to affirm that legitimate expectations may be protected by article 1105 in some circumstances.

Mobil Investments Canada Inc. & Murphy Oil Corporation v Canada

In *Mobil*, the claimants were American investors in two large oil production projects off the east coast of the province of Newfoundland and Labrador, Canada. At the time the investment was made, the province had in place certain research and development expenditure requirements for companies looking to participate in offshore oil extraction. A regulatory body, the Canada-Newfoundland Offshore Petroleum Board (the "Board") oversaw compliance with these requirements. In accordance with the requirements initially in place, the oil production projects each submitted plans to the Board outlining their research and development expenditures.[4] In 2004, the Board adopted new guidelines for research and development expenditures (the "2004 Guidelines") compelling the claimants to spend significantly more on research and development than previously required.[5]

The claimants alleged that the 2004 Guidelines violated article 1105 of NAFTA in "failing to provide a stable regulatory framework for the conduct of petroleum development projects in the Newfoundland offshore area

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[1] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States,* 17 December 1992, Can TS 1994 No 2, 32 ILM 289 (entered into force 1 January 1994).

[2] *Mobil Investments Canada Inc. & Murphy Oil Corporation v Canada*, Decision on Liability and on Principles of Quantum (Public Version) (22 May 2012), ICSID Case No ARB(AF)/07/4.

[3] In this regard the tribunal recognized it was bound by the NAFTA Parties' 2001 FTC Note of Interpretation which set out that article 1105 requires treatment no greater than the customary international law minimum standard of treatment of aliens. *Ibid* at paras 110 and 135.

[4] *Ibid* at paras 34-93.

[5] *Ibid* at para 100.

and by frustrating the Claimants' legitimate expectations with regard to that regulatory framework."[6] In its Decision on Liability and on Principles of Quantum, the tribunal endorsed the following principles:

"(1) the minimum standard of treatment guaranteed by Article 1105 is that which is reflected in customary international law on the treatment of aliens;
(2) the fair and equitable treatment standard in customary international law will be infringed by conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety;
(3) in determining whether that standard has been violated it will be a relevant factor if the treatment is made against the background of
    (i) clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment, and
    (ii) were, by reference to an objective standard, reasonably relied on by the investor, and
    (iii) were subsequently repudiated by the NAFTA host State."[7]

The tribunal went on to note this standard does not mandate a stable legal or business environment. It was emphatic that article 1105 is not, on its own, akin to a stabilisation provision.[8] A public authority is able to change its regulatory environment "to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor." The tribunal stated:

> "Governments change, policies changes [*sic*] and rules change. These are facts of life with which investors and all legal and natural persons have to live with. What the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment."[9]

According to the tribunal, the legislative framework was clear in that the research and development obligations at the time the investment was made could change,[10] and no individual on the Board or otherwise made any promise or representation that this scheme would not change so as to ground a legitimate expectation of permanence.[11]

The tribunal also considered whether a contractual agreement, in the form of the claimants' previous research and development agreements with the Board, could contain language amounting to an undertaking that there would not be any material changes in the scheme. While such a circumstance could theoretically give rise to a "stabilisation" right, the tribunal found that the agreements in this case did not have this effect. In order to amount to a promise on which to ground a breach of article 1105, the agreement would have to indicate the Board relinquished its ability to act as permitted under legislation.[12] This was not the case in the agreements considered in *Mobil*. The tribunal's remark in this regard reflects comments in *Cargill v United Mexican States*, cited in *Mobil*, that article 1105 may be able to protect legitimate expectations that arise from a contract or quasi-contract.[13]

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[6] *Ibid* at para 111.
[7] *Ibid* at para 152.
[8] *Ibid* at para 156.
[9] *Ibid* at para 153.
[10] *Ibid* at paras 159-160.
[11] *Ibid* at para 163.
[12] *Ibid* at para 165.
[13] *Ibid* at para 149 citing *Cargill, Incorporated v United Mexican States*, Award (18 September 2009), ICSID Case No ARB(AF)/05/2, at para 290.

Future Issues for Foreign Investors under NAFTA

The decision in *Mobil* is significant for two reasons. First, the tribunal confirms a narrow view of article 1105: the provision only protects against conduct reflected in customary international law on the treatment of aliens. Second, while the protections offered by article 1105 as set out in the tribunal's principles for the standard do not include legitimate expectations *per se*, a violation of such expectations may be a relevant factor in determining whether article 1105 was breached. Presumably this is because a legitimate expectation, reasonably relied on by an investor, that is repudiated by a state could amount to the "grossly unfair" conduct contemplated by article 1105.[14] There was no explanation provided on what might be required, in addition to a breach of a legitimate expectation, to ground a violation of article 1105. The precise role of "legitimate expectations" under article 1105 remains open for definition in future cases.

Given the increase in foreign investor interest in Canadian energy and natural resource industries, and Canada's continued pursuit of international investment agreements, there will likely be more decisions on fair and equitable treatment under NAFTA in the near future. These decisions should clarify the impacts and the issues left open in *Mobil*.

[14] This was the reasoning followed by the tribunal in *Waste Management, Inc. v United Mexican States* (Number 2), Award (30 April 2004), ICSID Case No. ARB(AF)/00/3, *at* para 98.

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The Model Law upheld as a complete code for enforcement of foreign arbitral awards

Is the 1985 UNCITRAL Model Law on International Commercial Arbitration a complete code for the enforcement of foreign arbitral awards? Are the Model Law's requirements for certified copies of the arbitration agreement and arbitration award only directory rather than mandatory? In ACTIV Financial Systems, Inc. v Orbixa Management Services, Inc.,[1] the Ontario Superior Court of Justice construed the International Commercial Arbitration Act[2] of Ontario, which implements the Model Law, and answered both of these questions in the affirmative. The Court further demonstrated an approach favourable to the international commercial arbitration regime by converting the application, which was originally brought as an enforcement of a foreign judgment under common law, into an application under the ICAA, noting that the provisions of article 35(2) of the Model Law are directory and not mandatory.

Background to the Application

The Applicant, ACTIV Financial Systems, Inc., obtained an arbitral award in a software licensing dispute against the Respondent, Orbixa Managements Services, Inc., in a New York-seated arbitration under the American Arbitration Association's Commercial Arbitration Rules. The award was confirmed and entered as a judgment against Orbixa in New York. ACTIV then applied to enforce the New York state judgment (rather than the underlying arbitral award) in Ontario under the common law foreign judgment enforcement regime.

Court's Decision

The Court held that the enforcement of foreign arbitral awards is exclusively governed by the ICAA, but found that it was not too late to convert the application under the common law to an application under the statute.

The Court emphasized that the enforcement of foreign arbitral awards under the ICAA is mandatory, subject to the grounds of refusal set out in article 36 and noted that confirmation of an award in one jurisdiction is no barrier to enforcement of the award under the ICAA in another. The Court found that the Model Law is the exclusive means to enforce a foreign arbitral award, regardless of whether it has been converted into a court judgment in another jurisdiction.

The Court then went on to consider whether the common law application could be converted into an application for enforcement under the ICAA. Article 35(1) requires the application to be made in writing, which it was. But Article 35(2) requires (a) the duly authenticated original award or certified copy, as well as (b) the original arbitration agreement or a duly certified copy; and (c) a translation of the award if it is not in English or French. There was no certified copy of the award or the arbitration agreement in this case, but the Court did not view

[1] 2011 ONSC 7286.

[2] RSO 1990, c 19 ("ICAA"); the Model Law is similarly incorporated into the provincial statutes of Canada's other provinces.

these missing items as fatal to the application. The provisions under Article 35(2) were interpreted to be directional, but not mandatory, and if necessary an adjournment was possible to obtain the missing materials. In this case, since there was no dispute over the existence of the agreement to arbitrate, nor over the content of the agreement or the content of the arbitrator's award, it was not necessary to adjourn, the application was converted, and the award was enforced.

Finally, the Court held that if the application could not have been converted into an application for enforcement under the Model Law, it would have been dismissed because bringing a common law application is not the proper procedure for enforcing a foreign arbitral award. The Court noted that the ICAA was designed to assist and encourage the mechanism of international commercial arbitration with relative ease and with confidence in the enforcement procedure. In conclusion, the Court stated that the Model Law recognizes that having two different means of enforcement would introduce unease and a lack of confidence in the enforcement procedure under the Model Law and possibly result in inconsistency in the enforcement of arbitral awards. There is no need for two enforcement mechanisms or for anything more than the Model Law offers.

CHILE

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Enforcement in Chile of International Arbitration Awards Vacated in the Seat of the Arbitration: Right Result, Wrong Reasons

I. Summary

In its decision of September 8, 2011, in the case *EDFI International S.A. v. ENDESA International S.A. and YPF S.A.*, 4390-2010, the Supreme Court of Chile (the "Supreme Court") held that an award set aside in the seat of the arbitration (arbitral *situs*) is not entitled to recognition and enforcement in Chile, following the trend of the vast majority of countries party to the 1958 New York Convention.[2]

In October 2007, an ICC tribunal rendered a decision finding for EDFI in the amount of $40 million and for YPF in the amount of $11,066,150. Interestingly enough, both parties to the arbitration sought to have the award set aside by the Court of Appeals of Buenos Aires (arbitral *situs*), and that court declared the award to be null. Notwithstanding this decision, EDFI then sought for the recognition and enforcement of the award before the United States District Court for the District of Delaware, the Tribunal de Grande Instance of Paris, and the Supreme Court of Chile.

II. The Chilean System of enforcement of international awards

The Supreme Court explained in *EDFI: "the regime adopted by Chilean law is one of 'relative recognition.'" Id.* at 10. This means that the recognition of the effectiveness of an international award in Chile requires a prior declaration that it fulfills the requirements of the *lex fori.* This recognition proceeding is known as "exequatur".

As for the law applicable, Chile is a signatory of the New York Convention. Moreover, in 2004 Chile enacted the law 19.971 of International Commercial Arbitration, adopting the UNCITRAL Model Law on International Commercial Arbitration. However, in practice, said norms interact with outdated regulations contained in the Code of Civil Procedure (1903), which results in unwanted ambiguity.[3]

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[2] In the United States *see TermoRio S.A. ESPE v. ELECTANTRA SP*, 487 F3d 928 (DC Cir 2007); *Baker Marine (Nig.) v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir.1999). Conversely, in France the Cour de Casation has held "Lastly, the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy", *Hilmarton Ltd. v. OTV*, Tribunal de Grande Instance, Nanterre, 22 September 1993, in *Albert Jan van den Berg*, Yearbook Commercial Arbitration 1995 - Volume XX, Volume XX (Kluwer, 1995) pp. 194 – 197.

[3] An apparent case of the said ambiguity is found in the "double exequatur" requirement: Whereas "the fact that no double exequatur is needed under the [New York] Convention is universally recognized by courts and commentators" *ICCA's Guide to the Interpretation of the 1958 New York Convention*, at 101; article 246 of the Code of Civil Procedure sets forth that "…the award authenticity and effectiveness shall be proved by its approval by a superior court of the seat of the arbitration." The inconsistency is evident.

III. Discussion

In the present case, the Supreme Court ignored the permissive nature of the rule contained in Article V (1)(e) of the New York Convention (as well as in Article 36 of the International Arbitration Law), when setting forth that recognition and enforcement of the award *may* be refused, as opposed to *shall* be refused, recognizing, in consequence, the discretionary power of the courts on the matter.

Indeed, the Supreme Court simply quoted the mentioned provisions to state "Having been proved the Award being null, it should be considered as fulfilled, in accordance to the examined norms, specific ground to deny the legal effect and enforceability of the Award within our country, since it does not fulfill the requirement of effectiveness established in Article 246 of the Code of Civil Procedure."

Analyzing this holding one could ask: was the decision of the Court grounded on the Convention, on the International Arbitration Law or, simply, on the Code of Civil Procedure? What would happen then in the case of an *ad hoc* arbitration? Is the Court requesting a "double exequatur"? What if none of the parties had sought an annulment before the Argentinean court? These questions draw attention to the undesirable effects of the mixture of two enforcement regimes that are not entirely compatible.

IV. Conclusions

The trend in Chilean courts is to recognize and enforce arbitration agreements and international awards, confirming Chile's long-standing tradition of arbitration. The real question is the validity of the rationale put forward by the courts for pursuing this approach. The fact that the courts may have reached the right outcomes in the cases before it does not excuse their lack of clear and coherent reasoning behind their ultimate decisions.

In *EDFI*, the Supreme Court failed to clarify key issues such as (i) the difference between *may* and *shall*, in connection with its discretion to enforce an award vacated in the arbitral *situs*; (ii) the mixture of two enforcement regimes that respond to different goals and necessities reflecting the different periods of time in which each was established; and (iii) the consideration of parochial issues such as the rules of domicile when facing exequatur proceedings.

Reaching a stage of consolidation on this matter will require further exposure of Chilean courts and practitioners to international arbitration practice. Nevertheless, the results reached by the Supreme Court on international arbitration matters so far indicate that Chile is at least moving in the right direction. This is, doubtless, a promising start.

COSTA RICA

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Costa Rica in **International Arbitration: A New 'Singapore' Rising in Latin America?**

All eyes are on Latin America when it comes to the development of the next major international arbitration centre. The rapid development in the continent has created significant arbitration work in the last decades. Up to now there is no clearly dominating institutionalized solution to international arbitration disputes that is located in Latin America; Costa Rica could be the answer.

Last year Costa Rica passed the International Commercial Arbitration Act, modeled on the UNCITRAL Model Law, the gold standard for modern arbitration worldwide. This is a huge step for international arbitration in Costa Rica since this law puts the old 7727 law out of effect for international arbitrations. The new law differentiates between domestic and international arbitrations, and incorporates many of the practices characteristic of modern arbitration. The legal community in Costa Rica has shown ample acceptance of arbitration as a method for dispute resolution. Prior to and after the passing of the Arbitration Act, the first and second chambers of the Supreme Court of Costa Rica have shown support of international arbitration that is evidenced by the small percentage of awards nullified in court.

In addition to the new act, there are many other traits that make Costa Rica an attractive seat for international arbitration. A quick look at the country highlights these key characteristics:

Neutrality – in the likeness of Singapore, Costa Rica is a completely neutral country. Costa Rica's government has been stable and peaceful since its foundation. Costa Rica is detached from the struggles that plague the rest of the continent; whereas other countries such as Venezuela, Colombia, and Chile have recurrently suffered through political instability and military conflicts. Indeed, just like Singapore, Costa Rica doesn't need to sell itself as a neutral venue because it is transparently neutral.

Location – Costa Rica is situated right in the middle of the continent making it an ideal middle point for the resolution of disputes between North American parties and South American parties. In international arbitration location often comes down to the leverage that one party has over the other, and Costa Rica possesses a strategic location in the middle of the continent that can satisfy the 'meet me halfway' mentality of highly contentious arbitrations.

Government & Law – the Costa Rican government has shown full support of arbitration and other forms of ADR in its three branches of government. Costa Rica is a signatory to the New York, Panama, and ICSID conventions. Costa Rica has also developed other laws that support arbitration such as the Alternative Resolution of Conflicts and Promotion of Social Peace (RAC), which is the predecessor to the new Arbitration Act. The right to

arbitration and ADR is imbued in the Costa Rican Constitution Article 43, and the leaders of the country have repeatedly adjusted policies towards enforcement of arbitral awards. The Supreme Court of Costa Rica has been equally pro arbitration, specially the First and Second Chambers of the court. Indeed, the new Arbitration Act is proof of the commitment that the various parts of the Costa Rican government have towards making Costa Rica a competitive arbitration seat.

Infrastructure & Culture – Costa Rica has been called for decades the Switzerland of the Americas, and it is known to be one of the most hospitable countries to foreigners in the continent. The Costa Rican people are among the most educated in Latin America, and a very large population is fluent in English. The country currently possesses notable institutions that administer arbitrations including the Costa Rican Chamber of Commerce (CCA) and AmCham. Last, Costa Rica is simply a very nice country to visit, a highly developed tourism industry can serve as leisure after the conclusion of a contentiously debated arbitration hearing.

Costa Rica offers many advantages over other neighboring countries for the development of a major international arbitration centre in Latin America. Characteristics such as neutrality and location place it on a similar stand as the successful Singapore in the Asian market. The future of Costa Rica as a popular seat for arbitration is not yet certain, but it is definitely heading in the right direction.

EGYPT

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Immunity of International Arbitral Institutions under Egyptian Law

The Cairo Court of Appeal upholds the immunity of arbitral institutions in an unexpected decision

On 6 June 2012, the Cairo Court of Appeal held that the Cairo Regional Centre for International Commercial Arbitration ("CRCICA") is immune from civil claims brought by all participants in the arbitral process.[1] Though unexpected, the decision is welcome and brings Egyptian jurisprudence in line with that of the major common law jurisdictions.

The liability of arbitral institutions

In France, it is well-established that arbitral institutions are not immune from suit on the basis that they do not perform a judicial function. The French Courts have characterised the relationship between the parties' arbitral institutions as contractual, and that breach of the institutional rules may result in the breaching party being held liable.[2] The Courts have also stated that clauses excluding the liability of institutions are void.[3]

Conversely, the United States Federal Courts[4] have extended judicial immunity[5] to arbitral institutions and the 1996 Arbitration Act adopts the same position.[6] Immunity of arbitrators[7] is applied by analogy with judges and extended to arbitral institutions based on their role in the discharge of the arbitrators' functions.

