Arbitration World

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From the Editors

Welcome to the 20th edition of *Arbitration World*, a publication from K&L Gates' International 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 are delighted that this edition includes a guest contribution from Abhijit Mukhopadhyay, President (Legal) of the Hinduja Group. In his article, Abhijit offers his thoughts and perspectives on the topical subject of arbitration in India. This represents what we expect to be the first of a number of guest contributions from in-house counsel in future editions of *Arbitration World*.

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).

Indian Arbitration—Recent Trends

Abhijit Mukhopadhyay, Hinduja Group*

Introduction

The Indian Arbitration and Conciliation Act, 1996 (the "Act") applies to both domestic arbitration in India and to international arbitration, in Part I and Part II respectively. India is a party to the Geneva Protocol on Arbitration, Geneva Convention on Foreign Arbitral Awards and the New York Convention. India has a comprehensive, contemporary and progressive legal framework to support international arbitration. India has a large pool of legal expertise available at a cost that is considerably lower as compared to other countries. Linguistically, it is linked to the English language, being the language of international business. The Government wants India to become a hub of international arbitration in the next five years. The Law Minister has promised to bring amendments to the Act to make arbitration a cost effective and time saving process.

Challenges

However, Indian arbitration faces three primary challenges:

- Traditional legislative methods which fail to swiftly bring out progressive amendments to the Act, since arbitration is too dynamic a field to address in a slow fashion;
- Judicial interpretations of the arbitration law not in keeping with the jurisprudential or the commercial philosophy behind arbitration; and
- Some retired judges, who are almost exclusively appointed as arbitrators by Indian parties, frequently conducting arbitrations more like an out-of-court litigation, thus impacting the goal of efficiency.

The ground reality at present is far from the stated objectives of the Act and the Government's desire to make arbitration a truly alternative dispute redressal mechanism that would provide fast, efficient and predictable remedies to foreign investors. The above is manifested in several decisions of the High Court and Supreme Court as follows:

- *Satyam Computer*: The Supreme Court has held that Part I of the Act applies to foreign arbitral awards which could therefore be challenged in India on the ground of illegality;
- *TDM infrastructure*: The Supreme Court has held that an arbitration between two companies incorporated in India cannot be termed as an international commercial arbitration;
- *Maestro Engineers*: The Supreme Court has held that when there are serious allegations of malpractice, only a civil court should adjudicate the dispute and not the arbitrator;
- *Magma Leasing*: The Supreme Court has held that termination of a contract due to breach would not render the arbitration clause inoperative;
- *Max India*: The Delhi High Court has held that if the parties had specifically excluded the jurisdiction of Indian courts, a petition seeking interim relief was not maintainable;
- *Equinox Corporation*: The Supreme Court has held that while the parties were free to choose the law governing the contract, where Part I of the Act is not excluded by the parties, it would continue to apply despite the foreign governing law;
- *ONGC*: The Supreme Court has held that a party may invoke a new arbitration in respect of a fresh dispute even when there is already an ongoing arbitration in respect of other disputes;
- *Phulchand Exports*: An Indian export company, Phulchand Exports Limited ("Phulchand"), initiated arbitration in the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation against a Russian company, OOO Patriot, under a Russian law contract for the export of rice to Russia. The Tribunal found for OOO Patriot on some of the issues and awarded damages. OOO Patriot sought to enforce the award in the High Court of Bombay. Phulchand challenged the enforceability of the award on the ground that it was contrary to public policy. The Bombay High Court, and on appeal the Supreme Court, rejected Phulchand's challenge and upheld enforcement. However, in doing so, the Supreme Court set a precedent that is of concern to many, by expanding the meaning of "against public policy in India" to include foreign awards that are "patently illegal", though it did not find the Russian award to be "patently illegal".

The Supreme Court recently reaffirmed its earlier decision in the case of *SBP & Co. vs. Patel Engineering Ltd*, recognizing the ability of the courts to examine the validity of an arbitration agreement when appointing arbitrators. The court also made some very important observations on the role of courts in dealing with allegations of fraud in the context of arbitration.

In the case of *Bhatia International* decided in 2002, the Supreme Court laid the foundation for intervention of the judiciary in international arbitrations thereby negating the intent of Part I of the Act. In *Bhatia*, the Supreme Court ruled that the power to grant interim measures provided in Part I of the Act (which was meant to cover only domestic arbitration) also extends to foreign-seated arbitrations. This opened the door for subsequent cases to further apply Part I to foreign arbitrations, such as holding that Indian courts would have jurisdiction to set aside an award rendered outside India *(Satyam Computer)* and to appoint arbitrators in foreign-seated arbitrations *(M/S Indtel Technical Services)*. As recently as 2011, in the case of *Videocon Industries*, the Supreme Court added to this contentious line of authority by confirming its decision in *Bhatia International*.

End of the Tunnel?

However, there is now some light at the end of the tunnel. The Chief Justice of India's decision to constitute a constitutional bench to revisit the earlier rulings has now paved the way for converting the Indian judicial system into a pro-arbitration regime. The *Bharat Aluminium* case was the reference point in this matter and the Chief Justice came to the conclusion that the ruling in *Bhatia International*

needs to be reconsidered by a five judge bench which commenced its hearing on 10 January 2012. The court was keen to help foreign investors avoid lengthy litigation in India-related commercial contracts where arbitration was chosen as a mode of dispute resolution. To this end, the court also noted that it was considering making a representation to Parliament for cases pertaining to the enforcement of foreign awards to be heard directly by the Supreme Court.

The case proceeded with submissions by various parties and interveners, including the London Court of International Arbitration India (LCIA India) and the Singapore International Arbitration Centre. Oral arguments concluded at the end of February 2012. The Supreme Court's verdict has now been announced. Gladly its emphasis is on making Indian courts more arbitration-friendly and less likely interventionist in foreign-seated arbitration matters. The Court ruled that Part I of the Indian Arbitration and Conciliation Act, 1996 does not apply to foreign-seated arbitrations. The Court has overruled the contrary decisions given in *Bhatia International* and *Satyam Computer* (supra). However, the Supreme Court expressly ruled that its latest decision will apply prospectively i.e., only to arbitration agreements which are concluded on or after 6 September 2012. This raises a concern for the plight of cases where the arbitration agreement was entered into earlier than 6 September 2012, and may cause parties to enter into fresh arbitration agreements for existing contracts where they wish to benefit from the application of the *Bharat Aluminium* Supreme Court decision.

