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Kirkpatrick & Lockhart Nicholson Graham LLP's Arbitration World

Welcome to the 2nd edition of 'K&LNG's Arbitration World'

Welcome to the second edition of 'Arbitration World', a publication from Kirkpatrick & Lockhart Nicholson Graham LLP's Arbitration Group. 'Arbitration World' aims to highlight significant developments and issues in international arbitration that matter to in-house counsel and company executives with responsibility for dispute resolution.

In this significantly expanded edition:

- We look back at our International Arbitration Seminar held at Claridge's, London in March this year and look forward to our forthcoming International Arbitration Webinar programme in the Autumn;
- We examine some practical considerations in relation to arbitration clauses in insurance contracts, consider the issue of whether an arbitrator has authority to grant rescission of the contract as a remedy in arbitration and offer some thoughts on ways to deal with the tricky area of arbitration of multi-party disputes with particular reference to the construction sector;
- A number of recent decisions and issues in the Court of Arbitration for Sport are reviewed;
- Recent cases in the UK, US and Germany on sovereign immunity are assessed;
- We consider the evolving approach to confidentiality in international arbitration and we touch upon the impact on arbitration practice of the growth of e-discovery; and
- We also consider the implications of the new form BITs entered into by the People's Republic of China and provide a roundup of developments in the world of arbitration across Europe, the Middle East, Asia and Africa.

If you would like to supply any feedback on anything featured in this publication, please send an e-mail to editors, Ian Meredith (imeredith@klng.com) and Peter Morton (pmorton@klng.com) (partners at Kirkpatrick & Lockhart Nicholson Graham LLP).

To register for forthcoming events please contact Kathie Lowe, Events Manager, London. (klowe@klng.com).

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Should a court compel parties to mediate?

by Rachel Stephens

The recent English Commercial Court decision in *C v RHL* [2005] EWHC 873 (Comm) has caused some raised eyebrows. Is it a natural and healthy extension of the Woolf reform principles, requiring parties to mediate disputes where possible to save on the considerable cost of fighting their disputes, or is the decision a traitor to the principles of the Arbitration Act 1996, which allows the courts to interfere only in very limited circumstances where parties have agreed to arbitrate?

In *C v RHL*, on the application of C for an anti-suit injunction, two corporate parties who had signed an agreement containing a clause referring all disputes to arbitration were ordered by Colman J to mediate. This was justified on the basis that subsidiary and affiliate companies of the defendant (who had started court proceedings in Russia in breach of the arbitration agreement) could join in, and the range of remedies which a mediator could broker were much wider than those available to the court or the arbitral tribunal.

It will be very interesting to see if the decision is followed in other cases. If it is the start of a trend, it may serve to increase the use of tiered dispute resolution clauses allowing for a structured transition from negotiation to mediation and on to arbitration, and even to clauses expressly excluding mediation.

Selection of Arbitrators

by Peter Morton

It has been said many times, such that it is now almost a cliché, that selection of the party-nominated arbitrator is the single most important decision a party will make in an arbitration. As the distinguished practitioner Dr Jean-Flavien Lalive once put it, "The choice of the persons who compose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightly been said that arbitration is only as good as the arbitrators."

One of the key attractions of arbitration (as far as 3 member tribunals are concerned) is the comfort and confidence parties gain by having a person of their own choice hearing and contributing to the determination of their case. Of course, no equivalent opportunity exists in a Court process.

The selection of the co-arbitrators, who may in turn between them choose the chairman of the tribunal, is an extremely important means by which the parties can maintain an indirect influence over the arbitral process.

If the selection of a party's nominated co-arbitrator is important then the selection of the Chair is crucial. It has been said that the vast majority of tribunals are Chair-driven and it is therefore essential that a party's Counsel ensures, through selection of party-nominated arbitrator and through other influence, that the right Chair is appointed.

The sort of factors which are important to have in mind when making selection of party-nominated arbitrator and Chair include:

- Nationality of the party-nominated arbitrator and the possible impact upon selection of the Chair;
- Standing and reputation of the party-nominated arbitrator to ensure that his/her views are influential;
- Unimpeachable reputation for impartiality and independence, in the absence of which a party-nominated arbitrator will enjoy less credibility with fellow arbitrators;
- Availability, to minimise subsequent delay;
- Likely disposition (in relation to which most due diligence is likely to be invested);
- Familiarity with relevant law;
- Familiarity with the relevant business or industry involved in the dispute; and
- Experience in the international arbitration arena.

It is now increasingly common practice to conduct pre-appointment interviews and to engage in detailed due diligence analysis of candidate arbitrators. The extent to which this is appropriate in an individual case will depend upon the sums involved and a range of other factors. To the extent such interviews do take place, they should be kept within strict parameters.

Investor Protection in the People's Republic of China

By June 2005 China had concluded Bilateral Investment Treaties (BITs) with 114 countries. BITs normally provide foreign investors with protections against measures such as expropriation without compensation. International arbitration before an International Centre for the Settlement of Investment Disputes (ICSID) tribunal is the usual mechanism for taking the benefit of such protections. However, historically, BITs entered into by China provided that the only issue capable of reference to ICSID arbitration was the amount of compensation available if an investor suffered expropriation. The value of Chinese BITs to the foreign investor was therefore extremely limited.

The climate within China is changing. New BITs with the Netherlands and Germany, ratified in recent months, grant the much broader investor protection common to other BITs. This gives scope for investors to structure transactions so as to take direct advantage of the new BITs as German or Dutch investors. Alternatively, investors may be able to take advantage of most favoured nation ("MFN") clauses, which prevent China treating investors from one state less favourably than those from another state, to take the benefit of the protections available to Dutch and German investors.

More detailed commentary on the issues arising from the new China BITs appeared in the May 2006 issue of International Trade Today and will be in the next issue of PLC Cross Border Quarterly magazine and on the PLC Cross Border website: (http://crossborder.practicallaw.com/main.jsp). If you would like a copy of this article please contact Ian Meredith (details on page 20).

Trouble at CIETAC

As has been widely reported, Dr Wang ShengChang, one of China's most respected arbitrators and a leading representative of CIETAC is at the time of going to press the subject of an investigation into alleged financial irregularity. It is presently unclear how this will affect the operation of CIETAC and the future of arbitration in China.

Recent decisions and issues in the Court of Arbitration for Sport ("CAS")

by Martin King

CAS' purpose is to provide an arbitral jurisdiction to resolve disputes directly or indirectly relating to sport, whilst recognising the needs of the international sporting community and doing so with specialist knowledge, speedy procedures and cost efficiency. Its arbitrators are appointed for a four year renewable term and must sign a declaration of independence upon appointment. CAS' jurisdiction is not in any way imposed upon particular sports, governing bodies or participants but it is freely available to resolve sporting disputes subject to its Code of Sports-related Arbitration and provided the parties agree to do so in writing. CAS provides precedent arbitration clauses for sports federations or clubs to insert into their rules and regulations and the majority of International Federations and National Olympic Committees have included clauses in their regulations referring any disputes to CAS.