The reasoning of the Cairo Court of Appeal

The Court of Appeal held CRCICA to be immune because of its status as a public international law entity established by an agreement between the Egyptian Government and the Asian-African Legal Consultative Organization. The Court reasoned that as such, CRCICA is an international legal entity enjoying all the

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[1] Cairo Court of Appeal, Section 7 Commercial, Challenge No. 32 of the judicial year 128, Session of 6 June 2012.

[2] *Cekobanka*, TGI Paris, 8 October 1986, (1987) _*Revue de l'arbitrage*_367; Raffineries d'Homs, TGI Paris 28 March1984, (1985)_*Revue de*
[2] *Cekobanka*, TGI Paris, 8 October 1986, (1987) _*Revue de l'arbitrage*_367; Raffineries d'Homs, TGI Paris 28 March1984, (1985)_*Revue de l'arbitrage*_141; M. Boisséson, "la constitution du tribunal arbitral dans l'arbitrage institutionnel" (1990) _*Revue de l'arbitrage*_337; Ph. Fouchard "Les institutions permanentes d'arbitrage devant le juge étatique" (1987) _*Revue de l'arbitrage*_225.

[3] CA Paris 22 January 2009, (2010) _*Revue de l'arbitrage*_321, note of Ch. Jarrosson,

[4] *Austin Municipal Secur., Inc. v National Asso. of Sec. Dealers* 757 F.2d 676, 1985 U.S. App. LEXIS 28866 (United states court of appeals 5th cir. 1985) ; *Corey v. New York Stock Exchange* 691 F.2d 1205, 1982 U.S. App. LEXIS 24370 (United states court of appeals 6th Cir. 1982); *Hawkins v. National Association of Securities Dealers Inc* 149 F.3d 330, 1998 U.S. App. LEXIS 17610 (United states court of appeals 5th cir. 1998).

[5] Judicial immunity in this context, is the immunity from civil liability, as defined in *Hawkins v National Association of Securities Dealers Inc.* 149 F.3d 330, 1998 U.S. App. LEXIS 17610 (United states court of appeals 5th cir. 1998) "The NASD enjoys arbitral immunity from civil liability for the acts of its arbitrators in the course of conducting contractually agreed-upon arbitration proceedings"

[6] s.74 Arbitration Act 1996, http://www.legislation.gov.uk/ukpga/1996/23/section/74

[7] Born, *International Commercial Arbitration, op. cit.*, 2009, p.1646 ; Alan Redfern, J. Martin Hunter & al., *Redfern and Hunter on International Arbitration*, Oxford University Press, 2009, p. 328.

privileges and immunities granted to such persons, including immunity from suit before local courts for acts done in the discharge of its functions.

The judgment raises a number of important questions including the scope and effect of international legal personality under Egyptian law and, in particular, whether the privileges and immunities granted to international legal persons might vary depending on their objectives and activities. Another key question left unanswered by the court is the law under which the legal personality of arbitral institutions should be determined.

ENGLAND

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Challenging an award based upon a conciliation or mediation clause

In *Wah (Aka Alan Tang) and another v Grant Thornton International Ltd and others [2012] EWHC 3198 (Ch)* (http://www.bailii.org/ew/cases/EWHC/Ch/2012/3198.html), the High Court dismissed an application of challenge to an arbitral award brought under section 67 of the Arbitration Act 1996 (http://www.legislation.gov.uk/ukpga/1996/23/contents), having found that the arbitral tribunal did have substantive jurisdiction to hear the claim brought by the claimants, following their exclusion from the defendants' network of accountancy and audit firms known worldwide as Grant Thornton.

At the centre of the claimant's application was an alternative dispute resolution clause contained in an agreement setting out the terms of membership of the international group of accountancy firms. The clause referred to the various levels of escalation of a problem in an attempt to resolve it prior to taking any further action and outlined pre-arbitration conciliation steps, which the claimants argued were clearly defined and, thus, were conditions precedent before an arbitral reference could be made. As these steps were not completed, it was argued that the arbitral tribunal could not have had jurisdiction in accordance with section 67 of the Arbitration Act 1996. The other side of the argument was that although certain steps were listed, they were not sufficiently precise or certain to be contractually binding; further or alternatively, this indicated that the parties did not intend and did not agree that if the conciliation failed, they should not be entitled to refer the dispute to arbitration.

The court dismissed the claimants' application. Having regard to a well established principle of English law that agreements to agree or negotiate in good faith are not enforceable due to the practical and legal impossibility of monitoring and enforcing the process[1], the court agreed with the arbitral tribunal's reference to the requirements for such a clause to be a condition precedent set out in *Holloway and Another v Chancery Mead Ltd [2007] EWHC 2495 (TCC)* (http://www.bailii.org/ew/cases/EWHC/TCC/2007/2495.html). The court further made reference to *Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others [2012] EWCA Civ 638* (http://www.bailii.org/ew/cases/EWCA/Civ/2012/638.html) and *Cable & Wireless Plc v IBM [2002] EWHC 2059* (http://www.bailii.org/ew/cases/EWHC/Comm/2002/2059.html) and concluded that, "in the context of a negative stipulation preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening is objectively ascertainable to enable the court to determine whether it happened or not"[2]. As to positive obligations, the court stated that the proper task of the court is "to assess whether specific provisions are singly and together sufficiently certain to be given legal effect"[3].

In particular, the court found that a clause listing the various levels in resolution of a problem, including review by the Chief Executive and escalation to a three-person Panel, "was too equivocal in terms of the

[1] Para 57
[2] Para 61
[3] Para 67

process and too nebulous in terms of the content of the parties' respective obligations to be given any legal effect as an enforceable condition precedent"[4]. Moreover, it was unrealistic to suppose that the officers or a panel could indefinitely postpone the right to arbitration, or indeed no arbitration can be commenced if no such panel was formed at all. The court did, however, note that if a provision contains, albeit in one part, a legally enforceable contract the court "may imply criteria or supply machinery sufficient to enable the court to determine both what process is to be followed and when and how, without the necessity for further agreement"[5].

Conclusion

This case is another example of the courts trying to give effect to what the parties agreed but they have found it difficult to fit such an agreement into an objective and legally controllable substance required under the present principles of English law. On a practical note, certainty is paramount and, as the court emphasised, clauses dealing with conciliation or mediation of disputes prior to arbitration or court proceedings, should set out in unequivocal detail the minimum required of the parties and how the process will be exhausted or properly terminable without breach.

[4] Para 72
[5] Para 58

FRANCE

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The participation of an arbitrator to a conference to which a party to the arbitration also participates does not have to be disclosed

The independence and impartiality of the arbitrator has been a central issue in the recent development of the French international arbitration substantive law. Cases brought before the French courts led the latter to impose a heavy constraint on the arbitrator who must reveal "all circumstances that are of such nature as to affect his or her judgment and to cause reasonable doubt in the minds of the parties as to his or her impartiality and independence."

The past years have shown a tendency by the French courts to impose on arbitrators a more and more stringent duty of disclosure. The courts have indeed held that the arbitrator's obligation of disclosure was not limited to his or her relationship with the parties but also covered his or her relationship with the parties' counsel[1] and we mentioned in last year's newsletter that a facebook relationship might, under certain circumstances, have to be disclosed (see Romain Dupeyré, "Arbitrators, watch your facebook friends"(2011)_*YIAG Winter E Newsletter*_16-17). Earlier in 2012, the French Supreme Court also considered that the duty of disclosure of the arbitrator went beyond the arbitrator's relationship with the parties and their counsel but also concerned the relationship with third parties having a close connection with the arbitration (such as competitors of one of the parties), provided that the links with the arbitration were relevant enough to be revealed by the arbitrator[2].

CSF[3] seems to put a limit to the traditional position of the French courts, since the court held that an arbitrator has the right not to reveal his or her participation to a conference organised by a third party and to which a company who appointed him as its arbitrator also participated as a speaker.

In the *CSF* case, CSF (a company belonging to the Carrefour group) and EDJUVE commenced arbitration and referred to the president of the Paris commercial court who appointed the arbitrator on EDJUVE's proposal. The parties reached a settlement, thus putting an end to the arbitration proceeding. After the settlement, CSF contended that the arbitrator appointed by the president of the Paris commercial court had not fulfilled his duty of disclosure on the grounds that he attended a conference to which EDJUVE also participated. CSF thus relied on article 1382 of the French civil code to obtain damages from the arbitrator. In its submissions, CSF underlined that the conference at stake was organised by a third party whose enmity towards the Carrefour group was widely known and that the president and the counsel of the EDJUVE participated as speakers in the conference, where they shared their difficulties *vis-à-vis* the Carrefour group and referred to their pending proceedings against Carrefour, so that the participation of the arbitrator in the conference could create doubts as to his independence and impartiality. The French Supreme Court relied on three

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1 Paris Court of appeal decision of March 10th, 2011, No 09/28537, *Tecso*

2 Supreme Court decision of February 1st, 2012, No 11-11.084, *EDF* ; J. Beguin, « Rappel de deux exigences : impartialité et équité », *JCP G*, n°8, February 20th 2012, 201 ; L. Weiller, « L'irrésistible ascension de l'obligation de révélation », *Procédures*, n° 3, March 2012, comm. 73

3 Supreme Court decision of July 4th, 2012, No 11-19.624, *CSF*, *D.*2011.2425, note Le Bars ; L. Weiller, « Domaine de l'obligation de révélation: rejet de la prétendue faute de l'arbitre », *Procédures*, n° 10, October 2012, comm. 284

objective elements that could characterise the independence and impartiality of the arbitrator. First, the arbitrator attended the conference as a lawyer without participating as a speaker. The French Supreme Court thus inferred that the participation was only passive. Second, the conference was organised by a food industry professional union so that the conference was a professional or corporate event. Finally, the presence of the arbitrator was only occasional. The arbitrator had not repeatedly attended conferences to which EDJUVE also participated.

According to the Supreme Court, those three elements were not sufficient to create doubts in the minds of the parties as to the independence and impartiality of the arbitrator. As a consequence, the French Supreme Court held that the occasional presence of an arbitrator attending as a lawyer specialised in that area, without participating as a speaker, in a conference on issues and development of the franchise organised by a food industry professional union and to which a company who appointed the arbitrator also participated is not of such nature as to cause reasonable doubt as to his impartiality and independence, so that the arbitrator committed no fault by not disclosing it to the parties.

The *CSF* case can hardly be seen as a reversal of the recent case law holding that the arbitrator's connections with third parties closely linked to the arbitration must also be revealed. Given the circumstances of *CSF*, it should only be interpreted as setting safeguard to the extensive conception of the duty of disclosure of the arbitrator. *CSF* has set objective elements to determine whether or not the participation of an arbitrator in a conference, organised by one of the parties or a third party linked to one of the parties should be revealed. As a consequence, one can assume that, should the participation of the arbitrator be active, should his or her participation in a conference be repeated over time, or should the conference not be of a corporate or professional nature, such participation might have to be disclosed to the parties.

GREECE

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Recognition and enforcement of foreign arbitral awards in Greece: An introduction

According to articles 903, 905 and 906 of the Greek Code of Civil Procedure (*Kodikas Politikis Dikonomias*, the "CCP"), a creditor may enforce a foreign arbitral award in Greece only if the award has first been recognized by the court of first instance (*Monomeles Protodikeio*) at the place of the debtor's seat or domicile. In the event that the debtor is not seated or domiciled in Greece, the award may be recognized by the Athens Court of First Instance. In any case, the regulations set forth by International Conventions prevail over the CCP. Note that Greece is, for instance, a member state of the 1958 New York Convention (the "NYC" implemented by Law Decree 4220/1961).

The application for recognition must be filed in accordance with the Greek jurisdiction rules. In principle, it is the creditor who should serve the application upon the debtor who may consequently decide to participate in the recognition hearing or may refrain from doing so. In any event, even if the application for recognition has not been served upon the debtor, the court may nevertheless decide to invite the debtor to the hearing of the application.

According to article IV of the NYC (see http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) as construed by Greek case law and practice, the party applying for recognition and enforcement of a foreign arbitral award shall submit the following documents along with its application:

(a) The original document or a certified copy of the document containing the arbitration agreement; Note that in accordance with Greek case law and practice, it is sufficient to submit the arbitral tribunal's official records of the case in the event that the parties have not concluded a written arbitration agreement but have nonetheless participated in the arbitration proceedings without objecting to the arbitral tribunal's jurisdiction.

(b) The original arbitral award or a certified copy thereof officially translated by the translation service of the Hellenic Ministry of Foreign Affairs.

Upon receipt of those documents, Greek courts will abstain from reviewing the award on the merits, including the arbitral tribunal's legal reasoning.

Recognition and enforcement of a foreign arbitral awards may be refused by Greek courts upon the debtor's request in accordance with article V of the NYC.

In Greece, the time frame for judicial recognition of a foreign arbitral award varies from 5 to 12 months. In practice, the hearing of an application for recognition may be postponed once or twice. However, the creditor may safeguard its interests during this time by filing an application for an interim measures against the debtor. The remedies that may be sought by such an interim measure vary and the Greek courts are free

to shape them as they deem appropriate in their absolute discretion. The most popular interim measures include freezing injunctions, prohibitory injunctions and injunctions for interim payments.

A Greek court's judgment that recognizes a foreign arbitral award is immediately enforceable. The debtor may consider filing an appeal against this judgment, provided, however, that the debtor has participated in the first instance hearing of the application for recognition. If the debtor has not participated in this hearing although it had been summoned, the judgment of the first instance court is final and no appeal can be filed. The appeal has to be filed within 30 calendar days from the date on which the judgment has been served upon the debtor. In case an appeal is filed, the enforcement of the judgment has to be postponed until the final judgment of the court of appeals is available.

In the event that no appeal is filed, the creditor may initiate enforcement proceedings. At this stage, a certified copy of the arbitration agreement and of the arbitral award along with official translations into Greek have to be resubmitted to the Secretary of the court of first instance.

The judicial recognition and enforcement of a foreign arbitral awards in Greece does not involve significant costs and expenses.

HUNGARY

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Hungary's new arbitration law restricting recourse to arbitration

2012 has been a decisive year for arbitration in Hungary. The Parliament has passed two acts restricting recourse to arbitration. These recent developments have raised concerns in the arbitration community as to whether they will adversely affect the investment climate in Hungary. This article highlights the main changes in relation to the new legislative framework.

Arbitration in Hungary is governed by the 1994 Arbitration Act (Law no. 71/1994, see http://www.mkik.hu/index.php?id=1409 for the original Hungarian version). According to section 1, it applies to institutional and *ad hoc* arbitration whenever the seat of the arbitral tribunal is in Hungary. The 1994 Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration as adopted in 1985. Although the 1994 Arbitration Act has been amended several times, it has not incorporated the 2006 UNCITRAL Model Law amendments. It is in this context that the new law on arbitration (Law no. 65/2012 (see http://www.complex.hu/kzldat/t1200065.htm/t1200065.htm for the original Hungarian version) has entered into force on June 13, 2012 and has amended the 1994 Act.

The newly adopted law has modified the general provisions of the 1994 Arbitration Act by adding two provisions to section 2. First, the amended statute prohibits recourse to *ad hoc* arbitration when the dispute arises out of a contract in relation to rights in rem or tenancies in immovable properties located in Hungary, and when the registered seats of the parties are in Hungary and the contract is governed by Hungarian law. In this specific case, parties are only allowed to refer their dispute to institutional arbitration and the seat of the arbitration has to be located in Hungary. The provision further states that the language of the arbitral proceedings shall be Hungarian.

The second restriction on arbitration stems from section 2 of the new law on arbitration. It expressly refers to the Law on National Property (Law. no. 196/2011), which entered into force on January 1, 2012. Indeed, section 17(3) of the Law on National Property prohibits recourse to arbitration in relation to assets located in Hungary and qualified as national property within the meaning of the statute. These disputes can only be settled by state courts and are exclusively governed by Hungarian law. As the notion of national property is broadly defined by the statute, it is advisable to examine whether agreements that are to be concluded with the Hungarian state, with a Hungarian state entity or a Hungarian state-controlled company may fall within the scope of this provision. Considering that most of the assets or the property owned by the state or a state entity may be qualified as national property, it might also be argued that section 2 of the new law on arbitration and section 17(3) of the Law on National Property would prohibit arbitrating investment disputes.

It is regrettable that Hungary's new law on arbitration marks the beginning of a legislative resistance to arbitration. By prohibiting *ad hoc* arbitration or institutional arbitration when the seat is outside Hungary, the new law imposes unnecessary restrictions on party autonomy. Moreover these restrictions and

prohibitions may encourage parties to resist enforcement of arbitral awards made against Hungary or a Hungarian party before Hungarian courts.

According to section 4 of the Law no. 65/2012, the amended statute will be applicable to proceedings commenced on or after June 13, 2012. Since the beginning of the year and before the entry into force of the new law on June 13, 2012, three new requests for arbitration against Hungary have been submitted to the ICSID Secretariat by foreign investors. They have probably drawn all conclusions from Hungary's new Arbitration Act.

