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**In this issue:**





# From the Editors

Welcome to the 11th edition of Arbitration World, a publication from K&L Gates' Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution. We hope you find this edition of Arbitration World of interest, and we welcome any feedback (email ian.meredith@klgates.com or peter.morton@klgates.com).

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# News from around the World

## Institutions

**American Arbitration Association**
The AAA's *Standard Fee Schedule* has changed, and standard fees have been increased, with effect from 1 January 2010.

**Centre for Effective Dispute Resolution**
The CEDR Commission on Settlement in International Arbitration has published its final Report and a new set of Rules for the Facilitation of Settlement in International Arbitration. The Rules are intended to be incorporated into institutional rules, or into an arbitration agreement, or used on an ad hoc basis, as a complement to arbitration rules. The Rules make specific provision for the role of the Tribunal in facilitating settlement, and for a Tribunal to take into account the parties' conduct in relation to settlement proposals in deciding on costs.

**Court for Arbitration in Sport**
The CAS has revised its rules and issued a new Code of Sports-Related Arbitration. The new rules, replacing those of January 2004, apply to all cases filed after 1 January 2010 unless the parties agree to apply the old rules. Changes introduced include revised fees for high-value cases, a prohibition on CAS arbitrators or mediators acting as counsel in cases before the CAS, and a reduction in the time limit for a panel to issue an award from four months to three.

**Stockholm Chamber of Commerce**
On 9 December 2009, the Board of Directors of the SCC adopted an amended proposal for new *Emergency Arbitrator Rules* which make it possible for parties to request interim measures before the constitution of a tribunal. The rules provide for an emergency arbitrator to be appointed within 24 hours from the time an application for interim measures is made and to make a decision within five days of appointment.

The SCC has issued revised versions of its standard Arbitration Rules and Rules for Expedited Arbitrations, both of which incorporate the Emergency Arbitrator Rules together with other changes. Both revised versions entered into force on 1 January 2010.

**UNCITRAL**
The UNCITRAL Working Group responsible for the revision of the 1976 UNCITRAL Rules has published the latest draft revised Rules. The proposed revisions will be discussed at the Working Group's next session at the beginning of February in New York.

## Asia

**China**
There are reports of a court in the People's Republic of China (PRC) granting enforcement of an ICC award from an arbitration seated in the PRC. This is thought to be the first reported instance of enforcement in the PRC of an award made under the auspices of a non-Chinese arbitration institution. For a full report, see the article below.

## Caribbean

**Haiti**
Haiti has ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Haiti deposited an instrument of ratification with the World Bank in late October 2009 and the Convention entered into force for Haiti in November 2009.

## Europe

The Civil Justice Unit of the European Commission is continuing with its review of Regulation 44/2001. It is analysing stakeholder responses to its consultation, many of which concerned the functioning of the "arbitration exception". The Commission plans to undertake an impact assessment and expects to publish proposals for reform in the second half of 2010.

**England and Wales**
An English court has upheld an arbitrator's power to decide the status of a state party to an arbitration. In Republic of Serbia v ImageSat International NV [2009] EWHC 2853 (Comm), the court considered an application by Serbia to challenge an arbitral award for lack of substantive jurisdiction under Section 67 of the Arbitration Act 1996. The arbitration arose from a contract between ImageSat and the State Union of Serbia and Montenegro (the State Union). Shortly after the arbitration was commenced, the State Union split and Serbia responded to the request for arbitration. The arbitrator decided, as a preliminary issue, that Serbia was the continuation of the State Union, rather than a successor state, and was a proper party to the contract and the arbitration. Serbia argued that the arbitrator did not have jurisdiction to decide that Serbia was a continuator state and a proper party.

The court dismissed the Section 67 challenge, on the ground that Serbia had conferred substantive jurisdiction on the arbitrator, by virtue of the Terms of Reference, to deal with the question whether it was a continuator or successor state. The decision is an example of the potential importance of the Terms of Reference in an ICC arbitration.

**Finland**
On 19 November 2009, in *Commission v Finland* (Case C 118/07), the ECJ held that the Republic of Finland had failed to fulfill its obligations under the EC Treaty to take the appropriate steps to eliminate incompatibilities with the EC Treaty concerning the provisions on the transfer of capital contained in Bilateral Investment Treaties entered into by Finland before its accession to the EC. The provisions of the BITs in question (with Russia, Belarus, China, Malaysia, Sri Lanka and Uzbekistan) guaranteed free movement of capital between the territories of the relevant states.

The ECJ considered that such unrestricted free movement of capital was incompatible with provisions in the EC Treaty that empower the Council to restrict payments to or from third countries.

The case is the latest in a line highlighting the complex interaction and potential for conflict between BIT provisions and Community law.

**Scotland**
On 18 November 2009, the Scottish Parliament passed the *Arbitration (Scotland) Bill*, which provides a new statutory framework for arbitration in Scotland. The new Act abolishes the distinction between domestic and international arbitration. Notable features of the new Act include an express confidentiality obligation (from which parties may opt out); provision for an "Arbitral Appointments Referee" to deal with failures in the appointments process; and provisions limiting challenges to awards and excluding appeals to the Supreme Court of the United Kingdom.

The Arbitration (Scotland) Act 2009 is due to come into force in early 2010 and, unless the parties agree otherwise, will apply to arbitrations commenced on or after the commencement date.

### Middle East

**Dubai**

Mohammed Bin Rashid Al Maktoum, the ruler of Dubai, has issued *Decree No 57 for 2009*, which establishes a special arbitral tribunal to decide all disputes relating to Dubai World Group (DWG) and its subsidiaries. DWG requested a moratorium on debt repayments and commenced restructuring in November 2009. The special tribunal, composed of Sir Anthony Evans (Chairman), Michael Hwang and Sir John Chadwick, will have jurisdiction to hear and decide any demand or claim submitted against DWG and its subsidiaries, including any demands to dissolve or liquidate the company. The tribunal will have its seat in the Dubai International Financial Centre. For a full report on this and other developments in the Middle East, see the article below.