Ad-Hoc Division

At major events, such as the Olympics, the Commonwealth Games or the European Football Championships, it is often necessary for a tribunal to make very swift decisions to resolve sporting disputes, particularly when team selection, qualification/progression through the event and medals might be at stake. CAS set up an ad-hoc division to deliver decisions within 24 hours of a request for arbitration, which first operated at the Atlanta Olympics in 1996, and has operated at many major events since (see following panel).

The ad-hoc division has a special set of rules for its proceedings. Those differing from the usual CAS Code include: the 24 hour decisions referred to above, the constitution of the panel is chosen by the President of the ad-hoc division rather than being party-nominated, the proceedings are free of charge and the ad-hoc division is not subject to any particular law but must rule on the dispute pursuant to the Olympic Charter and general principles of law. The ad-hoc rules also specify that, before filing any request for arbitration against a decision of the IOC, a National Olympic Committee, an International Federation or an Organising Committee for the Olympic Games, the applicant must exhaust all internal remedies available to him under the relevant regulations of the body concerned (unless the time needed to exhaust those remedies would make an appeal to the ad-hoc division ineffective). Thus the Canadian Olympic Committee's ("COC") application against the International Skating Union ("ISU") at the Turin Winter Olympics earlier this year (relating to the ladies' short track speed skating final during which the COC thought that a rival skater had committed a "kicking-out" infringement and should thus be disqualified) was dismissed by the ad-hoc division since the applicant had failed to first file a written protest and lodge a deposit with the race referee in accordance with the ISU General Regulations.

Another crucial decision at the Turin Winter Olympics related to the selection of the members of the Italian snowboard team for the Parallel G Slalom event for which there were 4 spaces. The ad-hoc division decided that a change in team qualification criteria implemented by the Italian national federation and its Olympic committee during the course of the qualification period was arbitrary and had not been properly communicated to all potential participants. Based on the original criteria for selection, Ms Isabella Dal Balcon qualified for selection. Based on the new criteria (introduced later and not communicated to Ms Dal Balcon), she did not qualify. The Italian national federation had not used any discretion in selecting the team, relying solely on the new second set of criteria. The CAS ad-hoc panel found the new criteria arbitrary and considered it unfair and unreasonable to apply them. In usual circumstances the panel would have preferred to refer the team selection back to the Italian national federation for reconsideration - however it was under significant time pressure as the event approached. Thus the panel declared that Ms Isabella Dal Balcon be selected to the Italian snowboard team and left it to the Italian federation and the Italian Olympic committee to determine who was to be left out.

The application to the ad-hoc division that received the most press attention was that of the 52 year old Anne Abernathy, the sole athlete representing the Virgin Islands at the Winter Olympics (dubbed "Grandma Luge"). She was injured in a training run for the Women's Luge event and was not able to compete. Since she missed the official weigh-in, she was not included in the start list for the

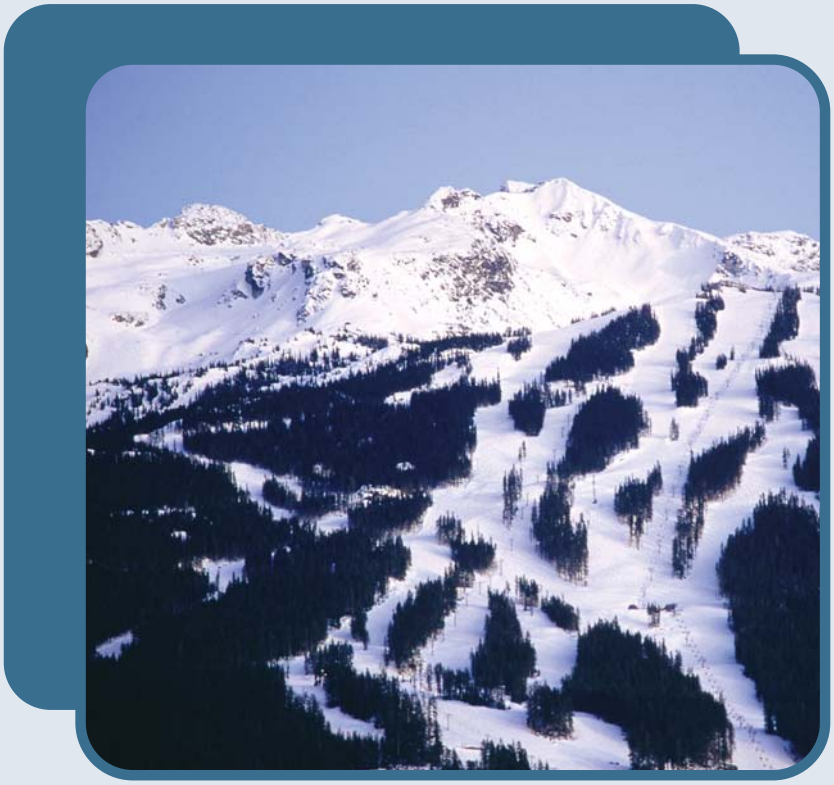
race. She had participated in 5 previous Winter Olympics between 1988 and 2002 and requested that her name be entered on the race list as a participant "who did not start". The panel invited Grandma Luge and the International Luge Federation to try and settle their dispute amicably and the ILF later agreed to write to the IOC to request that Anne Abernathy's name be included on the results list without a start number and with the annotation 'DNS'.

At the recent Commonwealth Games in Melbourne, the ad-hoc division exercised its discretion to refer a dispute to arbitration by CAS in accordance with the usual Code of Sports-related Arbitration. The urgency that might otherwise exist in such a case was absent as one respondent had withdrawn from the Games and the other came fourth and was thus not a medallist.

Panel independence

An issue crucial to all types of arbitration is the independence and impartiality of the tribunal panel and CAS is no exception. Respondents in two recent doping cases have raised questions regarding the potential partiality of an eminent CAS arbitrator in light of alleged connections to the World Anti-Doping Agency ("WADA").

Greek sprinters Kostas Kenteris and Katerina Thanou failed to attend a drugs test hours before the start of the Athens Olympics. Reports then surfaced that the pair had been involved in a mysterious motorcycle crash and had been taken to hospital, thus missing their tests. They were provisionally suspended from competition by the International Association of Athletics Federation ("IAAF") and missed the Games. However, the IAAF decision was later reversed by a Greek Athletics Federation disciplinary panel. IAAF appealed to CAS and proceedings are ongoing. Kenteris and Thanou are also facing separate charges in Greece regarding the crash amidst allegations that they and their former coach faked the crash to avoid the drugs test.