INDIA

Vrushali Babhulkar – MDP and Partners, Mumbai

SERVICE OF AN AWARD TO AN ADVOCATE IS NOT A COMPLETE SERVICE [1]

Previous practice of Arbitration in India, whether domestic or international, has been given a new-fangled approach by the apex court recently *vide* its simple and realistic interpretation of the laws prevailing in India in general and the Arbitration and Conciliation Act, 1996 ("the said Act") in particular. A question was put before the Supreme Court of India in the case of Benarsi Krishna Committee and Ors v Karmyogi Shelters private Limited on 21st September, 2012,[2] asking for enlightenment upon the duties of the arbitrator, that whether service of an arbitral award on the agent of a party amounts to service on the party itself and the court has given a straightforward answer to it guiding through an uncomplicated way.

The scenario, in brief, with respect to the aforesaid issue before the Court was that certain disputes arose between two parties over the working of an agreement and the same was referred to arbitration. After mulling over the materials brought on record, the learned arbitrator passed an award holding that the respondent had committed a breach of the terms of the agreement and therefore was liable to pay to the original claimant a certain amount. Under sub-section 5 of Section 31 of the said Act, the arbitrator is duty bound to serve a signed copy of the award to the "Parties*".* In the case for consideration the award was served upon the advocate for the party on 13th May, 2004 and no application for setting aside the award was filed within the statutory period of three months from the date of receipt of the award. However on 3rd February, 2005, the respondent filed an application to set aside the award after a delay of more than 9 months from the date of receipt of the award by the advocate for the respondent, stating that the award was never served upon the respondent. After exhausting all the legal remedies, the respondents moved the apex court to wipe out the grime over the exact construal of "Parties" in sub-section 5 of Section 31 of the said Act.

The apparent contention of the respondents was that on the strength of the "Vakalatnama"[3] executed by the party in favour of his advocate/agent, service of notice effected on the advocate holding such Vakalatnama amounted to service of the notice on the party himself[4]. Countering the contention of the respondents, the original claimant to the arbitration put forth that if an action is required to be taken in a particular manner, it had to be taken in that manner only or not at all[5]. Taking a step ahead, the claimants also argued that in view of sub-section (h) of Section 2 of the said Act, "party" means a party to the arbitration agreement i.e. a person directly connected with and involved in the proceedings and who is in control of the proceedings before the

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[2] In The Supreme Court Of India Civil Appellate Jurisdiction Special Leave Petition (Civil) No. 23860 of 2010

[3] A document execute by a party to any legal proceeding appointing an Advocate and empowering the same to file pleadings on its behalf.

[4] Pushpa Devi Bhagat v Rajinder Singh & Ors. [2006] 5 SCC 566

[5] National Projects Constructions Corporation Limited v Bundela Bandhu Constgructions Company [AIR 2007 Delhi 202]; Union of India v Tecco Trechy Engineers & Contractors [2005] 4 SCC 239; Nazir Ahmed v King Emperor [AIR 1936 PC 253]

arbitrator, as he would be the best person to understand and appreciate the arbitral award and to take a decision as to whether an application under Section 34 was required to be moved.

Inclining towards the respondents, the Supreme Court was pleased to elucidate that it is one thing for an advocate to act and plead on behalf of a party in a proceeding and it is another for an advocate to act as the party himself. The Definition of "Party" provided in the said Act does nowhere include its agent. Therefore service upon the party would mean delivery of a signed copy of the award on the party himself and not on his advocate. Further it was held that a signed copy of the award had not been delivered to the party itself and the party obtained the same on 15th December, 2004, and the application for setting aside the award was filed on 3rd February, 2005, the said application was filed within the stipulated period of three months as contemplated under Section 34(3) of the said Act. Accordingly, when a copy of the signed award is not delivered to the party himself, it would not amount to compliance with the provisions of Section 31(5) of the Act and ultimately the award was set aside.

This eloquent judgment has definitely shed light on the interpretation of "Party" for the purpose of sub-section 5 of Section 31 of the said Act. However doubts remain with respect to the extent of the duty cast upon the arbitrator to serve the award on Parties. Whether a single attempt to serve an award upon the parties is enough to prove the compliance of the said Act or whether the arbitrator is also bound to avail option of substituted service, making the arbitrator even more responsible and alert towards his duties.

Moreover, considering the efforts, costs and risks involved in the passing of an award, it is suggested that a challenge to the award may have two different facets, first being procedural challenge i.e. challenging the procedure adopted by the arbitrator, which may be cured so as to retain the sanctity of the award without fully setting aside all the award and the other being the substantive challenge against the alleged wrongful consideration of law or facts, wherein an arbitrator may be requested to reconsider the evidence and to decide the issue once again on merits.

Aditi Halan - Goldmount Advisors, Mumbai

Extent of intervention of Indian courts in Arbitration proceedings held outside India

A constitutional bench of the Supreme Court of India delivered its much anticipated judgment in the case of *Bharat Aluminium Company v Kaiser Aluminium Technical Services*[1] ("Balco") on September 6, 2012 overruling landmark judgments, namely *Bhatia International v Bulk Trading S.A*[2] ("Bhatia") and *Venture Global Engineering v Satyam Computer Services Ltd.*[3] ("Venture Global").

The Law

The Indian Arbitration and Conciliation Act, 1996 ("Act"), which consolidates the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards, is divided into parts and chapters where Part I deals with all four phases of arbitration - commencement, conduct, challenge and recognition and enforcement whereas Part II pertains only to recognition and enforcement of foreign awards. Section 2(2) (which is in Part I) of the Act reads as follows:

> "(2) This Part shall apply where the place of arbitration is in India."

Previous Position

Key holdings in *Bhatia* and *Venture*

In *Bhatia*, an Indian and foreign company entered into a contract that incorporated an ICC arbitration clause with the seat in Paris. The foreign company approached an Indian court against Bhatia International seeking an injunction under section 9 of the Act restraining them from alienating property.

The dispute in *Venture Global* arose out of a joint venture between Satyam Computer Services and Venture Global Engineering on account of which the parties resorted to arbitration. The sole arbitrator appointed by the London Court of International Arbitration made an award in favour of the former. Venture Global Engineering filed a suit before an Indian court challenging the foreign arbitral award. The court, in a very controversial decision, held that even a foreign award can be challenged under section 34 of the Act. It not only refused enforcement, but also set aside the validity of the award entirely.

The court, in *Bhatia* and *Venture Global*, concluded that by omitting the word "only" in section 2(2), as opposed to the UNCITRAL Model Law, the above section was only an inclusive and clarificatory provision, and does not state that provisions of Part I do not apply to arbitrations which take place outside India. This meant that the

[1] Civil Appeal No. 7019 of 2005 decided on September 6, 2012
[2] [2002] 4 SCC 105
[3] [2008] 4 SCC 190

Indian courts had jurisdiction with respect to foreign-seated arbitrations. The court chose to interpret section 9 and 34 so as to extend their applicability to foreign arbitrations and therefore, widen the scope of the court's powers. Based on this flawed analysis of the Act, Indian courts had hitherto asserted their jurisdiction to grant interim measures (section 9 of the Act) in aid of foreign-seated arbitrations and even set aside foreign awards (section 34 of the Act).

Balco

Brief facts

A contract was signed between Bharat Aluminium Company and Kaiser Aluminium Technical Services which contained an arbitration clause as per which any dispute under the agreement would be settled in accordance with English Arbitration Law and the venue of the proceedings would be London. The agreement further stated that the governing law with respect to the agreement was Indian law; however, arbitration proceedings were to be governed and conducted in accordance with English Law.

Arbitration in England was resorted to when disputes arose between the parties and the arbitral tribunal passed two awards in England which were sought to be challenged under section 34 of the Act in Indian courts. Another case, *Bharti Shipyard Ltd. v Ferrostaal AG & Anr.*, regarding the applicability of section 9 of the Act to arbitration proceedings taking place in London, was clubbed together with the above petition for hearing.

Key holdings of the court

The court in *Balco's* case held that there is complete segregation between Part I and Part II of the Act. The court unequivocally overruled *Bhatia* and *Venture Global* on the basis that Part I of the Act does not apply to foreign-seated arbitrations. It drew a distinction between the 'seat' and 'venue' of an arbitration proceeding. The court further clarified that choosing a foreign country as a seat for arbitration proceedings unavoidably entails the acceptance that the law of that country regarding the conduct and supervision of arbitrations will apply to the proceedings.

The propositions that govern this principle are that (i) the application of the UNCITRAL Model Law was intended to be limited to the territorial jurisdiction of the seat of arbitration and (ii) the seat of the arbitration is the 'centre of gravity' of the arbitration and therefore a choice of a foreign-seated arbitration by the parties ordinarily meant that the parties also agreed to the supervisory jurisdiction of the courts of that country. The court also held that the law declared in *Balco* shall apply prospectively, therefore, only to arbitration agreements made after September 6, 2012.

Consequences

The legal consequences are that Indian courts will have no powers including (i) the grant of interim remedies in aid of foreign-seated arbitrations (section 9 of the Act); (ii) the making of default appointment of arbitrators in foreign-seated arbitrations (section 11 of the Act); and (iii) applications to set aside foreign awards (section 34 of the Act), where the seat of arbitration is outside India, for arbitration agreements made after September 6, 2012.

The Delhi High Court in *NNR Global Logistics (Shanghai) v Aargus Global Logistics Pvt. Ltd.*[4] and *M/s Sancorp Confectionary Pvt. Ltd. & Anr. v M/s Gumlink A/S*[5] cited *Balco* stating that in the present cases, Part I of the Act had to be applied to foreign-seated arbitrations. This was because the court very clearly stated in *Balco* that the judgment would apply only prospectively. Thus it is clear that the Indian judiciary is unable to apply the law set down by the court, due to prospective applicability. To bring their arbitration agreements within the ambit of the law laid down by the *Balco* court, parties will have to revise and re-execute them.

Analysis

The decision of the Supreme Court in *Balco* has a few shortcomings namely – prospective applicability and foreign parties being remediless as interim orders by foreign courts and arbitration tribunals are not enforceable in India.

However, the judgment is a welcome change, especially by foreign investors and other parties who frowned upon the interference of Indian courts in arbitrations that take place outside India. The intervention of Indian courts made the task more tedious, expensive and time-consuming.

The decision has also clarified several legal debates with respect to applicability of Part I of the Act to foreign awards that arose during the interpretation of the Act. By inquiring into the intention of the UNCITRAL Model Law, the court substantiated the fact that Indian courts will not hesitate to be guided by the terms of the relevant international conventions, as they are understood internationally, and, if need be, construe Indian legislation to conform with the same.

[4] OMP No. 61/2012 decided on October 4, 2012
[5] CS(OS) 2400/2012 decided on October 19, 2012

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The role of Indian state courts in overseas arbitrations: An appraisal of *Bharat Aluminium*

6th September 2012 will, no doubt, be inscribed in the annals of Indian arbitration history. On this day, a five judge bench of the Indian Supreme Court clarified the legal position regarding many significant issues in Indian arbitration law, including the scope and applicability of the Arbitration and Conciliation Act 1996, by ruling that "Part I of the Act is applicable only to the arbitrations which take place within the territory of India". In the case of *Bharat Aluminium Co. v Kaiser Aluminium Inc*.[1], the apex court overturned a decade old *Bhatia* ratio, which had caused so many confusions in India related international commercial arbitrations.

Section 2 (2) of the Indian Arbitration Act provides that, "Part I shall apply where the place of arbitration is in India." But, in the year 2002, a three judge bench of the Supreme Court in *Bhatia International* v *Bulk Trading SA*[2] held that, "Part I of the Arbitration and Conciliation Act would also apply to international commercial arbitrations held outside India, unless the parties by agreement excluded all or any of its provisions". Even though this decision had invited large criticisms from all corners of the globe, Indian state courts strode several miles in this unusual path. A major setback happened in the case of *Venture Global Engineering* v *Satyam Computer Services Ltd*[3], where the Supreme Court heard an application under section 34 of the Act and set aside a foreign arbitration award.

In the beginning of 2012, the apex court decided to reconsider the above mentioned controversial rulings and constituted a constitutional bench of five judges to hear the consolidated appeals in the case *Bharat Aluminium*. The first and foremost issue before the court was whether Section 2(2) bars the application of Part I to arbitrations which take place outside India? While considering this matter, it rejected all arguments supporting *Bhatia* and affirmed that the omission of 'only' in Section 2(2) does not indicate that the Indian courts could supervise arbitrations taking place outside India. According to the apex court, the Arbitration and Conciliation Act recognises the territoriality principle of international arbitration by following the UNCITRAL Model Law. However, the court in this regard, found the Indian law to have adopted a scheme different from the Model law, as Article 1(2) provides for certain exceptions[4].

Another important aspect of the judgment is the court accepting the seat theory in international arbitration law and confirming that, 'the legal seat of arbitration is the centre of gravity' in every arbitration process. Therefore, by agreeing to a seat or place of arbitration outside India, the parties choose that foreign law of the seat of arbitration, to govern the conduct of arbitration. The bench also emphasised that, only the courts of the country where the seat of arbitration is situated have the competence to annul a foreign award, while identifying the ambiguity existing in Section 48 (1) (e), which is in line with Article V(1)(e) of the New York Convention[5]. This legal position of the Supreme Court clears up the anomaly regarding the supervisory

[1] Civil Appeal No.7019 of 2005. Available at http://www.sci.nic.in/outtoday/ac701905p.pdf.
[2] (2002) 4 SCC 105.
[3] AIR 2008 SC 1061.
[4] Art. 1(2) of the UNCITRAL Model Law: "The provisions of this law, except articles 8, 9, 17, 32, and 36, apply only if the place of arbitration is in the territory of the State."
[5] Article V 1 (e) says that enforcement of a New York Convention award can be refused where it "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."

jurisdiction of Indian courts in overseas arbitrations. Hence, the courts in India can no longer issue interim relief, appoint arbitrators or annul an award when the seat of arbitration is outside India.

Although the Bharat Aluminium judgment has been welcomed by arbitration enthusiasts, one should not forget the two caveats attached to this verdict. First, by declaring that no party in a foreign arbitration (arbitral seat outside India) can make an application to a court in India for interim measures of protection under Section 9 of the Act; the court puts the parties in a more dangerous situation than the Bhatia regime. The Second rider comes with the prospective overruling aspect of the decision as the Supreme Court says that the decision will apply only to arbitration agreements made on or after September 06, 2012. In other words, if the agreement is concluded prior to this date, Indian state courts can still supervise arbitrations seated abroad. Therefore, the possible remedy is for the parties to re-execute their arbitration agreements to make the *Bharat Aluminium* ratio applicable.

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Applicability of Part-I of the (Indian) Arbitration and Conciliation Act, 1996 to Foreign Seated Arbitrations[1]

The applicability of Part-I of the (Indian) Arbitration and Conciliation Act, 1996 (**"the Act**") to foreign seated arbitrations, has been a question of debate for a long time, especially in view of the decisions of the Supreme Court of India in *Bhatia International v Bulk Trading SA*, (2002) 4 SCC 105 ("Bhatia International"). A broader holding in Bhatia International was that in an arbitration not taking place in India, some or all of the provisions of Part I may be excluded by an express or implied agreement of the parties, and if not so excluded, Part-I would apply even to such arbitrations:

> "32. To conclude, we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In case of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail. Any provision, in Part I, which is contrary to or excluded by that law or rule will not apply."[Emphasis added]

Part I of the Act was clearly not intended to apply to arbitrations outside India, which is evidently clear from Section 2(2) of the Act, which provides that Part I "shall apply where the place of arbitration is in India". Although the Act does not expressly provide that Part I shall not apply where the place of arbitration is not in India, that must necessarily follow. Section 1(2) of the Act provides that it extends to the whole of India (subject to certain exceptions relating to the State of Jammu & Kashmir). Since the Act's territorial scope is limited to India, Part I is inapplicable outside India. However, the above-mentioned observations in Bhatia International had led to a substantial debate as to the applicability of Part-I of the Act in cases where the same has not been "expressly" excluded by the agreement of parties. In other words, what would constitute "implied" exclusion of Part-I of the Act and whether choice of a seat of arbitration outside India would constitute "implied" exclusion of Part-I of the Act? This issue had attained a complex shape, especially in view of several conflicting judgments of the courts in India.

Recently, though, in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, Inc., Civil Appeal No. 7019 of 2005 ("BALCO"), a five judge constitution bench of the Supreme Court of India, has sought to do away with the classification of "express" and "implied" exclusion, as propounded in Bhatia International. In BALCO, the Supreme Court, while overruling Bhatia International, has held that Part I of the Act is applicable only to arbitrations which take place within the territory of India.

In this regard, the Supreme Court opined that the Act has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law, in as much as Section 2(2) makes a declaration that Part I of the Act

1 Viplav Sharma, Advocate Supreme Court of India, New Delhi (India). The author can be contacted at viplavsharma@gmail.com.

applies to all arbitrations which take place within India, and therefore, Part I of the Act would have no application to international commercial arbitrations held outside India. Consequently, it was held that arbitral awards rendered in international commercial arbitrations held outside India would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Act. It was opined that the provisions contained in Act make it crystal clear that there can be no overlapping or intermingling of the provisions contained in Part I with the provisions contained in Part II of the Act.