Ernst & Young Survey

Recently, Ernst & Young conducted a study on the changing face of arbitration in India. Due to new liberal policies by the Government, India has opened up to foreign investments in various sectors. With the presence of almost all the Fortune 500 companies, in addition to one million-strong Indian companies, there is a considerable increase in the number of commercial disputes in India. There is pressure on the Government to enforce arbitration clauses in commercial contracts mandatorily. "All these factors coupled with delays in the traditional Indian litigation system, have led to a considerable increase in the number of arbitration cases" says the survey. In the survey, 68 respondents including general counsels at large companies and senior partners of domestic and international law firms participated.

Significant findings of this survey are as follows:

- **Arbitration clause:** 74% of the survey respondents considered the arbitration clause is an essential part of their legal contract. Indian courts have in several previous cases highlighted the need to have clear arbitration clauses. For instance, the case of *M/s Dozco India P. Ltd.* highlighted the need for a specific "seat" to be selected in the clause.
- **Type of arbitration:** The survey revealed a balance in the varying types of arbitration utilized. Indian ad hoc arbitration was undertaken by 24% of respondents, compared to 20% for international commercial arbitration. 27% of the respondents have undertaken both Indian ad hoc arbitration and international commercial arbitration. "Arbitration has generally been perceived as cheaper than traditional litigation, and is often one of the factors taken into account by parties when agreeing to submit disputes to arbitration. However, the ground realities show that arbitration in India, particularly ad hoc arbitration, is becoming quite expensive vis-à-vis traditional litigation", says Matthew Gearing, Partner, Allen & Overy LLP.
- **Arbitration Institutes:** Of arbitration institutes outside India, 60% of the respondents preferred the Singapore International Arbitration Centre, while 34% of the respondents preferred the LCIA India as the top local institution.
- **Indian regulations:** The survey highlighted the importance given by the Government of India to the improvement of the arbitration mechanism. More than 50% of the respondents said that the Government's recent steps to develop dispute resolution mechanism are in the right direction.
- **Enforcement of arbitral award:** 78% of the respondents revealed that they were satisfied with the arbitral award, in terms of justness and impartiality.
- **Cost and time disadvantage:** Around 50% of the respondents said that arbitration in India is expensive and does not provide timely resolutions, which highlights the need for radical changes in procedural aspects.

- **Arbitrator selection:** 68% of the respondents believed that subject matter experts should be appointed as arbitrators, as against 22% who believed that retired judges should play this role. Interestingly, in the *Denel v. Bharat Electronics* case the court cautioned the public sector undertaking against nominating their own senior employees as arbitrators.
- **Role of experts:** The survey revealed the growing trend to include expert witnesses in arbitral proceedings. More than half of the respondents stated that they have used experts in their arbitrations and that they believe that expert opinions add value to the process.

Conclusion

In conclusion, it can be said that India has the potential to become an international arbitration hub provided, however, that the Arbitration and Conciliation Act, 1996 is allowed by the judiciary to operate freely in the case of domestic and international arbitrations. This will certainly help the growth of the economy. Simultaneously, India should strive to be a preferred destination for international arbitrations. In a public speech, the then Indian Law Minister said that India "…… should be the most preferred destination for arbitration. In Delhi, we have an excellent mediation centre. We also want to upgrade mediation centres in Ahmedabad, Mumbai and Bangalore so that they become centres of international arbitration." However, India should take a cue from Singapore, which is aggressively promoting the Singapore International Arbitration Centre as the ultimate arbitration venue, especially for the emerging economies, which India has to match.

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News from around the World

Sean Kelsey (London)

Africa

Democratic Republic of Congo ("DRC")
On 13 July 2012, the DRC officially acceded to the Organisation for the Harmonisation of Business Law in Africa, or OHADA as it is better known. We report further on this significant development, below.

Americas

Cayman Islands
A new arbitration law, based on the UNCITRAL Model Law, came into force in the Cayman Islands on 2 July 2012. The Cayman Islands is a party to the 1958 New York Convention. In 2009, the Cayman government commenced consultation on amendment of the then current law (which had been in effect since 2001), and published a draft bill in 2010. The new law goes beyond the Model Law in providing that arbitrations are to be conducted in private and confidentially, allowing for related court proceedings to be held in private on the application of a party, and restricting publication, in appropriate circumstances, of information relating to the proceedings. Practitioners in the Cayman Islands comment that the new law provides less scope for judicial intervention in the arbitral process than hitherto.

USA
On 25 July 2012, the U.S. District Court for the Southern District of New York denied a motion to vacate an ICDR award which caused "*unnecessary expense*", and sanctioned the New York law firm, Harris Beach, which acted for the unsuccessful appellant, BVI entity Digitelecom. The award was issued last September in favour of Swedish telecoms company Tele2 Sverige ("Tele2"). Digitelecom had brought a claim in 2009 in connection with a Russian wireless phone operator in which both parties owned shares. The claim was dismissed, and Digitelecom was ordered to pay costs of more than US$2 million.

Applying to vacate the award in December 2011, Digitelecom argued among other things that the

arbitral tribunal "*had rendered a decision that was so inconsistent with the undisputed facts as to be irrational and which creates the strong inference of partiality or bias.*" The court rejected these arguments as entirely without merit, confirmed the award and imposed a costs sanction against Harris Beach, pursuant to section 1927 of the United States Code, for having multiplied the proceedings "*unreasonably and vexatiously*". District Judge Richard Sullivan noted that parties to an arbitration agreement have a "*strong interest*" in the finality of arbitral awards, and said that "*litigants must be discouraged from defeating the purpose of arbitration by bringing such petitions based on nothing more than dissatisfaction with the tribunal's conclusions.*" The decision is consistent with a trend in recent years which has seen U.S. courts impose costs sanctions on parties bringing groundless challenges to arbitration awards. In the 2010 case *Enmon v. Prospect Capital Corp*, a district court in New York fined Texan firm Arnold & Itkin for "*persistent, frivolous litigation, filed for the purpose of frustrating arbitration*".

