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From the Editors

Welcome to the 12th edition of Arbitration World, a publication from K&L Gates' Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution. We hope you find this edition of Arbitration World of interest, and we welcome any feedback (email ian.meredith@klgates.com or peter.morton@klgates.com).

News from around the World

Ben J. Anstey (London)

Institutions

Hong Kong International Arbitration Centre
The HKIAC has appointed Chiann Bao as its new secretary general. Ms. Bao joins the HKIAC from DLA Piper LLP's New York office.

International Court of Arbitration
The ICC has issued a revised version of its Statement of Acceptance, Availability and Independence for arbitrators, which took effect as of January 2010. Responding to concerns raised following the initial publication of the form, in August 2009, the new Statement makes it explicit that any information provided by an arbitrator must be treated confidentially and will be stored in compliance with French data protection law.

London Court of International Arbitration India
On 17 April 2010, the LCIA's New Delhi office launched its new Arbitration Rules at a conference in Mumbai, to coincide with the first anniversary of the LCIA's presence in India. The new rules are based on the LCIA Rules, and provide for expedited procedures and sanctions for delay, and grant the LCIA sole power to appoint chairs of tribunals. The rules also contain an article which is a variation on a similar requirement in the LCIA Rules, placing corresponding duties on arbitral tribunals and parties to ensure proceedings are conducted fairly, efficiently and expeditiously.

Stockholm Chamber of Commerce
After 35 years in the position, on 23 March 2010 Ulf Franke retired as secretary general of the Arbitration Institute of the SCC. He is replaced by Annette Magnusson.

Asia

India

The Law Ministry, Government of India has released a consultation paper with a view to amending the Arbitration and Conciliation Act 1996. Recommendations to overhaul the Act were given in the 176th Law Commission report, back in 2001.

The proposed amendments aim to address possible lacunae in the existing legal framework, to minimise court involvement in arbitral proceedings and to institutionalise the arbitration process, with the ultimate goal of making India a hub for international commercial arbitration.

Europe

Scotland

The commencement of the Arbitration (Scotland) Act 2010 (previously 2009), originally due to take place in early 2010 (as reported in our February 2010 edition), has been delayed, in order to provide time for the Rules of Court to be amended in accordance with the parts of the Act that require court support.

Ireland

On 24 February 2010, the Irish Senate passed the final stages of the Arbitration Act 2010. The legislation has been signed by President McAleese and will come into operation on 8 June 2010. The Act adopts the UNCITRAL Model Law, removing the distinction between domestic and international arbitration. Applications under the Act will be heard by a designated High Court arbitration judge. The grounds for challenging arbitral awards will be extremely limited. There will be no appeal from the High Court's decisions on key applications under the Act.

Russia

In December 2009 and January 2010, the Federal Arbitration Court of Moscow District upheld earlier decisions of the 9th Appellate Court (Moscow District), confirming the validity of 'hybrid' dispute resolution clauses, which provide for parties to an agreement to choose between litigation or arbitration when resolving disputes arising under the agreement.

Cyprus

A new arbitration centre is to be launched in Cyprus—the Cyprus International Arbitration Centre (CIAC). The CIAC will deal with domestic and international arbitrations. The management committee is headed by retired Judge Sotos Demetriou.

North America

U.S.

On 27 April 2010, in *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.*, the U.S. Supreme Court ruled that imposing class arbitrations on parties who have not agreed to them is inconsistent with the Federal Arbitration Act (FAA).

AnimalFeeds filed a class action lawsuit in the U.S. District Court for the Eastern District of Pennsylvania, alleging that Stolt-Nielsen had engaged in anti-competitive practices in the shipping market, in violation of federal antitrust laws. There were similar cases in the District of Connecticut, which were consolidated with the AnimalFeeds case.

The relevant arbitration clause was silent on the issue of whether class arbitration was permitted. The Supreme Court held that, under the FAA, arbitration is a matter of consent, and found that the arbitration panel had "*exceeded its powers by imposing its own policy choice instead of identifying and applying a rule of decision derived from the FAA or from maritime or New York law.*"

On Tuesday, 15 June 2010, K&L Gates will be hosting a webinar on recent developments regarding class action arbitration. For further details of this event and information on how to register, please click here.

Oceania

Australia

On 3 March 2010, plans were announced by the Commonwealth and New South Wales Attorney Generals for a new arbitration centre in Sydney, dedicated to the international arbitration market. The new centre is to be jointly funded by the Federal Government and State Government of New South Wales, together with the Australian Centre

for International Commercial Arbitration and the Australian Commercial Disputes Centre.

Proposed Revisions to the IBA Rules on Evidence

Damian Watkin (Singapore)

The leading institutional rules generally do not provide any comprehensive framework of provisions which shape, with any certainty, how oral and documentary evidence is to be presented and the evidentiary hearings conducted. It is often incumbent upon the tribunal, absent any agreement between the parties, to render directions addressing such issues: for example the scope of document production, submission timetables, the need for expert evidence, measures for non-compliance, admissibility of evidence, etc. Given also the striking differences that traditionally exist between the common and civil law systems' approach to the question of evidence, the potential benefits of a framework of guidelines to assist the evidentiary process are clear.

In 1999, the International Bar Association ('IBA') adopted its "Rules on the Taking of Evidence in International Commercial Arbitration" ('the IBA Rules'). Intended to supplement the respective laws and rules pursuant to which the arbitral proceedings are conducted, the IBA Rules strive to strike the compromise between the competing civil and common law approaches by providing practical solutions to some of the essential evidentiary issues. Whilst the IBA Rules are by no means a panacea for all issues that may arise, most practitioners within the international arbitration community regard the IBA Rules as a reliable and effective vehicle by which the evidentiary components to the proceedings can be shaped and governed with greater degrees of certainty.

An important aspect of the IBA Rules is that they help preserve one of the core facets which define international arbitration, namely flexibility of process. The IBA Rules have traditionally achieved this by not being unduly prescriptive and by affording the tribunal a wide scope in the interpretation and application of its provisions. In light of those merits of the IBA Rules, their adoption into arbitral proceedings is increasing globally and tribunals will also often refer to the IBA Rules as the benchmark in proceedings which draw parties from both common and civil law backgrounds.

Key proposed revisions to the IBA Rules

A specially formed IBA Subcommittee has recently undertaken a review of the IBA Rules, with the assistance of the original 1999 Working Party, culminating in a final draft of proposed revisions which have been submitted to the IBA Council for approval at its Council Meeting in May 2010. The latest iteration adopts a new title "*IBA Rules on the Taking of Evidence in International Arbitration*" dropping "Commercial" from its previous incarnation as a reflection, presumably, that the Rules might be applied not only in commercial cases but also in the increasing tide of investment treaty arbitrations. Unfortunately, the confines of this article do not allow for an analysis of every revision, save to acknowledge that each of its Articles has been amended to differing degrees and with varying impact. The more significant of those revisions are now discussed.