### North America

**U.S.A.**

On 22 December 2009, President Obama signed into law the 2010 Department of Defense Appropriations Act (H.R. 3326). The new Act includes a significant amendment prohibiting certain government defense contractors from entering into or enforcing arbitration clauses in employment agreements.

Broader restrictions are envisaged in the draft Arbitration Fairness Act, which is pending before the Judiciary Committees of both the Senate and the House. If passed, that Act would prohibit the enforcement of nearly all pre-dispute agreements to arbitrate employment, civil rights, franchise, or consumer matters.

### Oceania

**Australia**

On 26 October 2009, the Australian Senate passed the *Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008*, giving the Federal Court of Australia concurrent jurisdiction with the state and territory Supreme Courts under the International Arbitration Act 1974 (the 1974 Act). The Bill, which amends various Acts with the aim of improving the operation of the federal courts, is part of the Australian government's wider ongoing review of the 1974 Act.

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## Changes at the ICC

Louis Degos, Valence Borgia (Paris)

2009 was a successful year for the International Chamber of Commerce (ICC). Not only did it maintain its position as a key arbitration institution, but it also considerably expanded its activities. Jason Fry, Secretary-General of the ICC International Court of Arbitration, continued with his ambitious reform programme which has already led to the establishment of a new hearing center in Paris and the creation of the ICC Young Arbitrators Forum in 2008. The focus of the 2009 reform initiatives was on the institutional and legislative framework for ICC arbitration as well as on the exploration of new markets in Asia. Jason Fry presented these improvements during an arbitration dinner hosted by K&L Gates in Paris.

### Capacity building in response to growing caseload

The caseload of the ICC International Court of Arbitration has continued to grow: total cases had already risen from 599 in 2007 to 663 in 2008, and the figure will be even higher for 2009.

In order to respond to this growing caseload, the ICC has expanded its Court of Arbitration. During the meeting of the ICC World Council in Kuala Lumpur, 41 new members were appointed bringing the total number to 125; the number of vice presidents was increased from 9 to 15. The ICC's capacity to deal with a growing caseload has also been increased by the creation of new case-management teams.

### Exploring new markets in the Asia-Pacific region

Recognising the increasing importance of arbitration in the Asia-Pacific region, the ICC is undertaking initiatives to explore new markets in the region.

In this connection, the most important step in 2009 was the opening of a fully operational Hong Kong branch of the Secretariat of the International Court of Arbitration. The branch has its own case-management team, but works in close cooperation with the headquarters in Paris. Notably, quality control is exercised from Paris. The Hong Kong office has already proved successful: by early June 2009, it had registered more than 100 cases.

As a complement to the Hong Kong office, the International Court of Arbitration has recently opened a regional liaison office located in Maxwell Chambers, Singapore. Apart from promoting ICC dispute resolution services in Asia, this office is also entrusted with other activities such as offering training programmes.

### Taskforce on Arbitration involving States or State Entities

In addition to the geographical expansion, the ICC is also strengthening its position in new sectors. One very important field of activity is state arbitration. In the past, between 10 and 12% of the ICC's caseload involved states or state entities. Given the eminent importance of state arbitration, the ICC intends to play an even greater role in this field in the future.

For this reason, it has created the Taskforce on Arbitration involving States or State Entities. This taskforce, composed of over 150 members from 36 different countries, studies the implications of the participation of states and state entities on arbitration procedure and on administering institutions. Special attention is paid to international investment arbitration.

### ICC Arbitrator Statement of Acceptance, Availability and Independence

In August 2009 the ICC introduced amendments to the form which arbitrators are required to sign on accepting proposed appointments as an ICC arbitrator. The new "ICC Arbitrator Statement of Acceptance, Availability and Independence" not only requires arbitrators to provide a statement as to their independence from the parties, but the new form now also requires arbitrators to provide information on the number of cases they are dealing with, as well as on further commitments in the next 12 to 18 months. Such disclosure is said to have a twofold purpose: to increase transparency, and to minimize chances of delays resulting from arbitrators accepting too many cases.

### Revision of the ICC Rules of Arbitration

The initiative to revise the ICC Rules was launched in late 2008. It is dealt with by a taskforce composed of 175 members from 41 countries. The taskforce receives and analyses various suggestions on possible amendments of the ICC Rules, including from National Committees, members of the ICC, the Secretariat and the Court of Arbitration. The intention is to prepare a revised set of rules to be approved by the ICC Commission on Arbitration by mid 2010.

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## Rating of Arbitrators - New Services Launched

Peter Morton (London)

The question is often asked, if there are user ratings available for hotels and restaurants, why can't there be a similar system for arbitrators? For some time now there have been calls, particularly from the in-house legal community, for some sort of publicly available database for the rating of arbitrators. Some corporate counsel have voiced their frustration in having to rely on rumour and conjecture in selecting arbitrators, subject to having themselves had direct experience of the arbitrator and, of course, guidance that external counsel can offer. It is also suggested that having widely available information on arbitrator performance should lead to an expansion of the pool of arbitrators, by encouraging parties to extend appointments beyond the household names.

To date, no such service has really got off the ground. Concerns are frequently expressed about issues of privacy and confidentiality, data protection issues, the risk of defamation and the potential consequences if inaccurate information is published.

The recent launch of a number of website based services aimed at filling this perceived gap suggests that, in some form or other, feedback on arbitrator

performance is likely to become more readily available.

Some services are expected to be limited to strictly objective, factual information such as "promptawards.com". The website for PromptAwards states that, once launched, it will provide the names of arbitrators and details of the length of time it took, from the close of proceedings, for the tribunal to issue the award. The website is accepting submissions but has not yet gone live (as at early January 2010). It is said that the intention of the service is not just to name and shame those arbitrators who may be too busy to be prompt, but also to give credit to arbitrators with good track records, thereby encouraging faster resolution of disputes. Whilst PromptAwards will, initially at least, only cover "international construction" disputes, that term may well be interpreted broadly and, if successful, it is likely that similar such services may be made available for disputes across wider areas.