The CAS panel consisted of Peter Leaver QC (IAAF's party-appointed arbitrator), Christopher Campbell (the sprinters' party-appointed arbitrator) and Yves Fortier (President of the Panel, selected by the two party-appointed arbitrators). Mr Fortier is Chairman and senior partner at Montreal firm Ogilvy Renault. Also appointed to assist the Panel as an ad-hoc clerk was Stephen Drymer, a partner at Ogilvy Renault.

Prior to a CAS hearing scheduled for late February 2006, the sprinters raised an objection alleging that the President of the Panel, Mr Fortier, had not disclosed that his firm represents WADA (which has an interest in the prosecution of drug cheats and whose chairman, Dick Pound, had been vocal following their acquittal by the Greek Athletics Federation stating at the time that WADA would appeal to CAS if the IAAF did not) and that there was therefore a clear conflict of interest. Mr Drymer stepped down as ad-hoc clerk to the panel following their objection and the International Council of Arbitration for Sport ("ICAS") was in the process of considering the sprinters' application to remove Mr Fortier from the panel when Mr Fortier decided to step down.

Mr Fortier is reported to have stated that the application to remove him had no basis in fact or in law and reiterated his full independence, but he was troubled by the accusations and stepped down in order that the

Continued from page 5

arbitration procedure could continue in an atmosphere of confidence and serenity. CAS stated that it had full confidence in the independence and impartiality of Mr Fortier and pointed out that he has no relationship personally with WADA. Meanwhile lawyers for Kenteris and Thanou stated that they were seriously concerned with this unfortunate development and the integrity of the process must be safeguarded at all costs. The hearing has been postponed to a later date and Mr Fortier will be replaced on the panel.

Last year, Tim Montgomery (the former 100m world record holder) was found guilty by CAS of the offence of admitting having used a prohibited substance in contravention of IAAF Rules and CAS imposed a period of ineligibility of 2 years from 6 June 2005 and stripped Montgomery of all awards since 31 March 2001 (including his world record in 2002). He was found to have admitted to US athletics team-mate Kelli White at an event in Portugal in 2001 that he had taken "the Clear" (tetrahydrogestrinome or "THG" - a designer steroid which was undetectable by routine anti-doping testing until 2003). This was a notable decision in itself since it was a "non-analytical positive" case which found Montgomery guilty notwithstanding that he had never tested positive in any in-competition or out-of-competition drug test and showed that doping offences can be proved by a variety of means and not just pursuant to positive testing.

Soon after Mr Fortier stepped down from the Kenteris/Thanou panel, Montgomery's representatives wrote to CAS raising the same conflict of interest objection. The CAS panel for Montgomery's hearing had been exactly the same CAS panel as the Kenteris/Thanou hearing (i.e. including Mr Fortier as President and Mr Drymer as ad-hoc clerk). They urged CAS to vacate the arbitration award and dismiss the doping charges against Montgomery. CAS pointed out that a challenge to a CAS award needs to be brought before the Swiss Federal Tribunal. Montgomery's representatives are reported to be currently considering a potential challenge to the award before the SFT or in a US federal district court. It remains to be seen whether there are any other potential challengers who have been on the wrong end of a CAS doping decision in which Mr Fortier has been a panel member.

CAS: brief chronology and key facts

1981: a sports-specific jurisdiction was the brainchild of the IOC President Juan Antonio Samaranch

1984: CAS became operational and its Statutes (as ratified by the IOC) came into force

1991: CAS published a guide to arbitration including a precedent arbitration clause for sports federations/clubs' rules

1994: CAS reforms following challenge to CAS award before the Swiss Federal Tribunal. CAS' close connection to IOC could call independence into question. CAS modified its statutes replacing them with the Code of Sports-related Arbitration and created the International Council of Arbitration for Sport ("ICAS") to run and finance CAS

1996: Ad-hoc division created to make swift decisions on sporting disputes at major events, sitting at:

1996: Atlanta Olympics

1998: Nagano Winter Olympics and Kuala Lumpur Commonwealth Games

2000: European Football Championships (Belgium/Netherlands) and Sydney Olympics

2002: Salt Lake City Winter Olympics and Manchester Commonwealth Games

2004: Athens Olympics

2006: Turin Winter Olympics and Melbourne Commonwealth Games

Key Facts

- seat in Lausanne, Switzerland. Also operates from branches in Sydney and New York offering sports dispute resolution services throughout Europe, Oceania and the US
- over 150 arbitrators from more than 37 countries
- 2 divisions: Ordinary Division - hearing first instance disputes often of a commercial nature; and, Appeals Division - hearing disputes of a purely sporting nature, commonly appeals from last instance decisions of sporting bodies
- awards are final and binding and can be enforced according to rules of private international law

Introducing K&LNG'S Autumn Webinar Programme

We are proud to announce that in October K&LNG's Arbitration Group will be running a series of on-line seminars. "Virtual" delegates need only register their interest to receive log in details. Delegates can then "join" each webinar by accessing the dedicated website where they can hear the presentations and view the materials, email comments and observations to the webinar moderator and contribute to the discussion.

CPD accredited.

To register your interest please contact Kathie Lowe, Events Manager, London. (klowe@klng.com).

If you would like to propose topics for future webinars please feel free to do so.

- Dealing with political risk
  5 October 2006, 14:00 GMT
- Difficult countries
  12 October 2006, 14:00 GMT
- Document production in an electronic age
  19 October 2006, 14:00 GMT

Please see page 20 for more details.

Hot Topics

Conflicts of interest and barristers' chambers

When the IBA Committee produced the IBA guidelines on Conflicts of Interest in Arbitration, barristers' chambers were specifically exempted. As many tenants in London chambers are not barristers but lawyers from a wide range of countries, many of whom have left their partnerships in leading law firms as a result of the difficulties caused by the increasing scrutiny of conflicts, is the time now right to look more closely at whether the barristers' exception be limited to those formally called to the bar?

Do secretaries to the tribunal pose a danger to the arbitral process?