The primary objectives of the proposed revised IBA Rules are set forth within its Preamble, which confirms they "*are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations.*" The express reference to concepts of "fairness" as a primary objective is new. Parties ought to be aware that this is by no means idle rhetoric as, throughout the body of the instrument, there are further references to proportionality and fairness concerning such issues as electronic disclosure [Arts 3.3(a)(ii) & 3.12(b)] and the admissibility and assessment of evidence [Art 9.2(g)]. Indeed, the proposed revised Rules now conclude by expressly empowering the tribunal to exercise cost sanctions should it determine that any party has "*failed to conduct itself in good faith in the taking of evidence*" [Art 9.7].

Buttressing its primary objective, the revised IBA Rules provide that the arbitral tribunal "*shall consult the parties*" on the question of evidence at the outset of proceedings and "*invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence*" [Art 2.1]. The instrument also invites the tribunal to identify to the parties any issues it "*may regard as relevant to the case and material to its*

outcome; and/or for which a preliminary determination may be appropriate" [Art 2.3]. The emphasis the Rules now place on the early involvement of the tribunal suggests an approach to evidentiary issues which is more prescriptive than previously comprehended.

The revised Rules also contain an interesting revision concerning party-appointed experts, whose written report is now required to contain "*a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal*" [Art 5.2(c)]. This concept resonates with the overriding duty which the expert owes to the court in English court proceedings as summated in *The Ikarian Reefer* case and embodied at Part 35.3 of the English civil procedure rules. Whilst some of the principal court systems have also adopted similar concepts of party-appointed expert independence and overriding duties, for example the Australian Federal Court, it is not universally applied. The most obvious example is the US court system, where the party-appointed expert is commonly disparaged as a "hired gun." From the position therefore of a party whose own national court system does not recognise such a concept, it is questionable whether a party-appointed expert will ever be truly regarded as "independent" from the party which is paying the expert's fees. That is a thorny and long-rehearsed issue, so this particular revision will doubtless spark further debate.

On the issue of exclusion of evidence on the grounds of legal privilege, which is another taxing evidentiary concept in the context of an international arbitration, the proposed revised Rules now invite the tribunal to take into account any need to protect the confidentiality of "*a Document created or statement or oral communication*" made in connection with the obtaining of legal advice or settlement negotiations. The tribunal is also invited to take into account "*the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules*" [Art 9.3]. Both revisions, it is submitted, should greatly assist the tribunal in its determination on that complex issue.

Impact of the proposed revisions

Having regard to the above proposed revisions, the IBA Rules disclose a subtle shift to an instrument which is more prescriptive than its predecessor. To some international arbitration users, that will be difficult to digest and a debate will likely ensue as to whether the core facet of flexibility may, as a consequence, become fractionally eroded. That however is symptomatic (some would say the beauty) of international arbitration as a whole. Some users seek rules where others seek guidelines. The IBA Rules will therefore never be all things to all its users. There is a very fine balance to be struck between the many competing cultural and legal interests and it is against that distinctive backdrop that the revisions must be properly evaluated.

The proposed revisions seek to safeguard and promote further those other essential characteristics which help define international arbitration in the modern era, namely fairness, economy and efficiency. By also encouraging greater proactive involvement of the tribunal, particularly within the early stages of the proceedings, the revised Rules hark that little bit louder to the reality of what is actually happening in daily arbitration practise. Despite one or two potential controversies, the revisions should on the whole ensure that the IBA Rules remain a widely accepted instrument and secure international arbitration's footing in meeting the challenges that lay ahead.

Start of a New Epoch of ADR in Russia? Draft Mediation Law Brought to Parliament by President Medvedev

Dr. Rafal Morek & Jan Kaczmarczyk (Warsaw) and Marina Lebedeva (Moscow)

President Dmitry Medvedev introduced the eagerly awaited draft act on mediation: Проект Федерального Закона № 341071-5 "Об альтернативной процедуре урегулирования споров с участием посредника (процедуре медиации)", to the State Duma (the lower house of the Russian parliament) on March 11, 2010. The purpose of this bill is to effectively promote mediation in Russia.

Unlike arbitration, which is supported by legislation in the Russian Federation through the 1993 Law on

International Commercial Arbitration (based on the UNCITRAL Model Law) and the 2002 Federal Law on Arbitration Courts (governing domestic arbitration), mediation has thus far lacked an adequate legal framework. In particular, its use and development were hindered by a number of problems related to the lack of appropriate guarantees of confidentiality, mediation not affecting the running of limitation periods, and several other issues.

Similar to the legislative motives for promoting ADR in other jurisdictions, mediation is perceived in Russia as a means to ensure improved access to justice. The official judicial system is overwhelmed—in 2009 the state courts heard 25 million cases. In addition, the quality of judiciary work is hampered by procedural legislation which prescribes limited terms for hearing a case. Mediation appears to be an attractive and efficient alternative to state court proceedings. In many cases, it allows parties to reach the most favorable and mutually beneficial solution to their dispute without involving judicial bodies or expending significant financial and other resources.

The draft regulation contains a complex and detailed legal mechanism for mediation in civil, commercial, family and labor matters. It is accompanied by appropriate amendments and additions to the Civil Code, Civil Procedural Code, Arbitration Procedural Code and Federal Law on Arbitration Courts. The new provisions will regulate, inter alia, entering into a mediation agreement (out-of-court mediation), commencing a mediation when a dispute is already at court (court-related mediation), and conditions of settlement agreements' approval by courts.

The attractiveness of mediation should be further enhanced by the regulation providing that the commencement of mediation will interrupt the limitation period. Equally important would be the procedural guarantees of confidentiality, including the rule prohibiting a mediator from being called as a witness as to the facts that became known to him in the course of the mediation.

As regards the statutory requirements for future mediators, the bill proclaims—as a general principle—that disputes can be mediated by any person with full legal capacity and with no criminal record. However, pursuant to the bill professional mediators must be at least 25 years old, have higher education qualifications and pass appropriate mediation training in accordance with the program prescribed by the Russian Federal Government. Individuals who do not fulfill these criteria will be expressly forbidden from advertising themselves as professional mediators. The bill also prohibits public officials from being professional mediators.

According to the bill, legal entities whose main activity is to provide mediation services, i.e. institutional providers of mediation services, may also mediate disputes.

An interesting proposal foreseen by the draft allows for the setting up of professional mediator associations based on the principle of self-regulation of the mediation community (although such self-regulatory associations do not provide mediation services themselves). Both individual professional mediators and institutional providers of mediation services may establish and join self-regulating organizations and introduce certification programs for their members. The act requires such organizations to have at least 100 individual members and/or 20 legal entities providing mediation services.

The new Russian draft act on mediation is in many ways similar to the standards enshrined in the EU Directive 2008/52/EC and the 2002 UNCITRAL Model Law on International Commercial Conciliation. It is also intended to be specifically adapted to local circumstances and legal culture. Its drafters refrained from proposing more "progressive" methods of implementing mediation that have been adopted in certain other jurisdictions. This cautious approach can be illustrated, for example, by the fact that the act does not introduce statutory grounds for compulsory mediation schemes. Nor will the act provide for any specific penalties for failing to participate in mediation or for abusing this procedure by participating in bad faith. The act does not institute particular financial or other incentives to use mediation. In particular, mediated settlements will not be endowed with expedited enforceability by notarization or other means different from approval by court.