The US-based Institute for Conflict Prevention & Resolution (CPR) is this month (January 2010) set to launch an arbitrator rating system, run by a company called "Positively Neutral", with which CPR members will be able to access comments and ratings on CPR panel arbitrators (of which there are over 580) from lawyers who have used the arbitrators previously. The success of the system remains to be seen given that only those CPR panel arbitrators who have agreed to be part of the scheme will be rated, and the cost of the scheme (which CPR hopes to keep modest) will be borne by the arbitrators who sign up. There is a risk that if arbitrators do not sign up, there will not be anyone to rate. In considering whether to volunteer for the scheme, CPR arbitrators may be comforted by the fact that CPR requires that references be from both sides of a case and arbitrators will have the opportunity to review the results before they are made available to CPR members, although there can be no cherry picking: arbitrators can choose only to publish all or none of the ratings.

A similar UK-based service was recently launched called "DisputesLoop" which claims to assist lawyers in choosing arbitrators. It offers a service whereby subscribers may advertise an appointment for which an arbitrator is required. Subscribing arbitrators, in the relevant category specified, would then be notified and, if interested, invited to respond explaining in brief terms why they are the appropriate candidate. The appointing subscriber would then, in considering interested candidates, have access to peer review comments on them from people who have appointed them previously. There are said to be a number of safeguards in place in terms of feedback posted on arbitrators, including the need to register with DisputesLoop before being able to leave feedback, and the fact that all feedback is initially quarantined before release to allow the website operators an opportunity to approve the comments for publication and to provide the arbitrator with an opportunity to make representations.

All these initiatives will be reliant on the quality and quantity of information made available and it remains to be seen whether any will gain sufficient momentum to be a useful and truly successful resource. However, the fact that so many such services are being set up would suggest that the rating of arbitrators, in one form or another, is about to become a fact of life.

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## Are Arbitration Awards Capable of Being Remanded for Clarification under the Federal Arbitration Act After *Hall Street v. Mattel*?

Paul K. Stockman (Pittsburgh)

Although federal courts historically have remanded incomplete or ambiguous arbitration awards for "clarification," that remedy may no longer be effectively available in light of the United States Supreme Court's decision in Hall Street Associates, L.L.C. v. Mattel, Inc., which held that the specific remedies in the Federal Arbitration Act ("FAA") are the "exclusive" menu of judicial options when addressing an arbitration award.

Nearly two years after Hall Street, the decision continues to raise as many questions as it answers. The actual holding of the case is straightforward: the Court ruled that parties cannot expand the list of grounds for vacatur under Section 10 of the FAA, to permit a more searching judicial review of

arbitration awards. The rationale underlying that holding, however – that Sections 10 and 11 of the FAA "provide exclusive regimes for the review provided by statute" – calls into question a number of previously well-established principles of American arbitration law, and continues to puzzle courts and arbitrating parties.

The question that has generated the most litigation to date is whether arbitrators' "manifest disregard of law" remains a valid (albeit narrow) basis for vacating arbitration awards. This question has been answered in differing ways by different courts. In Comedy Club, Inc. v. Improv West Assocs., the Ninth Circuit held that arbitrators manifestly disregarding applicable law "exceed their powers," justifying vacatur under Section 10. In Citigroup Global Markets, Inc. v. Bacon, however, the Fifth Circuit held that "manifest disregard of law" is no longer an independent ground justifying vacatur.

That is not, however, the only principle that Hall Street calls into question. In particular, in light of Hall Street, it is now doubtful whether courts may remand incomplete or ambiguous arbitration awards back to the arbitrators for "clarification." While Section 10(b) of the FAA provides a limited authority for remand, as a practical matter it is most often unavailable, because it applies only if "the time within which the agreement required the award to be made has not expired." Of course, arbitrators – giving their award full consideration, and being fully subject to the human trait of procrastination – most often issue their award near the end of the time period for doing so (whether established by agreement or otherwise). As a result, in most cases there will be little opportunity for a remand within the time frame permitted by Section 10(b).

Before Hall Street, courts filled that gap with a "common law" doctrine permitting remand for "clarification." None of these decisions have found authority to remand in a specific provision of the FAA, however. Instead, all of them found a judicial authority to "remand for clarification" in general principles of the common law. In Colonial Penn Insurance v. Omaha Indemnity, for example, the Third Circuit recognized that "there is no explicit provision in the [FAA] for such a remand," and that Section 10(b)'s remand authority applies only "in certain circumstances". Similarly, the district court for the Northern District of Alabama in Lanier v. Old Republic allowed a remand for clarification "despite th[e] limited review" otherwise provided by the FAA.

In light of Hall Street's unequivocal pronouncement about the exclusivity of the judicial review provisions in Sections 10 and 11, it is highly doubtful that such a "common law" remand for clarification remains permissible under the FAA. And, as noted, FAA Section 10(b) will seldom be available as a practical matter, except in those rare instances when arbitrators have an unlimited time in which to deliver an award.

Participants in arbitration can debate the wisdom of this outcome. On the one hand, a remand for clarification can save time, effort and expense, avoiding the need to start arbitration anew when the arbitrators have rendered an incomplete or ambiguous award. On the other hand, practical experience suggests that arbitrators given a "second bite at the apple" often engage in unprincipled post-hoc "backfilling," abandoning neutrality in a misguided attempt to "defend" or bolster an award that the losing party may have properly called into question.

Nonetheless, Hall Street does provide an "escape hatch" for parties who wish to ensure that a remand for clarification remains permissible, if appropriate. Under Hall Street, parties "may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." It previously was well-established that the FAA does not completely pre-empt state laws unless they are inconsistent with the FAA's "goals and policies." In some instances, state laws may explicitly allow remands, whether by statute or at common law, without the stringent time limit that effectively precludes arbitrator rehearing under the FAA. For example, Section 23(c) of the 2000 revision of the Uniform Arbitration Act, as adopted in twelve states and the District of Columbia, allows matters to be remanded for rehearing without any time limitation.

In sum, arbitrating parties cannot count on there being the right, in cases governed by the FAA, to have ambiguous or incomplete awards remanded for clarification. In such a case – absent the explicit

specification of an additional source of governing law in the arbitration agreement – the only remedy may be vacatur of the award. This once again demonstrates the importance of anticipating and addressing, ex ante, possible outcomes in the arbitration process, to ensure that the arbitration proceeding conforms to the parties' intentions.