We have previously reported in relation to divergent opinions in U.S. courts as to who decides the arbitrability of substantive disputes (see for example the article on *Oracle America Inc. v. Myriad Group A.G.* in our June 2012 edition). In an Opinion dated 13 July 2012 in the case of *Bayer Cropscience AG v. Dow Agrosciences LLC*, the United States District Court for the Eastern District of Virginia (the "Court") has held that, in the Fourth Circuit (unlike others, such as the First—see for example the 1989 judgment in *Apollo Computer, Inc. v. Berg*), the question of whether parties to an arbitration agreement "*clearly and unmistakably*" intended to submit to the arbitral tribunal the issue of the arbitrability of their substantive disputes is not definitively answered by the incorporation of the ICC's rules of arbitration. The Court ultimately determined that the claims in question were subject to arbitration, and stayed the claim which had been brought before it in breach of the relevant arbitration agreement. The Fourth Circuit continues to stand out (as it acknowledged itself in *Bayer Cropscience*) from those circuits where incorporation of the ICC's rules of arbitration is accepted as clear and unmistakable evidence in relation to the 'threshold question' of arbitrability. Another recent US case on arbitrability—this time in relation to the UNCITRAL Rules—is discussed below.

Asia

Hong Kong

Following on from a decision of the Hong Kong Court of Appeal (the "Court of Appeal") on which we reported in June 2012, the Court of Appeal has affirmed the principle that parties which fail in a challenge to an arbitral award before the Hong Kong courts should be liable in costs on the indemnity basis, absent "*special circumstances*". In the case of Pacific China Holdings Ltd. ("Pacific") and Grand Pacific Holdings Ltd., the Court of Appeal had overturned a first instance decision which had set aside an ICC award on grounds of procedural irregularity. The Hon. Tang VP cited with approval the reasoning of Reyes J in *A v. R* (2009), that: "*Parties should comply with arbitration awards. A person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that the Court will enforce the award as a matter of course. Applications by a party to appeal against or set aside an award or for an Order refusing enforcement should be exceptional events. Where a party unsuccessfully makes such application, he should in principle expect to have to pay costs on a higher basis.*" It is reported that Pacific has applied to the Hong Kong Court of Final Appeal for leave to appeal the Court of Appeal's decision to re-instate the award.

India

We have previously reported on the case of *Bharat Aluminium v. Kaiser* and conjoined appeals, which were heard in the Indian Supreme Court (the "Supreme Court") earlier this year (highlighted in our March 2012 edition). In its keenly-anticipated judgment, handed down on 6 September 2012, the Supreme Court has overturned its own judgments in the *Bhatia* and other cases, to hold that Part 1 of the Indian Arbitration Act 1996 (the "Act") has no application to arbitrations seated outside India. That being so, the Supreme Court held that awards rendered in such arbitrations "would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in part II of [the Act]". Seasoned commentators may be inclined to enter caveats when heralding the

decision as a bright new dawn for international arbitration in a jurisdiction whose record in that regard, as discussed previously, can reasonably be described as somewhat chequered. Nevertheless, it is likely to represent a milestone in the development of the more benign arbitral environment in India for which influential commercial voices have been calling for some time.

Malaysia

The Kuala Lumpur Regional Centre for Arbitration (the "KLRCA") has introduced a further revision to its rules of arbitration to bring its administrative functions in line with current practices in international arbitration. The changes to the KLRCA rules (the "Rules")—which took effect on 2 July 2012—principally relate to commencement of proceedings, appointment of arbitrators, challenges, and administrative costs and fees. The revision follows entry into force in July 2011 of amendments to Malaysian arbitration legislation which enhanced local courts' non-interventionist and pro-enforcement stance. Changes introduced under the Rules include a reduction in the deadline for the appointment of an arbitrator to 30 days; a requirement that the appointment of arbitrators by the parties, or by any appointing authority agreed by them, be subject to confirmation by the director of the KLRCA; and provisions relating to challenge of arbitrators, which leaves the final decision with the director. Under the Rules as they previously stood, the challenging party could only seek involvement from the appointing authority when the parties were unable to reach an agreement. Provisions in the Rules will also enable the tribunal to discontinue a matter where fee deposits have not been paid.

Singapore

After a three-day hearing in July 2012, the Singapore High Court (the "High Court") has reserved judgment in relation to enforcement of five awards totalling US$300 million given by a SIAC tribunal. The dispute arose from provision of pay-TV services in Indonesia. Jakarta-based First Media is resisting awards made in favour of Astro All Asia Networks and other Astro companies ("Astro"). Enforcement proceedings brought by Astro in Hong Kong have been stayed pending determination of the case in Singapore.

Three of the eight Astro companies were non-signatories to the arbitral agreement, and the case raises issues similar to those raised in English and French proceedings during the recent well-known *Dallah v. Pakistan* case (which primarily concerned enforcement *against* non-parties—see *Arbitration World*, October 2009 and February 2011). Judgment is expected later this year, or early next, and we will report further in due course. One other interesting aspect of the case is the fact that the High Court was addressed by English QCs—something which under local law requires court permission, and is only allowed in "*difficult and complex*" cases—for the first time in eight years.

Europe

Switzerland

In a decision published on 20 June 2012, the Swiss Supreme Court (the "Supreme Court") confirmed that a challenge based on a breach of the principle of equal treatment and the right to be heard is only admissible if it has been raised during the arbitral proceedings. In January 2009, Y—an exporter of minerals from the Democratic Republic of Congo ("DRC")—entered a Swiss law contract with a Belgian seller of minerals, X, for the sale by Y of a mineral called cassiterite to X. Four months later, X purported to suspend the contract, on grounds that the Security Council of the UN had proscribed purchases of minerals suspected to come from areas controlled by rebels in Eastern DRC. Y initiated ICC arbitral proceedings in Geneva. A sole arbitrator rendered a final award ordering X to pay Y a sum in excess of US$9 million. In proceedings before the Supreme Court, X alleged breaches of—amongst other things—the principle of equal treatment and the right to be heard enshrined by Article 190(2)(d) of the Swiss Private International Law Act.