With regard to grant of interim measures of protection by the Indian courts in foreign seated international commercial arbitrations, the Supreme Court held that since the provision contained in Section 2(2) of the Act is not in conflict with any of the provisions, either in Part I or in Part II of the Act, consequently, no application for interim relief would be maintainable under Section 9 or any other provision of the Act, in such arbitrations, as applicability of Part I of the Act is limited only to arbitrations which take place in India. Similarly, it was opined that no suit for interim injunction simpliciter would be maintainable in India, on the basis of an international commercial arbitration, with a seat outside India.

It was however held by the Supreme Court that since the decision in Bhatia International, which was rendered on 13 March, 2002, has been followed by all the High Courts in India, as well as by the Supreme Court itself, in order to do complete justice, the law now declared by the Supreme Court in BALCO shall apply prospectively, to all the arbitration agreements executed after the date of the said decision, i.e., after 6 September, 2012.

IRELAND

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Irish Court Refuses to Stay Proceedings Pending Arbitration on Application of Third Party

The position of non-parties to an arbitration agreement has been one of debate in arbitration circles around the world. Modern commercial transactions, particularly in the construction context, have become extremely complicated, requiring the participation of several parties for the delivery of large-scale projects. Parties to arbitration proceedings are exclusively determined on a contractual basis. Entering into an arbitration agreement is the indispensable requirement for a person to participate in arbitration proceedings and to be bound by the ensuing arbitral award.[1] Generally speaking, where the third party would prefer to arbitrate rather than litigate a dispute, an application may be brought to stay court proceedings in favour of arbitration. In the alternative, the third party may want to escape the consequences of an award already made against it, and defend an application to enforce that award.[2]

The Irish High Court, in *P. Elliot & Company Ltd (In receivership and In liquidation) v FCC Elliot Construction Ltd*[3] refused an application to stay proceedings pending arbitration, under Art. 8 UNCITRAL Model Law (adopted into Irish law under Sec. 6 of the Arbitration Act 2010), and under the inherent jurisdiction of the Court, on the grounds that the applicant could not establish that it was a party to the arbitration agreement. The proceedings arose out of an application to stay proceedings in which the plaintiff Irish company sought judgment of approximately £1.2m in connection with a consultancy agreement ("Agreement") pursuant to an umbrella joint-venture agreement ("JVA") with a Spanish construction company (FCC Construcción SA). Prior to a tender being awarded, the joint venturers, for tax reasons, incorporated the defendant Irish company, which would be a party to a hospital-building contract to be entered into and the joint venturers would be involved indirectly through a plethora of other contracts. As part of this structure the plaintiff and FCC Construcción SA entered into a consultancy agreement containing an exclusive jurisdiction clause in favour of the Irish courts. The defendant argued that the plaintiff's claim was governed by an arbitration agreement covering disputes between the joint venturers in respect of the Agreement, and also the overall building contract. The arbitration clause invoked the ICC Rules, and the agreement was to be construed and interpreted in accordance with the laws of Northern Ireland with a seat in Geneva.

P Elliot brought summary proceedings against the defendant in the Irish courts for payment of invoices rendered under the consultancy agreement. The plaintiff contended that the monies were due further to the consultancy contract with an Irish governing law and Irish jurisdiction clause and without an arbitration clause.[4] Further, the plaintiff argued that the defendant was not a party to the arbitration agreement contained in the JVA and due to the lack of privity, could therefore not invoke it.

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[1] Dr Stavros Brekoulakis, "The Relevance of the Interests of Third Parties in Arbitration: Taking a Closer Look at the Elephant in the Room" (2009) 113 *Penn St. L. Rev* 1165-1188 at 1166

[2] Marcus Birch, "Wrong Party, Right Answer: The Irish High Court Refuses a Stay to Arbitration" (2012) *The MHC Times* Mason Hayes + Curran publication.

[3] [2012] I.E.H.C 361 (H. Crt)

[4] Davinia Brennan, "High Court Refuses Third Party's Application to Stay Proceedings Pending Arbitration" (2012) *Insights* A&L Goodbody publication.

The defendant applied for a stay in favour of arbitration on two grounds. Firstly, the defendant contended that any dispute between the parties was intimately connected with the original JVA. Specifically, it pointed to the arbitration clause in the JVA between the plaintiff and the defendant's Spanish parent. The defendant referred to an uncontroversial body of case-law favouring a broad interpretation of arbitration clauses so as to embrace commercial arrangements outside the precise commercial relationship where the arbitration clause is to be found[5]. The defendant urged the Court to look to the commercial reality of the contractual structure and identify the "the commercial centre of the overall relationship between the parties and apply the relevant jurisdiction and/or arbitration clause."[6] In particular, FCC Elliott argued that the arbitration clause in the JVA should be interpreted expansively to cover all disputes relating to the construction of the hospital, and that since the consultancy agreement was part of a contractual structure devised to implement the objectives of the joint venture, the court should find that the joint venture agreement was the "commercial centre" and apply the arbitration clause in it.[7]

MacEochaidh J in the High Court refused the application for a stay of the proceedings and did not exercise his inherent jurisdiction to grant such. The judge found guidance on the test for whether a stay of proceedings should be ordered from Canadian jurisprudence. The correct test was that "a stay of proceedings should be ordered where (i) it is arguable that the subject dispute falls within the terms of the arbitration agreement and (ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement."[8] Whilst MacEochaidh J accepted that the English case law stated the correct principles, he found the fact pattern of the case at issue distinguishable. The cases cited involved complex series of agreements between the same parties; here there was a relatively simple set of contracts involving several different parties.

The judge held that whilst the English cases recognised a presumption that reasonable business people would not intend to create conflicting jurisdiction clauses, this presumption did not apply where the parties clearly intended to replace an earlier arbitration clause with an exclusive jurisdiction clause.

> "[I]f the original joint venturers had decided to stitch in the original arbitration clause from the [JVA] to subsequent agreements, they could have done so. It is clear that subsequent agreements ... either deliberately excluded the original arbitration clause or expressly included it. It is the apparent deliberation ... that I find compelling."[9]

The fact that no arbitration clause was included, but instead an exclusive jurisdiction and governing law clause, established beyond doubt that the true intention of the parties was not to refer matters to arbitration. FCC Elliott was not a party to the arbitration agreement in the JVA, and the agreement sued on contained an apparently deliberate Irish jurisdiction clause. For those reasons, Art. 8 UNCITRAL Model Law was not engaged and the stay accordingly denied. One interesting point that MacEochaidh J did make about Art. 8 is that, at its core, the section is not about arbitration at all, but about holding parties to their contractual words:

> "Article 8 … directs courts to respect the arbitral process and stay court proceedings ... as an expression of the most basic concept in the law of contract ... that parties who have mutually exchanged promises for value may, at the suit of each other, be kept to their promises. Where parties promise to arbitrate their disputes, courts should stay their proceedings in favour of arbitration if that promise is proved."

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[5] *Fiona Trust & Holding & Holding Corporation & Ors v Yuri Privalov & Ors* [2007] U.K.H.L 40 (H. of L.)
[6] As per Collins LJ in *UPS AG v HSH Nordbank AG* [2009] E.W.C.A Civ. 589 at 747 (H. of L.)
[7] *Supra* note 2.
[8] Per Hinkson J in *Gulf Canada Resources Ltd v Arochen International Ltd* [1992] B.C.J 500; approved in *Pacific Erosion Control Systems Ltd v Western Quality Seeds* [2003] B.A.S.K 1743 (Sup. Ct)
[9] *Supra* note 4 at [64]

This case serves as a reminder of the dangers of including differing dispute resolution mechanisms at different levels (e.g. ICC, the courts etc.) where multiple related contracts are entered into in the course of a transaction. It also clarifies that the fact that a party applying for a stay is not a party to the arbitration agreement is not an insurmountable barrier under Art. 8 UNCITRAL Model Law. Such a party may invoke an arbitration clause and seek a stay, "through or under" a party to the agreement, as long as there exists a sufficient commercial connection. It is also noteworthy that, for the purpose of determining whether or not to grant a stay under Art. 8, the Irish Court appears to have undertaken a full, rather than merely a *prima facie*, review of whether there was an agreement to arbitrate.

ITALY


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Preventing Corruption in Public Administration: the Amendments to the Italian Law on Arbitration in Public Procurement

The Law No. 190 of November 6, 2012 (the so-called "Anti-Corruption Law"; see http://www.camera.it/465?area=16&tema=585&Misure+anticorruzione for the Italian language version of the Anti Corruption Law) has modified the Italian legal framework concerning arbitration in the field of public procurement that is otherwise determined by the Legislative Decree No. 163 of April 12, 2006 (the "Public Contracts Code"). For more information on the Public Contracts Code, see http://www.ppneurope.org/docs/ItalianPresidency/Comparative%20survey%20on%20PP%20systems%20across%20PPN.pdf.

These Italian regulations on arbitration in public procurement matters have been amended many times in the past without, however, those amendments following a coherent rationale. For instance, under the Law No. 244 of December 24, 2007, with regard to works, supplies and service contracts, public authorities and companies entirely owned or controlled by public authorities were not allowed to include arbitration clauses in their contracts or to sign submission agreements. Adopting a pro-arbitration approach, the Legislative Decree No. 53 of March 20, 2010, thereupon amended the Law No. 244 and removed the aforementioned prohibition of arbitration.

The amendments introduced by the new Anti-Corruption Law to the Public Contracts Code again reflect a change of opinion of the Italian legislator when it comes to arbitration. The amendments will now again limit recourse to arbitration in public procurement disputes. In fact, the amended version of paragraph 1 of Article 241 of the Public Contracts Code now provides that controversies regarding subjective rights arising out of public contracts concerning works, services, supplies, projects or ideas competitions may be arbitrated, however, only upon a reasoned approval of the administrative authorities. Without previous approval, the inclusion of an arbitration clause in the call for tender or in other tender documents is invalid. The nature and characteristics of the said "reasoned approval" of arbitration is yet unclear.

Paragraph 2 of Article 241 of the Public Contracts Code further extends the area of application of paragraph 1 Public Contracts Code to include disputes regarding concessions, works, supplies and service contracts where one of the parties is a company with public participation or a company controlled by or connected to a company with public participation, in accordance with Article 2359 of the Italian Civil Code. In addition, the new limitation of arbitration also applies to companies that carry out works or supplies that are financed by public monies.

For disputes with public entities and as far as the appointment of arbitrators is concerned, the Anti-Corruption Law emphasizes the principles of transparency – especially with respect to the arbitrators' fees – and of diversification in order to assure impartiality and to avoid conflicts of interest. In particular, the following new rules shall be complied with:

(i) when a dispute arises between two public entities, the arbitrators shall be chosen from amongst the pool of public executives;

(ii) when a dispute arises between a public entity and a private body, it is still "preferable" that the public entity chooses an arbitrator who serves as a public executive;

(iii) when the public entity is unable to appoint an arbitrator who serves as a public executive, the respective appointment is made upon a reasoned request, in accordance with the regulations of the Public Contracts Code;

(iv) a public authority fixes the maximum fee for the public executive's activity as an arbitrator;

(v) the above rules do not apply to arbitration procedures commenced before the date of the entry into force of the Anti-Corruption Law, *i.e.* before November 28, 2012.

KAZAKHSTAN

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The Scope of Arbitrability in Kazakhstan
Latest Amendments to Arbitration Law

Certain disputes cannot be submitted to arbitration and are reserved for exclusive jurisdiction of state courts. For instance, disputes arising out of violation of public policy. The interpretation of *public policy* in international arbitration practice has been narrow, encompassing violations of fundamental principles of public interests like disputes in relation to juveniles or incapable persons. Also, national laws purport to invalidate any pre-dispute arbitration clause on disputes relating to employment, consumer, franchise, or arising under statute that protects civil rights or regulates contracts or transactions between parties with unequal bargaining power (e.g. security transactions, insolvency disputes, competition – antitrust disputes etc).

Even though Kazakhstan signed the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1996, a relevant legal framework was enacted only in 2004 with the introduction of laws on arbitral tribunals[1] and international commercial arbitration.[2] These acts implemented provisions on arbitrability enshrined in Civil Procedure Code.[3]

Courts in Kazakhstan tended to interpret narrowly the scope of arbitrability and limit types of disputes that can be referred to arbitration. However, under the influence of international arbitration practice and development of investment economy, Kazakh courts have widened the scope of arbitrable disputes.

In June 2012, in light of further development of an arbitration-friendly society, the Government of Kazakhstan has adopted amendments to the laws on arbitral tribunals and international commercial arbitration.[4] The draft law has been elaborated to implement the Message of the President to the people of Kazakhstan (January, 2012). The Kazakh Ministry of Justice having analysed the current regulatory framework in relation to arbitral tribunals, having studied international experience of commercial arbitration came to a conclusion that there was a need to enhance application of arbitral institutes by means of widening the scope of arbitrability. Thus, changes will affect the possibility to submit to arbitration disputes arising out of not only civil contracts, but civil relationship as well, limiting arbitrability to disputes of a non-pecuniary nature connected with life and health, immunity protection of private life, personal and family secrets etc. Also, arbitrability has been extended to non-commercial disputes by abandoning the notion of commerciality in the title of the Law on International [Commercial] Arbitration, 2004. The new act shall be titled as Law on *International Arbitration.* Further, respective amendments are planned in the Civil Procedure Code and the Tax Code, aimed at relieving case workload from state courts and increasing the public's awareness of arbitration and the role of arbitral tribunals.

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[1] The Law of the Republic of Kazakhstan On Arbitral Tribunals dated 28.12.2004, No.22-III (with amendments as on 17.02.2012).
[2] The Law of the Republic of Kazakhstan On International Commercial Arbitration dated 28.12.2004, No.23-III (with amendments as on 05.02.2010).
[3] Civil Procedural Code of the Republic of Kazakhstan dated 13.07.1999, No.411-I (with amendments as on 17.02.2012).
[4] Draft Law of the Republic of Kazakhstan On Amendments and Additions to certain legal acts of the Republic of Kazakhstan concerning questions of improvements in arbitration and arbitral tribunals dated 15.06.2012.

In general, recently there has been a tendency to increase public awareness of arbitration as well as increase willingness to enforce arbitration agreements and arbitral awards by state courts in Kazakhstan. Courts should stay proceedings in favour of arbitration whenever there is a *bona fide* arbitration clause in contracts. It would be the other party's duty to prove that the arbitration agreement is not valid or due to different reasons is not capable of being performed.

In conclusion, it can be noted that with widened scope of disputes that can be referred to arbitration and enhanced practice of state courts of staying proceedings in favour of arbitration and enforcement of arbitral awards, arbitration in Kazakhstan is being developed in the right direction.

LITHUANIA

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Arbitrability in Lithuania after the latest legal amendments – a pro-arbitration approach

In June 2012, the Lithuanian Parliament passed an amendment to the Law on Commercial Arbitration (hereinafter the "LCA") which is based on the UNCITRAL Model Law on International Commercial Arbitration of 2006 (see http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=428486&p_query=&p_tr2=2 for the 2012 LCA in the original language). Furthermore, pro-arbitration changes have been introduced into the Enterprise Bankruptcy Law. The main novelty, however, is the fact that there is now an exhaustive list of non-arbitrable disputes. The list allows now for a restrictive interpretation of non-arbitrable matters.

1. Arbitrability in Lithuania before the above-mentioned legal amendments

The previous version of the LCA provided for a list of non-arbitrable disputes by stating that "disputes mentioned in the non-arbitrable disputes list of the LCA may not be submitted to arbitration"[1]. However, in Lithuanian court practice, the non-arbitrable disputes list was interpreted extensively. In 2011, The Supreme Court of Lithuania (hereinafter the "SCL") ruled in the case of *Kauno vandenys vs. WTE WassertechnikGmbH*[2] that the list of non-arbitrable disputes included in the LCA was not exhaustive. Therefore, further disputes not mentioned in the list may also be non-arbitrable. In the latter case before the SCL, a dispute related to the amendment of a public procurement contract's terms was decided to be non-arbitrable despite the fact that such disputes were not mentioned as non-arbitrable in the LCA. Subsequently, in July 2012, in the matter of *Private shareholders vs. Luksora, LLC*[3], the SCL further ruled that disputes about the investigation of a legal person's activities are non-arbitrable. Furthermore, according to other case law of Lithuanian courts, any dispute before an arbitral tribunal had to be transferred to the state court as soon as bankruptcy proceedings were initiated against the respondent in the arbitration[4]. Mostly, disputes against a bankrupt respondent were therefore not considered arbitrable.

In all of the above-mentioned cases, the Lithuanian courts decided that it was the public interests involved which rendered those disputes non-arbitrable. Therefore, the list of non-arbitrable disputes in the LCA was interpreted broadly.

2. Arguments in support of the arbitrability of public interest disputes

The case law of the European Court of Justice, especially the *EcoSwiss* case[5], indicates that public interest does not limit the arbitrability of a dispute. This is also reflected in *Mostaza Claro*[6], *Asturcom*[7], *Ingmar*[8] and

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[1] The LCA stated that disputes arising from constitutional, employment or family law, from relations based on administrative law, as well as disputes connected with competition and bankruptcy law as well as disputes arising from consumer contracts may not be submitted to arbitration.
[2] SCL *UAB Kauno vandenys vs. WTE Wassertechnik GmbH*, docket number 3K-7-304/2011.
[3] SCL *Private shareholders vs. Luksora, LLC*, docket number 3K-3-353/2012.
[4] Lithuanian Court of Appeal, *UAB Vilmstata vs. UAB RANGA-IV*, docket number 2-22/2012.
[5] *EcoSwissChinaTimeLtd vs. BenettonInternational* NVC-126/97 [1999] ECR 1-3055.