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## Arbitral tribunal confirms that ECT binds Russia

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

An arbitral tribunal under the auspices of the Permanent Court of Arbitration confirmed in a decision of 30 November 2009 that Russia is bound by the Energy Charter Treaty. Yukos shareholders had initiated the arbitral proceedings arguing that Russia had violated the Energy Charter Treaty by unlawfully expropriating Yukos oil company. The tribunal dismissed Russia's defence that in the absence of ratification the Energy Charter Treaty was not applicable. Claims by former shareholders in Yukos of up to $100 billion will now proceed to the merits phase.

This ruling strengthens the rights of investors who made energy-related investments in Russia before 19 October 2009. However, it does not apply to investments which were made after this date. New investors should structure their investments carefully in order to maximize protection under international law.

### Protection of "old" investments under the Energy Charter Treaty

The Energy Charter Treaty (ECT) is a multilateral treaty which provides protection of investments in the energy sector. It contains provisions very similar to those contained in Bilateral Investment Treaties (BITs). For example, the ECT provides protection against unlawful expropriation and discrimination against energy investments or foreign investors. It obliges the contracting parties to accord investments fair and equitable treatment and to observe obligations, including contractual obligations, the contracting party has entered into with an investor or an investment. Most importantly, it contains a right to take the state to international arbitration if it has infringed the rights of investors. Arbitral awards are binding and enforceable under international law.

The ECT has been ratified by 46 states. Russia signed it on 17 December 1994, but never ratified it. Normally, treaties do not apply before ratification. Things are different under the ECT. Art. 45(1) ECT provides for provisional application of the treaty pending its entry into force. The arbitral tribunal confirmed that the provision applies to Russia and that Russia is bound by the treaty.

The decision only applies to investments which were made before 19 October 2009. This has the following reason: on 20 August 2009, Russia informed the Depository of ECT of its intention not to become a Contracting Party of the ECT. According to Art. 45(3) ECT, such notification results in the termination of the provisional application upon the expiry of 60 days. Russia is, however, obliged to continue applying the provisions of the ECT to investments made before 19 October 2009 for a period of 20 years.

### Protection of "new" investments under BITs

Although Russia is a promising market for investors, there is considerable political risk. Investors who want to make new investments in Russia – whether in the energy sector or in other sectors – cannot rely on the ECT.

While Russia has BITs in force with more than 40 countries, the large majority of these treaties provide only limited protection. Many of them date from the Soviet era and provide only limited access to arbitration. Even though the scope can be extended by operation of most-favoured-nation clauses, this is still a disputed area and investors should be aware of this risk.

Moreover, many Russian BITs only protect those investments which are legal under Russian law. Such "legality clauses" typically pose a significant risk for investors since host States may attempt to deny protections of a BIT by having recourse to their national law. This is an even greater risk when the legal environment may not be entirely transparent.

There are however some BITs which contain strong protections. Investors should therefore seek specialist advice and structure their investments carefully in order to benefit from these BITs, and thereby help mitigate political risk.

## Challenges to arbitrators and the growth of on-line comments and social networking

Ian Meredith (London)

Both anecdotal evidence and data released by a number of the major arbitral institutions suggest that 2009 was a year in which an increasing number of parties mounted challenges to the appointment of arbitrators in both commercial and investment arbitrations. This trend seems likely to continue into the new decade.

In a recent case from the arena of investment treaty arbitration, the leading arbitrator His Honour Judge Charles Brower was successfully challenged by the State of Ecuador on the basis of comments he was reported as making in an interview that was published and made available in an on-line news digest by Transnational Dispute Management, on the grounds that his comments raised justifiable doubts about his impartiality.

When asked, in the interview, about "*the most pressing issues in international arbitration*," Judge Brower had replied that one issue is certain states' lack of "*acceptance and willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing*." Brower noted that Ecuador has denounced the ICSID convention and *"is expressly declining to comply with the orders of two ICSID tribunals"* and went on to comment that *"when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya… the politics may change"*.

In its challenge, counsel for Ecuador argued that the arbitrator's comments showed he had pre-judged the "*live issue*" of whether Ecuador was bound by provisional orders made by the Perenco and Burlington Resources tribunals prohibiting the state from selling off oil assets, as well as Ecuador's ultimate liability for expropriating Perenco's investment. Ecuador also accused him of breach of confidentiality.

In response, Perenco argued that Judge Brower's interview contained nothing more than *"an innocuous summary of publicly known facts,"* that the Libya analogy was not a comment on liability, but on possible investor reaction and that, in impartiality challenges, "*deference"* should be given to arbitrators of Judge Brower's experience and standing in the international community.

In the decision, the secretary general of the Permanent Court of Arbitration, Mr Christiaan Kröner, said the *"combination of the words chosen by [Judge] Brower and the context in which he used them have the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower's impartiality."*

Ecuador's claim that Judge Brower had pre-judged the provisional orders question in the interview was rejected as was the breach of confidentiality claim, but *"given Judge Brower's experience and reputation, it can be assumed that he must have been aware of the risks his interview could entail as far as raising justifiable doubts regarding his impartiality or independence."*

As the popularity of social networking sites, blogs and listservs continues to grow so does the volume of open source electronic material available to parties and counsel on the leading arbitrators.

Whether the simple fact that a party's counsel is shown as a "friend" of that party's nominated arbitrator on a social networking site is sufficient to found a justifiable doubt as to that arbitrator's impartiality is highly questionable, but challenges are understood to have been mounted as a result of the existence of such entries and it can be expected that counsel will increasingly evaluate the open source material now available at the click of a mouse to investigate an arbitrator's digital footprint when assessing the appearance of bias.

Those seeking to pursue careers as arbitrators (especially those looking to accept appointments in

the most high profile of cases) will need to be increasingly careful about the interviews they give, the comments they post on-line and the digital trace they leave if they are to avoid facing more challenges in the future.

