Welcome to the Fourth Edition of "Arbitration World", a publication from K&L Gates’ Arbitration Group which aims to highlight significant developments and issues in international arbitration that matter to executives and in-house counsel with responsibility for dispute resolution.

In this edition we look back at the firm’s third annual London International Arbitration Seminar at the Mandarin Oriental Hotel in Knightsbridge in April and look forward to hosting a similar event in San Francisco on 4-5 October 2007 (details in the Forthcoming Events section on the back page).

We are pleased to include a guest contribution from Petter Tornquist of Setterwalls, the leading Swedish law firm, on the new rules of the Arbitration Institute of the Stockholm Chamber of Commerce.

We look at the reasons behind the growth in arbitration in sport, by reference to some recent examples in the U.S.

We review the recently revised code for NASD Securities Arbitrations and developments in resolution of domain name disputes in Asia.

Getting dispute resolution clauses right is always important. We look at why this is particularly the case for directors and officers’ liability insurance.

We report on a recent case which may sound the death knell for the English Court’s practice of granting anti-suit injunctions where proceedings have been commenced in breach of an arbitration clause in another E.U. Member State.

We also include our usual round-up of recent developments in international arbitration from around the world.

To supply feedback on any feature in this publication please contact the editors, Peter Morton (peter.morton@klgates.com) or Ian Meredith (ian.meredith@klgates.com) in London, Jack Boos (jack.boos@klgates.com) in San Francisco or Joanne Diakos (joanne.diakos@klgates.com) in New York.
Recent Arbitration Developments from Around the World

Europe

Denmark
As reported in the Summer 2006 issue of Arbitration World, Denmark introduced a new Arbitration Act in 2005. To complement this new legislation, and ensure quality and integrity of arbitration proceedings in Denmark, the Danish Arbitration Institute is to be separated from the Construction Arbitration Board, which is currently responsible for the administration of the Institute. The Institute is in the process of setting up its own secretariat and producing an internal book of guidelines.

Serbia
Serbia has ratified the convention on the settlement of Investment Disputes. It came into force on 8 June 2007.

Switzerland
The Stockholm Chamber of Commerce has revised its rules, with the new rules coming into effect at the start of this year. See the special report authored by Setterwalls, Sweden, on page 12 for more details.

Asia

Singapore
The Singapore International Arbitration Centre (SIAC) introduces an updated set of arbitration rules with effect from July 2007. The changes include that an arbitrator is not deemed to be appointed until confirmed by the Chairman of SIAC, the tribunal will be required to submit its award in draft to SIAC to be reviewed before being issued, and a memorandum of issues defining the issues to be decided in the award must be drawn up by the tribunal.

Korea
The Korean Commercial Arbitration Board (KCAB) has brought in changes to its International Arbitration Rules, effective for arbitrations started after 1 February 2007. Proceedings started before then can be subject to the new Rules, if all parties agree. The KCAB administers arbitrations conducted under other rules, such as the UNCITRAL Rules, as well as providing the option of KCAB Rules.

Hong Kong
Michael J. Moser has been elected as the new Chairman of the Hong Kong International Arbitration Centre (HKIAC), with effect from 1 March 2007. Mr Moser was the first foreigner to be appointed as an arbitrator in mainland China and is fluent in Mandarin Chinese. Mr Moser is also the vice chair of the IBA Committee on Arbitration.

Australia/Oceania

Marshall Islands
Latin America

Ecuador
The Centre for Arbitration of the Guayaquil Chamber of Commerce in Ecuador introduced new rules at the beginning of this year. The new rules follow the ICC in imposing a requirement on Arbitral Tribunals to produce a Terms of Reference document at the start of the arbitration. The rules also require Arbitral Tribunals to expressly rule on their jurisdiction at the outset of the arbitration (for which the parties have an opportunity to make representations) and the Tribunal cannot overrule this decision in its final award. Ecuador is a signatory to the New Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Argentina
An ICSID Tribunal has delivered a further blow to Argentina finding in favour of claimant Enron and awarding damages of U.S. $106 million. The case is another flowing from the economic crisis of the late 1990’s.

Bolivia
The Government of Bolivia has signalled its intention to withdraw from the ICSID Convention. See article on page 9.

North America / Caribbean

Canada
Canada has signed up to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The Convention cannot be ratified until all thirteen of Canada’s provinces and territories have brought in the necessary implementing legislation. So far, five jurisdictions have done so (British Columbia, Ontario, Newfoundland and Labrador, Saskatchewan and Nunavut).

Bahamas

Africa

Gabon
The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards came into force in Gabon in March 2007, bringing the total number of Convention signatories to 142.

Egypt
The Cairo Regional Centre for International Commercial Arbitration is consulting on draft new arbitration rules, which closely track the UNCITRAL Rules, with some minor modifications.

Middle East

Dubai
The new Dubai International Arbitration Centre (DIAC) Rules came into force on 7 May 2007. The DIAC Rules have been completely re-drafted to make the rules more “international.” The DIAC’s aim was to produce world-leading arbitration rules, selecting the best aspects of other institutions’ arbitration rules from around the world.
On January 24, 2007, the U.S. Securities and Exchange Commission (“SEC”) approved a revised code of arbitration procedure that applies to securities arbitrations administered by the Dispute Resolution subsidiary of the National Association of Securities Dealers (“NASD”). The revised code took effect on April 16, 2007.