The act is to come into force on 1 January 2011, if approved by the State Duma, the Council of Federation (the upper house of the Russian parliament) and signed by the President of the Russian Federation. It is expected that the draft may become the binding law in the same wording as proposed by Mr. Medvedev. The establishment of a legal framework for mediation is seen as an important step forward in promoting ADR in Russia.

Conflict in the U.S. Courts Regarding the Enforceability of Arbitration Clauses in International Insurance Contracts

Paul K. Stockman, Pittsburgh

American law in general is uniformly and strongly supportive of agreements to arbitrate. That uniformity breaks down, however, when insurance contracts are involved. Under the McCarran-Ferguson Act, state laws "regulating the business of insurance" take precedence over any inconsistent "Act of Congress," unless the federal enactment "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). This "reverse preemption" has been held to apply to federal arbitration statutes, meaning that state insurance laws declining to enforce arbitration clauses in insurance contracts remain valid. As a result, the enforceability of an arbitration clause in an insurance policy in many cases turns on the specifics of governing state law.

The Court of Appeals for the Fifth Circuit has introduced yet another layer of uncertainty into this interpretive puzzle. In *Safety National Casualty v. Certain Underwriters at Lloyd's, London* (2009), the court (sitting *en banc*) held that the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is ***not*** an "Act of Congress" within McCarran-Ferguson's "reverse preemption," even though it is enforced in the United States only through a specific Congressional enactment. Accordingly, the court declined to apply a Louisiana statute invalidating arbitration clauses in insurance contracts, and held that the arbitration (in a dispute over excess workers' compensation insurance covering a self-insurance fund) should proceed.

The decision was not unanimous. Three judges dissented from the 14-judge majority, arguing that the New York Convention had no independent enforceability in American courts, and that the implementing legislation, *see* 9 U.S.C. §§ 201-208, was unquestionably an "Act of Congress" explicitly within the scope of McCarran-Ferguson's "reverse preemption." (One judge concurred in the judgment, on the alternative ground that the New York Convention was enforceable in its own right, and did not rely on an "Act of Congress" to give it effect.)

Significantly, the *Safety National* decision explicitly conflicts with a decision from the Court of Appeals for the Second Circuit, *Stephens v. American International Insurance* (1995). That court, using the same reasoning as the *Safety National* dissent, held that the New York Convention was not "self-executing," and relied on an "Act of Congress" for its implementation in American courts. Accordingly, the court concluded, the implementing statute was "reverse preempted" by the McCarran-Ferguson Act, and did not mandate enforcement of arbitration clauses in international insurance contracts.

As a result of the *Safety National* decision, within the territorial limits of the Fifth Circuit (Texas, Louisiana and Mississippi), state laws denying the enforceability of arbitration clauses in insurance disputes ***do not*** apply to international commercial insurance contracts, but ***do*** apply to purely domestic insurance policies. By contrast, within the Second Circuit (New York, Connecticut and Vermont), state laws precluding insurance arbitration are enforceable, regardless of whether the insurance transaction is purely domestic or international.

Because of this conflict between two Courts of Appeals, the matter may be ripe for resolution by the United States Supreme Court. And indeed, the loser in the *Safety National* case has requested such a review. The Court has not yet decided whether to hear the case; instead, on 17 May 2010, it asked the Solicitor General to file a brief presenting the United States government's views on the matter. (In such a situation, the Court often follows the Solicitor General's recommendation.)

In the interim, there are two lessons for parties to international insurance transactions: **First,** the parties should not assume that an arbitration clause in the relevant policy document is or is not enforceable. Whether that is the case will depend upon the venue of any dispute, and the idiosyncrasies of whichever state's law is held to govern. (According to the Petition for Writ of Certiorari in *Safety National*, thirteen states—Arkansas, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Missouri, Nebraska, Rhode Island, South Carolina, South Dakota, Virginia and Washington—have statutes invalidating arbitration clauses in insurance policies, and four others—California, Maryland, Mississippi and Wyoming—invalidate or limit arbitration clauses in certain types of policies.) **Second,** and consequently, parties to insurance disputes with international aspects and arbitration clauses are well-advised to consult counsel who have expertise both with substantive principles of insurance law ***and*** with nuances in the law of arbitration and conflicts of law.

"Financial Legal Expertise Centre" Proposed for the Resolution of Financial Disputes

Clare Tanner, London

The global financial crisis has prompted a vast amount of comment on and proposals for improvements in the political and regulatory spheres. There has, perhaps, been less focus on improvements in the resolution of financial disputes even though the crisis has inevitably given rise to an increased number of such disputes.

One organisation that has put its head above the parapet on this issue is the World Legal Forum (WLF). The WLF is a not-for-profit organisation based in The Hague which was founded to stimulate the effectiveness of international law. The WLF published a report last year considering various mechanisms for dispute resolution on complex financial products.

The report has not been made publicly available, but it is reported to have considered mediation, ad hoc arbitration, arbitration supervised by the Permanent Court for Arbitration in The Hague, a new treaty-based arbitration facility and an international tribunal. The difficulties of achieving international consensus tend to favour mediation or ad hoc arbitration and the WLF's preliminary recommendations were to establish a mediation and arbitration facility to be organised by market participants and to be called the Financial Legal Expertise Centre (FLEC). The FLEC proposals are understood to include the creation of a list of experts to be appointed as arbitrators in ad hoc arbitrations subject to the UNCITRAL rules.

The WLF will be hosting an international expert meeting on arbitration in structured finance in May 2010 and it is reported that the topics under consideration will include the benefits and mechanics of creating an international financial disputes tribunal and enforcement issues.

The concerns of some participants in financial markets when it comes to arbitration, such as a lack of arbitrator expertise and procedures suitable for financial disputes, could be addressed by FLEC. The need for publicly available precedents in some cases could also be addressed if parties agree to the publication of awards. When combined with other existing features of arbitration, such as finality and the ability to enforce awards made in a country which is a party to the 1958 New York Convention in any other Convention State, this could result in an attractive forum for the resolution of financial disputes. However, it remains to be seen whether FLEC will gain sufficient support and funding from market participants and other interested parties to be viable.

Proposed Changes to Polish Arbitration Legislation

Wojciech Sadowski, Warsaw

On 8 March 2010 the Polish Ministry of Economy proposed a draft act on eliminating administrative barriers for citizens and businesses. The package proposes to amend 81 existing legislative acts, including arbitration law contained in the Polish Code of Civil Procedure, as well as the Insolvency and Restructuring Act. The general idea behind the proposal is to speed up arbitration-related proceedings before the state courts. The hope is that

this will be achieved by introducing short terms for state courts to finalize matters related to disqualification of an arbitrator, as well as proceedings related to setting aside, confirmation and enforcement of arbitral awards. The draft is at initial stages of legislative proceedings. After completion of the internal consultation process within the executive branch, it will be submitted to the Parliament, where it may undergo substantial amendments.