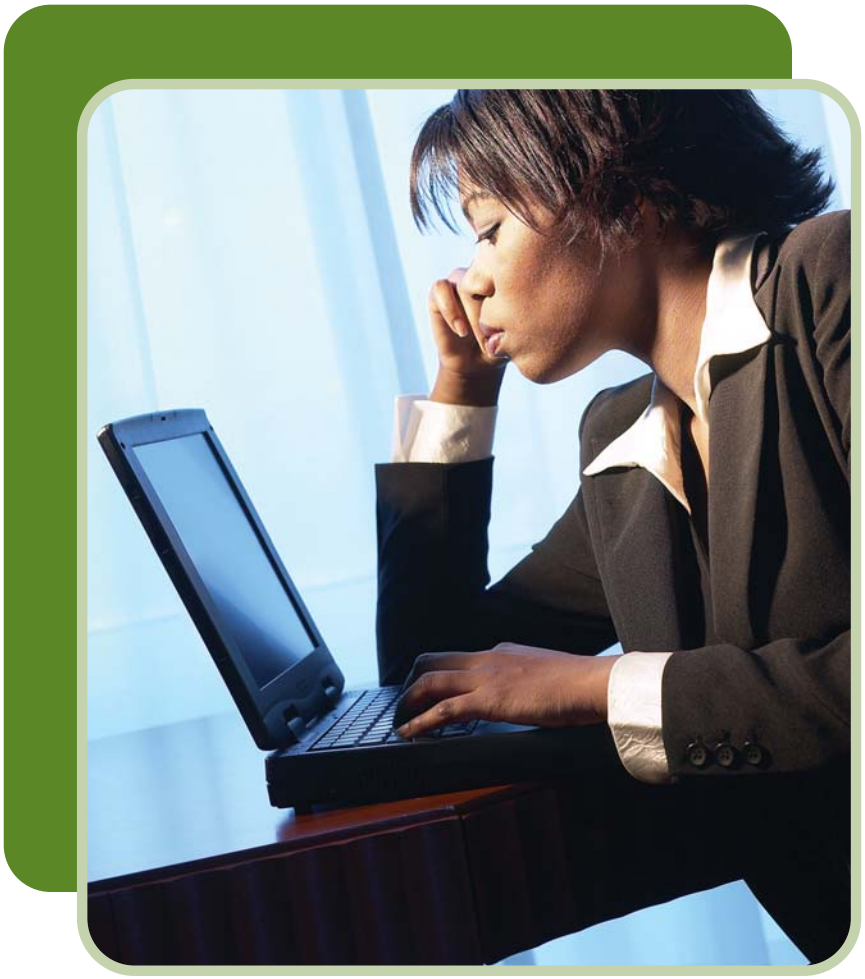
Over recent years the practice of Tribunals appointing secretaries has grown to the extent that it could be said to be unusual for there to be no "assistant". Clearly in the case of an ad hoc Tribunal, where there is no administering organisation, there are very many administrative tasks which can be more efficiently undertaken by administrative assistants than by the Tribunal members themselves. The question however arises as to whether it is proper for the role of the secretary to extend into research for the Tribunal members (including in particular the Chair), the drafting of procedural orders, minutes of the deliberations of the Tribunal, the boiler plate sections of awards or indeed more significant sections of awards.

Document production in an electronic age

by Sarah Aspinall

Over recent years many commentators have suggested that there has been a developing consensus over the scope of document production in international arbitration. Starting with the IBA Rules of Evidence in June 1999, and to a limited extent, the development of principles of proportionality enshrined in the English Court reforms of the same year, there has been a movement towards a middle ground between the old civil and common law traditions.

With the development now of the far more onerous obligations on US litigants to engage in e-discovery dramatically increasing the scope of the material each party is required to disclose and with pressure from many US law firms to take the same principles and export them to international arbitration, we may see a dramatic extension and perhaps polarisation of approaches and a consequent shattering of the developing consensus.



Enforcement of arbitral awards against sovereign States

by Jeffrey Vitek and Caroline Benham

Recent cases have served to reinforce the principles of State immunity. A party considering contracting or working with a State government should therefore do so with caution.

Even if a party is successful in obtaining a judgment or arbitral award against a State, there are a number of important points relating to State immunity which should be borne in mind and the victory may be an empty one if the property against which execution is sought attracts immunity and cannot be enforced against.

The UK position

State Assets

The principle of State immunity was statutorily recognised in the State Immunity Act 1978 ("the SIA"). A foreign State is immune from both injunctive relief and execution unless the State's written consent has first been obtained or the property against which execution is sought is for the time being in use or intended for use for commercial purposes. To this extent, execution cannot be made against a credit balance on a bank account kept by a foreign State for the purpose of meeting the ordinary expenditure of its embassy but may be issued where the purpose of the account is to discharge liabilities incurred in commercial transactions.

A central bank account attracts almost absolute immunity and will only be

liable to execution if it has waived its immunity from execution in writing. The SIA specifically provides that where a central bank or other monetary authority is a separate entity it is entitled to immunity from injunctive relief and execution as if it were a State. Irrespective of this, the property of the central bank would normally be immune from execution as it is not regarded as being used for, or intended for use for, commercial purposes.

In the recent case *AIG Capital Partners Inc v the Republic of Kazakhstan* the assets of the central bank of Kazakhstan were immune from the enforcement process. The claimant had obtained an arbitration award and sought to obtain a third party debt order against cash and securities pursuant to a custody agreement with the National Bank of Kazakhstan. They sought enforcement against funds and securities in London which were part of the National Fund of Kazakhstan set up as a stabilisation fund to ride out fluctuating oil and commodity prices. The fund was administered by the National Bank of Kazakhstan which in turn placed part of it in the care of banks in London under a custodianship agreement. The funds were actively traded. It was held that "property of a state's central bank or other monetary authority" under s14 SIA meant any asset in which the central bank had some kind of property interest, irrespective of the capacity in which the central bank held the assets or the purpose for which the assets were held. In this case, the nature of the property right of the bank was immaterial as the assets concerned were immune from the enforcement process. Even with this being the case, the property was immune from the enforcement jurisdiction of the UK courts as the assets in question were not at any time intended for use for commercial purposes within the meaning the SIA .

State-Owned Companies

Whether or not a State-owned company attracts immunity is less clear cut. An entity which is distinct from the executive organs of the government and is capable of suing or being sued will only be entitled to immunity if the proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been immune. In *Kensington v Republic of the Congo* an application for enforcement was made against the proceeds of oil disposals by the Republic of Congo's State-owned oil company. The claimant was successful in obtaining a third-party debt order directly against a debt owed to the oil company. The court found that the oil company had deliberately established a complex structure of companies to prevent the Republic of Congo's creditors from seizing funds in the hands of the oil company "with the object of evading enforcement of existing liabilities of the Congo by hiding its assets from view".

The US position

In the United States, as in the UK, a foreign sovereign is granted certain protections from the attachment of judgments and awards and the execution of these against its property. Those protections are set out in the Foreign Sovereign Immunities Act ("FSIA") and codified at 28 USC ss1602-1611.

Under the FSIA, there is a general presumption that a foreign State's property is immune from attachment and this must be overcome in order to execute a foreign arbitral award in the US against the property of the foreign sovereign. However, there are exceptions to this presumption which are set out in ss1610(a) and (b) and the property in the US of a foreign state will not attract immunity from execution if that property is used for a commercial activity in the US. Commercial activity is defined in s1603(d) as "either a regular course of commercial conduct or a particular commercial transaction or act". In determining whether property is used for a commercial activity, the courts will consider what the property is used for rather than how it was generated or produced.