Ever since the U.S. Supreme Court’s 1987 decision in Shearson v. McMahon, 482 U.S. 220, arbitration has been the most widely used means of resolving disputes between securities firms and their customers. Last year close to 5,000 arbitration cases were filed with the NASD. Although originally intended to provide a prompt and inexpensive alternative to traditional lawsuits, the securities arbitration process has become increasingly legalistic, expensive and bureaucratic. The revisions to the NASD’s arbitration code are intended to make the securities arbitration procedure less costly and time-consuming and more predictable by reducing the opportunities for gamesmanship and abuse. These are some of the principal features of the revised code:

**Arbitration Selection**
The new code tries to improve the NASD arbitrator selection process. NASD arbitration panels typically consist of three members: two “public” arbitrators (i.e., arbitrators unaffiliated with the securities industry) and one “industry” arbitrator. One of the “public” arbitrators is chosen to chair the panel. In the past, the NASD supplied parties to an arbitration with two lists of proposed arbitrators: a list of ten “public” arbitrators and a list of five “industry” arbitrators. These lists were generated from the NASD’s rosters of arbitrators on a rotational basis. The parties would independently strike and rank these potential arbitrators. Because the parties could strike an unlimited number of names on each list, their collective strikes could eliminate most or all potential arbitrators, requiring the NASD to generate additional potential panel members – some of whom might be more objectionable to the parties than the ones they originally struck.

Under the revised code, the NASD will use a new computer system (called MATRICS) to generate lists of arbitrators on a random basis, thereby providing arbitrators with an equal opportunity to be listed on any given list of proposed arbitrators for a particular arbitration panel. There will now be three lists: for the public chair of the panel, for the other public member of the panel and for the industry member of the panel. The lists will be longer, but the revised code puts new limits on the ability of the parties to strike potential arbitrators, i.e., each party must leave (and rank) at least four names on each list. The NASD expects that this should expedite the arbitrator selection process and give the parties more control over that process.

**Discovery**
The revised code seeks to reduce the amount of time and money spent on disputes over the “discovery” to which parties are entitled prior to an arbitration hearing. Over a period of years, counsel for the claimants in securities arbitration became increasingly aggressive in demanding that securities firms produce large volumes of documents, e-mails and other information, not only about the
individual customer’s accounts but about each firm’s general business practices and procedures. Securities firms frequently objected to what they considered to be unreasonably burdensome demands for irrelevant or marginally relevant documents. Many of these disagreements led to time-consuming motions and hearings before the arbitration panels or their chairs. In 1999 the NASD attempted to reduce the range of discovery disputes by adopting a Discovery Guide that described the categories of documents parties should routinely exchange without arbitrator or NASD staff intervention. The Guide also provided advice to arbitrators about the documents each party was presumptively required to produce. Despite this guidance, parties often ignored the Discovery Guide or quarreled about its application.

The revised Code incorporates many of the Discovery Guide’s procedures and sanctions. It gives parties more time to respond to document production lists and other requests, but also provides more stringent enforcement mechanisms when parties fail to respond or assert frivolous objections to requests for production of documents or information. Under the new code, a panel may sanction a party that fails to produce required documents by assessing monetary penalties, precluding a party from presenting evidence, making an adverse inference against the party at fault, assessing postponement and forum fees, and awarding attorneys’ fees and expenses. A panel may also dismiss a claim or defense with prejudice for material and intentional failure to comply with a panel discovery order. The NASD expects these changes to the code to significantly reduce the number of discovery disputes in securities arbitrations.

Language and Structure

In an effort to comply with the SEC’s “plain English” initiative, the code of arbitration procedure has been revised to use simpler, less legalistic terminology. The code has also been restructured into a more logical, user-friendly format and now contains a definitions section to eliminate confusion or disputes about the meanings and scope of commonly used terms. In addition, the revised code gives the parties more flexibility and control over the arbitration process by clarifying which deadlines can be extended and by establishing straightforward procedures under the rules to seek such extensions.

Motions Practice

The revised code also tries to establish new procedures for motions practice before NASD arbitration panels. Increasingly, the parties to securities arbitrations have filed dispositive motions, asking panels to dismiss or curtail claims or counterclaims before a hearing on the merits. At one time these motions focused rather specifically on arguments that a claim was too old to be considered by a panel or was otherwise outside the panel’s jurisdiction. In recent years, motions before NASD arbitration panels have come to resemble the kinds of lengthy dispositive motions that are routinely filed in court – making detailed legal and factual arguments about why particular claims or counterclaims should not proceed. Although the revised code that took effect on April 16, 2007, establishes uniform procedures for such motions, an NASD proposal to amend the code even further – to discourage dispositive motions and to allow them to be granted only in extraordinary circumstances – is currently pending before the SEC.

The NASD has promised to provide training to its staff, arbitrators and others regarding the most significant changes to the arbitration process made by the revised code of arbitration procedure. The NASD also plans to monitor the effectiveness of the revised code and to propose amendments to address new or continuing problems in the securities arbitration process.
Introduction

The increasing reliance on Internet-based technology in global trade is a corollary of globalization. This is evidenced by the dramatic increase in domain name registration. The array of domain names is extending, more so since registration of a domain name is no longer confined to Roman script. We have already seen the birth of domain names in Arabic, Korean and Cyrillic.

In Hong Kong, the Hong Kong Domain Name Registration Company Limited has, since March 2007, been formally accepting applications for registration of “.hk” Chinese domain names (“CDN”) in the following seven categories:

- “.hk”;
- “公司.hk公司.hk” (equivalent to “.com.hk”);
- “網絡.hk” (equivalent to “.net.hk”);
- “組織.hk” (equivalent to “.org.hk”);
- “政府.hk” (equivalent to “.gov.hk”);
- “教育.hk” (equivalent to “.edu.hk”); and
- “個人.hk” (equivalent to “.idv.hk”).

Asian Domain Name Dispute Resolution Centre

The ever-increasing number of Internet users in the Asia-Pacific region indicates a huge and energetic Internet economy and a clear need for a regionally accessible dispute resolution provider. A provider was established in 2002 with a specific view to serving the region – the Asian Domain Name Dispute Resolution Centre (“ADNDRC”).