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## Recent Decisions from India on the Scope and Interpretation of Arbitration Agreements

Raja Bose & Mika Talreja (Singapore)

As discussed in previous editions of Arbitration World, certain decisions of the Indian courts have given rise to concern in the international arbitration community at what is perceived to be an excessively "interventionist" approach by the Indian courts to arbitration. Two recent decisions of the Indian Supreme Court add to this debate.

In N. Radhkrishnan v M/s. Maestro Engineers & Ors. (2009) the Supreme Court held that a case relating to serious allegations of fraud and malpractice "*must be tried in court*" and "*such a situation can only be settled in court through furtherance of detailed evidence by the parties and such a situation cannot be properly gone into by the Arbitrator*". In the view of the Supreme Court, a court rather than an arbitral tribunal "*would be more competent and have the means to decide such a complicated matter involving various questions and issues raised in the present dispute*".

In arriving at this decision, the Supreme Court relied on two previous judgments. In its 1962 decision in Abul Kadir Shamshuddin Bubere v Madhav Prabhakar Oak, the Supreme Court had held that it would be sufficient cause for the court not to order an arbitration agreement to be upheld if a party is charged with fraud and the party seeks to try the matter in open court. In Oomor Sait v Aslam Sait (2001), it was held that despite the existence of an arbitration clause, the court could refuse to stay court proceedings and added that it may refuse to refer the dispute to an arbitrator if the dispute gives rise to complex questions of law or fact which would involve detailed oral and documentary evidence.

The Supreme Court's decision appears to conflict with the literal wording of Section 8 of the Indian Arbitration and Conciliation Act 1996 (the "Act"). Section 8 imposes a mandatory requirement on any judicial authority before which an action is brought, to refer the matter to arbitration if it is the subject of an arbitration agreement. On a literal interpretation of Section 8, the court has no discretion to decline to refer the matter to arbitration. The Radhkrishnan case is the latest in a line of cases where the courts take an interventionist role by raising an exception to the rule in Section 8 in cases involving fraud, and which would require detailed documentary and oral evidence**.** It remains uncertain as to how the courts will determine whether the fraud is serious enough to decline making a reference to arbitration in the future.

In Indian Oil Corporation Ltd. & Ors. v M/s. Raja Transport Pvt. Ltd. (2009) the Supreme Court decided that it would not amend an arbitration agreement which provided for one of the parties' employees to be appointed as the arbitrator. The court decided that it would not interfere in appointing an arbitrator when the parties entered into the contract voluntarily with a full understanding of the arbitration agreement.

In arriving at this view, the court cited Section 11(6) of the Act which outlines the grounds on which an appointment may be challenged. The court construed Section 11(6) narrowly and held that it could not be invoked by a party to sever and nullify individual terms of the arbitration agreement. The parties must accept the agreement in its entirety.

In contrast to the Radhkrishnan case, this judgment demonstrates a willingness to uphold an arbitration agreement. The court was reluctant to allow parties to enforce the terms of an arbitration agreement selectively or amend or dispute certain terms of the agreement after the fact. However unusual the parties' agreement to arbitrate seems to the outsider, the court upheld it.

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# Arbitrability of Shareholder Disputes Under German Law and the New DIS Supplementary Rules

Dr. Eberhardt Kühne, Ishak Jonas Isik (Berlin)

In its landmark decision of 6 April 2009, the German Federal Court of Justice (**BGH**) determined the requirements for the arbitrability of shareholder disputes pertaining to German limited liability companies (**GmbH**). The GmbH is the most popular vehicle for investment and business in Germany. In this decision, the BGH has moved away from its prior jurisprudence according to which disputes on the nullity and avoidance of decisions taken by shareholders' meetings were not arbitrable.

## Background

Up to the 1980s, the prevailing opinion both in the German courts and in legal writings was that only state courts had jurisdiction to rule on the nullity and avoidance of GmbH shareholders' resolutions. In the 1990s, certain state courts and authors began to express opposition to the traditional approach.

In 1996, the Higher Regional Court of Karlsruhe held that disputes among GmbH shareholders on the validity of GmbH shareholders' resolutions were in principle arbitrable. However, in its judgment of 29 March 1996, the BGH set aside this verdict. It reasoned that the *inter omnes* effect as provided for in sections 248(1) and 249(1) of the German Stock Corporation Act (**AktG**) could not be achieved by means of a contractual arrangement between GmbH shareholders. The statutory provisions of the AktG could not be applied by analogy to limited liability companies. This is key since the *inter omnes* effect of *res judicata* is considered a substantial prerequisite of (state court or arbitral) decisions on the validity of shareholders' resolutions. The BGH further reasoned that such a substantial change to the law as would be required to bring the GmbH position into line with that applicable to stock corporations should be decided by the legislature.

However, in 1997 when the German arbitration law was revised, the legislature explicitly entrusted the question to the judiciary and legal literature. The BGH has now assumed such responsibility and refined its case law.

## Cornerstones of the Federal Court of Justice's ruling

In its April 2009 decision, the BGH highlighted that arbitration proceedings relating to GmbH shareholder disputes have to feature standards equivalent to state court proceedings in line with the rule of law. To ensure that disputes on the validity of shareholders' resolutions of limited liability companies are arbitrable and to achieve the *inter omnes* effect, a minimum standard of rights of participation and of legal remedies must be guaranteed for all shareholders.

In particular, four minimum requirements must be fulfilled. First, the arbitration must be with the consent of all shareholders. This should be either by incorporation into the articles of association of a company, or by a separate "individually negotiated agreement". Secondly, all shareholders must be informed about the initiation and the progress of the arbitration proceedings, and be permitted to join the proceedings at least as co-intervenor. Thirdly, all shareholders must have the opportunity to participate in the selection and appointment of the arbitrators, unless the selection of the arbitral tribunal is entrusted to a neutral institution. The majority principle applies when several shareholders on one side of the dispute select an arbitrator. Finally, all disputes on the validity of shareholders' resolutions shall be consolidated and be subject to the jurisdiction of one arbitral tribunal.