The draft specifically provides that motions for disqualification of an arbitrator should be decided by the courts within two weeks, and actions to set aside an award within three months from the start of the procedure. In a similar vein, applications for confirmation or enforcement of a domestic award should be decided within one month, and similar applications related to foreign arbitral awards within three months from the moment of initiation of the proceedings. There is no doubt that it would be a great achievement to keep court proceedings within those strict time limits, which could further bolster arbitration as an efficient method of resolution of business disputes—however, it is rather doubtful whether it would be possible to implement the intended goals. This is particularly true in cases involving parties from various jurisdictions, where it can be difficult to serve court documents abroad within three months. Nonetheless, the proposal should be seen as indicative of the positive approach of the branch of the Government responsible for the economic dimension of the Polish legal system and may be improved in the further course of the legislative process.

In another part of the commented draft, it is proposed to limit the right of a third party to intervene in court proceedings related to annulment, confirmation and enforcement of arbitral awards. Currently, any party able to demonstrate its legal interest could join such proceedings as an intervener, e.g. because confirmation of the award in question could lead to its liability toward the party losing the arbitration. This can lead to substantial derogation from the principles of confidentiality and privacy of the arbitration process and undermine the stability of the awards. The proposed draft provides for the intervener to meet another threshold, notably, in addition to demonstrating legal interest, an intervener would also have to be party to the arbitration agreement in question. In practical terms, the proposal limits the possible instances of intervention only to multilateral arbitration agreements, where not all parties to the agreement were simultaneously parties to arbitration. Another area of arbitration where intervention could still be relevant would be corporate disputes between the shareholders and between the shareholders and the company. It should be highlighted, however, that the scope of arbitrability of such disputes has been largely curtailed by a resolution of the Polish Supreme Court of 7 May 2009 (III CZP 13/09), which declared non-arbitrable disputes related to invalidation and/or annulment of resolutions taken by shareholders of limited liability and joint-stock companies.

The draft legislation also attempts to shorten the time limit for bringing an action to set aside an award. It remains the general rule that a party dissatisfied with an award can challenge it only within two months from the date of its receipt. However, the draft legislation proposes that in cases where rectification, interpretation or correction of a clerical mistake was requested, a given action must be brought within one month from the moment when the relevant decision was served on the party. The draft further proposes that where the award is challenged because it was based on a forged document or obtained as a result of a criminal offence, as well as when it conflicts with another judgment or award, the award can be challenged only within one year from the moment when the award was actually served on that party. It can be assumed that the reason for these proposals is to introduce a foreseeable moment beyond which the arbitral award would be immune to challenge.

The draft also discreetly proposes to repeal Articles 142 and 147 of the Polish Insolvency and Restructuring Act, which provide that from the time when bankruptcy proceedings are initiated by a bankruptcy court, all arbitration agreements binding on the insolvent party automatically become invalid and all pending arbitration proceedings involving the insolvent party should be terminated. This proposed amendment would bring arbitral proceedings on the same footing as judicial proceedings, implying protection of the reasonable expectations of parties to arbitral proceedings

pending at the commencement of bankruptcy proceedings.

The provisions to be repealed have recently become notorious due to the *Vivendi S.A. v. Elektrim S.A.* case, where the defendant became insolvent in the midst of a pending set of arbitration and post-arbitration proceedings, setting the stage for the battle for control over a major Polish GSM operator. The insolvency of Elektrim revived the thorny conflict of policies between arbitration and insolvency and led to divergent interpretations of the English, Swiss and Polish courts.

Recent Developments Concerning Dubai Ruler's Decree 57 of 2009

Neal Brendel, Dubai and Roberta Anderson, Pittsburgh

The 25 November 2009 announcement by the Dubai government that it would seek a stand-still on debt repayments by state-owned Dubai World, and its subsidiary, Nakheel PJSC, sent shockwaves through the global financial markets and investment community.

As discussed in our February 2010 edition of Arbitration World, the Dubai government subsequently announced the implementation of a comprehensive legal framework to govern the possible bankruptcy or liquidation of Dubai World or its subsidiaries. This legal framework is established by Decree No. 57 of 2009 ("Decree 57"), which was effective as of 13 December 2009 and is based largely on the Dubai International Financial Centre's ("DIFC") insolvency laws, together with some amendments specific to Dubai World. Among other things, Decree 57 establishes a tribunal, initially comprised of three senior international judges from the DIFC Courts (the "Tribunal"), which has exclusive power to hear and decide all disputes relating to any demand or claim submitted against Dubai World or its subsidiaries.

Two recent developments—one in the form of a Tribunal practice direction and another in the form of a Dubai court decision—have clarified the scope and significance of Decree 57. In addition, the Dubai government recently announced a specific restructuring proposal to resolve all outstanding demands and claims by creditors of Dubai World and Nakheel. These recent developments are discussed in turn below.

Tribunal Practice Direction No. 1 of 2010

As we noted in the February 2010 edition of Arbitration World, the Decree 57 framework appeared to potentially supersede existing contractual arbitration provisions, including with respect to claims already in arbitration. A recent practice direction of the Tribunal issued on and effective as of 30 March 2010, however, entitled "Practice Direction No. 1 of 2010," makes clear that the Tribunal will respect and enforce arbitration clauses contained in contracts with Dubai World and its subsidiaries—including with respect to claims already in arbitration. More specifically, Practice Direction No. 1, which relates to arbitration clauses in contracts with Dubai World companies, states that the Tribunal has a policy "to respect and enforce arbitration agreements made between [Dubai World] and its creditors" and also states that parties should "continue with pending arbitration proceedings in accordance with their contractual obligations." In addition, Practice Direction No. 1 makes clear that applications with reference to arbitrations involving Dubai World subsidiaries, which would otherwise be made to a Court, should now "be made to the Tribunal."

In confirming that contractual arbitration arrangements remain valid in disputes with Dubai World and its subsidiaries, Practice Direction No. 1 has resolved a key ambiguity arising from Decree 57. Practice Direction No. 1 also makes it clear that the Tribunal retains ultimate jurisdiction over claims against Dubai World and its subsidiaries, including Nakheel.

The Dubai International Arbitration Centre likewise has confirmed that Decree 57 does not affect disputes involving arbitration, but that any resulting arbitration award to which the Decree applies must be enforced through the Tribunal.

It has been suggested that Practice Direction No. 1 leaves open the issue of whether a voluntary application notice filed by the debtor would still act to stay any pending arbitration and prohibit the

commencement of a new arbitration with the Tribunal absent permission of the Tribunal. One might expect that this, and other issues related to the operation of the Tribunal, will be clarified in due course as cases come to be dealt with by the Tribunal. The first ever case to come before the Tribunal was filed on 5 April 2010 against Dubai World subsidiary Limitless LLC by a former employee, and may set the tone and stage for other claims.

Recent Dubai Court of First Instance Decision

Another issue of debate concerning Decree 57 relates to whether the Tribunal currently is operational or, alternatively, would only become operational following a Dubai World or Nakheel voluntary application notice to the Tribunal. On 30 March 2010, the Dubai Court of First Instance offered insight regarding this issue when it dismissed a claim against Nakheel relating to the ownership of real estate. The Dubai Court of First Instance dismissed the claim on the basis that the Tribunal had exclusive jurisdiction to hear and decide such matters pursuant to Decree 57. It remains unclear as to whether the decision may be appealed and in any event its impact as precedent is questionable. Nevertheless, the decision is instructive regarding the current scope and effect of Decree 57.