The ADNDRC is the fourth approved provider designated by the Internet Corporation for Assigned Name and Numbers (ICANN) to administer and
provide dispute resolution services in relation to generic top-level domain names (gTLDs). The other three are the New York-based CPR Center for Dispute Resolution, the Minneapolis-based National Arbitration Forum and the Geneva-based World Intellectual Property Organization (WIPO).

The ADNDRC is a joint undertaking by the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC) and the Korean Internet Address Dispute Resolution Committee (IDRC). Currently, ADNDRC has offices in Beijing, Hong Kong and Seoul.

The ADNDRC is an accredited provider of the Uniform Domain Name Dispute Resolution Policy (UDRP), whose role is to promote the use of online dispute resolution for gTLDs in Asia. The UDRP applies to disputes involving domain names registered in the gTLDs.

Resolution of domain name disputes by ADNDRC

The ADNDRC resolves domain name disputes by what is known as an “administrative process”, which is in many ways similar to arbitration. The process is initiated by filing a Complaint with the ADNDRC in accordance with the UDRP, its related Rules of Procedures and the Supplemental Rules of the ADNDRC.

In order to succeed, it is necessary for the Complainant to prove all of the following:

- the domain name is identical or confusingly similar to a trademark or service mark in which the Complainant has rights;
- the domain name registrant has no rights or legitimate interests in respect of the domain name; and
- the domain name has been registered and is being used in bad faith.

The domain name registrant against whom the Complaint is filed (“Respondent”) must file a Response. Subsequently, a panel (“Panel”) of one or three persons (as the case may be according to the Complainant’s request) will be selected to conduct the proceeding and to make a decision.

Essentially, the ADNDRC administrative proceeding is based only on documents provided by the relevant parties - oral hearings are only allowed in exceptional cases.

Concerns may arise as to whether the Respondent will respond. It is nearly always in the Respondent’s interests to file a Response. Under the terms of the standard Registration Agreement between the domain name registrar and the gTLD domain name registrant, the latter is required to participate in any UDRP proceedings brought before a dispute resolution service provider, such as ADNDRC or WIPO, commenced in respect of the gTLD domain name in question. If the registrant fails to file a Response, the ADNDRC will proceed to appoint the Panel. The Panel will then decide the case based on information available to it. In doing so, the Panel may draw such inferences as it deems appropriate from the Respondent’s default.

The Panel does not make monetary awards or awards relating to costs, including, without limitation, fees and costs of legal representatives. Decisions rendered by the Panel are limited to either that the Complaint is not justified (in which case the existing registered gTLD domain name registrant shall be entitled to retain the domain name in question), or that the Complaint is justified (in which case the Panel will order that the domain name in question should be cancelled or transferred to the Complainant).

If a Decision of cancellation or transfer is made against the Respondent, the domain name registrar will wait ten (10) business days after it is informed by the
Under the UDRP, either party to the administrative process may submit the domain name dispute to a court of competent jurisdiction before or after the process has commenced or after the Panel has reached a Decision.

Generally speaking, the ADNDRC administrative proceedings can be completed within 60 days from the date on which the Complaint is duly filed.

To keep up with the demanding pace of the cyberworld, the ADNDRC operates the dispute resolution process by a unique Online Domain Name Dispute Resolution System. It is a fully web-based system, available on the ADNDRC website (www.adndrc.org), which is designed to facilitate the resolution of domain name disputes.

Elimination of Favoritism
Traditionally, the UDRP process, which is also adopted by all other UDRP providers such as WIPO, has been criticized for favouring trademark holders over domain name registrants. Such criticisms stem from the fact that under the rules of all other UDRP providers, where a Complainant elects a one-person Panel and the Respondent does not elect a three-person Panel, the provider (e.g., ADNDRC) will appoint the sole panelist who is to decide the case. As the provider is chosen by the Complainant, there is a concern that perhaps the provider may tend to select a sole panelist who is more likely to decide the case in favour of the Complainant.

Any such accusations seem to be eliminated under the Supplemental Rules adopted by the ADNDRC, under which both the Complainant and the Respondent are allowed to participate in the selection of the sole panelist. In particular, both the Complainant and the Respondent are entitled to give rankings to five candidates. The appointed sole panelist will be that panelist who received the highest mutual ranking by both parties.

Conclusion
Nowadays, domain names are no longer just identifiers of businesses and other Internet users; they have also become valuable assets. The rapid expansion of the Internet in Asia has made clear the need for a regionally-accessible provider for dispute resolution services in the domain name context. The ADNDRC has made, and will continue to make, resolution of such disputes in Asia far easier and more efficient.

Guidelines Published on Interviewing Arbitrators

The London-based Chartered Institute of Arbitrators has recently (May 2007) published guidelines on the interviewing of prospective arbitrators. The guidelines, prepared following wide international consultation, aim to assist practitioners in what has remained a grey, and sometimes controversial, area.

We anticipate including a full summary of the guidelines in our next edition (Winter 2007/8). In the meantime, the guidelines are available free to CIArb members and should be published in book form in due course.
There have been recent important developments in the U.S. concerning a federal statute ("Section 1782") which allows parties to obtain discovery to assist international and foreign (i.e. non-U.S.-based) proceedings, including arbitration. The result of recent court decisions in the U.S. has been that parties engaged in litigation or arbitration proceedings outside of the U.S. may be able to use Section 1782 to seek discovery from parties with relevant evidence in the U.S.

So, for example, in In re Oxus Gold, a New Jersey court allowed a U.K. company to subpoena documents and deposition evidence to assist in an investor-state arbitration in London, distinguishing earlier cases on the basis that the arbitration arose out of a bilateral investment treaty which had, per se, received government approval. Very shortly after this decision, an Atlanta court in In re Roz Trading made a similar finding to allow a Cayman Island company to seek documents for use in a Vienna seated arbitration. The key finding was that arbitral tribunals are "tribunals" for the purposes of Section 1782.