Continued from page 9

This most often becomes an issue when the property is an intangible asset such as money owed to the foreign sovereign. The question then is whether the money is used by the foreign sovereign for commercial activity in the United States, such as paying a commercial debt, and not whether the money was generated by commercial activities. If a court finds that the property at issue is used for commercial activity and that the judgment is "based on an order confirming an arbitral award rendered against the foreign State," the court will permit attachment of and execution against the property.

Just as in the UK, a foreign central bank account held in the US is immune from execution even if the funds are for use or intended for use for a commercial purpose. S1611 states that immunity will only not attach to the central bank account if it has been explicitly waived by the bank or authority in question or its parent foreign government.

In summary, once an arbitral award against a foreign State has been confirmed by a US tribunal, that award can be executed against the sovereign's property located in the US and used for commercial purposes in the US. There are further exceptions to immunity which may apply in specific circumstances and parties are advised to explore the full realm of these given their particular circumstances.

The German Position

In a recent decision by Germany's highest court in civil matters, the Federal Supreme Court has recently rendered an important decision on the enforcement of arbitral awards against state assets. In the case of a German investor, Sedelmayer, in the context of a claim under the German-Soviet-Russian Bilateral Investment Treaty following the claimant's success, he sought to enforce the award made by the Stockholm Chamber of Commerce by attachment of the Russian Embassy's VAT refund claims against Germany and the fees owed by Lufthansa to Russia for air traffic rights on and over Russian territory. The Federal Supreme Court denied both attachments, thus frustrating the claimant's attempts to seize assets of the Russian State located in Germany. This case further illustrates the difficulties for claimants seeking to isolate assets which are available for attachment. The Court held that both categories of asset were subject to Russian public law and therefore fell within State immunity.

Conclusion

Both in the UK and the US it will only be possible to enforce a judgment or award against the property of a State if that property is being used, or is intended for use, for commercial purposes. Funds in a State's central bank account held in the UK or US will attract immunity from execution unless that immunity has been explicitly waived. Whilst in the UK, the *Kensington* case does give some limited comfort to a party seeking to enforce an award against a State-owned company, this is generally a difficult area in which a prudent investor should seek to protect itself.

Recent developments around the world

Europe

Austria

Austria has recently passed a new Arbitration Act, based on the UNCITRAL Model Law. The new legislation comes into force this summer.

The legislation covers domestic and international, commercial and non-commercial arbitration (there are special provisions for consumer and labour disputes) and with it Austria hopes it will be an even more attractive venue for international arbitration. The most significant change to existing legislation is the power given to arbitral tribunals to make interim awards, which will be enforced by the state courts.

Denmark

A new Danish Arbitration Act, also based on the UNCITRAL Model Law, came into force last year. The Act gives the Danish courts jurisdiction to hear questions of the composition of the arbitral tribunal (including those relating to impartiality of an arbitrator) where the Danish courts have jurisdiction over at least one of the parties and the seat of the arbitration has not yet been determined.

In a departure from the Model Law, the new Danish legislation does not require arbitration agreements to be in writing. An award based on an arbitration agreement not in writing could be difficult to enforce in a different country.

Poland

Following its entry into the EU on 1 May 2004, Poland has adopted wide-ranging amendments to its arbitration laws in an effort to bring them into line with the UNCITRAL Model Law and to resolve the problems which have in the past beset arbitration proceedings in Poland. The new laws are ten years in the making and are a significant improvement on their predecessor.

Russia

As highlighted in the last edition of Arbitration World, ICAC's new rules were published at the end of last year and came into force for arbitrations commenced after 1 March of this year. They introduce significant changes to the way ICAC works and to the appointment and challenge of arbitrators.

Middle East

United Arab Emirates

The London-based Chartered Institute of Arbitrators has opened a regional office in Dubai, with responsibility for the United Arab Emirates. The Institute is a not-for-profit organisation which promotes training for arbitrators and the standing of arbitration around the world. It plans to work closely with the relatively new Dubai International Arbitration Centre and other centres in Dubai to provide training programmes for arbitrators in the region.

Saudi Arabia

When Saudi Arabia joined the ICC as a member in 1975, it formed the Saudi National Committee, to implement ICC initiatives in the Kingdom. The Committee did not however meet until 2004 (when it took the name ICC-Saudi Arabia). ICC-Saudi Arabia has recently established a Saudi International Arbitration Commission for the promotion of ICC arbitration throughout the Kingdom. It is expected that new arbitration centres around Saudi Arabia will follow.

Asia

Pakistan

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards came into force in Pakistan on 12 October 2005.

Africa

Liberia

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards came into force in Liberia on 15 December 2005.

Topical Issues in International Arbitration

Claridge's, 23 March 2006

Our second annual International Arbitration Seminar, held at Claridge's, London this year, yet again proved to be an overwhelming success with both attendees and those who joined by our live web feed.

The day was broken up into three panel sessions. The first panel, chaired by John Magnin (K&LNG London partner), covered: constituting and managing the relationship with the Tribunal, including the selection and appointment of arbitrators; the importance of selecting the right counsel; pre-appointment interviews of arbitrators; and the application of the IBA Guidelines on Conflicts of Interest. Members of the panel included Peter Morton (K&LNG London partner), Michael Schneider (founding partner of Lalive, Geneva), Jennifer Kirby (Deputy Secretary General of the ICC, Paris) who gave the perspective of the Institution, Robyn Durie (T-Mobile (UK) Limited) who gave the in-house lawyer's view and Samuel Haubold (tenant of Littleton Chambers, London) who spoke from his experience both as a board director and arbitrator.

John Dingess (K&LNG)

Sherry Williams (Halliburton Company)

Marina Kaldina (Basic Element Company)

David Mildon QC (Essex Court Chambers) and John Dingess (K&LNG)

The second panel session, chaired by James Hudson (K&LNG London partner), focused on disputes in the national resources and energy sectors. Topics covered included strategies in dealing with disputes in far-flung places, dispute resolution under long-term supply agreements and a history of arbitration in South America. The panellists included John Dingess (K&LNG Pittsburgh partner), David Mildon QC (Essex Court Chambers, London), Sherry Williams (Halliburton Company, Houston), and Marina Kaldina (Basic Element Company, Moscow).

Ian Meredith (K&LNG)

Michael Hwang SC (Essex Court Chambers)

Zachary Douglas (Matrix Chambers) and Xing Xiusong, Sean (Global Law Office)

Wang Jie (CIETAC), Zachary Douglas (Matrix Chambers), Michael Hwang SC (Essex Court Chambers), Xing Xiusong, Sean (Global Law Office) and Ian Meredith (K&LNG)

The third panel session was chaired by Ian Meredith (K&LNG London partner) and focused specifically on China and the Asia-Pacific region. Michael Hwang (Senior Counsel, Singapore) started the session with an overview of issues arising in arbitration in various countries across the Asia-Pacific region. Wang Jie (CIETAC) spoke regarding CIETAC and the changes brought about by the new CIETAC Rules, Xing-Xiusong, Sean (Global Law Office, Beijing) spoke on issues regarding enforcement of arbitral awards in China, before Zachary Douglas (Matrix Chambers, London) finished off the day with a presentation on investment treaty arbitration.