A final requirement for the validity of an arbitration agreement is public policy pursuant to section 138 of the German Civil Code. Section 138 is a provision typical in civil law jurisdictions, enabling the courts to reconcile the enforcement of contractual obligations with the demands of public morality or standards. The effect of this public policy requirement in this context is that, even if the four above requirements are met, an arbitration agreement could still be held void if, viewed generally, a shareholder's constitutional right to legal remedies is not effectively guaranteed or, put differently, if there are concerns that a shareholder is disadvantaged by the arbitration agreement. The BGH's insistence on this requirement was criticised in the context of its 1996 verdict because of the

extreme legal consequences of its application, namely the invalidity of the arbitration agreement. In the view of many legal writers, such consequences could be avoided by applying by analogy specific provisions of German arbitration law by which state courts ensure that public policy is not violated but without affecting the validity of the arbitration agreement (e.g., section 1034(2) of the German Code of Civil Procedure according to which a state court decides on the composition of the arbitral tribunal in case of disadvantages). The public policy requirement is crucial and requires further refinement in future case law.

### The DIS Supplementary Rules and some unresolved issues

In the aftermath of the BGH judgment, the German Institution of Arbitration (**DIS**) published Supplementary Rules on Shareholder Disputes which came into force on 15 September 2009. These Supplementary Rules reflect the requirements set forth in the recent BGH ruling and are applicable (in addition to the general DIS Rules) if the GmbH shareholders have referred their disputes - in line with the BGH verdict - to the DIS. This specific set of rules is rich in detail, and far more detailed than has typically been included in arbitration provisions contained in articles of association. However, in the absence of such detailed provisions, any uncertainties or ambiguities may result in the invalidity of the arbitration agreement. Where the GmbH shareholders intend to refer their disputes to the DIS, it is advisable, for clarity, to explicitly refer to the Supplementary Rules.

The BGH verdict did not shed light on whether arbitral agreements in articles of association of German stock corporations, which are governed by the Stock Corporation Act (AktG), are also arbitrable. The prevailing opinion refers to section 23 para. 5 AktG, according to which deviations in the articles of association from statutory law are only permissible if explicitly permitted by the relevant statute. Lacking such provision, disputes on the validity of shareholders' resolutions of German stock corporations are, therefore, considered non-arbitrable.

### Updating a company's articles of association

Against this background, it may be advisable for companies to review and adjust any existing arbitration clauses in their articles of association in line with the BGH judgment in order to avoid such clauses being held invalid.

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## Watch Your Captions and Requests for Relief – the Tenth Circuit Establishes Two-Prong Test for Interlocutory Appeals under Federal Arbitration Act

Jeremy Mercer (Pittsburgh)

Recently, the Tenth Circuit waded into an unsettled area of law in the U.S. – does the denial of a motion to dismiss, where such motion is based on the existence of an arbitration provision, entitle the movant to the right to an interlocutory appeal of that denial? In *Conrad v. Phone Directories Co., Inc.* (2009), the Tenth Circuit answered the question in the negative. It formulated a two-prong test for determining when such interlocutory appeal rights would be provided: (1) was the motion in the trial court captioned as a motion under the Federal Arbitration Act ("FAA")? and (2) is the relief requested in the motion consistent with seeking a decision on the merits by an arbitrator as opposed to the court?

In the case before the Tenth Circuit, the defendants had filed, in the trial court, a motion to dismiss the plaintiff's complaint and supported it on three separate grounds. One of those grounds was that the plaintiff had an employment agreement that contained an arbitration provision that arguably applied to the claims raised in the litigation. The trial court denied that motion and the defendants appealed.

The Tenth Circuit noted that the FAA expressly provides for an interlocutory appeal of any trial court order denying a motion under the FAA to stay litigation in light of arbitration or to compel arbitration. But, the Court noted that the defendants' motion was not seeking either form of

relief. Instead, the defendants sought to dismiss the litigation.

According to the Tenth Circuit, the relief sought by the defendants was a judicial relief – a judicial declaration of the rights of the parties – as opposed to relief afforded by an arbitrator. Combining that with the fact that the motion was styled as a motion to dismiss rather than as a motion to stay or a motion to compel arbitration, the Tenth Circuit found the defendants not to be entitled to an interlocutory appeal of the trial court's order denying that motion.

Along the way to reaching that decision, the Tenth Circuit formulated a two-prong test to be applied in all future cases in that Circuit (which encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming) when assessing whether a party is entitled to the FAA's interlocutory relief rights. The new test requires courts within that Circuit to look first at whether the motion was captioned as one under the FAA. However, the Court cautioned that "while in the vast majority of cases the caption will go most of the way toward answering the questions, we felt that it is not dispositive." To make the caption dispositive of the question would, according to the Court, run counter to the Federal Rules of Civil Procedure's notice pleading requirements and encourage litigants to "game" their captions to take advantage of the interlocutory relief.

Therefore, according to the Tenth Circuit, a second step is needed. For that second step, the court is required to look at whether it is apparent from the four corners of the motion that the movant seeks only that relief permitted by the FAA, or other judicially-provided relief. Basically, the courts are to look at whether the movant is requesting relief that ultimately can be awarded by an arbitrator as opposed to a court. "If the essence of the movant's request is that the issues presented be decided exclusively by an arbitrator and not by any court, then the denial of that motion may be appealed under [the FAA's interlocutory appeal provision]."

The Court noted that its decision and new two-prong test was supported by the text of the FAA itself (which specifically spelled out certain motions entitled to interlocutory relief), the canons of statutory construction, the Supreme Court's recent decision in *Arthur Andersen, L.L.P. v. Carlisle* (see the May 2009 edition of *Arbitration World* for a discussion of that decision), the decisions by three other Courts of Appeals, the Tenth Circuit's preference for bright-line rules, and the federal courts' policy preference disfavoring piecemeal appeals.

"Therefore, based on the text and the overall structure of the statutory provision, as well as canons of construction and policy considerations, we conclude that § 16(a) [of the FAA] permits interlocutory appeals only over those motions brought explicitly pursuant to the FAA, or motions in which it is unmistakably clear that the defendant seeks only the relief offered by the FAA."