Whilst the U.S. courts have made a series of findings which give broad meaning to the words of Section 1782, it should be noted that if the statutory requirements are satisfied, the court may allow the discovery sought in its discretion, but is not required to do so. The availability of the procedure will be dependent on the facts of an individual case.

The exercise of the court’s discretion is based on a number of factors, including whether the entity from whom discovery is sought is a participant in the foreign action and whether the application is made in good faith and/or places an undue burden on the entity receiving the request.

In re Roz Trading is now on appeal, and a decision is awaited by the international arbitration community. If affirmed, the provisions of Section 1782 will become an important tool for parties to international arbitration when seeking access to evidence in the U.S.

Venezuela and Bolivia Throw a Challenge to ICSID

Investment treaties have in recent years provided a route for international investors to seek recourse directly against sovereign states that infringe their rights. Many claims have arisen out of failed privatisations across the former Soviet states, others have arisen from economic crises like that which befell Argentina in the 1990s and yet more have developed out of states seeking to recover control over their natural resources as their prices have increased.

On 1 May, most of the foreign oil companies operating in Venezuela’s Orinoco Belt agreed in principle to hand over 60% of their assets to state-owned oil company PDVSA. A process of negotiation is now ongoing which is intended to lead to a final agreement by 26 June.

This coincides with both Venezuela and Bolivia’s announcement of their intention to leave the International Centre for the Settlement of Investment Disputes. Coming as it does around 12 months after Occidental launched its ICSID claim against Ecuador following the alleged seizure of its oil reserves in the Amazon Basin and Ecuador’s empty chair policy at ICSID, this may signal a new challenge by Latin American states to the jurisdiction of ICSID.

Simply withdrawing from ICSID in this way does not, however, close the door on the scope existing for adversely affected investors to bring claims arising from the expropriation of their assets, a lack of fair and equitable treatment or to otherwise rely upon the significant number of investment treaties which remain in force and under which countries like Venezuela, Bolivia and Ecuador have agreed to protect the rights of investors and consented to have claims resolved at ICSID.

It will be interesting to see if any further steps are taken by states like President Chavez’s Venezuela. At least so far, the door remains open for investors to mount claims. We may well see a rush to commence claims before further steps are taken.
K&L Gates' International Arbitration Day
The Mandarin Oriental Hotel, Knightsbridge, London
April 2007

On 19 April 2007 we hosted our third annual London International Arbitration Seminar entitled “International Arbitration as a Tool in Effective Risk Management.” The event was well received both by those who attended in person and those who joined via our live webcast.

As in previous years the aim of the day was to cover a variety of topics of interest to executives and in-house lawyers with responsibility for managing international arbitrations.

The event was made up of five panel sessions, with the speakers on each panel comprising a mix of corporate counsel, arbitrators, representatives of arbitral institutions and lawyers from K&L Gates' offices in Asia, North America and Europe, all offering their own perspectives.

The first panel session focussed on the topic of “When is arbitration the right choice?”. Gerry Lagerberg of PricewaterhouseCoopers opened the day with a presentation of the results of a recent survey, commissioned by PwC on corporate attitudes and practices in International Arbitration. Jack Boos (K&L Gates, San Francisco) and Peter Morton (K&L Gates, London) then looked respectively at factors to consider in deciding whether to arbitrate, and matters to consider in drafting an effective arbitration clause, before Rocio Peña Echarri of CEMEX gave the in-house lawyer's view on the pro's and con's of arbitration.

The second panel session looked at controlling costs and reducing delay in international arbitration, with a focus on the report issued in March by the ICC Commission on Arbitration Task Force on “Techniques for controlling time and cost in arbitration”. John Uff QC, Keating Chambers, gave his own thoughts on the Report of the ICC Task Force (of which he was a member) and on means of reducing time and cost generally. Richard
Paciaroni (K&L Gates, Pittsburgh) and Ian Meredith (K&L Gates, London) summarised some of the key findings of the Report, before David Burt, Corporate Counsel, DuPont, gave his views on the difficult issues of cost and delay in arbitration. Martha Dawson (K&L Gates, Seattle) then provided a presentation regarding means of saving time and costs in document-intensive arbitration through the use of sophisticated document analysis software originally created and used by the firm’s e-DAT Group.

The third panel session looked at the controversial topic of the role of mediation in arbitration. Speakers included the leading London-based mediator, William Wood QC (Brick Court Chambers) and the leading Singapore-based arbitrator, Christopher Lau SC. Matthew Forsyth, Assistant General Counsel for Sapient Corporation (Europe and Asia), added his thoughts from his experience as an in-house lawyer and 'user' of the processes.

The first afternoon session focussed on arbitration in Asia, with presentations from Christopher To, Secretary General of the Hong Kong International Arbitration Centre, who looked at the growth of international arbitration in Hong Kong and the reasons behind that growth, and Christopher Lau SC who looked at the attractions of Singapore as an international arbitration centre. Wing Cheung (K&L Gates, Hong Kong) then looked at the topic of dispute resolution culture across Asia, before Ian Pennicott QC (Keating Chambers, London) looked at recent trends in dispute resolution in South East Asia and Hong Kong in particular.

The day ended with a final panel session on investment treaty arbitration. Professor Philippe Sands QC (Matrix Chambers, London) gave his views on the reasons for the growth in investment treaty arbitration and recent developments in this area. The day was completed with presentations from Clare Tanner (K&L Gates, London) on how to structure deals in order to take the benefit of investment treaty protection and Jane Harte-Lovelace (K&L Gates, London) on the topic of political risk insurance. We would like to thank all of the panelists for their contributions and would also like to thank all those who joined us on the day, both in person and online.