The Supreme Court dismissed the appeal, confirming existing caselaw which holds that such breaches must be alleged in the course of the arbitral proceedings. Waiting to raise them until filing a petition before the Supreme Court to invoke such violation is liable to be held an act of bad faith whereby the right to object is deemed to have been waived. Although Y had filed certain new documents four days before the arbitral hearing, X had been given the opportunity to comment on the late production and had failed to object at any time

during the arbitration. Although caselaw suggests there may be exceptions in the case of "irreparable" or "particularly serious" procedural errors, the decision is a reminder of the potential dangers of failing to raise objections on grounds of the violation of procedural rights without delay during the arbitral proceedings.

Middle East

Saudi Arabia

A new arbitration law came into force in Saudi Arabia in July, and is being greeted as a significant improvement on the Kingdom's existing arbitration law, enacted in 1983. The key changes are discussed further below.

Institutions

CAS

The Court of Arbitration for Sport (CAS) has had an eventful fortnight or so, adjudicating in a number of disputes arising out of the London 2012 Olympic Games. The institution's website is reporting around a dozen cases, the bulk of which concern athletes' challenges to national Olympic squad selections, and/or applications for permission to participate in London. A very small handful of 'substantive' disputes relate to results in individual events. On 10 August 2012, a CAS *ad hoc* division heard the application of the Swedish National Olympic Committee ("NOC") and the Swedish Triathlon Federation against the decision of the International Triathlon Union issued on 8 August 2012 rejecting an appeal from the Swedish NOC requesting that Lisa Norden be ranked in equal first place in the women's triathlon event with Nicola Spirig of Switzerland on grounds that a photo-finish in that event had been too close to call. The day following the hearing, 11 August, the CAS tribunal rejected the appeal. The same day, a sole CAS arbitrator rejected an urgent application filed that morning by the Russian Olympic Committee against the decision taken by the International Sailing Federation on 10 August 2012 to terminate the Women's Elliott 6m class semi-final sailing races due to lack of wind, and to declare the Spanish team as winner.

CEAC

Founded in 2008, the Chinese European Arbitration Centre (CEAC) is administering its first three arbitrations. CEAC—a body devoted to settling disputes between Chinese and European parties—was founded by the Chinese European Legal Association to offer a China-focused alternative to established arbitration centres. It is reported by CEAC that its standard form arbitration clause is used increasingly by a number of DAX and Dow Jones-listed companies in their China-related contracts, and seems to be used in China-Africa business and international transactions involving parties with Chinese management or shareholders as well. CEAC's rules, based on the UNCITRAL Rules, have been selected for use in the next Willem C. Vis moots in Hong Kong and Vienna. In March 2012, CEAC appointed Christine Heeg of Bird & Bird as its first secretary general.

CIETAC

We have previously reported on the emergent rift within CIETAC, as its Shanghai and Shenzhen sub-commissions (the "Sub-commissions") reacted to implementation of the institution's new rules, effective since 1 May 2012 (and on which we report further, below), by declaring independence (see *Arbitration World*, June 2012). The Sub-commissions have now published their own articles of association and arbitral rules. On 1 August 2012, CIETAC announced that the Sub-commissions can no longer accept and administer cases, having violated the institution's articles of association and arbitration rules. With the schism likely to rumble on, parties should consider the position carefully when nominating CIETAC or either of the Sub-commissions as administering authority.

World Investment Treaty Arbitration Update

Lisa M. Richman (Washington, D.C.),
Dr. Wojciech Sadowski (Warsaw), and
Dr. Sabine Konrad (Frankfurt)

In each edition of *Arbitration World*, members of K&L Gates' Investment Treaty Group provide updates concerning recent, significant investment treaty arbitration news items. This edition features a discussion of recent membership changes at the International Centre for the Settlement of Investment Disputes; an update relating to the Australian government's rejection of investor-state

arbitration; and a summary of the jurisdictional decision of an *ad hoc* tribunal relating to a dispute submitted under a little-known Islamic investment treaty.

Montenegro Signs the ICSID Convention as Venezuela's Withdrawal Becomes Final

On 19 July 2012 Montenegro signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Convention"). This is the second accession to the Convention this year: the Republic of South Sudan ratified the Convention on 18 April 2012. The week following Montenegro's ratification, Venezuela's withdrawal from the Convention became final. We reported Venezuela's plans to withdraw in September 2011 and February 2012 Alerts.

Although the departures of Venezuela, Bolivia and Ecuador—the only three States to have denounced the ICSID Convention since 2005—have attracted substantial attention, the ten States that have signed or ratified the Convention in that same time period (including Montenegro) have received much less publicity. While the impact of the withdrawals unquestionably is important for investors, the substantial number of current ICSID member States (147 as of August 2012) should give investors comfort about the continued availability of ICSID as a facility to resolve investor-state disputes.

Moreover, even if a State is not an ICSID member or ceases being one, there are other options available to initiate investor-state arbitration. For example, nearly all of Venezuela's bilateral investment treaties allow for both ICSID **and** UNCITRAL arbitration, so the latter still remains an alternative for investors.

UPDATE: Australia's Unqualified Rejection of Investor-State Arbitration Questioned

As we reported previously in our May 2011 issue, the Government of Australia announced last year that it will no longer include investor-state arbitration in its trade agreements. At the time, the government suggested that Australian businesses concerned about sovereign risk in foreign countries should reconsider whether they wanted to invest in those countries notwithstanding the risk.

On 13 July 2012, Australia's largest business organization, the Australian Chamber of Commerce and Industry (ACCI), with the support of a number of other Australian business groups, companies, and legal experts on investor-state dispute resolution, sent a letter urging the government to reconsider its exclusion—if only on a case-by-case basis. The letter emphasizes the value of investor-state dispute settlement provisions in securing the right of Australian investors to be able to sue foreign governments noting that such provisions "support Australian companies in their investments in foreign countries and provide an efficient mechanism for companies to seek to directly rectify any adverse situations". The letter further stated that the "government's refusal to consider inclusion of such provisions in current or future regional and bilateral free trade agreements is a flawed approach which reduces security for Australian firms seeking to invest internationally".