Restructuring Proposal

On 25 March 2010, the Dubai government announced a restructuring proposal that is backed by about US $9.5 billion of funding from the Dubai government, including US $5.7 billion previously made available by the Abu Dhabi government. Under the proposal, Dubai World, which seeks to restructure about US $26 billion in debt, asked a core panel of seven foreign and local banks (representing almost 100 creditors) to roll over liabilities into two new loans over five to eight years at an undisclosed commercial rate. It is reported that Dubai World is offering to pay trade creditors an additional one percent in interest upon maturity of the new debt as part of the restructuring. The restructuring requires approval from a supermajority of creditors such as banks, unsecured banks, sukuk holders and trade creditors in order to proceed. It is thus evident that creditor claims may threaten the restructuring effort. Notably, moreover, the restructuring plan pertains only to Dubai World and Nakheel, and not to other subsidiaries of Dubai World such as Limitless LLC.

It is also reported that Nakheel has started signing settlement agreements to pay trade creditors 40 percent of the total amount owed in cash together with an annual return of 10 percent on the recovered claims. The remaining 60 percent would be paid in publicly traded securities.

Adjudication: A New Approach to Resolving Construction Disputes in Germany

Kristina Fiebich & Christoph Mank (Berlin)

During the last couple of years, alternative dispute resolution (ADR), i.e. arbitration and mediation, has become an increasingly popular tool for resolving all kinds of disputes that would otherwise have been subject to court litigation. Yet, with regard to construction disputes, state court litigation and arbitration have rarely proved an appropriate means of dispute resolution. Since construction disputes are generally extremely complex both in legal and factual terms, state court litigation has often proved to be too expensive and time-consuming. Thus, obtaining a final decision can take several years, and the result is often difficult to predict. For similar reasons, arbitration has also not always been able to meet the specific demands in construction disputes, either.

General Remarks on Adjudication

Adjudication represents a new method of ADR in Germany, likely to fundamentally change the system of resolution of construction disputes. Unlike litigation and arbitration, it combines judicial and technical know-how, and thus, provides for a conflict management mechanism tailor-made for the specific needs of the construction industry. It is available to the parties from the signing of a contract until its completion.

Due to an accelerated procedure, adjudication can provide considerable time and cost savings. In order to avoid construction disputes leading to delay or even cancellation of construction works, adjudication aims to resolve disputes fairly, swiftly

and cost-effectively. The procedure is scheduled in a fixed time frame of 6 to 8 weeks during which the adjudicator has to come to a decision. Factual as well as legal aspects of a dispute are analyzed only summarily. Due process is limited to the minimum.

Whether the adjudication is contractually agreed by the parties or required under statutory law, the decision is generally binding unless one or both parties file for litigation or arbitration. Time limits and scope of judicial review, however, differ according to the agreed set of rules.

The person appointed as adjudicator must be well experienced in the building practice and of profound knowledge of building law and techniques. Thus, it is assumed that decisions rendered by someone having such expertise are more likely to be accepted by the parties and less likely to be challenged.

The German Approach

While other European countries, particularly the U.K., have been practising adjudication for many years already, its development and implementation in the German legal system has started only recently. There are several initiatives which have elaborated adjudication rules designed for contractual implementation and codification, respectively.

Some set of rules, for example the "AO-Bau" (Adjudikationsordnung für Baustreitigkeiten) or the "SL Bau" (Streitlösungsordnung für das Bauwesen), are designed to solve disputes provided the parties have contractually agreed upon adjudication. Instead of having to negotiate the terms for dispute settlement individually, the parties may simply adopt the "AO-Bau" or the "SL Bau", providing for a sophisticated set of contractual provisions. Also the Deutsche Institution für Schiedsgerichtsbarkeit e.V. ("DIS", i.e. the German Institution for Arbitration) is working on new provisions for implementing adjudication in the existing set of rules. In any case, all these sets of rules are optional and require an agreement of the parties involved.

The initiative of the *Deutscher Baugerichtstag e.V.*, however, has taken a different approach. The *Deutscher Baugerichtstag e.V.* is an institution advising on and discussing construction-related legislative initiatives. It is expected that its proposed regulations shall form the framework for future statutory provisions, granting each party of a construction contract the right to institute adjudication against the other party by law. Furthermore, it is expected that each construction contract shall provide for rules of dispute settlement. If the parties have failed to make provision for dispute settlement, the adjudication procedure will be governed by rules which are currently in the process of being drafted. However, adjudication shall not be mandatory if the contract involves a consumer. At any time, it can be waived (or replaced by mediation) by agreement of both parties.

Conclusion

So far, experience of adjudication as a dispute resolution process in Germany is very limited. Many working groups, organizations and renowned construction lawyers have praised adjudication as a "revolution" in construction disputes providing for quick and well-accepted results. In practice, however, adjudication has not yet been fully implemented. The process is still new in Germany and whether it will be a success remains to be seen.

Disputes involving minor and medium-sized construction projects, in particular, are generally still settled before court. Many parties appear to have more confidence in arbitrators and judges than in technical experts. Considering that none of the initiatives presented above has become widely accepted yet, many parties feel uncertain which set of rules to choose and whether adjudication is actually able to fully meet their legal and economic interests.

Even more critical voices have raised the issue of possible resulting legal uncertainty. Since adjudicating decisions are private and confidential and therefore must not be published, technical as well as judicial knowledge and experience will remain "behind closed doors". This may not only slow down future developments in law but will make disputes and subsequent litigation—if necessary—less predictable and less transparent.

The ongoing debates and complaints about the ineffectiveness of the German legal system with regard to construction disputes have shown that change, of some form or other, to the current system of court and alternative dispute resolution is

necessary. It remains to be seen, however, if adjudication is able to meet the expectations and demands of the construction industry and if so, in which way it will be introduced into the German legal system.

New York Court Compels Arbitration and Orders Anti-Suit Injunction while Disregarding Indian Anti-Suit Injunctions

Jesse Franklin & Bradley Bowen, Seattle

A New York federal court recently demonstrated a potential benefit to designating a U.S. seat of arbitration: the availability of anti-suit injunctions to prevent opposing parties from litigating arbitrable matters in foreign jurisdictions in contravention of an agreement to arbitrate. For parties that are particularly concerned about being dragged into court in foreign jurisdictions related to vexatious claims, the New York federal court case is encouraging because it demonstrates a commitment to quickly compel parties to arbitrate in accordance with their underlying agreement. Additionally, the case demonstrates that U.S. courts may be reluctant to order a global anti-suit injunction when a more narrowly tailored anti-suit injunction can be ordered instead.

On 23 March 2010, a New York federal court ordered an anti-suit injunction and compelled arbitration of a shareholders' dispute between Amaprop Limited ("Amaprop"), organized in the Cayman Islands, and Indiabulls Financial Services and Indiabulls Finance Company Private Limited, (collectively "Indiabulls"), organized in India. The underlying dispute between Amaprop and Indiabulls involves a shareholder agreement which granted Amaprop certain buy-back rights. Amaprop alleged that when it wished to exercise its buy-back rights, Indiabulls refused to honor its rights under the agreement. As a result, on 19 January 2010, Amaprop commenced arbitration under the ICDR Rules (the international arm of the AAA). On February 11, 2010, Indiabulls made an initial appearance in the ICDR arbitration by letter and denied breaching the agreement. On 24 February 2010, Indiabulls requested an additional four weeks to file a Statement of Defense, but noted that they would proceed with appointing an arbitrator. Amaprop also sought leave to file an amended Statement of Claim in order to add a claim, which would be due on 5 March 2010.