We are hosting a similar event on 4-5 October 2007 in San Francisco, further details of which can be found under “Forthcoming Events” on the back page of this edition.
The New Rules of Arbitration Institute of the Stockholm Chamber of Commerce

by Petter Törnquist, Setterwalls, Sweden

Setterwalls
Arsenalsgatan 6
SE-111 47 Stockholm
Tel: +46 8 598 890 00
petter.tornquist@setterwalls.se
www.setterwalls.se

Background
The Arbitration Institute of the Stockholm Chamber of Commerce (“the SCC Institute”) has adopted new arbitration rules. The new rules entered into force on 1 January 2007 and will be applied to all disputes that are initiated following that date.

The new rules serve to meet with the increasing number of international disputes that are handled by the SCC Institute. Statistics show that over the past decade the SCC Institute has administered almost 200 cases per year. A majority of these cases has had an international character and every year there are typically parties from 30 to 40 different countries arbitrating before the Institute. Hence, the new rules have been drawn up with the aim of offering a set of modern and easily comprehensible arbitration rules that are well suited for international arbitration and which reflect international best practice.

In reality, the new rules are not fundamentally different from the previous ones, which date from 1999, and anyone familiar with the old rules will feel at home with the new rules. This lack of fundamental changes is not surprising given the fact that the review of the rules was not a response to any particular dissatisfaction with the old rules but rather a desire to ascertain that the arbitration rules of the SCC Institute conform to modern international best practice. Still, there are a few new provisions and a number of editorial and linguistic changes that deserve particular mention.

Appointment of Arbitrators
Similar to the old ones, the new rules provide that, absent party agreement, the arbitral tribunal shall consist of three arbitrators, unless the SCC Institute decides that a sole arbitrator is sufficient taking into account the specific circumstances of the case. In line with the objective of having user-friendly and easily comprehensible rules, the new rules specifically provide that the parties are free to agree on the number of arbitrators and on the procedure for appointing arbitrators. In
addition, the new rules introduce a provision requiring the parties to comment on the number of arbitrators in their request for arbitration.

Where there are multiple claimants or respondents and the arbitral tribunal is to consist of more than one arbitrator, the principal rule, both under the previous rules and the new rules, is that the multiple claimants, jointly, and the multiple respondents, jointly, shall appoint an equal number of arbitrators. If either side failed to make such joint appointment, the previous rules provided that the SCC Institute should make the appointment for that side or, if the circumstances so warranted, that the SCC Institute should appoint the entire arbitral tribunal. The new rules provide that the SCC Institute shall always appoint the entire arbitral tribunal where one side fails to make a joint appointment. The reason for this change is to avoid the risk that an award is set aside by national courts on the basis of unequal treatment of the parties.

Consolidation
The new rules contain a new provision on consolidation. This new provision enables the SCC Institute to consolidate two or more parallel arbitral proceedings provided that they concern the same legal relationship and involve the same parties, albeit that consolidation may only take place following consultation with the arbitrators and the parties. It should be noted that the provision cannot be used to increase the number of parties in an on-going arbitration or to consolidate cases where different claimants are arbitrating against the same respondent. The practical implication of the new consolidation provision remains to be seen. One can certainly question whether it will increase the efficiency of the proceedings to consolidate cases where the parties have strongly differing opinions about the suitability of consolidation. Therefore, this new provision may perhaps not lead to other cases being consolidated than those that are already today consolidated on an ad hoc basis simply because the parties agree to it.

Interim Measures
The previous rules provided that the Arbitral Tribunal could “order specific performance … for the purpose of securing the claim”. In the new rules the revised provision is broader, allowing the Arbitral Tribunal to “grant any interim measures it deems appropriate.” In order to support the enforceability of a decision on interim measures, the new rules allow the Arbitral Tribunal to issue the interim measures in the form of either an order or an award.

The possibility to issue the interim measures in the form of an award corresponds to a general development in international arbitration law and is in line with the UNCITRAL rules on interim measures.

Evidence
The new rules include three provisions on evidence: a general rule on evidence, a rule on witnesses and a rule on experts appointed by the arbitral tribunal. These provisions reflect structural and linguistic improvements rather than substantive changes to the rules.

To conform to international expectations and standards, the new rules explicitly provide that it is for the arbitral tribunal to determine the admissibility, relevance, materiality and weight of the evidence. Again, this is not expected to result in any new practice or procedures since the old rules allowed the arbitral tribunal to refuse to accept evidence if it considered the evidence to be irrelevant, non-essential or if proof could be established by more convenient or less expensive means.

Separate Award on Advance on Costs
The revision has also resulted in a new provision which allows the arbitral tribunal to make a separate award ordering a party to reimburse another party for any advance on costs paid by the latter party on the former party’s behalf. Previous practice shows that arbitral tribunals have sometimes been reluctant to issue separate awards on redress during on-going arbitrations, absent a specific agreement between the parties entitling such redress.

This new provision makes clear that by choosing the arbitration rules of the SCC Institute, the parties have in effect agreed to allow for redress through a separate award.

Conclusion
As mentioned in the beginning of this article, the new rules apply to arbitrations commenced on or after 1 January 2007. Thus, it is still too early to assess their practical significance to the cases before the SCC Institute but they surely give testimony to the Institute’s objective to maintain its position as one of the leading arbitration institutes for international disputes.
Sports are watched and played across the world with unbridled enthusiasm for the intense nature of competition inherent in sporting contests. This public interest in every aspect of sports is a principal reason for the use of arbitration to settle disputes, keeping the competition on the fields and in the stadiums and arenas - and out of court rooms. Players, unions, teams, leagues, stadium authorities and sports broadcasters all have an interest in focusing fan interest on the competition of sports, and not on the resolution of disputes that have no relation to the scoreboard.

In professional sports the use of arbitration is prevalent in collective bargaining agreements, as owners and players use arbitration to settle disputes involving salaries, injury benefits and player grievances on discipline (such as suspensions).