We would like to thank all the panellists for their contributions, and would also like to thank all those who joined us on the day, both in person and on-line.

The availability of rescission as a remedy in arbitration

by John Sylvester and Steven Pieren

The authority of an arbitrator to resolve a dispute between parties is derived from the agreement between the parties to arbitrate such dispute. The agreement to arbitrate is typically a clause in a business contract between two parties, rather than being a separate agreement that only addresses the parties' desire to arbitrate potential disputes. In the course of arbitrating disputes arising under the business contract, the question often arises whether an arbitrator has the authority to rescind, or otherwise void, the business contract between the parties. Given that the authority of an arbitrator to resolve disputes typically is derived from a clause in the business contract, rescission of the business contract would also arguably rescind the power of the arbitrator to resolve the dispute. This issue has arisen in an insurance arbitration currently being handled by K&LNG, and the insurers have argued that the arbitrator has no authority to rescind the contract at issue.

The Supreme Court of the United States was presented with this question in *Prima Paint Corp. v Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S. Ct. 1801 (1967). In *Prima Paint*, the parties entered into a consulting agreement with a broad arbitration clause. One week after the execution of the agreement, Flood & Conklin Manufacturing Co. ("F&C") filed a petition for bankruptcy. Upon discovering F&C's bankruptcy filing, Prima Paint contacted F&C to indicate that F&C had breached the agreement. In response to these allegations, F&C filed an action to arbitrate the dispute. Prima Paint filed suit in federal court seeking to rescind the agreement due to F&C's allegedly fraudulent representations that it was solvent and also sought to enjoin the arbitration proceeding because the rescission issue was a question for the federal court rather than an arbitrator.

Construing the Federal Arbitration Act, the Supreme Court determined that a federal court may only determine issues "relating to the making and performance of the agreement to arbitrate… Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it. But the statutory language [of the Act] does not permit the federal court to consider claims of fraud in the inducement of the contract generally." Therefore, only if the fraud-in-the-inducement claim is limited to the arbitration clause, and the rescission claim goes to the making of the agreement to arbitrate, does the federal court have jurisdiction to decide the dispute. If, however, the fraud-in-the-inducement claim relates generally to the contract as a whole, then the rescission claim is within the scope of an arbitrator's authority. In *Prima Paint* the Supreme Court determined that, as there was no claim that Prima Paint was specifically fraudulently induced to enter into the agreement to arbitrate, the rescission claim was within the scope of an arbitrator's authority.

As recently as this year, the Supreme Court has reaffirmed the broad *Prima Paint* holding that an arbitration clause is severable from the remainder of the contract and, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is properly within the scope of the arbitrator's authority, rather than within the scope of a court's authority. See, e.g., *Buckeye Check Cashing, Inc. v Cardegna*, 126 S. Ct. 1204, 1209 (2006) (affirming that rule of severability applies to actions in state court governed by Federal Arbitration Act). Therefore, a party seeking to rescind a contract in arbitration may rely on *Prima Paint* and its progeny to support its argument that rescission of a business contract generally is within the scope of an arbitrator's authority and should not be determined by a court in the first instance.

The authority of an arbitrator to rescind a business contract under state arbitration acts is less certain, and the result may even vary from court to court within a specific state. Compare *Anton Sattler, Inc. v Cummings*, 425 N.Y.S.2d 476, 479 (N.Y. Sup. Ct. 1980) (finding contract void and reversing arbitrator's award due to fact that arbitrator could not enforce terms of void contract) with *Kessler v Nat'l Cas. Co.*, 185 N.Y.S.2d 437, 440 (N.Y. App. Div. 1959) (overruling trial court's determination that arbitrators

had no power to rescind or reform the agreement). Therefore, when negotiating the terms of a potential arbitration clause, a party may wish to consider selecting the Federal Arbitration Act to govern the arbitration for the more uniform treatment of a variety of issues, including the availability of rescission as a remedy.

Under English law, the arbitration clause is also separated from the larger contract. Therefore, unless the rescission claim specifically relates to the arbitration clause, rather than the contract generally, an arbitrator has the authority to resolve the dispute. Under most domestic laws, the arbitration clause constitutes a separate and distinct contract under the *Kompetenz-Kompetenz* principal. Therefore, unless the rescission claim specifically relates to the arbitration clause rather than the contract generally, an arbitrator retains authority to resolve the dispute.

In summary, under the federal law of the United States and under English law, a party to a contract may support its argument that, unless a party's rescission claim relates directly to the arbitration clause itself, a rescission claim is properly within the scope of the arbitrator's authority. The various state arbitration statutes vary in their resolution of this issue, with some State courts finding rescission claims to be arbitratable and other State courts finding a rescission claim to be outside the scope of an arbitrator's authority.

The evolving approach to confidentiality in international arbitration

by Sarah Munro

One of the major advantages of referring a dispute to arbitration, rather than seeking redress through the courts, is the expectation that the parties' evidence and submissions, together with the details of any award, will remain confidential. This is often cited by leading companies as the principal reason for the inclusion of arbitration clauses in their commercial contracts. By using arbitration rather than litigation, parties hope to avoid, at least in part, the publicity that major court proceedings can attract, and to ensure that commercially sensitive information does not reach the hands of competitors.

However, the principle of confidentiality in arbitration is not absolute. As set out below, there are a number of issues parties should bear in mind when considering submitting disputes to arbitration.

Limits to confidentiality

Whilst arbitration proceedings and awards themselves may be confidential, listed companies should be aware that they may still be required to disclose both the proceedings and any adverse awards under their reporting obligations. In the UK, the Disclosure Rules require companies listed on the full list to disclose as soon as possible any information which, if generally available, would be likely to have a significant effect on its share price. In the drawing up of both final and interim accounts, auditors must disclose and account for contingent liabilities. Further, if a listing is contemplated, a company should be aware that it has an overriding obligation to disclose anything material to the investor in the listing document. Continuing arbitration proceedings are likely to fall within this category.

Likewise in the US, SEC rules and financial statements' regulations may require disclosure of material arbitration proceedings which a company is defending (and possibly those in which the company is claimant). A listed company should therefore seek specific and detailed advice before entering the arbitral process.

Institutional provisions

The machinations of an arbitral tribunal are by their nature confidential, and this is largely upheld by institutional rules. The ICC International Court of Arbitration publishes extracts from a number of redacted versions of ICC arbitral awards on its website and in certain academic publications. Article 6 of the Statutes of the International Court of Arbitration states that "The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity."

Article 30.1 of the LCIA Arbitration Rules provides that "Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings

created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a State court or other judicial authority." Article 30 also emphasises the confidential nature of deliberations of the tribunal and the fact that awards will not be published without prior written consent of all parties and the tribunal.