However, on 4 March 2010, Indiabulls Finance Company Private Limited sought and obtained an *ex parte* injunction from the High Court of Judicature at Bombay enjoining Amaprop from proceeding with arbitration at all. On 9 March 2010, Indiabulls Financial Services followed suit and also obtained an *ex parte* injunction enjoining Amaprop from proceeding with arbitration. Allegedly, Amaprop was never provided with notice of the proceedings in the Indian court, and even after the proceedings, Indiabulls were unwilling to provide the underlying papers in the actions. Consequently, on 9 March 2010, after the High Court of Judicature at Bombay ordered the second injunction, Amaprop filed an action with the federal court in New York, requesting the court to compel ICDR arbitration and order a global anti-suit injunction, enjoining Indiabulls from filing suit in India and in any jurisdiction worldwide.

Only two weeks after Amaprop filed in New York, the federal court granted Amaprop's petition to compel arbitration and ordered an anti-suit injunction enjoining Indiabulls from commencing or prosecuting any action in India related to the agreement.

In ordering the anti-suit injunction, the court first found as a threshold matter that a valid arbitration agreement existed and that Indiabulls failed to arbitrate in accordance with that agreement. Additionally, the federal court relied heavily on the factors for injunctive relief set forth in *China Trade & Dev. Corp. v. M.V. Choong Yong* (2d Cir. 1987) and *Storm LLC v. Telenor Mobile Communs. AS* (S.D.N.Y. Dec. 15, 2006). The factors the federal court considered included: "(1) frustration of a policy in the enjoining forum; (2) [whether] the foreign action would be vexatious; (3) [whether the foreign proceedings present] a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) [whether] the proceedings in the other forum prejudice other equitable considerations; or (5) [whether] adjudication of the same issues in separate actions would result in delay,

inconvenience, expense, inconsistency, or a race to judgment."

After noting that the Indian court injunctions were inconsistent with the strong U.S. policy favoring the enforcement of arbitration agreements, the federal court considered a number of case-specific facts that justified enjoining Indiabulls from pursuing related claims in the Indian courts. The court found Indiabulls had "acted in bad faith throughout and in a manner calculated to cause vexation" by initially appearing in the ICDR arbitration proceedings and then applying on an *ex parte* basis to the Indian court for an injunction without providing any notice to Amaprop. The court noted that the Indian court orders might even subject Amaprop to contempt sanctions for even proceeding with the New York ICDR arbitration. Additionally, the court indicated concern about improper delay due to inefficiencies in the Indian court system—according to the expert testimony of a retired Indian Justice of the High Court of Judicature at Bombay, a civil case may take at least 15 years to reach original resolution and an additional 5 to 10 years to reach a final resolution on appeal.

In light of these facts, the court opined: "Respondents' [Indiabulls'] actions threaten United States policy in favor of arbitration; there is the possibility of inconsistent judgments if this action is permitted to continue in parallel jurisdictions; Respondents have engaged in forum-shopping despite their agreement to arbitrate all disputes in New York; and if the Respondents are not enjoined from pursuing the Indian actions there is a great risk of delay, inconvenience, and additional expense."

It is worth noting that the federal court ordered an anti-suit injunction that was narrower than requested by Amaprop. Amaprop originally requested an injunction that barred Indiabulls from filing suit in any other jurisdiction worldwide, but the court limited the anti-suit injunction to India alone. However, the court invited Amaprop to seek additional relief should Indiabulls file suit in another jurisdiction.

English Court of Appeal Confirms Brussels Regulation Judgments Must Be Recognised in Other Proceedings Outside of the Brussels Regulation

Peter Morton, London

In *National Navigation Co v Endesa Generacion SA* [2009] the Court of Appeal in England confirmed that where judgment is given in proceedings whose subject matter falls within the Brussels Regulation (*Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*), that judgment will be subject to recognition in another EU member state regardless of whether the proceedings in which a party seeks to rely on the judgment fall within the Regulation.

Specifically, the Court of Appeal held that the English court was bound by an earlier decision of a Spanish court to the effect that no arbitration clause was incorporated into the relevant contract. This was notwithstanding that the English court proceedings fell within the arbitration exclusion to the Brussels Regulation.

Background

The dispute related to a ship owned by National Navigation Co (NNC) which was shipping coal owned by Endesa Generacion SA (Endesa) pursuant to a charterparty and bill of lading. A dispute arose and Endesa brought proceedings in Spain against NNC (the Spanish Proceedings) in which it was held that the London arbitration clause was not validly incorporated into the contract.

NNC subsequently commenced arbitration in London and commenced English Commercial Court proceedings in support of the arbitration (the Arbitration Action), in which NNC sought (i) a declaration from the Court that the London arbitration clause was validly incorporated and (ii) an anti-suit injunction in respect of the Spanish Proceedings.

At first instance, the English court held that although no anti-suit injunction would be granted

(applying the ruling of the European Court of Justice (ECJ) in *West Tankers*), the Arbitration Action fell outside the scope of the Brussels Regulation (by reason of the arbitration exception, Art 1(2)(d)) and therefore the English courts were not bound to recognise the judgment in the Spanish Proceedings as to whether the arbitration clause was validly incorporated. The Judge decided to grant a declaration that the English arbitration clause was validly incorporated. Endesa appealed the decision.

Court of Appeal Decision

The Court of Appeal held that the judgment in the Spanish Proceedings relating to the incorporation of the arbitration clause was a judgment that fell within the ambit of the Regulation. This was consistent with the ECJ's ruling in *West Tankers*: a preliminary ruling as to the applicability of an arbitration clause in proceedings in which the main subject of the proceedings falls within the Regulation, is to be categorised as within the Regulation.

However, the Court of Appeal did not agree that the English courts could ignore the decision in the Spanish Proceedings. It held that, as the judgment in the Spanish Proceedings fell within the Brussels Regulation, it was binding on the English court, even in proceedings (such as the Arbitration Action) which themselves fell outside the scope of the Regulation. Accordingly, the appeal was allowed: the ruling in the Spanish Proceedings that the arbitration clause was not validly incorporated had to be recognised and the Arbitration Action was dismissed.

The Court of Appeal's judgment contains a detailed examination of the case law in this area. The Judgment makes clear that in determining the applicability of the Regulation, proceedings are to be characterised by reference to the substantive claims that are their subject matter; that is, the nature of the rights which the proceedings serve to protect. Where a dispute as to the existence of an arbitration agreement arises, whether the proceedings fall within or outside the Regulation (by reason of the arbitration exception) will depend on whether that dispute forms the main subject matter of the proceedings or is merely ancillary to a substantive dispute which itself falls within the Regulation.