The resolution of sporting disputes, like stadium lights on the night of a big game, casts a glaring light on the benefits of arbitration rather than litigation. The confidential nature of the process, the expertise of the arbiters, and the potential speed and economy of the process all support the use of arbitration in the sports area.

Confidentiality

The world’s largest corporations are followed rarely with the same level of intensity that sports fans follow their favorite teams and players. Prominent stock analysts could not identify every vice-president of a corporation under inspection, yet even the casual sports fan can name a favorite team’s starting lineup and reserves, and the serious sports fan can recall player salaries and the years left on a contract. Radio stations devoted to “sports talk” 24 hours a day are found in most major U.S. cities, as callers and hosts spend hours discussing not just activities on the field, but also off-field activities ranging from salary caps, and the ability to terminate a lease, to the length of suspensions.

The public nature of litigation (even if it is not televised) adds fuel to media and fan pursuit of the latest news item. The recent arbitration regarding the New York Knicks’ firing of head coach Larry Brown serves as a perfect example of the benefits of a closed, confidential arbitration hearing. The issue for resolution was the amount of money remaining on Brown’s contract that the Knicks were obligated to pay. Although this would be a mundane issue in the corporate world, a trial with public testimony by Brown, the Knicks ownership, its general manager Isiah...
Thomas, and Knick players - some casting public blame on others - would have damaged the reputations of all.

**Expert Decision makers**

The term “(s)he knows the game” is the ultimate compliment to a coach or manager. Similarly, decision makers in sports disputes who “know the game” will help bring about a fair and informed result. Even if explaining the rules of a sport or the nuances of specific contract provisions were possible to a jury or judge, the time spent and chances of mistakes argue against uninformed decision makers.

Major League baseball salary arbitrations are required for certain players in the collective bargaining contract, utilizing specialized arbitrators who possess tremendous knowledge of baseball statistics, player performance, and the intricacies of player contracts. The collective bargaining agreement of the National Football League extends hundreds of pages, a culmination of hours of negotiation on issues as specialized as the compensation of a player whose contract is terminated while recovering from an injury. Only an arbitrator intimately familiar with the document and the sport it regulates can render informed decisions regarding injury and non-injury grievances brought by players.

**Speed**

Many fans would appreciate an official’s adverse call to be resolved immediately by arbitration before further damage is done to their team. Although this is not possible for game-related disputes, prompt and economical arbitration hearings are common for off-field disputes. The speed of arbitration, versus the sometimes protracted delay of judicial proceedings, fits perfectly with sports disputes where games cannot be postponed for years while a court determines player eligibility, game day broadcast rights or other similar disputes.

The Court of Arbitration for Sport created an Ad-Hoc Division which sits at major events such as the Olympic Games in order to resolve disputes within twenty-four hours.

In 2005, Kenny Rogers, a Texas Rangers pitcher, was suspended for 20 games by the Baseball Commissioner Bud Selig for punching a cameraman. A prompt arbitration hearing, however, reduced this suspension to 13 games. If the suspension were reviewed through litigation, it would be virtually impossible for a court to adjudicate the issue in an informed manner in time to preserve the rights of all of the affected parties.

The above described benefits have been embraced by the sports business/legal professionals, and in an increasing amount, arbitration provisions are being included in sports-related contracts - extending beyond collective bargaining agreement and eligibility issues. Tim Frank, Vice-President – Basketball Communication for the NBA, stated, “Arbitrations tend to be faster, more cost effective and simply a better way of resolving our disputes.” A recent Marquette Sports Law Review Article (16 Marq. Sports L. Rev. 99) found that most professional sports facility leases contain arbitration provisions. Concession contracts, media agreements, player endorsement deals, and personal seat license agreements are examples of sports-related transactions that employ arbitration clauses.

A recent example underscoring the desirability of an explicit arbitration provision was the ownership dispute within the NBA’s Atlanta Hawks organization. In 2003, Steve Belkin bought 30% of the team and was named the “Governor” or managing partner of the team. In 2005, the general manager of the Atlanta Hawks negotiated an arrangement for the Phoenix Suns to sign the Suns’ player, Joe Johnson, to a multimillion-dollar contract and then trade him to the Hawks for draft picks and players. Belkin objected on behalf of the Hawks to the Johnson trade and ordered his general manager not to make the trade. With public opinion in Atlanta running very strongly for a trade, the other partners publicly supported the general manager’s decision and tried to have Belkin removed as Governor. A trial court blocked attempts to have Belkin removed after an unusual hearing where the current general manager testified against the current Governor. While this litigation ensued, Johnson was unable to sign a contract, and because he was a “premier” free agent, other teams and players were compelled to wait to see where Johnson would sign before making commitments. Only after NBA Commissioner David Stern interceded with the parties did the process reach a conclusion. In the end, the NBA, the Hawks, and the ownership group all were damaged by the publicity engendered by the open legal proceedings situation.

As sports, both professional and collegiate, continue on their path to “big business”, the benefits of arbitration as a means to settle all forms of disputes continues to increase in importance.
Directors and Officers’ Liability Insurance - The Importance of the Dispute Resolution Clause

by Sarah Turpin (K&L Gates, London) & Tom Reiter (K&L Gates, Pittsburgh)

The increasing significance of D&O insurance

In today’s highly regulated and litigious climate, directors and officers are subject to increasing scrutiny, not only by shareholders, but by regulators, government bodies and criminal investigators. The U.S. has witnessed a proliferation of securities class actions in recent years, combined with follow-on ERISA lawsuits and shareholder derivative suits. U.S. government regulators and prosecutors, such as the SEC and the Department of Justice, have become increasingly active, and the long arm of U.S. jurisdiction is such that directors of non-U.S. companies face increasing scrutiny even where their links to the U.S. are fairly tenuous. In the U.K., the Companies Act 2006, with its codification of directors’ duties and statutory framework for shareholder derivative claims, is expected to result in increased claims against directors. U.K. regulators such as the FSA, the OFT and the HSE are focusing more and more on the conduct of senior management. Add to this the highly publicized accounting scandals such as Enron and WorldCom, the horror story of Equitable Life and the recent extradition of the Nat West Three and it is not surprising that directors and officers’ liability (“D&O”) insurance is a subject of increasing importance to both companies and directors.