The letter suggests that the refusal to consider including investor-state dispute resolution clauses in free trade agreements and bilateral investment treaties does not benefit the government because it is still required to comply with its obligations in existing treaties. Moreover, the letter suggests that the government should focus less on in-bound foreign investment, and instead support Australian companies in successfully investing in emerging markets.

If the government maintains its opposition to investor-state arbitration, proper investment structuring (to take advantage of bilateral investment treaties allowing for investor-state arbitration) becomes all the more important for Australian nationals wishing to invest abroad.

Ad Hoc Tribunal Upholds Jurisdiction of Claim Under Islamic Investment Treaty

An *ad hoc* tribunal of three arbitrators seated in Singapore has upheld jurisdiction to hear a claim—apparently the first of its kind to reach this stage—under a little-known investment treaty signed in 1981 by member states of the Organisation of Islamic Cooperation ("OIC", known until 2011 as Organisation of the Islamic Conference), a union of 57 Muslim countries. The Agreement on the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the

Islamic Conference, which entered into force in 1988, has been ratified by 27 of the 33 OIC signatories (a further 24 member states are not contracting parties). It provides a range of protections for investors and their investments broadly analogous with those afforded under bilateral and multilateral investment treaties. The US$25 million claim was brought by a Saudi businessman against Indonesia, and arises from the controversial 2008 bail-out and nationalisation of Indonesia's Bank Century (now known as Bank Mutiara), in which the claimant was a shareholder. The tribunal rejected Indonesia's submission that only disputes between states may be resolved under the Treaty.

International Arbitration in Chile—2004 and Beyond

Richard F. Paciaroni and Denise N. Yasinow (Pittsburgh)

Arbitration has a strong history in Chile, more so than in many Latin American countries. In fact, arbitration is widely viewed within Chile as the preferred method of international dispute resolution. Chile ratified the ICSID Convention in 1991, the New York Convention in 1975, and the Panama Convention in 1976. Chile has also entered into Bilateral Investment Treaties (BITs) with over 50 nations.

Notwithstanding these progressive moves, Chile's substantive arbitration laws were behind the times. Prior to 2004, Chilean courts applied purely domestic-related law (the 1943 Code of Judicial Organization and 1902 Code of Civil Procedure) to both domestic and international arbitration. This hampered the scope and legal effect of international arbitration. The Chilean Congress recognized that its domestic laws and international agreements were not sufficient. On September 10, 2004, it passed Law No. 19.971 on International Commercial Arbitration ("Chilean Arbitration Act" or "CAA"), which brought Chilean international arbitration law up to modern standards.

Highlights of the CAA

- For the most part, the CAA is based on the UNCITRAL Model Law of 1985 (the "Model Law").
- Scope of Application and Definitions: The CAA applies mainly, with some exceptions, to international commercial disputes in which the seat of arbitration is in Chile. The definition of "international" is broad, as well as the definition of "commercial", which includes investment (Arts. 1 and 2).
- Arbitration Agreement and Substantive Claim Before Court: A Chilean court must refer parties to arbitration in a dispute that is the subject of an international arbitration agreement, unless the court finds the agreement is null and void, inoperative or incapable of being performed (Art. 8).
- Interim Measures: Parties may request interim measures from the arbitral tribunal and from the domestic courts (Art. 9). The arbitral tribunal may, at the request of a party and if not otherwise agreed by the parties, order such interim measures of protection as it deems necessary. This includes requiring a party to provide appropriate security (Art. 17).
- Jurisdiction of Arbitral Tribunal: The tribunal may rule on its own jurisdiction, including whether an arbitration agreement exists and is valid. Like the Model Law, the CAA allows for very limited instances of appeal to domestic courts (Art. 16).
- Recourse Against an Award: Within thirty days of the award, a party may request from the arbitral tribunal the correction of arithmetic, clerical, typographical, or other similar errors (Art. 33). If the parties agree, then a party may request the interpretation of part of the award (Art. 33). A request for setting aside/annulment must be presented to the appropriate Court of Appeal within three months of receipt of the arbitral award (Art. 34). The grounds for setting aside an award are limited, including lack of proper notice, the award answers questions not submitted for arbitration, and the award conflicts with Chile's public policy.
- Recognition and Enforcement: There is provision for recognition and enforcement of

awards rendered both inside and outside of Chile (Arts. 35 and 36). Recognition and enforcement are subject to *exequatur* by the Chilean Supreme Court and may only be denied under the limited exceptions provided by the New York Convention.

The CAA at Work

Since the enactment of the CAA in 2004, international arbitration has taken off in Chile. The effort was led by CAM Santiago, the premier institution for arbitration and mediation in Chile, which began administering international commercial arbitrations in 2006. Among other services, CAM Santiago offers its own set of procedural rules and assistance in arbitrator selection. It should be noted that Chilean courts have fully supported both the letter and spirit of the CAA.

For instance, in the 2006 case of *D'Arcy Masius Benton & Bowles Inc. (Chile) Ltda. v. Otero Lathrop Miguel* (May 25, 2006), the Santiago Court of Appeals held that the CAA is applicable to all international commercial disputes arising after 2004, no matter when the relevant arbitration clause was signed.

In 2008, Chile's Supreme Court, in the case *Mauricio Hochschild v. Ferrostaal* (Jan. 22, 2008), affirmed the parties' right to choose a foreign dispute resolution forum in a contract, even if one of the companies in the potential dispute is Chilean. This decision further supported the legitimacy of international arbitration agreements and their enforcement by Chilean courts.

In 2009, in *Publicis Groupe Holdings B.V. v. Árbitro Manuel José Vial Vial* (Aug. 4, 2009), the Santiago Court of Appeals rejected a request for annulment of an arbitral award in the only annulment procedure completed to date. The decision emphasized that the annulment of an arbitral award under the CAA is an extraordinary recourse.

Finally, in a string of decisions post-CAA, the Chilean Supreme Court consistently affirmed its limited scope of review in granting leave to enforce international arbitral awards. As an example, in *Kreditanstalt Für Wiederaufbau v. Inversiones Errázuriz* (Dec. 15, 2009), the Supreme Court granted leave to enforce a French award, even though a request for annulment was still pending before the courts of the seat of arbitration.