By contrast, the ICSID website contains access to online decisions and awards, showing the full texts, often in a variety of languages. According to the ICSID and Additional Facility Arbitration Rules, the tribunal may allow persons who are not parties to the arbitration to attend a hearing only "with the consent of the parties", and Article 48(5) of the ICSID Convention contains the same prohibition concerning publication of an award.

Comparing arbitration and litigation

Given these apparent limitations, is it still correct to suggest that parties concerned about confidentiality should choose arbitration rather than litigation? In February 1996, the Departmental Advisory Committee in England produced a Report on the Arbitration Bill in which it was stated that confidentiality and privacy were "essential features" of commercial arbitration in England. In terms of the hearing: arbitration proceedings are by their nature private, whereas court proceedings are usually held in public. Although silent on the issue of confidentiality, the Arbitration Act 1996 was intended to leave intact as a feature of English arbitration the aspect of privacy and confidentiality, and this has been confirmed in various recent court decisions.

Maintaining the confidentiality of documents may be key. In *Ali Shipping Corporation v Shipyard Trogir* the Court of Appeal held that arbitration proceedings and documents or other information generated during the course of the arbitration should be treated as confidential, subject to five defined exceptions: 1) consent; 2) an order of the court; 3) by leave of the court; 4) circumstances where disclosure is reasonably necessary to protect or establish the legal right of a party or a third party; and 5) in the interests of justice.

The decision in *Ali Shipping* can be contrasted with the court's position on access to copy documents from court proceedings in litigation. Although applications to the court which concern existing or anticipated arbitrations are usually heard in private, the Civil Procedure Rules (CPR) do not provide such a restriction in respect of litigation proceedings. CPR Part 5.4 makes provision for the supply of documents from court records. Under the rules, a court or court office may keep a publicly accessible register of claims which have been issued out of that court. Any person who pays the prescribed fee may, during office hours, search any available register of claims.

The way ahead

In *Glidepath BV and others v Thompson* and others the underlying proceedings, which involved allegations of fraud against the defendants, commenced in court but part way through had been stayed to arbitration by consent pursuant to section 9 Arbitration Act. Although the applicant was not a party to those underlying proceedings, they were relevant to his employment tribunal claim, and he therefore wanted access to several key documents from those proceedings. As a non-party, his application was governed by the provisions of the CPR Part 5.4 detailed above, and the court's permission was therefore required for disclosure. Colman J held that such permission should not be given to a "stranger" to an arbitration unless all the parties to the arbitration consented or there was an overriding interest of justice in favour of disclosure. The applicant failed to meet this test and the court held that where the application for a stay was preceded by applications for freezing injunctions or third party disclosure orders, despite the existence of a binding arbitration agreement, the court's discretion in relation to such an application by a non-party to the arbitration should be exercised by reference to principles of confidentiality.

Conclusion

Arbitration remains the process of choice for parties who are keen to retain confidentiality when seeking to resolve disputes. A number of recent decisions, including those mentioned above, have emphasised that the courts are willing to engage in a balancing exercise to weigh the importance of confidentiality against other concerns. Parties should bear in mind, however, that requirements to disclose may be imposed upon them and it may not be possible to keep the existence or substance of an arbitration completely confidential.

Multi party arbitration

Where multi party disputes arise, it is desirable that issues be dealt with in the same proceedings rather than in a series of separate proceedings. The aim is to save time and money and, more importantly, to avoid the risk of conflicting awards on the same issues. This goal is achievable if the parties litigate in national courts but more difficult in arbitration.

Taking a construction project as an example, a major international construction project is likely to involve not only the Employer and the Main Contractor but an Engineer, Consultants and a host of specialist Subcontractors and Suppliers. Each will be operating under different contracts, often with different choice of law and arbitration clauses, and yet any dispute between the Employer and the Main Contractor may well involve the Engineer and one of the Subcontractors. Presently, without the consent of all parties, if separate arbitration proceedings are commenced, such proceedings cannot be consolidated despite the fact that there is a risk of inconsistent findings. Grounds on which the Subcontractor may object are that its dispute is not related to the dispute between the Employer and the Main Contractor. This point was addressed recently in an English court judgment *City & General (Holborn) Limited v AYH plc* where the judge held that it was not necessary for the majority of the issues in the proposed arbitration to be substantially the same as or connected with the issues in the arbitration that had already started. It was sufficient if a material portion of the issues were the same. This case is support for the view that it is now easier in England to refer related disputes between multiple parties to the same arbitrator.

Multi party arbitrations may arise because there may be several contracts with different parties which bear on the matters in dispute or, alternatively, there may be several parties to one contract. In this latter case one of the issues which arises on joinder is that each party, for example of a joint venture, may wish to appoint an arbitrator. Both the ICC Rules (1998 Edition) and the LCIA Rules (1998 Edition) provide for the right of the parties to nominate (jointly, if appropriate) a member of the arbitral tribunal if they can agree and to take away that right and vest it in the Institution if they cannot agree.

Unusually the LCIA Rules permit joinder of consenting third parties on the application of one of the parties to the arbitration. One way to avoid the problems which arise in multi party arbitrations in international construction engineering projects is for all parties to the project to enter into an Umbrella Agreement before the project begins which clearly sets out their agreement to the same arbitral tribunal in the event of the same or similar issues of fact and law arising in a dispute(s). The Umbrella Agreement would have to deal with such things as the procedural rules for the arbitration (for example ICC or LCIA), the seat of the arbitration, the law governing the dispute, the language of the arbitration and a procedure for resolving any disputes which arise in relation to whether or not disputes between two parties to the Umbrella Agreement relate to or are the same as the subject matter of a dispute between other parties to the Umbrella Agreement. Such procedure could involve reference to an independent third party whose decision all parties agree to abide by. At the time an Umbrella Agreement is entered into all the parties e.g. Consultants and Subcontractors will not be appointed. However, in each subsequent Deed of Appointment a clause should be present which ensures strict adherence to the terms of the Umbrella Agreement and provided that "the Parties" in the Umbrella Agreement are defined sufficiently broadly. If therefore a dispute arises between the Employer and the Main Contractor and the Main Contractor considers it related to its dispute with its Subcontractor then the three parties can be part of the same arbitral proceedings and thereby avoid inconsistent decisions and save time and money.

Of course, consideration needs to be given to whether tactically early commitment to an Umbrella Agreement will be beneficial. For example, the Employer may not wish to become involved in a more complicated arbitral process when as far as he is concerned responsibility lies solely with the Main Contractor.

Arbitration clauses in insurance contracts - some practical considerations

by Sarah Turpin and Ben Morgan

Policyholders are increasingly aware of the need, not only to ensure that the terms of insurance contracts are certain, but to negotiate improvements to the policy wording aimed at making the wording more policyholder friendly. While eyes are usually on "key" clauses relating to the scope of cover and the policy exclusions, it is remarkable how little attention is given to dispute resolution clauses. When a claim is made, they can be among the most critical terms of an insurance contract.