Krombach[9]. Legal doctrine also supports the idea that public interest may well be protected in arbitration[10]. Also, courts are able to refuse the enforcement of arbitral awards on the basis of public policy[11] The grounds for refusal of enforcement should be interpreted restrictively[12]. Furthermore, it is accepted that lists of non-arbitrable disputes should be interpreted restrictively[13]. All in all, the decisions of the Lithuanian courts described in 1. above were incompatible with a pro-arbitration approach. In conclusion, although even before the new version of the LCA there was in fact a list of non-arbitrable disputes, Lithuanian courts did not apply it and interpreted the list in an expansive manner.

3. The new pro-arbitration approach after the 2012 legal amendments

The updated version of the LCA now provides that „all disputes can be referred to arbitration, except for the ones that are outlined in this article [i.e. article 12(1) LCA]. In this way, the legislator indicated that the list of non-arbitrable disputes is exhaustive and thereby prevented future interpretations contrary to this principle. Furthermore, by the 2012 amendment of the LCA, the list of non-arbitrable disputes has been shortened. Thus, a greater number of disputes now qualify as arbitrable[14]. On the basis of the new version of the LCA, a corresponding change of the previous Lithuanian case law that interpreted the list of non-arbitrable matters broadly may therefore be expected.

In addition, the 2012 amendment of the Enterprise Bankruptcy Law clarifies that a bankrupt company can also be a party to arbitration proceedings. This will again trigger a change to current Lithuanian case law which holds disputes against bankrupt respondents non-arbitrable. Due to the updated Enterprise Bankruptcy Law, arbitration users can now rest assured that bankruptcy proceedings will neither terminate an arbitration nor the validity of an arbitration clause.

4. The positive influence of the latest legal amendments to arbitration in Lithuania

A stable legal framework and a reliable judiciary play a vital role when choosing the place of arbitration. Usually, disputes are resolved in countries that follow a pro-arbitration approach[15]. Accordingly, a state that shows an anti-arbitration bias is not an attractive choice. In practice, there have been instances where arbitrators desired to avoid sitting in a state that disfavors arbitration which even resulted in the parties changing the previously agreed place of arbitration[16].

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[6] *Elisa María Mostaza Claro vs. Centro MóvilMilenium SL* C-168/05 [2006] ECR I -10437, 38, 39.
[7] *AsturcomTelecomunicaciones SL vs. Cristina Rodríguez Nogueira* C-40/08 [2009] ECR I-09579.
[8] *Ingmar GB Ltd. vs. Eaton Leonard Technologies Inc*. C-381/98 [2000] ECR I-9305.
[9] *Krombach vs. Bamberski* C-7/98 [2000] ECR I-1935, 23.
[10] Phillip Landolt, Modernised EC Competition Law in International Arbitration, Kluwer Law International (2006) p. 147; Sotiris I. Dempegiotis, EC Competition Law and International Arbitration in the Light of EC Regulation 1/2003 (2008) 25(3), Journal of International Arbitration pp 365-395; Epameinondas Stylopoulos, Powers and duties of arbitrators in the application of competition law: an EC approach in the light of recent developments (2009) 30(3), European Competition Law Review pp118-124.
[11] 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(2)(b).
[12] Herbert Kronkeet al., Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Kluwer Law International (2010) p 259; see also Gary B. Born, International Commercial Arbitration, Kluwer Law International (2009) p 2619; see also Nicholas Fletcher on *Dallah Real Estate and Tourism Holding Company vs. The Ministry of Religious Affairs, Government of Pakistan AS*, UK Supreme Court (docket number 15/11/2010). A contribution by the ITA Board of Reporters, Kluwer Law International, 2011.
[13] E. Gaillard/ J. Savage in Fouchard Gaillard Goldman,On International Commercial Arbitration,
Kluwer Law International (1999) p 339.
[14] Disputes connected with competition can now be referred to arbitration. Furthermore, parties may refer a dispute arising from employment relations and consumption agreements, if arbitration agreement was concluded after the dispute arose. The older version of the LCA stated that disputes connected with patents, trademarks and service marks cannot be referred to arbitration. The new version of the LCA states that only the disputes connected with patents, trademarks and design registration cannot be referred to arbitration. Therefore, all other disputes arising from intellectual property right can be referred to arbitration under the new of the LCA.
[15] William Park, National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration (1989) 63Tulane Law Review, p 680. Quoted from Nicolas Ulmer, The Cost Conundrum (2010) 26(2) Arbitration International, pp 221-250.
[16] Eric A. Schwartz, Do International Arbitrators Have a Duty to Obey the Orders of Courts at the Place of the Arbitration? Reflections of the Role of the Lex Loci Arbitri in the Light of a Recent ICC Award, International Law, Commerce and Dispute Resolution, ICC Dispute Resolution Library (2005) pp 801-805. Emmanuel Gaillard, Legal Theory of International Arbitration, Martinus Nijhoff Publishers (2010) p 83.

The above mentioned 2012 amendment to the Lithuanian LCA clearly provides for an exhaustive list of non-arbitrable disputes. Such a list is a very important guarantee for legal certainty and for respecting the parties‘ lawful interests. Therefore, Lithuania is now more of a pro-arbitration state and becomes a more attractive choice as a place of arbitration.

MALAYSIA

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Are there Passive Remedies in Jurisdictional Challenges under the Model Law?

The issue of whether it is open to a party to invoke lack of jurisdiction as a ground to resist enforcement when it did not raise any such objections pursuant to Article 16 of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") (the equivalent of section 18 of the Malaysian Arbitration Act 2005 ("Malaysian Act")) has been the subject of much debate, especially since the publication of the UK Supreme Court case of *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs, Government of Pakistan* [2010] 3 WLR 1472 ("the *Dallah* case").

In Malaysia, section 18 of the Malaysian Act, which follows closely Article 16 of the Model Law, allows an aggrieved party who is dissatisfied with an arbitral tribunal's decision (on a preliminary question) that it has jurisdiction to appeal to the Court within a set time frame.

The central question then is whether a party's failure to seek, pursuant to section 18(8) of the Malaysian Act or Article 16(3) of the Model Law, the judicial review of an interim decision of the arbitral tribunal dismissing an objection to its jurisdiction precludes that party from subsequently raising that same objection either in support of an application to set aside the award (section 37 of the Malaysian Act or Article 34 of the Model Law) or to resist an application seeking the recognition and enforcement of the award (sections 38 and 39 of the Malaysian Act or Articles 35 and 36 of the Model Law). Diverging court decisions have been rendered on whether a post-award challenge at the enforcement stage is permissible and whether the failure of a party to apply for court review of the arbitral tribunal's decision on jurisdiction under Article 16(3) of the Model Law would imply a waiver of such party's objection to jurisdiction.

In Malaysia, there is no authority as yet which has decided this question of whether such an aggrieved party may have a second bite at the proverbial cherry in the enforcement proceedings.

The Malaysian High Court had in the case of *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application [2012] 8 MLJ 585* placed heavy reliance on the *Dallah* case. In this case, the defendant had failed to raise a plea as to the arbitral tribunal's lack of jurisdiction at the arbitration proceedings and instead participated in the tribunal proceedings without objection. The arbitral tribunal sat in England, found in the plaintiffs' favour and handed down identical awards in respect of the contract. The plaintiffs then applied for recognition and enforcement of the awards in Malaysia. The defendant opposed the applications claiming they should be dismissed under sections 39(1)(a)(ii), (iv) and (v) of the Malaysian Act on the basis that the awards were not valid as the tribunal had no jurisdiction to hear and determine the dispute. The defendant said its failure to raise this objection at the arbitration proceedings was irrelevant and it was not estopped from raising the issue before the court. The plaintiffs argued that the defendant was estopped from raising any objection as to the tribunal's jurisdiction since it had never challenged the tribunal's jurisdiction at its inception but had instead participated in the arbitration proceedings.

The Malaysian High Court upheld the defendant's challenge and refused to recognise and enforce the arbitral award in Malaysia. On the issue of the tribunal's jurisdiction to arbitrate on the dispute referred by the parties, the learned judge, applying the *Dallah* case, held that the recognising or enforcing court was entitled, if not bound, to inquire fully into the matter of jurisdiction or lack of jurisdiction of the tribunal in making its award, regardless of whether the issue was raised for the first time before the court or whether it had been raised before and was already considered by the tribunal. The enforcing court must carry out an independent exercise or investigation into the issue.

The Malaysian court quoted *in extenso* the *Dallah case*; Lord Mance's judgment "*...the Tribunal's own view of its jurisdiction has no legal or evidential value when the issue at hand is whether the tribunal had any legitimate authority in relation to the government at all…*". Lord Mance said that the tribunal's decision was always open to 'a full judicial determination on evidence of an issue of jurisdiction' by the court. It can be seen that the tribunal had neither the first nor the last word on the determination of the issue of the validity of the supposed arbitration agreement. It lies with the court.

The Malaysian court held that the defendant who objects to the jurisdiction of the tribunal has two options which are not mutually exclusive. It may challenge the tribunal's jurisdiction in the courts of the arbitral seat; or it may resist enforcement before the enforcing court. Not having taken the first option does not deprive the defendant of its right to raise it for the first time nor should it be treated with any less regard. This is entirely proper and within the intention and scope of section 39 of the Malaysian Act.

The case of *Food Ingredients* must be read with caution when considering the impact of a failure to challenge a tribunal's jurisdiction under section 18 of the Malaysian Act or Article 16 of the Model Law for two reasons:

1. The High Court decision has been overturned by the Court of Appeal, which has yet to deliver its grounds. The matter is now pending leave of the Federal Court; and
2. Section 18 of the Malaysian Act was not considered at all and instead reliance was placed on the *Dallah* case as the applicable law was English law, it being the *lex arbitri*, which did not adopt Article 16 of the Model Law.

Perhaps assistance can be drawn from the recent Singapore High Court decision of *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others [2012] SGHC 212* (known more famously as the *Astro v Lippo* case) where the Singapore High Court had dismissed challenges brought by the Lippo Group in respect of 5 domestic international arbitration awards rendered against them pursuant to a SIAC arbitration in Singapore between the Lippo Group and the Astro Group (the "Singapore Awards"). In this case, the Lippo Group had challenged the jurisdiction of the arbitral tribunal which ruled against it and it did not appeal to the Singapore Court against the tribunal's decision within the set time frame but instead continued with the arbitration under protest. When the Singapore Awards were issued in favour of the Astro Group, the Lippo Group chose not to apply to set aside the awards and the time limit for setting aside had also expired. The Astro Group then obtained leave to enforce the awards against the Lippo Group, which then applied to set aside this leave in order to oppose the enforcement of the Singapore Awards. One of the grounds raised by the Lippo Group to oppose the enforcement was the tribunal's lack of jurisdiction.

The Singapore Court held that in relation to a domestic international arbitration award, an unsuccessful party cannot just remain passive and resist recognition and enforcement only when enforcement proceedings are brought. The unsuccessful party must act to set aside the award within the correct timescale. When a ruling on jurisdiction is heard and determined as a preliminary issue, an unsuccessful party must subject the ruling to the court for review within the statutory time limit. If it does not do so and continues with the arbitration, the court held that it cannot then revive a jurisdictional objection at the enforcement stage so as not to make a mockery of the finality and effectiveness of arbitration awards on jurisdiction.

In this case, there was no challenge by the defendant of that award under Article 16 (jurisdiction of the tribunal) or Article 34 (setting aside of awards) of the Model Law previously and the prescribed time limits under each article had since lapsed. The court held that the tribunal addressed jurisdiction in its ruling dated 7 May 2009 as a preliminary question under Article 6(3) of the Model Law, a consequence of which being that the defendant could only request the Court to rule on the question of the tribunal's jurisdiction within 30 days after having received notice of the tribunal's ruling on jurisdiction.

The court held that once the time limits had lapsed, the Singapore International Arbitration Act did not permit the challenging party to assert either Article 16 or Article 34 of the Model Law as grounds for setting aside the Singapore Awards or for the Singapore courts to refuse recognition and enforcement of the same, with the sole exception of section 24 which allowed the Singapore Courts to set aside an award on two grounds additional to those in Article 34 i.e. fraud and breach of natural justice. Neither of these two grounds had been asserted by the defendant.

The court dismissed as irrelevant the *Dallah* case and considered that the UK jurisprudence on arbitration was out of line with the rest of the Model Law countries and that "*any sensible discussion of the Model Law must draw heavily from arbitration law in civil law jurisdictions*".

Belinda Ang J, sitting as the High Court Judge, rejected the defendant's argument that it could resist recognition and enforcement of the Singapore Awards on jurisdictional grounds notwithstanding the time bar in Article 16 and Article 34 of the Model Law. This is because the Singapore International Arbitration Act makes a distinction between an international arbitration award rendered in Singapore (a domestic international arbitration award) and an arbitration award rendered in a foreign New York Convention country (a foreign international arbitration award). Section 3(1) of the Singapore International Arbitration Act explicitly excludes Article 36 of the Model Law in relation to domestic international arbitration awards.

Conclusion

Although the *Astro v Lippo* case was essentially decided on the threshold question of whether there was a statutory basis for Lippo Group to invoke lack of jurisdiction as grounds to resist or refuse enforcement of a domestic international award, the Singapore Court made it clear there are no passive remedies when it comes to challenging jurisdiction under the Singapore International Arbitration Act (which adopted the Model Law) – a party wishing to oppose a jurisdictional decision made by way of preliminary determination must act within the prescribed timeframe under Article 16(3) of the Model Law.

Further, it is interesting to note that the Singapore High Court recognised that the Model Law is not a creature typical of the statutes emanating from common law jurisdictions; it more properly resembles civil law drafting. As such, any sensible discussion of the Model Law must draw from arbitration law in civil law jurisdictions. In this regard, the court opined that the law and decisions made in Germany, Quebec, and other Model Law and civil law countries were more appropriate in aiding interpretation of the Model Law provisions than the UK cases.

It is thought that the approach taken by the UK Supreme Court in the *Dallah* case had no place in the Model Law jurisdictions because there is no similar provision to Article 16(3) in the UK Arbitration Act 1996. However, it remains to be seen how the Malaysian courts will decide this issue of the right to a second bite of the proverbial cherry to defeat a final award on the grounds of lack of jurisdiction in the same situation.

POLAND

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The Use of Psychology in the Practice of Arbitration in Poland

Developments in psychology regarding the assessment of the truthfulness of witness testimony is a much discussed topic in the practice of law in Poland that may also significantly influence the field of arbitration.

An accepted method for the assessment of the veracity of oral statements is called "Statement Validity Assessment" ("SVA"). SVA has initially been developed in Germany and Sweden as a method to determine the credibility of child witnesses in sexual abuse cases, based on the clinical experience of several renowned psychologists (like psychologists *Vrij and Undeutsch*). SVA contains four stages:

1. Case-file analysis
2. Semi-structured interview
3. Criteria-Based Content Analysis ("CBCA")
4. Evaluation of CBCA with the Validity Checklist

The core component of SVA is CBCA which is applied to the written transcripts of testimonies. CBCA is based on 19 criteria which are judged on the basis of a three point scale. Researching the methodology of SVA and CBCA further has been proposed by organizations of the Polish educational system, for example by the Warsaw School of Social Sciences and Humanities. Also, SVA techniques have been proposed as a new element of training for judges and prosecutors in Poland.

However, SVA and CBCA are criticized for being too error-prone to be admitted as scientific expert evidence in criminal courts. It has been suggested that the SVA methods alone are insufficient in order to determine whether a person is being truthful. Therefore, a new assessment procedure was recently developed and has been proposed by Polish scientists under the name of "Multivariable Adult's Statement Assessment Method" ("MASAM") (*B.W. Wojciechowski*, *Psychological Content Analysis and Witness Testimony Veracity Assessment*, *Palestra 1-2*, *2012;* cf. http://www.ip.us.edu.pl/?fo_id=6008 for the Polish language website of Prof. Wojciechowski's institute). During the studies for MASAM, it has been found that MASAM is significantly more reliable as a technique to assess the truthfulness of a statement. MASAM is primarily based on the hypotheses underlying SVA but additionally takes into account the following supplementary assumptions:

1. Every testimony contains both truthful as well as untrue accounts;
2. Thus, statements of adults are not either entirely truthful or entirely untruthful as such;
3. The processes underlying eye witness testimony must be taken into consideration in order to form a final opinion about the veracity of a statement.

The author suggests that arbitration practitioners should become acquainted with the use of psychology in arbitration since the trend to revert to psychology in arbitration may well evolve into standard procedure.

RUSSIA

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Unification **Russian's** case law concerning invoking public policy clause to refuse enforcing an arbitral award

Current Russian legislation allows to refuse enforcement of an arbitral award, if such enforcement would violate public policy (article 244 (1) (7) of the Arbitration Procedure Code of the Russian Federation). This argument is quite often invoked in Russian case law; in some cases such argument is highly questionable. Currently in Russia, a very first attempt is being made to unify the case law in this matter.The Supreme Commercial Court of the Russian Federation has prepared a draft digest; it includes the 14 most important cases, in which the enforcement of arbitral awards is being challenged in violation of public policy. We present the most interesting of them.