These developments, when considered as a whole, demonstrate that Chile has modernized and liberalized its stance towards international arbitration. If Chile progresses as quickly in the next 8 years as it has in the past 8 years, it may become established as the seat of choice for international commercial dispute resolution in South America.

Thailand Loses U.S. Appeal of Confirmation on UNCITRAL Award and Challenge to Arbitrability

Josh M. Leavitt (Chicago)

Questions of who decides arbitrability and the standards for review of those questions continue to percolate through the United States court system. A recent example is an appeal decided by the Second Circuit Court of Appeals in New York. The case involved the Kingdom of Thailand ("Thailand") and the insolvency administrator of a German company Walter Bau AG ("Walter Bau"). Remarkably, questions of who decides arbitrability were still being asked and decided in the appeal despite a long procedural history that involved two arbitration hearings over a five year period and confirmation proceedings that had been ongoing in the federal courts for two more years. While in the end the federal appellate court held that there was "clear and unmistakable intent" that the arbitrators were to decide arbitrability (a standard discussed in previous issues of *Arbitration World*), the reasoning the appellate court adopted involved consideration of a number of legal issues, the public policies underlying arbitration and enforcement of foreign awards and principles of judicial economy.

In 2005 Walter Bau initiated arbitration claiming that Thailand unlawfully interfered with investments made by predecessors in interest in a Thailand tollway project. Thailand objected to the tribunal's jurisdiction on the ground that Walter Bau had never obtained a "Certificate of Admission" from the Thailand Ministry of foreign affairs and

thus the investments were not "approved investments" within the meaning of a 2002 bilateral investment treaty between Thailand and the Federal Republic of Germany (the "BIT"). The tribunal conducted a two day hearing on the jurisdiction issue and found that it had jurisdiction because the dispute concerned "approved investments" within the meaning of the BIT. In 2009 the tribunal held an 11 day hearing on the merits of the claim and awarded Walter Bau over 30 million Euros.

As part of attempts to enforce the award, in 2010 Walter Bau petitioned the federal district court in New York to confirm the award pursuant to a U.S. statute implementing the New York Convention. Thailand moved to dismiss the petition arguing the tribunal had lacked jurisdiction to render the award because Walter Bau did not make an "approved investment", as required for claims to be arbitrated under the BIT. The district court performed a deferential review of the tribunal's jurisdictional determination and entered judgment confirming the award. It declined to perform a *de novo* review because the issue of whether the tollway project involved "approved investments" was an issue of arbitration agreement scope and not one of agreement formation.

On appeal, the federal appellate court held that the district court incorrectly declined to conduct the *de novo* review of the question of "whether the parties have submitted a particular dispute to arbitration, i.e., the question of arbitrability". The appellate court held that arbitrability is an issue for judicial determination unless the parties "clearly and unmistakably provide otherwise". The court held that whether the district court properly declined to determine independently whether the tollway project involved "approved investments" does not turn on whether that question was one of scope or formation, but rather on whether there was clear and unmistakable evidence of the parties' intent to commit that question to arbitration. The court acknowledged that in the absence of such clear and unmistakable evidence a court discharges its duty to independently review scope-related questions of arbitrability by applying a presumption of arbitrability. In language that may well be examined carefully in subsequent cases, the appellate court reasoned that the district court "conflated the concepts of (1) deferentially reviewing arbitrators' resolution of questions of arbitrability when there is clear and unmistakable evidence that the parties intended to commit such questions to arbitration; and (2) discharging the duty to independently review scope-related questions of arbitrability by applying the presumption of arbitrability in the absence of such evidence. The district court should not have refused to determine independently whether the tollway project involved "approved investments" without first finding clear and unmistakable evidence of the parties' intent to submit that question to arbitration".

That ruling however "did not result in a victory for Thailand" as the confirmation of the award was affirmed without remand for further proceedings. Interestingly the appellate court appeared to determine that enough was enough and held that it had the power on the record before it to decide whether the parties intended to arbitrate arbitrability. The parties agreed in the Terms of Reference to use the UNCITRAL Arbitration Rules. Article 21 of those rules provides:

> "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement"

Additionally, the Terms of Reference empowered the tribunal to "consider…objections to jurisdiction." The appellate court found that this represented clear and unmistakable evidence existed of the parties' intent to arbitrate arbitrability, including whether the tollway project involved "approved investments". Accordingly, the court found that Thailand is not entitled to an independent judicial determination of that same question. While the aspect of the ruling addressing the effect of the incorporation by reference of the UNCITRAL Arbitration Rules (and of other international arbitration rules) may not itself be remarkable and has been the subject of prior appellate court holdings (as discussed in our October 2010 and June 2012 issues of *Arbitration World*), the nuance decided by the Second Circuit was the argument advanced by Thailand that prior legal authority had not precluded independent judicial review of this question at the later confirmation stage. On this nuance, and citing public policies of arbitration, the

New York Convention and the lengthy procedural history of the case in the record before it (including the tribunal's 43 page decision on the jurisdictional issue, following hundreds of pages of party submissions and a 2 day hearing), the Second Circuit stated that failing to give any deference to the tribunal's decision "would entail an enormous waste of resources". Because the parties agreed to be governed by the UNCITRAL Rules and to what it considered "substantially similar language" in the Terms of Reference, the parties were deemed to clearly and unmistakably commit questions of arbitrability to the arbitrators. Thus the district court considering whether to confirm the award would have to have reviewed the arbitrators' resolution of such questions with deference.

Important UK Privy Council Decision on Enforcement against State-Owned Entities

Sean Kelsey (London)

On 17 July 2012, the United Kingdom Privy Council (the "Privy Council") upheld an appeal against orders of the Jersey courts for enforcement of debts owed by the Democratic Republic of Congo (the "DRC") against assets of a mining and infrastructure company owned by the DRC. The general tenor of the judgment suggests that it will take "*quite extreme circumstances*" before a state-owned corporation's separate juridical personality will be disregarded for purposes of enforcement of a state's debts. The case arose out of an attempt to enforce arbitration awards, but the decision of the Privy Council is likely to be of relevance beyond the arbitral sphere, and beyond the Privy Council's territorial jurisdiction. Although not binding in the courts of England or most Commonwealth jurisdictions, the decision is likely to be instructive and have persuasive value there.