What is now clear is that even where English proceedings are not themselves within the scope of the Regulation (as in the case of the Arbitration Action), the English court will still be bound by European decisions on the same issue.

Comment

This decision is considered by many to be unsurprising as it is consistent with the reasoning in the ECJ decision in *West Tankers*. The decision is of particular interest given the ongoing review of the Brussels Regulation. An illustration of the unsatisfactory position under the current regime was referred to by Lord Justice Waller in the Court of Appeal judgment: a court in member state A, where proceedings on the merits have been commenced, is free to ignore a judgment in arbitration proceedings in state B, the seat of the arbitration, on the basis that the judgment was made in proceedings that fall outside of the Regulation (by reason of the arbitration exception). Yet a preliminary ruling in the proceedings in state A, deciding that the arbitration agreement is invalid, would bind the courts in state B (the seat of arbitration) if obtained first, because the ruling would be made in proceedings falling within the scope of the Regulation.

Many commentators have raised concerns that the importance of the court "first seised" under the existing regime could lead to forum shopping and pre-emptive jurisdictional challenges to arbitration agreements.

Whether the current review of the Brussels Regulation leads to changes which may resolve these kinds of difficulties remains to be seen.

Investment Treaty Arbitration Update

Lisa Richman, Washington D.C. and Dr. Sabine Konrad, Paris

In each future edition of Arbitration World, members of K&L Gates' International Law and Investment Treaty practices will provide updates concerning recent, significant investment treaty arbitration news items. This edition features updates regarding an annulment decision relating to

a dispute concerning the government of Kazakhstan, two updates regarding Chevron's ongoing conflict with Ecuador, the consideration of requests for provisional measures in cases involving Venezuela and Bolivia, the rejection of a disqualification proposal filed in a matter involving the Ukraine, a decision requiring Argentina to post a bond relating to its request to vacate two arbitration awards, and new legislation relevant to foreign investments in Belize.

Ad Hoc Committee Refuses to Annul Award Against Kazakhstan

On 25 March 2010, an ICSID ad hoc committee ruled that an award against Kazakhstan (*Republic of Kazakhstan v. Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS (ICSID Case No. ARB/05/16)*) in the amount of US $125 million will stand. Despite Kazakhstan's annulment request disputing the award, the committee found that the tribunal had, among other things, given adequate reasons for the calculation of damages.

The dispute dates back to 1998, when Rumeli, a Turkish company, won a 15-year license to develop Kazakhstan's second mobile telephone network with a local partner. Telsim, another Turkish company, joined the venture two years later. The underlying ICSID dispute was premised on allegations by Rumeli and Telsim that their investment in Kazakhstan's largest mobile telecommunications company, Kar-tel, was expropriated. In 2008, a tribunal ruled that the telecom companies suffered an expropriation of their investment in the joint venture project, culminating in a buyout ordered by Kazakhstan's Supreme Court.

Kazakhstan sought annulment of the award in which it was found in breach of the bilateral investment treaty (BIT) between Kazakhstan and Turkey and ordered to pay damages. It claimed that the original tribunal exceeded its powers, departed from fundamental rules of procedure, and failed to state reasons for the calculation of damages. Kazakhstan contested the tribunal's approach to damages particularly in light of the alleged financial difficulties and/or insolvency of the joint venture and argued that the tribunal should have used a liquidation value approach rather than the discounted cash flow method to calculate damages. Kazakhstan also argued that, contrary to the tribunal's finding, the investment was fraudulent and illegal.

The committee determined that the annulment application failed because Kazakhstan did not establish grounds for annulment under the ICSID Convention. Although it acknowledged it was not surprising that Kazakhstan had contested the "baldly stated" figure, it determined the tribunal did not fail to give reasons for its damages award, that the tribunal examined all of the positions, and set out reasons in terms appropriate to the circumstances and evidence available to it.

New Decisions in the Longstanding *Chevron v. Ecuador* Dispute

Chevron is engaged in a number of international investment related disputes including an arbitration by Chevron alleging that Ecuador failed to honor its contractual obligations relating to oil pricing, an action in Ecuadorian court by residents of the Lago Agrio region that Chevron failed to properly remediate environmental damage, and an arbitration by Chevron against Ecuador asserting that Ecuador is colluding with the Lago Agrio plaintiffs and trying to shift its own liability for the environmental damage to Chevron.

The Oil Pricing Proceedings

On 30 March 2010, an international arbitration tribunal ruled in Chevron's favor in its dispute with the government of Ecuador over oil pricing. In a claim filed in December 2006, Chevron alleged that for over a decade, 15 different judges in three different courts failed to rule on any of the seven separate commercial cases brought by Texaco (which was purchased by Chevron in 2001). Six of the seven cases have since been resolved, only one of which resulted in a decision in favor of Texaco. The award concerned the "ultimate use" of crude oil Texaco supplied to Ecuador under agreements signed in the 1970s. According to Chevron, Ecuador was entitled to buy crude oil for domestic consumption at a reduced market price, and buy additional oil for export at prevailing international prices. Chevron alleged that it was forced to provide oil at prices far lower than it had bargained for, and that Ecuador exported a portion of that oil for its own profit in violation of the agreements. Ecuador challenged the arbitral claim on

jurisdictional grounds, citing abuse of process. It also argued that the Ecuador-U.S. BIT, which took effect in 1997, could not be retroactively applied to the dispute. The tribunal, sitting under the auspices of the Permanent Court of Arbitration at The Hague, dismissed Ecuador's objections because of the "undue delay" of Ecuadorian courts in deciding the claims filed by Texaco between 1991 and 1993. However, it rejected a denial of justice claim brought by Chevron. The award does not specify the amount of damages Chevron will receive, but says these will be subsequently determined once the tribunal has determined the taxes which Chevron would have been required to pay in the absence of a breach of the BIT. Chevron has speculated the tribunal will award damages of approximately US $700 million; Ecuador has asserted the amount will be substantially lower in light of applicable tax laws.

The Lago Agrio Cases

On 11 March 2010, Judge Leonard Sand of the U.S. District Court for the Southern District of New York granted Chevron's motion to dismiss Ecuador's request to stay the company's other PCA arbitration against Ecuador. Judge Sand held that there was at least one arbitrable issue raised in the Chevron claim which prevented him from staying the arbitration.

Chevron filed for arbitration against Ecuador in September 2009, arguing that it violated the Ecuador-U.S. BIT by, among other things, interfering on behalf of the Lago Agrio plaintiffs in their class action suit against Chevron for US $27 billion over environmental damage allegedly caused by Texaco. In response to Chevron's arbitration, Ecuador and the Lago Agrio plaintiffs separately asked the U.S. District Court to stay the arbitration, arguing that during a previous lawsuit over the environmental damage Texaco promised it would abide by any ruling in Ecuador in order to have the case moved there. In granting Chevron's motion to dismiss the requests, Judge Sand said he would assume, without deciding, that he had the power to stay an arbitration under certain circumstances. He noted that the Court was divided on the issue, citing two recent cases which took opposite views as to whether the District Court had the power to stay an arbitration. Surprisingly, the Judge did not address whether the public international law nature of the arbitration alone prevented any interference with it by a national court judge. Instead, he decided that New York law provides if there is at least one arbitrable issue, the Court should not intervene in an arbitration. The Judge held that Chevron's claim that two Chevron lawyers were inappropriately criminally indicted and sanctioned and that this entitles the company to "moral damages" is an arbitrable claim. The government of Ecuador and the Lago Agrio plaintiffs are both appealing Judge Sand's order.