Refusal to enforce an award by reason of breach of the public policy is *an extraordinary defence mechanism, which courts may invoke only in cases of violation of fundamental legal principles, which have the highest imperative, universal, particular social and public importance, and constitute the basis of the public policy of the Russian Federation.* The court pointed out that enforcement of the arbitral award to deliver the goods "will not lead to the result contrary to generally accepted standards of morality and ethics, jeopardise life and health of individuals or national security" (sec. 3 of the Digest).

Public policy of the Russian Federation is not identical to the legislation of the Russian Federation. In that case, the party sought to have enforcement of the award declined. The court held that despite the fact that the concept of compound interest is non-existent under Russian law, it cannot be a reason to decline to enforce the arbitral award on the ground of a breach of public policy (sec. 5 of the Digest). At the same time, in another case where Russian law was applicable, the trial court found that the penalty was of a repressive nature, as it was six times higher than the principal. However, the cassation court reversed that decision and set out a general rule, under which collection of liquidated damages agreed between the parties in their contracts shall not be viewed as a breach of the public policy of the Russian Federation, provided *inter alia* that the amount of the loss is freely agreed by the parties in good faith as competitors with equal bargaining power and its collection of such loss is intended to compensate the injured party within reasonable limits for the losses caused by the failure or improper performance of contractual obligations by the other party (sec. 6 of the Digest).

Violation of procedure rules is a violation of public policy. At the enforcement of the award, party A alleged a violation of public policy on the grounds that one of the arbitrators was not impartial and independent of the other party B, as he held the position of head of the legal department of B's parent company. Party A filed a written statement to challenge the arbitrator. The tribunal dismissed it. The state court held that since the arbitrator was interested in the outcome of the case, it was against the public policy of the Russian Federation (sec. 13 of the Digest). In another case the party insisted that the arbitrator was not impartial and independent of the other party as he had been appointed four times in the last three years by this company. The Russian court did not sustain the petition, pointing that the petitioner had not tried to challenge the

arbitrator before and hence his right to object was lost (sec. 12 of the Digest). That ruling of the court applied principles close in nature to notion of the common law *estoppel*.

Conclusion: As mentioned above, the history of the application of the **"public policy"** clause has its own extremes. Analysis of the **Digest's** draft has shown a desire of the Russian courts to establish a reasonable order of application of the clause, which generally leads to foreseeable results and saves the parties from unplanned surprises. It is important that the unification case law will continue the work on the formation of the position that the application of public policy clause is an extraordinary defence mechanism. It seems that the Digest will result in general beneficial effects in the form of stability of civil turnover.

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The extent to which public policy grounds may be invoked for refusal of enforcement of foreign judgments and awards in Russia becomes more clear

On 20 December 2012, the Presidium of the Supreme Arbitrazh Court of the Russian Federation (SAC) considered a draft of a landmark Information Letter regarding the proper scope of application of the public policy exception clause to refuse recognition and enforcement of foreign judgments and arbitral awards in Russia. The Information Letter summarizes the Russian court's practice and provides recommendations to the lower courts. According to the SAC's officials, the rationale is to clarify why some foreign judgments and awards are unenforceable in Russia and to debunk the myth that the courts over broadly interpret the concept of public policy.

As a result of the discussion the drafters should further develop the document, after which the Presidium will return to its consideration.

In general, the document reaffirmed that public policy encompasses fundamental legal principles of particular public significance and that it is an exceptional defence against enforcement of foreign judgments and awards, which the courts should properly evaluate in each case based on the parties' arguments.

A court, however, may refuse to recognize a judgment or an award on an *ex officio* basis if it finds that the award contradicts Russian public policy. As an example of this approach the SAC quoted a case concerning an award enforcing a contract executed as a result of corruption. In rejecting the application for the award's recognition and enforcement, the court referred to a Russian criminal court judgment on commercial bribery that came into force, according to which the claimant bribed the respondent's manager to secure the contract.

The SAC also brought up a topical issue of arbitrator impartiality making two observations:

- The award is not contrary to Russian public policy if the arbitral procedure provided guarantees of the arbitrators' independence and impartiality. This is the case, for example, when a party fails to exercise its right under the applicable arbitral rules to challenge an arbitrator's appointment after he discloses information on circumstances giving rise to reasonable doubts as to his impartiality.

- The award is contrary to Russian public policy if rendered by an arbitrator, who was able to influence one of the parties due to his official status and powers. As an example, the drafters considered the case when the party's request to challenge the arbitrator's appointment, after the arbitrator disclosed his position of head of the legal department of the opponent's parent company, was denied.

In order to foster the perception of the public policy clause as indeed an extraordinary defence, the drafters of the Information Letter suggest further examples that should not prevent enforcement.

Particularly, this is the case when a judgment or an award relies on foreign rules that differ from the Russian ones. According to the SAC, the fact that some foreign rules do not have equivalent counterparts in Russian

law is not sufficient grounds to declare that an award contradicts Russian public policy. In the case under consideration the court rejected the debtor's argument that an award contradicts Russian public policy since it provided for double-recovery (compound interest) under foreign law.

The SAC also restrained a frequent argument that an award for recovery of liquidated damages violates Russian public policy due to its contradiction of the fundamental principle of proportionality of civil liability. The supreme body affirmed that a court may not refuse to enforce such an award if the recovered damages have a compensatory rather than penal character.

With regard to other circumstances that may not in and of themselves trigger the refusal of enforcement on public policy grounds, the SAC cited, *inter alia,* an obligation imposed on a party to provide security as a precondition for a foreign judgment appeal and non-compliance by a foreign party with a transaction approval procedure prescribed by its *lex personalis*. A court is also not entitled to invoke public policy grounds in cases when there are other proper grounds for refusal (e.g. absence of a party's notification of the proceedings).

One of the most disputable issues at the Presidium's discussion was whether an award rendered in the absence of one of the appointed arbitrators may contradict Russian public policy. The final position of the SAC on this question as well as on a number of other issues is yet to be developed in the final draft of the Information Letter.

SOUTH AFRICA

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The Western Cape High Court refines court practice on preclusion

I. Introduction

Shall a party that did not raise certain grounds against an arbitral award in setting aside proceedings at the place of the arbitration be precluded from resisting elsewhere against recognition or enforcement of that award based on the very same grounds? Various answers have been given to this question in several jurisdictions, under several applicable laws and applicable conventions, and in various constellations.[1] The courts of the United Kingdom have also dealt with the described situation,[2] quite recently in the widely reported decision in *Dallah*.[3] The issue is not a new one under South African law either: The Transvaal Provincial Division held in *Seton*[4] that a court is not entitled to refuse recognition of a foreign arbitral award on the ground of fraud in circumstances where the party resisting the recognition of the award has not exhausted the remedies available to it in a foreign jurisdiction or proper forum.

II. The **Western Cape High Court's j**udgment in *Phoenix*

On 24 February 2012, the High Court of South Africa (Western Cape) delivered a judgment in *Phoenix*[5] in which preclusion, as described above, played a role. The application in this case arose out of an arbitral award made on 16 March 2011 following proceedings conducted in the London Court of International Arbitration under the auspices of the London Maritime Arbitrators Association. DHL Global Forwarding SA (Pty) Ltd (South Africa) was obliged to pay Phoenix Shipping Corporation (Delaware) an amount of US$ 253,694.00 plus interest. Bateman Projects Limited, trading as Bateman Engineered Technologies (South Africa) was obliged to indemnify DHL in respect of DHL's liability to Phoenix (alternatively DHL was entitled to damages in a like amount). Both Phoenix (as principal applicant) and DHL (as co-applicant) sought to have the respective portion of the award made in their respective favour recognised and enforced in South Africa. As DHL did not resist the relief sought against it by Phoenix, that order was granted. Bateman had challenged the jurisdiction of the arbitrator in the arbitration proceedings and persisted in this position in the recognition and enforcement proceedings. DHL contended that Bateman could not challenge the jurisdiction of the arbitrator, as Bateman had failed to avail itself of the remedies available to it in England and that, in any event, Bateman was precluded from doing so in terms of the provisions of the English Arbitration Act, 1996.

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[1] E.g. Austria: Oberster Gerichtshof [Supreme Court] 3 Ob 221/04b (26 January 2005); Germany: Bundesgerichtshof [Federal Supreme Court] III ZB 100/09 (16 December 2010); Oberlandesgericht [Higher Regional Court] Karlsruhe 9 Sch 02/09 (4 January 2012); Quebec: *Smart Systems Technologies Inc v Domotique Secant Inc* [2008] QCCA 444.

[2] E.g. *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania & AB Geonafta* [2005] EWHC 9 (Comm); this judgment was overruled by [2006] EWCA Civ. 1529; cf. also Roy Goode, "The Role of the Lex Loci Arbitri in International Commercial Arbitration", (2001) 17 Arbitration International 19-40, 35.

[3] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

[4] *Seton Co v Silveroak Industries Ltd* [2000] (2) S.A. 215 (T).

[5] *Phoenix Shipping Corporation v DHL Global Forwarding SA (Pty) Ltd and Another* [2012] (3) S.A. 381 (WCC).

In its decision, the High Court of South Africa (Western Cape) through *Yekiso* J established that it was accepted in *Seton* that it is normally appropriate to leave a party to a foreign arbitration to pursue any remedy it has in the foreign jurisdiction. Yet the court then distinguished *Seton* from the case before it, holding that it would appear that a challenge to the arbitrator's jurisdiction stands on a different footing to other challenges to an award, whether on substantive or procedural grounds. The court thereupon considered that "[a]bsent proof that a party has bound itself to an arbitration agreement, containing a clause submitting the parties to arbitration, the arbitrator does not have jurisdiction over that party. An order for the recognition and enforcement of a foreign arbitral award which, on the face of it, is invalid, would be contrary to a legal order in any civilised world." After summarising part of the facts and findings of *Dallah*, the Western Cape High Court found that by implication, the English Supreme Court had held "...that the provisions of section 103(f) of the English Arbitration Act, 1996 did not preclude a challenge in England a jurisdictional challenge of a foreign award (sic!)."

Yekiso J then judged:

> "The English Arbitration Act, 1996 contains the same provision to section 4(1)(b)(v) of the Recognition & Enforcement of Foreign Arbitral Awards Act. There is no reason, in the instance of this matter, not to follow the interpretation of the English Supreme Court in interpreting the provisions of section 4(1)(b)(v) of the Recognition & Enforcement of Foreign Arbitral Awards Act. I am enjoined by section 233 of the Constitution of the Republic of South Africa, 1996 that, when interpreting any legislation, including the Recognition & Enforcement of Foreign Arbitral Awards Act, to follow any reasonable interpretation of the legislation or statutory enactment that is consistent with international law. (...) Following that approach, I similarly hold, that Bateman can challenge the jurisdiction of the arbitrator in this court in spite of the statutory estoppel provisions contained in the English Arbitration Act, 1996; that DHL failed to prove that the arbitrator who handed down the award had jurisdiction to determine the award; and, in the light thereof, the application by DHL to intervene as the co-applicant in the main application ought to fail on this ground alone."

The court also determined that the agreement on the basis of which the arbitral tribunal had found Bateman liable to DHL was invalid, and held that the recognition and enforcement of an award derived from such alleged or purported agreement would offend the public policy of South Africa.

III. A similar question in domestic arbitration

For the sake of completeness, it shall be duly noted that a question of preclusion similar to the one discussed above also arises in domestic arbitration under South African law. In a nutshell, the issue is whether a party that wants to resist against an application by the other party to have an award made an order of court pursuant to Section 31(1) Arbitration Act 42 of 1965 shall be precluded from doing so if it had not timeously invoked the provisions of Section 33 Arbitration Act 42 of 1965 to have the award set aside. It appears that generally the principles in decisions on that issue do not *per se* apply when the place of the arbitration is not in South Africa: the courts might conclude that it makes a difference whether setting aside proceedings were available in a South African court or in a foreign court.

The Witwatersrand Local Division in *Fernandes*[6] held

> "...that it is not permissible for a respondent, faced with an award with which he is not satisfied by reason of alleged misconduct on the part of an arbitrator, not to apply to set aside the award but merely seek to raise such alleged misconduct without joining the architect when an attempt is made to enforce the award."

[6] *M M Fernandes (Pty) Ltd v Mahomed* [1986] (4) S.A. 383 (W).

With reference to this case, *Lane & Harding* conclude that "…where a party seeks to oppose the application on grounds for remittal for reconsideration by the arbitral tribunal of any matter, or for the setting aside of the award, such party must take positive steps to have the award remitted or set aside as the case may be."[7] However, based on a passage in the judgment of the Witwatersrand Local Division in *Fassler*,[8] the South-Eastern Cape Local Division in *van Zijl*[9] found an exception to the rule in *Fernandes* and held that

> "[w]here an arbitrator's award is in fact a nullity, the failure by one party to the arbitration to timeously invoke the provisions of s 33 of the Arbitration Act 42 of 1965 to have the award set aside would not disentitle that party from resisting an application by the other party to have the award made an order of Court."

Similarly, the Supreme Court of Appeal in *Vidavsky*[10] came to the following conclusion:

> "An award made where one party has not received notice of the proceedings carries no legal force at all and does not even require to be set aside. Such case is distinguishable from a valid award which is enforceable until set aside. In the case of the defence of want of jurisdiction in the arbitrator, which results in total or partial voidness of the award, the complaining party may wait for the application to enforce the award and then raise the objection. It is not necessary, under those circumstances, for the complaining party to seek the setting aside of the award in terms of s 33(1)."

The Cape Provincial Division in *Kolber*[11] came to the conclusion that

> "[i]f the award of the tribunal is voidable (as opposed to void *ab initio*), there exists a valid award that is enforceable until it is remitted to the tribunal (s 32(2)) or set aside (s 33). Thus, where the unsuccessful party applies for but is refused applications both for the setting aside and the remittal or (sic!) the award, an application under s 31(1) to have the award made an order of Court should succeed."

IV. Conclusion

The decision in *Phoenix* reported here not only contributes to the issue of preclusion debated in South Africa and on the international level,[12] but also once again affirms that arbitration is an important method of dispute resolution in South Africa.[13]

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[7] Patrick M. M. Lane and R. Lee Harding, *National Report for South Africa (2010)*, in Jan Paulsson (ed), *International Handbook on Commercial Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2010 p24.
[8] *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd* [1992] (3) S.A. 825 (W).
[9] *van Zijl v von Haebler* [1993] (3) S.A. 654 (SE).
[10] *Vidavsky v Body Corporate of Sunhill Villas* [2005] (5) S.A. 200 (SCA).
[11] *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others; Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another* [2001] (2) S.A. 1097 (C).
[12] For a discussion of German court practice, cf. Wolfgang Kühn, "Aktuelle Fragen zur Anwendung der New Yorker Konvention von 1958 im Hinblick auf die Anerkennung und Vollstreckung ausländischer Schiedssprüche – Eine Betrachtung der deutschen Rechtsprechung", (2009) 7 *German Arbitration Journal [SchiedsVZ]* 53-61, 59.
[13] For earlier such affirmations, cf. Stephan Wilske and Jade G. Ewers, "Why South Africa Should Update Its International Arbitration Legislation", (2011) 28 *Journal of International Arbitration* 1-13, 10.

SPAIN

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Mediation Law in Spain: An Overview of the Spanish Mediation Act

Law 5/2012, of July 6, on Mediation in Civil and Commercial Matters (the "Mediation Act"), was published in the Official Gazette of the Spanish State on July 7, 2012 and entered into force on July 27, 2012.[1]

The Mediation Act incorporates the European Union Directive 2008/52/EC into Spanish law and establishes a general regulation for mediation.[2]

The Mediation Act is divided into the following sections: (i) general provisions, (ii) underlying principles of mediation, (iii) provisions applicable to mediators, (iv) mediation rules of procedure and (v) enforceability of agreements resulting from mediation. A summary of each of the sections follows.

1. GENERAL PROVISIONS

a. The filing of the request for mediation suspends but does not interrupt the prescription or limitation periods in which a party may bring an action. Nonetheless, failure to execute the Minutes of the constitutive session (the constitutive session is explained in Section 4(a) below) within 15 days from the date on which the request for mediation was received by the mediator and/or the mediation institution would cause the prescription and limitation periods to resume.
b. Mediation Institutions promote mediation and administer mediation proceedings but are not permitted to act as mediators themselves. These institutions must guarantee transparency in the appointment of mediators and must separate mediation and arbitration, should they be involved in administering arbitration proceedings as well.

2. UNDERLYING PRINCIPLES OF MEDIATION

a. Whenever an agreement in writing to submit a dispute to mediation is in place, mediation must be attempted before the parties may institute any other extrajudicial proceedings, such as arbitration, or bring an action in court. This is the case even when the dispute concerns the

[1] The Mediation Act has been in force as a Royal Decree-Law since March 7 (Royal Decree-Law 5/2012, of March 5, on mediation in civil and commercial matters, which was approved by the Council of Ministers on March 2, 2012). This Royal Decree-Law was subsequently passed as an "ordinary law" by Spanish Parliament on July 6 and now the official reference to the Mediation Act is "Law 5/2012". Royal-Decree Laws are approved by the Council of Ministers in cases of necessity and urgency of adoption of norms in certain, limited subject matters. Royal Decree-Laws do have the same binding force than Ordinary Laws. Yet, Royal Decree-Laws can be introduced into the Parliament to undergo the parliamentary legislative process (as it happened in this case). In practice, this means that the Parliament may introduce amendments and/or include provisions dealing with other matters that the Royal-Decree Law could not rule on considering the limited scope allowed to Royal-Decree Laws by the Spanish Constitution.