In both the U.K. and the U.S., D&O policies are normally taken out by the company as policyholder and are structured around the indemnification provided by the company. So called “Side A” coverage covers the liabilities of the directors and officers in defending any claim, where the company fails to indemnify as a result of legal restrictions or insolvency.

“Side B” also covers the liabilities of the directors and officers, but only to the extent that they have been indemnified by the company. The direct liabilities of the company itself are not covered by the D&O policy, unless the company has taken out “Side C” or “entity” coverage, although for public companies this is normally restricted to securities claims.

D&O claims are often highly complex and may involve substantial risk, both to the company and to the individual directors. They can also prove very costly for D&O Insurers, with the result that coverage for such claims is often vigorously disputed.

Dispute resolution clauses in D&O policies

The increasing tendency of D&O insurers to dispute policy coverage means that, in practice, the dispute resolution clause can have a particularly important role. In the U.S., however, D&O policies are often silent as to the form of dispute resolution, thereby permitting the insurer and the insureds to initiate court proceedings in the U.S. state or federal district that is regarded as most favourable to their interests. One leading D&O insurer has introduced a clause which provides the insured with the choice of two options (i) non-binding mediation and, if mediation proves unsuccessful, the dispute may be litigated by either the insurer or the insured after a cooling off period or (ii) binding arbitration.
In the U.K., D&O insurers have traditionally favoured the English courts as the chosen forum for dispute resolution. This is no doubt a reflection of the fact that English law is often regarded as more favourable to insurers (although in recent years the courts have become more policyholder friendly). More recently, some D&O insurers in the U.K. have opted for arbitration as the chosen method of dispute resolution or for “stepped” clauses involving mediation followed by arbitration where mediation proves unsuccessful. There are several reasons why insurers believe that their interests may be better served by arbitration than by the English courts, not least the issue of confidentiality and the desire to avoid binding precedents which may prove unfavourable.

In contrast to the U.S., most Bermuda-based D&O insurers (whether providing primary or excess layer cover) typically provide for any disputes to be resolved through arbitration. The arbitration clause will often prescribe the procedural aspects of the arbitration in some detail, including the seat of the arbitration (often London), the choice of arbitrator and the procedural law to be applied (which may differ from the governing law of the contract). As far as governing law is concerned, some Bermudan insurers have actually sought to modify the application of the chosen law in certain areas. For example, one particular Bermuda-based insurer provides for the policy to be governed by New York law but seeks to exclude the contra proferentem rule of construction whereby any ambiguity in the contract of insurance has to be construed against the party who drafted it (normally the insurer).

**Arbitration or litigation?**

There are differing views as to whether policyholders are best served by arbitration or litigation, and it is important that policyholders, and directors, give careful consideration to what they consider likely to best serve their particular interests. Where arbitration is the chosen method of dispute resolution, it is essential that the arbitration clause is adequately drafted, as any uncertainties about the arbitration process are likely to delay the resolution of the dispute in question. This may be a particular cause for concern for the director if the claim in question falls under “Side A”, which means that the losses are not being indemnified by the company and, pending resolution of the dispute with D&O insurers, the director may be having to fund his or her own defence costs. It should also be made clear that arbitration will apply to all coverage disputes and not simply disputes involving the policyholder company, assuming that is the intention. If the company is insolvent, or if there is a conflict of interest between the company and the director, it is important that the director has the ability to pursue his or her claim under the policy.

**Drafting considerations**

The number and choice of arbitrators may prove particularly significant in the D&O context. There may be a requirement for some or all of the arbitrators to have experience of insurance, either from working in the insurance industry or as lawyers or other professional advisers serving the industry. Such individuals may be more likely to favour insurer-friendly arguments, particularly if their economic future is dependent upon the insurance industry. This is a particular cause for concern for the director if the claim in question falls under “Side A” because the decision made by the arbitrators could potentially result in the director having to fund the underlying claim out of their own pocket.

If possible, the policyholder should, at the pre-contract stage, seek to restrict the number of “industry” arbitrators that may be appointed. If the
The ECJ has severely limited the circumstances in which a national court of an EU Member State can grant an injunction restraining a party from pursuing court proceedings in the courts of another Member State. Only in the area of arbitration have the courts of certain Member States (most notably those in England) continued to grant anti-suit injunctions to prevent parties from proceeding with actions before the courts of other Member States. This is based on the so-called “arbitration exception” contained in article 1(2)(d) of Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“the Regulation”). SpA

The need for consistency in relation to the dispute resolution process is also an important consideration in the D&O context where there is more than one layer of insurance involved. The concern is that the excess layer insurer(s) may impose an express dispute resolution clause which differs from that in the primary policy. This is a real possibility, particularly where Bermuda-based excess liability insurers are involved, but is something which is often overlooked in practice. The result is that the same coverage dispute could end up being subjected to arbitration and/or litigation in several different countries. This fragmentation of the dispute resolution process is far from desirable given the costs involved and the risk of inconsistent outcomes. It is something which can generally be avoided by ensuring that such matters are given adequate attention at the pre-contract stage.

The Anti-Suit Injunction: On Borrowed Time?

by Ian Meredith (K&L Gates, London) and Sarah Munro (K&L Gates, London)

The ECJ has severely limited the circumstances in which a national court of an EU Member State can grant an injunction restraining a party from pursuing court proceedings in the courts of another Member State. Only in the area of arbitration have the courts of certain Member States (most notably those in England) continued to grant anti-suit injunctions to prevent parties from proceeding with actions before the courts of other Member States. This is based on the so-called “arbitration exception” contained in article 1(2)(d) of Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“the Regulation”). SpA

However, this may be set to change following the recent House of Lords decision in West Tankers Inc v RAS Riunione Adriatica di Sicurita & Ors ([2007] UKHL 4), where the court referred to the ECJ the issue of whether the grant of an anti-suit injunction in the context of arbitration is consistent with the Regulation.