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## International Arbitration in the UAE and the Middle East Region: Recent Developments

Neal Brendel (Dubai) and Roberta Anderson (Pittsburgh)

As the Middle East plays an increasingly important role in the world's global economy, arbitration has become an increasingly important and attractive method of resolving international commercial disputes in the Middle East. The increasing popularity of arbitration in the Middle East as a method of resolving commercial disputes has led both to a recent proliferation of competing arbitration centres and to the adoption of arbitral rules reflecting international best practices. Two developments reflecting these trends - one infrastructural and one legislative – are discussed in this update. These developments should further improve the quality of arbitration in the Middle East region. In addition, as part of another legislative development, the government of Dubai has recently announced the implementation of a comprehensive legal framework to govern the possible bankruptcy or liquidation of Dubai World or its subsidiaries.

### New Bahrain Chamber for Dispute Resolution

On January 12, 2010, the Kingdom of Bahrain formally launched the new Bahrain Chamber for Dispute Resolution. The Chamber, an initiative of Bahrain's Ministry of Justice and Islamic Affairs and the American Arbitration Association, is known

formally as the BCDR-AAA and has been described as the world's first arbitration "free zone," since the BCDR-AAA is open to parties from anywhere in the world and the parties are free to choose applicable law. As a result, in circumstances in which an international dispute is heard at the BCDR-AAA and the parties agree to be bound by the outcome, the award will not be subject to challenge in Bahrain. In addition, Bahrain has introduced the concept of compulsory statutory arbitration for commercial and financial disputes. Specifically, cases already before Bahrain's domestic courts with amounts in controversy in excess of 500,000 BHD ($1.3m USD), which involve an international party or a party licensed by the Central Bank of Bahrain, will now be transferred from the court system to the BCDR-AAA for final and binding resolution. It is reported that the first court cases will be transferred to the Chamber within weeks.

The BCDR-AAA is intended to establish Bahrain as a neutral venue for multinational companies seeking to conduct international arbitration in the Middle East, and may emerge as a significant competitor to the arbitration centres of Dubai and Abu Dhabi. In addition to the BCDR-AAA, Bahrain serves as home to the Gulf Cooperation Council Commercial Arbitration Centre, which was established in 1993 by the chambers of commerce in each of the GCC countries as an independent, non-profit organization and which has been fully functional since March 1995.

## New DIAC Arbitration Statute

Since the last issue of Arbitration World, which addressed certain issues concerning the Dubai International Arbitration Centre ("DIAC"), the government of Dubai has issued Decree No. 58 of 2009, which approves a new statute governing the internal regulations of the DIAC. The new statute, which replaces the current statute approved by Law No. 10 of 2004, has not yet been published in the official gazette, and therefore is not yet available for review. Reports indicate that the objective of the new statute is to revise the current legislation consistent with global developments and international best practices in alternative dispute resolution, and to amend the DIAC's procedural rules. The authors understand, however, that the new Decree is limited to amending the internal regulations of the DIAC and will not affect the federal arbitration provisions. Although it is widely anticipated that a new comprehensive federal arbitration law applicable to the DIAC may be enacted in the near future, perhaps in 2010, the date of enactment remains unconfirmed. Such law may be closely based on the UNCITRAL Model Law.

## New Insolvency Code Applicable to Dubai World

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

The government of Dubai has since recently announced the implementation of a comprehensive legal framework to govern the possible bankruptcy or liquidation of Dubai World or its subsidiaries. This legal framework is established by Decree No. 57 of 2009, effective as of December 13, 2009, and is based largely on the Dubai International Financial Centre's insolvency laws, together with some amendments specific to the Dubai World group. Under the Decree, Dubai World or its subsidiaries can seek protection from creditors through a voluntary arrangement or, in appropriate cases, an orderly winding up. The Decree establishes a Tribunal, initially comprised of three senior international judges from the Dubai International Financial Centre Courts, which would have sole power (upon application by Dubai World or its subsidiaries to seek protection under the new framework) to hear any demand or claim submitted against Dubai World or its subsidiaries, including the adjudication of disputes relating to debt restructuring and, upon a voluntary arrangement not being sanctioned, the winding up of the company. The new framework creates an automatic moratorium, irrespective of the consent of creditors, which immediately would apply to all creditors, secured or unsecured. The framework therefore appears to supersede any existing contractual dispute resolution mechanisms (e.g. arbitration or UAE litigation). Nor, apparently, would claims be treated any differently depending on whether they are already in arbitration or litigation; rather, it appears that any such proceedings would be replaced by the Tribunal proceedings and that

unsecured trade creditors would be required to file a proof of claim in connection with any voluntary arrangement or winding up. Impacted creditors may wish to seek advice as to steps they may take to enhance their recovery in the event of a voluntary arrangement.

## Trade Credit Insurance Arbitrations and How to Avoid Them

Jane Harte-Lovelace and Ben Anstey (London)

Whatever market they operate in, most companies extend some form of credit to their customers. Trade credit insurance potentially covers companies against payment default, insolvency or failure of their customers. It may be offered on a 'whole-turnover' basis, which allows the policyholder to grant credit up to a certain limit, or on a 'specific accounts' basis, which provides cover against credit extended to a number of specifically named customers. Cover is not usually available for 100% of a company's trade credit, the insured usually retaining responsibility for between 5% and 25% of the total credit extended.

The economic events of the past couple of years have resulted in a large number of insurance claims appearing in this market, as more companies have struggled to pay accounts on time or at all, or gone insolvent, leaving unpaid bills. As a result, the number of instances of insurers looking to deny cover for particular claims, based on alleged non-compliance with policy terms, or even to avoid policies altogether based on alleged non-disclosure prior to inception of the policy, has multiplied, as has the number of such disputes submitted to arbitration.

Careful attention to policy wording, at inception, during the life of the policy and in connection with a claim can often make the difference between an insured company receiving payment or not. Delay or failure to recover under a trade credit insurance policy, where the premium paid may well have been very substantial in itself, can have very serious repercussions on a company's financial health.