[2] Law 5/2012 includes further provisions dealing with varied procedural topics such as amendments to the Civil Procedural Code and articles governing access to Spanish Bar. This article does not discuss those provisions.

validity or existence of the contract that contains the agreement to submit the controversy to mediation. The jurisdiction of the chosen dispute resolution authority may be challenged when an agreement to refer the matter to mediation is not honored.

b. Equality among the parties, impartiality and neutrality of the mediators.
c. Confidentiality. Any person involved in the mediation (including the mediator) must keep confidential any information he acquired as a result of the mediation process, and is exempted from giving evidence about any such information in judicial or arbitration proceedings, unless the parties agree otherwise in writing or the evidence is requested by a reasoned decision of a judge of the criminal jurisdiction.
d. The parties involved in the mediation process must act in good faith, with loyalty and showing mutual respect.

3. PROVISIONS APPLICABLE TO MEDIATORS

a. The mediator must be a natural person satisfying the following requirements: (a) he must be in full possession of his civil rights, (b) must not incur in any conflict of interest and (c) must have completed specific training that has been provided by "duly accredited" institutions. Additionally, a mediator must have a civil liability insurance policy.
b. Quality and self-regulation of mediation. Adequate training of mediators shall be promoted, as well as the drafting of, and adherence to, voluntary codes of conduct.
c. The mediator shall disclose any circumstance that may affect his impartiality or generate a conflict of interest and, in particular, the circumstances mentioned in the Mediation Act: (i) the existence of personal, contractual, commercial and/or business relationships with any party; (ii) direct or indirect interest; (iii) previous actions by the mediator or a member of his company or organization in favor of one or more of the parties, in any circumstance, excluding the mediation process at stake.
d. Liability of mediation institutions and mediators. Should the mediator fail to faithfully comply with his responsibilities, he may be held liable for any damages caused by his acting. The damaged party shall have a direct action against the mediator and, when applicable, against the mediation institution, regardless of the availability of any actions for reimbursement of the mediation institution against the mediator. Potential liability of the mediation institution derives from the appointment of the mediator and/or the breach of any obligations pertaining to the mediation institution.

4. MEDIATION RULES OF PROCEDURE

a. Constitutive session. Once the mediation request has been filed and the informative session[3] has taken place, the mediation procedure will commence with a constitutive session in which, among other issues, the subject-matter of the dispute submitted to mediation, the program of activities (*i.e.*, the procedural calendar) and the deadline for completion of the procedure shall be agreed upon by the parties and recorded in the corresponding Minutes. If no agreement is reached on any of those matters, the Minutes of the constitutive session shall state that the mediation was not successful.
b. Duration and termination of the procedure. The Mediation Act stresses that the procedure shall be as brief as possible and the different stages be condensed into the fewest possible number of sessions. The procedure may end without an agreement due to any of the following reasons: (i) one or all the parties exercise their right to terminate it, (ii) the time limit allocated to the mediation procedure elapses; or (iii) the mediator determines that the parties' positions are irreconcilable. The Final Minutes executed at the end of the procedure shall include any agreements reached.

[3] After receiving the request for mediation, the ad hoc mediator and/or the mediation institution calls the parties for an initial session where information is given as to any issues that may affect the impartiality of the mediator (should there be any), main features of the mediation process and proceedings, its costs and consequences and the deadline for the signature of the constitutive session Minutes.

c. Conduct of proceedings through electronic means. Recourse to electronic means for any session and stage of the proceedings is encouraged. This is particularly the case of any dispute submitted to mediation consisting of a monetary claim not exceeding 600 Euro, unless recourse to such means is not possible for any of the parties.

5. ENFORCEABILITY OF AGREEMENTS RESULTING FROM MEDIATION

a. The parties may include the terms of the agreement resulting from mediation in a public deed, thereby constituting an enforceable title. The Spanish Notary Public will verify whether the requirements established by the Mediation Act are satisfied and the content of the agreement is not contrary to the laws.
b. Without prejudice to the provisions of EU regulations and international conventions, agreements enforceable in another State will only be enforceable in Spain when their enforceability stems from the intervention of a competent authority performing functions equivalent to those accomplished by the Spanish authorities. A foreign agreement resulting from mediation that has not been declared enforceable by a foreign authority will only be enforceable in Spain upon its formalization in a public deed before a Spanish Notary Public at the instance of all the parties or at the instance of one of them with the express consent of the others.
c. The agreement resulting from mediation may be challenged before the courts with an action seeking annulment of said agreement based only on causes for the annulment of contracts.
d. When the agreement is reached as a result of a mediation process that took place after the commencement of judicial proceedings, the parties may request judicial approval (“*homologación*”) of said agreement.

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TURKEY


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The new Istanbul International Arbitration Centre

In Turkey, it is now accepted that the dynamics of international trade necessitate a corresponding evolution of the legislation. In modern commercial life, speed is one of the most appreciated qualities. For business people, time equals money, which also results in the search for quick solutions for each aspect of business activity including dispute resolution. Arbitration provides speed, impartiality and privacy and is therefore frequently preferred to state court litigation. In light of the increase in international relations, foreign investment and, as a consequence, the need for regulation in the field of international arbitration, Turkey enacted its law on international arbitration in 2001. Turkey's law on international arbitration is based on the UNCITRAL Model Law on International Commercial Arbitration and governs arbitrations taking place in Turkey in addition to the arbitration related provisions included in the Turkish Constitution and in the Civil Procedure Code. Currently, the Union of Chambers and Commodity Exchanges of Turkey (the "TOBB"; cf. http://www.tobb.org.tr/Sayfalar/Eng/AnaSayfa.aspx) and the Istanbul Chamber of Commerce (the "ITO"; cf. http://english.ito.org.tr/wps/portal) provide arbitration facilities in Turkey; however, their acceptance is limited, due to various reasons *inter alia* including a perceived lack of party autonomy and strictness when it comes to their arbitration rules.

Within the framework of the Istanbul Financial Centre Project, and in order to ensure coordination with respect to arbitral awards, to establish a legal infrastructure consistent with international standards and to form a mandatory safety mechanism appealing to foreign investors, preparations for the foundation of the Arbitration Centre have been initiated. The draft law on the Istanbul Arbitration Centre (the "Draft Law") was presented to the Prime Minister of Turkey in 2011. The Draft Law governs the incorporation, organization and activities of the Istanbul Arbitration Centre that aim at the settlement of disputes, including those bearing a foreign element, through arbitration and alternative dispute resolution methods. By the Draft Law, Turkey intends to establish an arbitration centre that will be internationally acknowledged in terms of its organization and functioning. It is worth mentioning in this respect that on November 30, 2012, a Conference on the Istanbul Arbitration Centre took place at the premises of the TOBB. At this conference, members of several international arbitration institutions as well as Turkish scholars and practitioners discussed the features and qualities required for the prospective Istanbul Arbitration Centre in light of their respective experiences. Long-standing arbitration practitioners emphasised the importance of neutrality, impartiality and stability of the arbitration centre in order to raise credibility and to become competitive internationally. At this conference, the Draft Law was evaluated and criticised.

The Draft Law envisages two separate arbitration courts: a national and an international court of arbitration. Accordingly, the Istanbul Arbitration Centre will consist of a general assembly, a board of directors, auditors, an advisory board, the two courts of arbitration and a secretary general. The board of directors will draft the rules of arbitration and alternative dispute resolution. The prospective arbitration centre is expected to publish its rules of arbitration and alternative dispute resolution upon approval of the board of directors' draft by the general assembly. As regards rule-making, the participants of the aforementioned conference recommended to learn from the rules of arbitration of internationally acknowledged institutions.

One of the major impediments to Turkey becoming an arbitration-friendly country is the attitude of Turkish courts towards arbitration. It is frequently criticised that Turkish courts adopt a rather conservative approach when they are involved in the arbitral processes, in particular with respect to award enforcement proceedings and *exequatur* and the set-aside of awards. The Turkish scholars' and practitioners' plans include lobbying for the elimination or at least a reduction of this approach by the Turkish courts.

In the view of the authors, a properly functioning arbitration centre is a prerequisite for the increase and development of international trade in Turkey and an arbitration friendly environment is essential for achieving the goals of such a dispute resolution centre. Projects, events and organizations on the way of incorporation of the Istanbul Arbitration Centre allow the legal community to discuss the current arbitration legislation and to shape the legal system of the future. Notwithstanding: The fact that the Istanbul Arbitration Center will be established and regulated by law instead of a private undertaking as in most other European countries may still trigger considerable criticism.

UNITED ARAB EMIRATES


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A Matter Of Discretion: The DIFC Courts Stay Proceedings In Favour Of Arbitration

There have been a number of important developments regarding arbitration law in the Middle East over the past several months. The United Arab Emirates (*UAE*) has experienced significant growth in domestic and international arbitrations and the courts are now dealing with complex questions regarding the roles they play in the arbitration landscape.

A pair of recent cases determined by the courts of the Dubai International Financial Centre (*DIFC*) highlights the evolution of local arbitration law to provide greater support of arbitral proceedings. The DIFC is a distinct, opt-in, jurisdiction in the Emirate of Dubai. The DIFC provides an "offshore" option to international companies conducting business in the region. It has its own judicial system and procedural rules based on English law. The roster of judges includes local and international jurists.

The two recent DIFC cases are *Injazat Capital Ltd. and Injazat Technology Fund B.S.C. (ITF) v Denton Wilde Sapte & Co (DWS)*, CFI 019/2010 [2012] and *International Electromechanical Service Co. LLC (IES) v Al Fattan Engineering LLC (AFE) and Al Fattan Properties LLC (AFP)*, CFI 004/2012 [2012].

In both cases, the defendants sought a stay of the DIFC court proceedings in favour of arbitral proceedings.

In *Injazat*, ITF commenced proceedings before the DIFC courts claiming damages for professional negligence by DWS. However, the parties had concluded an optional arbitration agreement, which DWS claimed it had exercised. The arbitration agreement provided for arbitration in London under the auspices of the London Court of International Arbitration. DWS sought an order dismissing or staying the proceedings before the DIFC courts, based on several arguments that drew upon DIFC law, Dubai law and the New York Convention.
In *Electromechanical*, IES sued the defendants, AFE and AFP, in the DIFC courts for the recovery of outstanding funds that it alleged were owed under a subcontract for mechanical, electrical and plumbing works. The defendants argued that the subcontract contained an arbitration agreement and sought an order from the DIFC courts declaring that it should not exercise its jurisdiction over the dispute, and an order dismissing or staying the proceedings. The arbitration agreement provided for arbitration in "onshore" Dubai, under the rules of the Dubai International Arbitration Centre (*DIAC*).

Though the requests for a stay by the defendants in both cases were similar, it is important to note the differences in the factual scenarios. Primarily, the seat of the arbitration in *Injazat* was outside of the UAE, whereas in *Electromechanical*, it was inside the UAE (albeit in a different legal jurisdiction to the DIFC). As a result, the New York Convention was only applicable to the *Injazat* case.

The defendants advanced different arguments in pursuit of their orders. Nevertheless, in both cases, the courts' decision turned on two connected issues: first, do the DIFC courts have the "inherent jurisdiction" to grant a stay of the proceedings? Second, if the DIFC courts do have the "inherent jurisdiction" to stay the

proceedings, should they exercise their discretionary power to do so? The DIFC courts' divergent responses to these issues governed the outcome of the cases.

In *Injazat*, the court noted that it lacked the statutory power to order a stay of the proceedings in favour of arbitration, in part because the seat of the arbitration was outside of the DIFC.[1] It also refused to stay the proceedings on the basis that the parties had agreed on the jurisdiction of another "court" and that DIFC law was inapplicable. Ultimately, the court considered whether it had the "residual discretion" to order a stay of the proceedings. It determined that it did have the "residual discretion"; however, it chose not to exercise this discretion on the basis that the statute dealing with the court's power to order a stay (Arbitration Law No 1 of 2008, or the *Arbitration Law*) was "detailed and precise", and that its discretion should only be exercised when dealing with "cases not contemplated by the statutory provisions."[2] Accordingly, the court dismissed the application.

In *Electromechanical*, the court also found that it had discretion to grant a stay against one or both of the defendants in order "to serve the interests of justice and to prevent abuse of the Court's processes."[3] Significantly however, in departing from *Injazat*, the court in *Electromechanical*, decided to grant the stay of the proceedings against AFE and AFP. The court concluded that as between IES and AFE, there was a detailed mechanism for dispute resolution, and there would be a minimal risk of harm to the defendant. As between IES and AFP, the court ordered a stay largely on the basis of judicial economy and the need to avoid inefficiency and duplication of proceedings.

These judgments are important as they highlight the DIFC courts' evolving attitude towards arbitration and their role in supporting parties' agreed dispute resolution mechanisms. In *Injazat*, the court expressed a desire to play a supportive role. Justice Steel expressed concern that the wording of the Arbitration Law "constitutes on the face of it a failure to implement the terms of the New York Convention to which the Emirates is a party."[4] He further confessed a reluctance not to exercise the court's residual discretion to stay the proceedings because of the "implications for perfectly straightforward arbitration clauses with a seat outside the DIFC."[5]

The analysis in *Electromechanical* casts these comments in a different light. The court was careful to acknowledge that the New York Convention is inapplicable to cases where the application for a stay of proceedings is sought in a jurisdiction of the state in which the arbitration is seated. However, it considered the issue carefully and reached the vital conclusion that "[i]n *Injazat*, where the State of the seat [of the arbitration] was London and thus different from the State of the DIFC Court in which a stay was sought, refusing to grant a stay did put the United Arab Emirates in breach of the New York Convention."[6]
The *Electromechanical* case therefore provides multiple forms of reassurance for parties seeking to arbitrate in the UAE, or seeking support of their arbitral proceedings by the DIFC courts. The court has provided guidance on when and how they will grant a stay of proceedings in favour of an arbitration seated in "onshore" and "offshore" Dubai. It has gone one step further to clarify that under the New York Convention, it may be obliged to exercise its discretion to grant a stay of proceedings in favour of an arbitration seated outside the UAE.

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1 Injazat Capital Ltd. and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co, CFI 019/2010 [2012] at para. 20.

2 Ibid, at para. 36.

3 International Electromechanical Service Co. LLC v Al Fattan Engineering LLC and Al Fattan Properties LLC, CFI 004/2012 [2012] at para. 132.

4 Injazat Capital Ltd. and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co, CFI 019/2010 [2012] at para. 21.

5 Ibid, at para. 37.

6 International Electromechanical Service Co. LLC v Al Fattan Engineering LLC and Al Fattan Properties LLC, CFI 004/2012 [2012] at para. 122.

The Middle East is a rapidly evolving region for arbitration, with considerable attention paid to new arbitration laws, arbitration centres and judgments. Though not normally considered a centre of common law jurisprudence, in this case, the common law has demonstrated considerable flexibility and responsiveness to the needs of parties operating in the region and beyond.

USA

Erica Stein – Hanotiau & van den Berg, Brussels

International Arbitration Has Trouble Finding Its Place in the United States Court of Appeals for the Third Circuit

On 26 July 2012, the United States Court of Appeals for the Third Circuit (the "Third Circuit")[1] handed down its opinion in *Control Screening LLC ("Control Screening") v Technological Application and Production Company (Tecapro), HCMC-Vietnam ("Tecapro")*,[2] affirming the judgment of the United States District Court for the District of New Jersey (the "District Court") to "compe[l] arbitration to proceed in New Jersey",[3] despite the Third Circuit's understanding that "both parties understood that arbitration would take place in Europe".[4]

Tecapro, a Vietnamese company, concluded a contract with Control Screening, a New Jersey company, containing the following arbitration clause:

> "In the event all disputes are not resolved, the disputes shall be settled at International Arbitration Center of European countries for claim in the suing party's country under the rule of the Center. Decision of arbitration shall be final and binding [sic] both parties."

These provisions can certainly lead to different possible interpretations, in particular regarding where the place, or seat, of the arbitration should be. The reference to the "International Arbitration Center of European countries" could be understood as a reference to a seat in Europe, which could make sense in the context of a contract between a Vietnamese and a U.S. party. By the same token, the reference to the "International Arbitration Center of European countries" could have been intended to designate an arbitral institution, with the language "for claim in the suing party's country" suggesting that the designation of the place of arbitration would be triggered by the party filing for arbitration.

When Tecapro decided to sue Control Screening for breach of contract, the problems with this arbitration clause came to light. Tecapro initiated arbitration proceedings in Belgium under the Belgian Judicial Code, while Control Screening filed a petition before the District Court to compel arbitration in New Jersey. The District Court granted Control Screening's request, and Tecapro appealed.