The claimant in the Jersey proceedings was a Delaware corporation—FG Hemisphere LLC ("FG Hemisphere")—which had purchased the assignment of two very substantial ICC arbitration awards against the DRC, and has sought enforcement against the DRC's assets in a number of jurisdictions around the world. A recent attempt to enforce the awards against various assets in China was dismissed by the Hong Kong Court of Final Appeal as contrary to absolute sovereign immunity under Chinese law in a judgment dated 8 June 2011. The Jersey proceedings related to attempts to enforce against assets and income of an entity owned by the DRC government called La Générale des Carrières et des Mines S.a.r.l. ("Gécamines").

The Royal Court of Jersey upheld FG Hemisphere's claim, including its claim for injunctive relief, finding that Gécamines was "*at all material times an organ of and so to be equated with the DRC, its interests plainly subordinated to those of the Congolese State*", and on an application to that finding of caselaw, particularly the well-known decision in *Trendtex Trading Corp v. Central Bank of Nigeria* [1977] 1 QB 529. The Jersey Court of Appeal upheld the first instance judgment.

The Privy Council considered and applied the State Immunity Act 1978 (the "Act") and the distinction drawn therein between a state and a "*separate entity*", defined under the Act as "*any entity …which is distinct from the executive organs of the government of the State and capable of suing and being sued*". In examining the status of Gécamines under the Act, the Privy Council held that "*constitutional and factual control*" of a separate entity by a state, and "*the exercise of sovereign functions*" of a state by a separate entity do not necessarily mean that that separate entity can be equated with an organ of that state. The Privy Council found that, as a matter of fact, Gécamines was not a "*mere cypher*" of the DRC government, but a "*real and functioning corporate entity, having substantial assets and a substantial business*" which ran its own financial affairs with increasing autonomy from the state. Gécamines was an integral element in the DRC government's delivery of an ambitious infrastructure project, but that simply meant that it was a separate entity exercising some sovereign authority. Gécamines was "*an entity clearly distinct from the executive organs*" of the DRC government, and the interference of that government in its affairs was irrelevant to its status, as a matter of law.

The Privy Council stated that "*where a separate juridical entity is formed by the State for what are*

on the face of it commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities". Rebuttal of the presumption would require "*quite extreme circumstances*", such as for example where the affairs of the separate entity and the relevant state were "*so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State*".

The Privy Council considered FG Hemisphere's alternative case, brought on the basis of a piercing of the corporate veil, finding that, although a state's interference in the affairs of a state-owned entity may be such as to entitle a creditor of that entity to lift its veil of separate juridical existence in order to enforce against the state, that did not necessarily enable a creditor of the state to proceed against an entity whose ownership by that state was so veiled. The Privy Council held that veil-piercing was not justified on the relevant facts, but did not go so far as to elaborate the principles applying to veil-piercing claims.

The Privy Council's decision is persuasive (but not binding) in UK crown dependencies, overseas territories and certain other Commonwealth jurisdictions, is likely to be persuasive in the rest of the Commonwealth in relation to enforcement of debts owed by a state against the assets of state-owned entities, and is likely to make it more difficult for creditors of a state to achieve enforcement against such assets in those jurisdictions.

Saudi Arabia Introduces a New Arbitration Law

Jennifer Garn (Dubai)

Whilst much of the Middle East is in turmoil, Saudi Arabia, the region's largest economy, is experiencing strong growth and economic modernisation. It is therefore appropriate that the country is improving its dispute resolution mechanisms by introducing a new arbitration law. Based broadly in structure and content on the UNCITRAL Model Law (the "Model Law"), the new Law came into effect 30 days after being published in the Official Gazette on 8 June 2012 and replaces the previously enacted Arbitration Law of 1983.

The new Arbitration Law has removed various provisions from the 1983 Law which caused problems for those wishing to refer disputes to arbitration. The new provisions have two major effects on arbitration in Saudi Arabia: first, they increase the speed and efficiency of the arbitration process; and, second, they include fewer mechanisms for potentially subverting arbitration. For instance, the 1983 Law set out a laborious process whereby parties had to file the arbitration agreement with the court, who would then supervise the conduct of the arbitration. Another major limitation of the 1983 Law was the requirement that awards be issued within 90 days, unless the parties agreed otherwise, which was often insufficient for determining substantial disputes. Accordingly, upon the expiry of the relevant period, either party could legitimately circumvent the arbitration agreement by commencing court proceedings. Even when an award was issued, before it was ratified, the court would hear any party's objections and decide whether to reject the award or issue an order for its execution. As there was no prohibition on the court reconsidering the merits of the dispute during the enforcement process, there was a significant risk that the court would impose its own decision and completely undermine the arbitration process.

The new Law introduces a number of key changes that considerably improve the previous arbitration procedure and should lead to an increase in the use of arbitration in Saudi Arabia:

The Arbitration Agreement

The definition and required form of an arbitration agreement is very similar to that provided in the Model Law. The Law also now expressly states that a court has no jurisdiction to hear disputes in relation to which there is an arbitration agreement, provided that the defendant invokes the arbitration agreement prior to filing a defence. This provision should dissuade a party from attempting to litigate a dispute that is subject to an agreement to arbitrate.

Appointment of arbitrators
The new Law sets out a streamlined procedure for appointing the arbitral tribunal should the parties not agree, which previously would have required the intervention of the court. The constitution of the tribunal and the methods by which the arbitrators are selected are similar to other common procedures for the appointment of arbitrators, although the Law requires that parties enter into an independent contract with the arbitrator in which the arbitrator's fees are specified and which must be lodged with the authority designated in the implementing legislation.