Two well-known decisions in 2003 and 2004 established that if court proceedings are commenced in another Member State in contravention of an arbitration clause, it is for the party to assert its contractual choice before the court first seised of the dispute. These decisions were based on the premise that the Regulation provides uniform rules for the allocation of jurisdiction between Member States, whose courts are equally able to apply without interfering with the jurisdiction of a court first seised. Any party wishing to challenge jurisdiction must apply to the court first seised, and courts in other Member States should respect the decision of that court.

West Tankers involved a vessel chartered to an Italian oil refinery company that was involved in a collision with a jetty in Italy. The charterparty was expressed to be governed by English law and contained an arbitration clause, with London as the seat. The owners of the jetty commenced an arbitration against West
Tankers in London but its insurers brought an action in the Italian courts, being the place where the damage had occurred. West Tankers therefore applied to the Commercial Court in London for an anti-suit injunction to prevent the continuation of the action in Italy on the basis it arose out of the charterparty. The judge granted a permanent anti-suit injunction but gave permission to appeal straight to the House of Lords on the issue. The House of Lords referred the following question to the ECJ: “Is it consistent with [the Regulation] for a Court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?”. In a leading judgment given by Lord Hoffman, the House of Lords made clear that the court of a Member State that is the seat of the arbitration should be able to support the arbitral process by granting an anti-suit injunction in circumstances where proceedings commenced solely to enforce a contractual agreement to arbitrate had arbitration as their subject matter and therefore fell within the “arbitration exception”.

The important question is the extent to which the ECJ will support the view indicated by the House of Lords. It remains possible that the ECJ will use the opportunity it has now been given to revisit the boundaries of the arbitration exception and the anti-suit injunction may not survive its further review. It is to be hoped that the ECJ takes note of Lord Hoffman’s concluding observation in West Tankers that the competition between international arbitration centres is now very strong, with many leading centres currently to be found in the EU.

A version of this article appeared in PLC Cross Border and can be viewed on the K&L Gates Web site at www.klgates.com under the Newsstand section of the Arbitration practice page.
The theme for this one-and-a-half day event is “International Arbitration: Practice, Procedure and the Impact of Cultural Differences”. Corporate counsel, leading arbitrators, representatives of arbitral institutions and arbitration practitioners will explore a broad range of topics, including: why arbitrate?; the case for and against institutionally administered arbitration; dealing with documentary evidence and witnesses; the cross-cultural dimension - Asia, Europe and Latin America; and dealing with misbehaving parties and arbitrators.

The second day (morning only, followed by lunch) will feature a session on ethics in international arbitration and breakout sessions for attendees with interests in construction and engineering, intellectual property and biotechnology. The event will also be made available by live webcast.

Webinar: Investment Treaty Arbitration in South America

We will be running a web-accessible seminar on recent developments in Investment Treaty Arbitration in South America. Leading speakers from the world of investor state arbitration will offer their perspectives, including on the implications of Bolivia’s withdrawal from ICSID and the Ecuadorian empty chair policy.

Full details will be available shortly.

Forthcoming Events

International Arbitration Seminar
4 & 5 October 2007, The City Club, San Francisco, USA

Who to Contact

For further information, contact:

Paul Davis (Anchorage) paul.davis@klgates.com T: +1 907 777 7609
Michael Greco (Boston) michael.greco@klgates.com T: +1 617 261 3232
Yujing Shu (Beijing) yujing.shu@klgates.com T: +86 10 8518 8528
Christoph Wagner (Berlin) christoph.wagner@klgates.com T: +49 (0)30 220 029 110
James Pranske (Dallas) james.pranske@klgates.com T: +1 214 939 4985
Carleton Strouss (Harrisburg) carleton.strouss@klgates.com T: +1 717 231 4503
Stephen Lo (Hong Kong) stephen.lo@klgates.com T: +852 2230 3588
James Hudson (London) james.hudson@klgates.com T: +44 (0)20 7360 8150
Ian Meredith (London) ian.meredith@klgates.com T: +44 (0)20 7360 8171
Robert Galt III (Miami) robert.galt@klgates.com T: +1 305 539 3311
Michael Gordon (New York) michael.gordon@klgates.com T: +1 212 536 4855
Bill Grenner (Orange County) william.grenner@klgates.com T: +1 949 623 3548
Jon Michaelson (Palo Alto) jon.michaelson@klgates.com T: +1 650 798 6704
Tom Bisic (Pittsburgh) tom.bisic@klgates.com T: +1 412 355 6538
John Dingess (Pittsburgh) john.dingess@klgates.com T: +1 412 355 6564
Doug Parker (Portland) doug.parker@klgates.com T: +1 503 226 5725
Jack Boos (San Francisco) jack.boos@klgates.com T: +1 415 882 8005
Edward Sangster (San Francisco) ed.sangster@klgates.com T: +1 415 249 1028
Hugh Bangasser (Seattle) hugh.bangasser@klgates.com T: +1 206 370 7607
Fred Tausend (Seattle) fred.tausend@klgates.com T: +1 206 370 6798
David Chang (Taipei) david.chang@klgates.com T: +886 2 2175 6799
Charles Eisen (Washington, D.C.) charles.eisen@klgates.com T: +1 202 226 9077
Glenn Reichardt (Washington, D.C.) glenn.reichardt@klgates.com T: +1 202 778 9065

To register for these forthcoming events please contact: Kathie Lowe (kathie.lowe@klgates.com).