On appeal, the Third Circuit noted that the "International Arbitration Center of European countries" does not exist,[5] and acknowledged that the phrase "for claim in the suing party's country" is not clear.[6] However, it

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1 The Third Circuit hears cases on appeal from district courts in Delaware, New Jersey, Pennsylvania and the U.S. Virgin Islands.
2 687 F.3d 163 (3d Cir. 2012).
3 *Id.* at 171.
4 *Id.* at 170 fn. 5.
5 *Id.* at 169.

appears that the Third Circuit was not fully briefed by the parties on what these phrases could mean within the framework of the arbitration agreement. As a result, the issues surrounding these references were not parsed through sufficiently by the court.

First, the Third Circuit did not analyse the clause's reference to the "International Arbitration Center of European countries" as a reference to a non-existent arbitral institution, or as a possible reference to the seat of the arbitration. Instead, the Third Circuit regarded this language as designating "a non-existent arbitration forum".[7] However, the court's reference to "forum" is, at best, unclear in the context of an international arbitration, as is evident from the Third Circuit's conclusions that: "[t]hough the parties apparently intended to arbitrate in Europe, those intentions were nullified by virtue of their mutual mistake in selecting a non-existent arbitration forum"[8]; and "the invalid forum selection provision is severable from the rest of the arbitration agreement".[9]

The Third Circuit then addressed – only briefly, in a footnote – the clause's language that any disputes shall be settled "for claim in the suing party's country".[10] By doing so, the Third Circuit elided over the interplay between this language and the reference to the "International Arbitration Center of European countries", and led itself away from addressing the question of the arbitral seat and whether the arbitration clause provides for one. In all events, the Third Circuit led itself away from determining that the arbitration should be held in Europe, despite its understanding that the parties had agreed to arbitrate there. Instead, the Third Circuit decided to compel arbitration in New Jersey – not because the parties had agreed upon this, but rather because the Third Circuit considered that New Jersey was the only place where it had the power to do so.[11]

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6 *See Id.* at 170 fn. 5.

7 *Id.* at 170.

8 *Id.* at 170 fn. 5.

9 *Id.* at 170.

10 *Id.* at 170 fn. 5.

11 The Third Circuit based this decision on Section 4 of Chapter 1 of the Federal Arbitration Act, which provides that arbitration proceedings "shall be within the district in which the petition for an order directing such arbitration is filed". 9 U.S.C. § 4. This is surprising, taking into account the court's own observation that "[a] district court's primary authority to compel arbitration in the international context comes from 9 U.S.C. § 206 [i.e., Section 206 of Chapter 2 of the Federal Arbitration Act], rather than from 9 U.S.C. § 4". *See* 687 F.3d at 171 fn. 6. Section 206 of the Federal Arbitration Act rather provides that a district court is empowered to "direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States." 9 U.S.C. § 206.

Sylvia Tonova[1] *– Jones Day, London*

Non-Signatories and the Arbitration Agreement: The General Partner

International tribunals and national courts have extended the arbitration agreement to non-signatories of the arbitration agreement applying different legal theories, including agency, apparent authority, implied consent, guarantor, estoppel, group of companies, third-party beneficiary, alter-ego and veil piercing. Additionally, the arbitration agreement may be extended to a non-signatory general partner in a limited partnership on the basis of the *lex societatis*.[2] This represents another category of extension of arbitration agreements to non-signatories.

This article discusses the legal basis on which a general partner in a limited partnership organized under the laws of the State of Delaware (the *lex societatis* of the partnership) may be bound by an arbitration agreement which was signed only by the limited partnership. As the partnership law of other jurisdictions may be similar, the legal principles discussed in this article may provide a useful framework even if another law applies as the *lex societatis*. There may be a variety of reasons for including the non-signatory general partner of a limited partnership in the arbitral proceeding. For example, the limited partnership may not have assets sufficient to satisfy an award, and enforcement of an award against the general partner would be facilitated if the general partner is a party to the award. Further, the general partner may benefit from participating in the arbitration because the principle of collateral estoppel would apply in a subsequent action against the general partner and the partner thus would be prevented from defending on the merits.

Section 17-403(b) of the Delaware Revised Uniform Limited Partnership Act ("Delaware Limited Partnership Act") provides that "a general partner of a [Delaware] limited partnership has the liabilities of a partner in a partnership that is governed by the Delaware Uniform Partnership Law in effect on July 11, 1999 (6 Del. Cl. § 1501, et seq.) to persons other than the partnership and the other partners," *i.e.*, to third parties.[3] Pursuant to Section 1515(a)(2) of the Delaware Uniform Partnership Law in effect on July 11, 1999, "all partners are liable … [j]ointly for all [contract] debts and obligations of the partnership."[4] Thus, in contrast to the legal relationship

[1] The author is an associate at Jones Day in London. The views expressed in this article are solely those of the author and may not be attributed to Jones Day.

[2] The *lex societatis* governs the nature and existence of a limited partnership and, as such, the legal relationship between it and its constituent partners. *See Ad Hoc Award in Zurich of 15 September 1989*, ASA Bull. 270 (1990) (in a contract with a choice of Swiss law, the tribunal concluded that Italian law, as the law "most closely tied to the question," should be applied to determine whether the partner in an Italian partnership was bound by the arbitration agreement entered into by partnership); Marc Blessing, *Extension of the Arbitration Clause to Non-Signatories*, *in* THE ARBITRATION AGREEMENT – ITS MULTIFOLD CRITICAL ASPECTS 151, 161 (ASA Special Series No. 8, Dec. 1994) ("[I]n the case of a contractual joint venture or in the case of a consortium formed as a business partnership the national [law of the joint venture or consortium] [sic] will normally quite clearly answer the question whether or not the partners of the joint venture or the members of the consortium are themselves directly liable, either as primary or as secondary debtors (apart from the liability of the joint venture as such or consortium).").

[3] Delaware Limited Partnership Act, DEL. CODE ANN. tit. 6, § 17-403(b) (2010). The Delaware Limited Partnership Act governs all limited partnerships formed in Delaware on or after January 1, 1983. *Id.* § 17-1104(a).

[4] Delaware Uniform Partnership Law ("Delaware Partnership Law"), DEL. CODE ANN. tit. 6, § 1515(a)(2) (1998).

between a corporate parent company and its subsidiary, general partners of Delaware limited partnerships are jointly liable for all contract debts and obligations of the limited partnership.[5] (It is beyond the scope of this article to discuss the joint liability of multiple general partners in a limited partnership.) Therefore, a general partner may be held liable for breach of a contract concluded by the limited partnership even if the general partner is not a signatory to the contract.[6] Where the general partner of a limited partnership is another limited partnership, the liability passes through that partnership to its own general partner because each general partner is liable for the contract debts and obligations of its limited partnership.[7]

Although there is no Delaware law precedent directly on this point, U.S. courts have held that a general partner's liability for all contract obligations of the limited partnership extends to a contractual obligation to submit disputes to arbitration.[8] Delaware law, accordingly, provides that an action against the limited partnership may be commenced against the partnership alone as well as against its general partners.[9] When a contract with a limited partnership contains an arbitration agreement, claims therefore may be submitted to arbitration directly against the general partner as well as against the limited partnership.

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[5] *See, e.g., Great Lakes Chemical Corp. v. Monsanto Co.*, 96 F. Supp. 2d 376, 391 (D. Del. 2000) ("General partners in limited partnerships have all the powers and duties of general partners in general partnerships, and are liable for the debts of the partnership." (citing 6 Del. C. § 17-403(b)); *Council of the Wilmington Condo. v. Wilmington Ave. Assocs., L.P.*, C.A. No. 94C-09-004, 1997 WL 817843, at *9 (Del. Super. Ct. Oct. 27, 1997) ("As a general partner of a limited partnership, Kain is liable to third parties as is a partner in a partnership without limited partners. A partner is jointly liable for the debts of a partnership."); *Transpac Drilling Venture, 1983-63 by Crestwood Hospitals, Inc. et al. v. United States*, 16 F.3d 383, 388 (Fed. Cir. 1994) ("[G]eneral partners assume unlimited liability for partnership debts under Delaware limited partnership law."); *In re Heritage Organization LLC*, 413 B.R. 438, 515 n.65 (N.D. Tex. 2009) (veil piercing theories do not apply to a Delaware limited partnership because under Delaware partnership law, a general partner is liable for limited partnership's debts as a matter of law); *Peters v. AT&T Corp.*, 179 F.R.D. 564, 568 (N.D. Ill. 1998) (liability of a general partner of a Delaware limited partnership is determined under general partnership law rather than corporate law dealing with piercing the corporate veil).

[6] *See, e.g., Sandvik AB v. Advent Int'l Corp. et al*, 83 F. Supp. 2d 442, 448 (D. Del. 1999), *aff'd* 220 F.3d 99 (3rd Cir. 2000) (holding as a matter of Delaware law that a general partner may be liable for breach of a contract concluded by the Delaware limited partnership); *Metro Commercial Real Estate, Inc. v. Reale*, 968 F. Supp. 1005, 1007 (E.D. Pa. 1997) ("Defendant, as a general partner of Lan Associates [a Delaware limited partnership], is liable for the contractual debts of Lan Associates.").

[7] *See Connecticut Nat'l Bank v. Norwalk Factory Outlet Limited Partnership, et al.,* 1993 Conn. Super. LEXIS 383, at *8 (Conn. Super. 1993) (holding, as a matter of Connecticut law, which is the same as Delaware law in this regard, that liability for an unpaid promissory note signed by a Connecticut limited partnership (P1) extended to: the limited partnership's general partner (P2) (itself a Delaware limited partnership); that limited partnership's general partner (P3) (also a Delaware limited partnership); and that limited partnership's general partner (P4) (a Delaware corporation)); *Gilbert Switzer Assoc. v. Nat'l Hous. P'ship, Ltd.*, 641 F. Supp. 150, 156 (D. Conn. 1986) (enforcing an arbitration award rendered against a limited partnership against the general partner of the limited partnership [NHP] and the general partner [NCHP] of the first general partner [NHP] under Connecticut limited partnership law).

[8] *See, e.g., Kannayan v. Dollar Phone Corp.*, 2009 WL 523186, at *4 (W.D. Okla. 2009) (accepting that partner can be bound by an arbitration agreement signed on behalf of a partnership); *Lake v. Griffin*, 2009 WL 5067634, at *9 (Cal. App. 2009) (partner is required to submit to arbitration where the partnership has agreed to that manner of dispute resolution); *Hardie v. United States*, 367 F.3d 1288, 1291 (Fed. Cir. 2004) (holding that the United States, as a general partner of a limited partnership, was bound by the arbitration clause in a joint venture agreement to which the limited partnership was a party); *Valley Casework, Inc. v. Comfort Constr., Inc.*, 90 Cal. Rptr. 2d 779, 785 (Cal. App. 1999) ("An individual partner may be required to submit to arbitration where the partnership has agreed to that manner of dispute resolution."); *Berger Farms v. First Interstate Bank of Oregon, N.A.*, 939 P.2d 64, 73 (Or. App. 1997) (individual partners bound by arbitration agreements entered into by the partnership); *County of Contra Costa v. Kaiser Foundation Health Plan Inc.*, 54 Cal. Rptr. 2d 628, 632 (Cal. App. 4th 1996) ("general partner of a limited partnership is bound by the arbitration agreement entered into by the partnership and a third party"); *Keller Constr. Co., Inc. v. Kashani*, 220 Cal. App. 3d 222, 228 (Cal. Ct. App. 1990) (general partner in limited partnership bound by arbitration agreement concluded by the limited partnership); *Creative Securities Corp. v. Bear Stearns & Co.*, 671 F. Supp. 961, 962-963 n. 1 (S.D.N.Y. 1987) (ruling that "[f]or the purposes of this motion, the Court assumes that even if the general partners are non-signatories, they are bound by the arbitration provisions contained in the contracts"); *Ferreri v. First Options of Chicago, Inc.*, 623 F. Supp. 427, 435 n.7 (E.D. Pa. 1985) (rejecting argument that partners cannot be bound to arbitrate on the basis of agreement signed by general partner for partnership); *Hartford Fin. Sys., Inc. v. Florida Software Serv., Inc.*, 550 F. Supp. 1079, 1087 (D. Me. 1982) (concluding there was "no authority for excluding an obligation to arbitrate from [the partner's liability for] the 'debts and obligations'" of the partnership); *Matter of Camhi (Undergarment & Negligee Workers Union, Local 62, I.L.G.W.U.)*, 28 Misc. 2d 93, 95 (N.Y. Sup. 1960) (partner bound to arbitrate dispute notwithstanding that the partner did not personally sign the agreement). *See also* Vol. 59A American Jurisprudence § 340 (2003) ("The relationship between a sole general partner and a limited partnership is such that the partner is bound by an agreement to arbitrate disputes entered into by the partnership.").

[9] *Randle v. GC Serv., L.P.*, 25 F. Supp. 2d 849, 852 (N.D. Ill. 1998) ("[U]nder Delaware partnership law, plaintiffs are entitled to sue both the limited partnership and its general partners. Delaware has a 'common name' statute which allows a limited partnership to be sued as an entity…. Such statutes 'are permissive, not mandatory; suit may still be brought against the general partners … liable for the partnership obligation.' Under Delaware law … individual partners may be sued without resort to the partnership name.") (internal citations omitted).

The general nature of these principles of partnership law has been recognized by several commentators[10] and in a number of arbitral awards. For example, in ICC Case no. 3879, the tribunal observed:

> A partner is bound by the arbitration clause entered into by a general partnership ('*Société en nom collectif*') of which he is a partner, and the co-contracting party may rely upon the arbitration clause if he brings his action against the partner instead of bringing it against the partnership.[11]

Similarly, in ICC Case No. 9762, the tribunal stated:

> It is generally accepted that if a third party is bound by the same obligations stipulated by a party to a contract and this contract contains an arbitration clause or, in relation to it, an arbitration agreement exists, such a third party is also bound by the arbitration clause, or arbitration agreement, even if it did not sign it. In other words, the mandatory force of the arbitration clause (or arbitration agreement) cannot be disassociated from that of the substantive contractual commitments…. This may be the case of an individual partner being bound by an arbitration clause signed by a general partnership.[12]

In short, the general partner of a limited partnership may be bound by an arbitration agreement contained in a contract signed only by the limited partnership and may be held liable for the contract debts and obligations of the limited partnership in an arbitral proceeding.

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[10] *See, e.g.*, *Who are the Parties to the Contract(s) or to the Arbitration Clause(s) Contained Therein? The Theories Applied by Courts and Arbitral Tribunals*, *in* Bernard Hanotiau, COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS 7 (Kluwer Law International 2006) ("Persons other than the formal signatories may be parties to the arbitration agreement … because they are … members with the signatories of a general partnership or a community of rights and duties."); Otto Sandrock, *'Intra' and 'Extra-Entity' Agreements to Arbitrate and their Extension to Non-Signatories under German Law*, 19 J. INT'L ARB. 423, 438 (2002) ("General partners are fully liable for the debts of their partnership. With reference to that unlimited liability, German courts have constantly held that 'external' arbitration agreements also bind general partners even though these partners did not sign the respective arbitration agreement in their own names and on their own behalf.").

[11] Interim Award of 5 March 1984 in ICC Case no. 3879, *Westland Helicopters Ltd. (U.K.) v. A .O.I. et al*, 11 Y.B. COM. ARB. 127, 128-129 (1986) (emphasis in original).

[12] Final Award in ICC Case no. 9762 of 2001, 29 Y.B. COM. ARB. 26, 39 (2004). *See also* Hanotiau, *supra* note 10, at 117-118 (describing an unpublished award in an *ad hoc* arbitration where the tribunal extended the arbitration agreement to the second, third and fourth respondents, none of whom had signed the arbitration agreement, on the ground that the claimant could not have regarded its relationship with first, second, third and fourth respondents other than "as a relationship with various members of a partnership with joint and several liability with respect to the claimant").

ANNOUCEMENTS

New LCIA Registrar Sarah Lancaster

The LCIA is very pleased to welcome Sarah Lancaster, who joined the LCIA as Registrar on 29 October 2012.

Sarah has more than 10 years' experience gained working in Baker & McKenzie's London and Sydney offices. Her practice has incorporated general commercial litigation and international arbitration, with a particular focus on telecoms and resources & energy disputes.

Based in the LCIA's Fleet St offices, Sarah heads up the casework Secretariat, which is responsible for the administration of all disputes referred to the LCIA.

The Gillis Wetter Memorial Prize

We are pleased to advise that the winner of the 2012 GWP will be announced in the Spring. The winner will be invited to the YIAG symposium at Tylney Hall on 10 May to be presented with his/her prize by Professor Park, President of the Panel of Judges.

YIAG'S FORTHCOMING EVENTS

21 February 2013
Young Practitioners' Symposium, Co-hosted by the IBA Arbitration Committee, YIAG and ALARB Young Committee
A half-day symposium.
Bogotá
Programme and registration form

10 May 2013
Young International Arbitration Group Symposium
A half-day symposium preceding the LCIA European Users' Council Symposium.
Tylney Hall, UK

20 September 2013
Young International Arbitration Group Symposium
A half-day symposium preceding the LCIA European Users' Council Symposium.
Tylney Hall, UK

OTHER ARBITRATION EVENTS

19 June 2013
8th Annual Dallas Roundtable
A Roundtable event on International Arbitration.
Dallas
For further information, please click here.

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