Decisions on Provisional Measures in Cases Against Venezuela and Bolivia

On 3 March 2010, the tribunal denied an application under Article 47 of the ICSID Convention for provisional measures by the claimant in *Cemex Caracas Investments BV v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/15)*. Article 47 empowers the tribunal to grant provisional measures "to preserve the respective rights of either party." The claimant alleged that Venezuela had expropriated its investment in a cement company, Cemex Venezuela. Vessels operated by Cemex were sold to a Mexican third party, Sunbulk, to satisfy debt payments owed by Cemex to one of its subsidiaries. Subsequently, however, the Venezuelan government obtained a seizure of the vessels, apparently in an attempt to unwind the transfer to Sunbulk. The claimant argued that Venezuela's actions would increase the damages claimed in the arbitration and aggravate the dispute, making it more difficult to resolve. The tribunal rejected claimant's application. Applying ICJ and ICSID jurisprudence, it held that provisional measures would only be granted upon proof of irreparable harm; that is, harm which is urgent or imminent and could not be compensated by an award of damages. The increase of damages alleged by the claimant did not satisfy that criterion because the consequence of the seizures would be a financial loss that could be readily compensated by the tribunal. The tribunal also found there was no inherent power to grant provisional measures on the basis of "aggravation" unless Article 47 otherwise was satisfied.

In a separate case requesting provisional measures, an ICSID arbitration panel recently ordered the Republic of Bolivia to suspend criminal proceedings it determined were directly related to an arbitration between Bolivia and three Chilean investors concerning the 2004 revocation of 11 mining

concessions. *Quiborax, S.A., Non Metallic Minerals S.A. and Allen Fosk Kaplun v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2).* On 26 February 2010, the tribunal granted the relief because the criminal proceedings were interfering with the claimants' ability to access key evidence, such as corporate records located in Bolivia, and were having the effect of intimidating potential witnesses into refusing to testify. The powers of treaty tribunals to protect the proceedings will be discussed in more detail in a future edition of Arbitration World.

Following the tribunal's decision, Bolivia filed a proposal to disqualify the entire ICSID tribunal on the grounds of bias. The proceedings have been stayed. Because "a majority of the members of the tribunal," in this case all three arbitrators, have been challenged, the dispute cannot be resolved by the remaining unchallenged members as is normally the case. In such a situation, Rule 9 (2), (5) of the ICSID Arbitration Rules refers the decision to the Chairman of the Administrative Council. The Chairman may also delegate the decision. In the past, in a case where the two remaining arbitrators did not agree whether or not the challenge of the third member should be upheld and one member of the tribunal previously worked at the World Bank, the Chairman asked the Permanent Court of Arbitration in The Hague to make the necessary decision. *Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8).*

Unsuccessful Challenge to ICSID Arbitrator

Ukraine recently lodged an unsuccessful bid to disqualify one of three tribunal members in an ICSID case in which it is alleged that Ukraine breached the Austria-Ukraine BIT. In a challenge brought after the conclusion of the hearing on the merits and submission of post-hearing briefs, Ukraine objected to claimant's appointed arbitrator primarily on the basis that he studied at Harvard Law School in the late 1980's at the same time as claimant's counsel, Dr. Leopold Specht, but had not disclosed this before the first procedural meeting. On 19 March 2010, the remaining members of the tribunal, Hon. David A. Robinson and Dr. Stanimir A. Alexandrov, determined that Dr. Yoram A. Turbowicz could continue serving on the panel because there was no rule or case providing that "long-ago encounters at an educational institution" provide a sufficient basis to disqualify an arbitrator or impugn his impartiality or independence. *Alpha Projektholding v. Ukraine (ICSID Case No. ARB/07/16).* In reaching that conclusion, they referred to the requirement of Article 57 that the challenging party must establish facts that make it "obvious and highly probable" that the challenged arbitrator will be unable to exercise independent and impartial judgment. They determined that Dr. Turbowicz had not been obligated to disclose his prior "encounter" with Dr. Specht and was required to disclose only information that "would reasonably cause his ... reliability for independent judgment to be questioned by a reasonable person." They concluded that standard was not met, even if Dr. Turbowicz perhaps would have, in hindsight, been "wise to disclose" the connection. The tribunal also determined Ukraine's challenge that Dr. Turbowicz's prior inexperience as an ICSID arbitrator was an insufficient basis to exclude him, "if there were [such a prerequisite], there would never be a first time for anyone." They also noted that Dr. Turbowicz had the necessary competence in the "field of law" as required by Article 14(1) of the ICSID Convention. Finally, the tribunal members deferred the question of whether the request was time barred in light of their resolution of the substance of the disqualification proposal. They acknowledged, however, that "other arbitrators charged with resolving only this issue might reasonably reach the conclusion that [the request] is [time barred]."

Government of Argentina Must Post Bond to Challenge UNCITRAL Awards

On 31 March 2010, in an action in District of Columbia federal court filed by Argentina in an attempt to vacate two arbitration awards against it, Judge Reggie Walton ruled that Argentina must post a bond of approximately US $280 million, the amount of the contested arbitration awards, in order to continue with its efforts to vacate the rulings. He also administratively stayed the actions pending posting of the bond. The development comes in the context of claims filed by energy companies BG and National Grid proving breaches of the United Kingdom-Argentina BIT relating to the privatization of the electricity sector in 2001-02. BG and National Grid based their request for a bond on Article VI of the New York Convention. Judge

Walton's ruling appears to be the first instance where a United States Judge has granted pre-judgment security under the New York Convention in these circumstances.

Belize Legislation Introduced

The *Supreme Court of Judicature (Amendment) Act, 2010*, a controversial piece of legislation, recently was passed in the Belize House of Representatives and is being considered by the Senate. The new law would give the Supreme Court of Belize the power to issue an injunction against any person, company or even arbitrators who participated in an arbitration against the government of Belize, irrespective of the location of the arbitration. Once the injunction is issued, if the arbitration proceeds, those involved, including their lawyers, advisers, corporate directors, shareholders and secretaries, could be criminally charged and fined up to half a million dollars or jailed for up to ten years. A further three hundred thousand dollar fine could be charged for each day a person continues in breach of the injunction. An injunction can be issued and a person or entity can be found in violation in absentia, provided they were given 21 days notice. This includes persons acting in an official capacity for or on behalf of a person or entity found to have violated the act unless he "adduces evidence to show that the offence was committed without his knowledge, consent or connivance." Contrary to usual presumptions of innocence, the burden is on the individual charged to show he had no knowledge of the alleged violation. The proposed law likely originated from a pending expropriation claim and two arbitration awards that were issued against, but have not yet been paid by, the government of Belize. The impact of the law, if passed, can be expected to discourage foreign investments in Belize, given the inability to protect such investments and the significant penalties that could be incurred when trying to enforce an agreement with the government.