Companies which have bought or intend to buy trade credit insurance should take care in reviewing the wording of any policy prior to inception and make sure that they provide full disclosure in the proper format and comply strictly with the provisions of the policy. Where policy terms are particularly onerous, for example where there are basis of contract clauses in proposal forms or a large number of conditions precedent in the policy, it may well be worth seeking to negotiate wordings with insurers prior to inception. Insurers often impose onerous obligations requiring ongoing notification throughout the life of the policy of certain circumstances and events. As many trade credit insurance policies run for longer than one year it is important to ensure that ongoing notification requirements are met. The information insurers require prior to policy inception and during the course of the policy varies widely: trade credit insurance policies tend to be heavily tailored to different companies and different markets.

These considerations are particularly important in relation to policies underwritten in the London market (as a great deal are), as these are usually subject to English law. English law has historically tended to be more favourable to insurers than many other jurisdictions, particularly the U.S., imposing some quite onerous requirements on insureds in terms of disclosure of information. Specific advice on the position under English law should be taken where appropriate.

In the event of a refusal by insurers to confirm cover for a claim, the policy terms should always be checked to see what processes are available for handling any complaints, and consideration should be given to whether commercial pressure may be brought to bear, before resorting to arbitration (or litigation), as provided for in the policy.

## ICC Award in Beijing-Seated Arbitration Successfully Enforced in China

Raja Bose & Mika Talreja (Singapore)

Press reports indicate the first reported case of an ICC award issued in the People's Republic of China

(the "PRC") being recognized and enforced by the PRC courts.

The relevant dispute involved a breach of contract claim between a Swiss claimant and a Chinese respondent. The arbitration agreement provided for arbitration in Beijing under the ICC Rules. The Claimant initiated ICC proceedings and obtained an award in its favour.

When the Claimant sought to enforce the award in the PRC, the Respondent argued before the Ningbo Intermediate Court *inter alia* that the conduct of ICC arbitration violated PRC laws, the ICC did not have inherent jurisdiction over the case and that the real intention of the parties had been to submit the dispute to arbitration under the rules and administration of the Court of Arbitration of the China Chamber of International Commerce ("CIETAC"). The Ningbo Intermediate Court rejected the Respondent's argument and upheld the enforcement of the award. In arriving at this decision, the Court classified the ICC award as "non-domestic" and held that it fell within the terms of Article I(1) of the New York Convention.

The decision is of importance because the enforceability of arbitral awards conducted in the PRC by international arbitration institutions has been the subject of some debate. It had previously been understood that an arbitration agreement would only be valid in the eyes of the Chinese courts if it provided for arbitration to be administered by one of PRC's arbitration commissions, such as CIETAC.

While the decision is a positive step forward, the question remains whether the approach will be followed by other Chinese courts.

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## No U.S. Constitutional Due Process Clause Protections for Foreign States or Nations

Jeremy Mercer (Pittsburgh)

Foreign states and nations beware. On September 28, 2009, the United States Court of Appeals for the Second Circuit (which covers the states of Connecticut, New York, and Vermont) overruled one of its prior decisions and held that foreign states or nations are not entitled to the U.S. Constitution's due process clause protections. *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*. One implication of this decision is that the holder of an arbitration award against a foreign state or nation or agent thereof may be able to confirm that award in certain courts within the United States even if the foreign state or nation or agent thereof has no contacts with the United States.

Frontera and SOCAR, an oil company owned by the Azerbaijan government, had an agreement that permitted Frontera to explore, develop, rehabilitate, and manage oil deposits within Azerbaijan. A few years into the agreement, a dispute arose regarding SOCAR's alleged failure to pay for oil Frontera delivered to it. Frontera then sought to sell oil to non-Azerbaijan purchasers but SOCAR seized the oil exports. Resulting arbitration in Switzerland culminated in an award for Frontera.

Frontera sought to confirm its arbitration award in a federal court in New York, a precursor to permitting enforcement of the award in the U.S. However, the federal trial court dismissed the matter, finding that although the Foreign Sovereign Immunities Act permitted confirmation of the award, the court did not have personal jurisdiction over SOCAR under the test required by the U.S. Constitution's due process clause. The plaintiff appealed the dismissal, claiming that SOCAR was an agent of the state of Azerbaijan and, therefore, was not entitled to due process protections.

The U.S. Constitution's due process clause provides that "no person shall be … deprived of life, liberty or property without due process of law." As relevant in this matter, due process requires that a defendant not present in the jurisdiction of the court have certain "minimum contacts" with that jurisdiction so that maintaining litigation against that defendant in that jurisdiction would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.* (1945). SOCAR argued it did not have the required minimum contacts with the forum, thus the maintenance of the litigation violated its due process rights. Frontera argued, however, that due process rights should not apply to foreign states or nations because U.S. states are not entitled to due process rights. The courts have held that U.S. states

are not entitled to those protections because they are not "person[s]" within the meaning of the due process clause.

The Second Circuit agreed in part with Frontera, finding no "compelling reason to treat foreign sovereigns more favorably than 'States of the Union.'". The Court of Appeals explained that a foreign sovereign who is not subject to constitutional restrictions should not benefit from its protections when U.S. states are not entitled to that protection but are required to abide by the restrictions. In reaching its decision, though, the Court of Appeals overruled one of its prior decisions that required foreign states to be provided due process protections.

But, the Second Circuit's newly-announced rule did not fully resolve the matter between Frontera and SOCAR because even though a foreign sovereign is not entitled to due process protections, that does not mean an instrumentality or agency of a foreign state also is denied those protections. Because U.S. jurisprudence has traditionally treated instrumentalities of the state as independent of the state, before Frontera could take advantage of the newly-announced rule, it had to show on remand that SOCAR is an agent of the Azerbaijan Republic. To do that, Frontera must show that "the state so 'extensively control[s]' the instrumentality 'that a relationship of principal and agent is created,' or if 'adher[ing] blindly to the corporate form … would cause … injustice.'"

Possibly foretelling the future, the Second Circuit expressly reserved comment on whether a corporation owned by a foreign state or nation, but not rising to the level of an agent of that state or nation, is entitled to due process protections. According to the Second Circuit, any decision on that matter at this time would be premature and "far from obvious."

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