"Standard" policy wordings produced by insurers often favour arbitration as the means of resolving any disputes in relation to the scope of policy cover and/or the quantum of claims.

Achieving Clarity

Where arbitration is the chosen method of dispute resolution, it is essential that the arbitration clause is properly drafted to ensure that the process works effectively in practice. Failure to do so can lead to challenges over the correct seat, governing law or procedure to be followed which will inevitably result in additional costs and significant delays in recovery. This is not only extremely frustrating but can prove disastrous for the policyholder.

One of the perceived advantages of arbitration is that the process is more flexible and potentially less time consuming than court proceedings. This may not prove to be the case if inadequate attention is given to the arbitration provisions at the policy drafting stage: taking the time to get the wording right can avoid unnecessary delays and have dramatic effects on the cash flow, or even the survival, of a business.

There are at least five essential components that should be present in any arbitration clause:

- The clause should specify what categories of dispute are to be resolved through arbitration. In some cases the arbitration clause will be restricted to only certain categories of dispute, leaving other disputes to be dealt with by the courts.
- The number of arbitrators and the procedure for their appointment, including any requirement for candidates to have industry-related experience.
- The governing law, if not stipulated elsewhere in the contract, should be covered in the arbitration clause and the policyholder should look to use this to its benefit. The law in some jurisdictions is more "policyholder friendly" than in others, and this can create valuable leverage in settlement negotiations.
- The type of arbitration should be made clear, whether an institutionally administered arbitration (e.g. ICC, LCIA) or alternatively an "ad hoc" arbitration where the parties are left to manage the procedure between themselves and the tribunal (once formed).
- The seat of the arbitration must be specified and the policyholder should look to influence this. In addition to the potentially considerable costs involved in having to travel far afield to resolve a dispute, it is very important to bear in mind that, in the absence of a contrary provision, the "seat" will determine (a) the law governing the arbitration (which may be different from that governing the contract generally) (b) the scope for interference by national courts (c) the scope for appeal and (d) the enforceability of the award.

While the policyholder should make

every effort to negotiate each of these components to its advantage, the perfect position may not always be achievable. Nonetheless, at the very least there should be certainty about what is agreed. Depending on the wording of the policy and the choice of law, there may be no downside to insurers in delaying payment while resolving uncertainties about the arbitration agreement. In contrast, policyholders may be forced by cash flow difficulties, compounded by delays in trying to resolve these formalities, into accepting lower settlements than they should realistically be entitled to.

Excess Layer Insurance

Most excess layer policies are based on standard form wordings which often provide that the excess layer policy "follows form" i.e. follows the same terms and conditions as the primary layer, except as otherwise provided. There is, however, authority under English law that general words of incorporation may not be sufficient to incorporate an arbitration clause (or other dispute resolution clause) into an excess policy. This lack of certainty can lead to delay and there should ideally be an express dispute resolution provision. (See the *Trygg Hansa* case referred to in the panel).

Problems can also arise where the excess layer policy contains an express arbitration or dispute resolution clause which differs from that of the primary layer policy. This is not uncommon and can prove very expensive for the policyholder. In the event of a coverage dispute involving both primary and excess layer insurers the policyholder could, by way of example, be forced to arbitrate against one insurer in London, issue civil proceedings against three insurers in New York and arbitrate against two insurers in Bermuda. This fragmentation of the dispute resolution process is highly inefficient and may well have an adverse impact on any settlement negotiations. Attention to detail at the time of placement can result in a more cost effective and streamlined process being put in place.

Global Insurance

Similar difficulties can arise in the context of global insurance programmes. A company may take out local policies to provide limited cover for overseas subsidiaries while also taking out a global or master policy to provide additional cover for the same types of risk. The local policy may provide for coverage disputes to be resolved through the local courts or local arbitration, whereas the global policy may provide for disputes to be resolved in another jurisdiction. While there are real benefits in having global insurance cover, care needs to be taken to ensure that policies contain express provisions for the resolution of coverage disputes and that there are no conflicts in the dispute resolution provisions.

The importance of an effective mechanism for the resolution of policy coverage disputes cannot be overstated. The policyholder should take steps to ensure that, if an insurer wrongfully refuses to settle a claim, there is a clear and enforceable mechanism in place to enable the dispute to be resolved in a timely, fair and cost-effective manner.

The incorporation of an arbitration provision by means of a general incorporating provision was considered by HHJ Jack QC in *Trygg Hansa Insurance Company Limited v Equitas Limited* [1998] 2 Ll Rep 439. The Judge was required to consider the effect of section 6 of the Arbitration Act 1996 which specifically provides that an arbitration clause can be incorporated into an agreement by reference, provided that the reference is such as to make it part of the agreement itself. The Judge held that section 6 did not alter the existing law relating to incorporation by reference and that he was obliged to follow the analysis in *Excess Insurance Company Limited v Mander* [1995] L.R.L.R 358. In that case, Colman J held that, in the absence of special words of incorporation, general words of incorporation are not to be treated as effective for the purpose of section 6 and, in the light of this, the general words of incorporation in the excess of loss contracts in that case were not to be taken as indicating an intention to incorporate the arbitration clause from the primary policy.

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Autumn Webinar Programme

Dealing with political risk

- What are Investor Protection claims - we will focus on the developing Bolivian situation and how that may trigger BIT claims as a route to explain this fast developing area of arbitration;
- We will also look at practical steps that a General Counsel can take in structuring deals/investments to maximise scope for using the protection of BIT's; and
- Review MIGA, OPIC and other commercial forms of political risk cover.

5 October 2006 14:00 GMT

Difficult countries

Special problems arise when one contracting party is located in a State where difficulties are experienced with judicial involvement in international arbitration - here we will be looking at recent developments in India with Ciccu Mukhopadhaya of the leading India Arbitration law firm Amarchand & Mangaldas & Suresh A. Shroff & Co.

We will also be considering the issues arising in Bangladesh, Pakistan, Indonesia, Thailand, China, Venezuela and Bolivia. The focus will be on what a party can do to limit exposure to "games playing" including anti suit applications and the misuse of "public policy" bars to enforcement.

12 October 2006 14:00 GMT

Document production in an electronic age

The development of scavenging technology, the move of many corporates to paperless or near paperless operations and the recent cases perceived to have been determined on the basis of "electronic smoking guns" all represent challenges for the International Arbitration community. In this webinar we will be joined by Prof Hans Van Houtte (a member of the IBA Committee that drafted the IBA Rules of Evidence) and will be looking at:

- What scavenging technology can uncover;
- The impact of e-discovery on arbitration; and
- How far a party to an arbitration can finesse the document production procedure to its advantage.

19 October 2006 14:00 GMT

To register for forthcoming events please contact:
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