Arbitrators must be adults of good conduct and hold a degree in Shari'a studies or law, although, in a three-member tribunal, it is sufficient that only the chairman meets these criteria. The law is not clear, however, whether women can sit as arbitrators. Beyond failing to meet the specified requirements, an arbitrator may be rejected if he/she does not possess the qualifications agreed upon by the parties or if circumstances exist which raise serious doubts as to the arbitrator's impartiality. Indeed, the new Law introduces a requirement which should improve transparency, fairness, and efficiency; an arbitrator must not have an interest in the dispute and must state in writing to the parties all circumstances which may cast reasonable doubt upon the arbitrator's neutrality and independence. Further, if any doubts as to the impartiality of the arbitrator are raised, they are referred to the arbitral tribunal itself, and any subsequent appeal to the courts does not result in a suspension of arbitration proceedings.

Competence of arbitral tribunal to rule on its own jurisdiction
In accordance with the Model Law, the new Law provides that the arbitral tribunal shall adjudicate arguments regarding its own lack of competence, including arguments based on the lack of an arbitration agreement, the voidance thereof and the non-inclusion of the subject matter of the dispute. The Law also introduces the express provision, common in many other jurisdictions, that an arbitration clause is severable from the remainder of the contract.

Arbitration procedure
The new Law states that parties may agree on the application of foreign law and the procedures which the arbitral tribunal shall apply, including the parties' right to adopt the rules of international organisations or arbitration centres, provided they do not contravene the principles of Shari'a law. Where there is no specific agreement by the parties, the Law sets out many procedural features common to international rules of arbitration, such as determining the place of the arbitration, the language, the basic pleadings, the hearings and the use of experts. Beyond these procedures and provided it does not contravene Shari'a law, the arbitral tribunal may select the arbitration procedure that it deems appropriate.

Arbitral award
A written and reasoned arbitral award must now be issued within 12 months of the start of the arbitration, unless extended, which gives the arbitral tribunal a more realistic timeframe in which to decide disputes than under the 1983 Law. A true copy of the award shall be delivered to the parties within 15 days of issuance. Publication of any part of the award, without the written approval of the parties, is expressly prohibited. The award must specify details including: a summary of the arbitration agreement and the evidence adduced, the text of the final ruling, the arbitrators' fees and expenses, and the distribution of liability for their payment between the parties.

Appeals against and enforcement of the award
Arbitral awards issued in accordance with the new Law may only be challenged by an application for setting aside, filed by a party within 60 days of notification of the ruling, and no party may relinquish its right to challenge the validity of an award before it has been delivered. Furthermore, the Law expressly states that, in determining an application for setting aside an award, the court may not examine the facts and subject matter of the dispute. This is a major development from the 1983 Law, which gave the courts a broad discretion to revisit the merits of the dispute during the enforcement process. However, an order for enforcement shall still only be granted if the court is satisfied that: the award does not contradict a previous ruling by a court or tribunal which has jurisdiction over the dispute; does not contravene Shari'a law or public order; and that the person ruled against has been duly notified. The risks of non-enforcement may be increased by the

conservative interpretation of Shari'a law adopted by the courts of Saudi Arabia.

Conclusion

Although not all of the unconventional features of the 1983 Law have been remedied—for instance, Saudi governmental entities still generally require the consent of the Council of Ministers to agree to arbitration proceedings, arbitrators are required to meet certain narrow criteria, and there remains a risk that the local courts will not enforce the award on grounds of non-compliance with Shari'a law—this Law is a significant improvement. Accordingly, contracting parties should feel more comfortable referring their disputes to arbitration, rather than to the courts, knowing that the process should now be quicker and more transparent and that any favourable award should be easier to enforce.

The Democratic Republic of the Congo Joins OHADA and its Arbitration Mechanisms

Louis Degos and Dara Akchoti (Paris)

On 13 July 2012, the Democratic Republic of the Congo ("DRC") officially filed in Dakar (Senegal) the accession documents to the Organisation for the Harmonisation of Business Law in Africa (better known by its French acronym "OHADA", for *Organisation pour l'Harmonisation du Droit des Affaires en Afrique*) that it ratified on 27 June 2012. The DRC becomes the 17th Member State of OHADA, which will facilitate arbitration in this country that is estimated to have US$24 trillion-worth of untapped mineral deposits.

OHADA is an international organisation created by the Treaty of Port-Louis (Mauritius) dated 17 October 1993, revised on 17 October 2008 in Québec, Canada (the "OHADA Treaty"). It has harmonised business law in its West African Member States through directly applicable acts inspired from French law and covering commercial, corporate and insolvency matters, among others. The 16 other Member States are Benin, Burkina Faso, Cameroon, Comores, Congo, Ivory Coast, Gabon, Guinea-Bissau, Guinea, Equatorial Guinea, Mali, Niger, the Central African Republic, Senegal, Chad and Togo. The working languages are French, English, Spanish and Portuguese.

OHADA has created two sets of rules regarding arbitration:

- the Uniform Act on Arbitration dated 11 March 1999 (the "Uniform Act"), based on the UNCITRAL Model Law, lays down basic rules that are applicable to any arbitration where the seat of the arbitral tribunal is in a Member State; even where this is not the case, these rules may be chosen by the parties as the applicable procedural law; and
- the OHADA Treaty provides for institutional arbitration under the Rules of Arbitration of the *Cour Commune de Justice et d'Arbitrage* ("CCJA Rules"). In addition to its numerous arbitral functions (arbitration centre, setting-aside proceedings, appeal of enforcement orders), the CCJA is the sole supranational court of OHADA, which guarantees a uniform interpretation of OHADA law (*i.e.* the Treaty, regulations applying the Treaty and Uniform Acts) through judgments and advisory opinions.

Accordingly, three main scenarios may be distinguished:

- if the arbitration clause just provides for arbitration under the Uniform Act, the latter will govern the proceedings but there will be no institutional framework (*ad hoc* arbitration);
- if the arbitration clause provides for arbitration under the OHADA Treaty or the CCJA Rules, the CCJA will be acting as an arbitration centre (institutional arbitration);
- if the arbitration clause provides for arbitration in a Member State in accordance with institutional rules other than those of the CCJA, the Uniform Act will apply to matters not regulated by these institutional rules.

Therefore, the drafting of the arbitration clause requires considerable care.

Vigilance is all the more important given that the rules laid down in the Uniform Act and the CCJA Rules differ on important issues such as appeals and enforcement of awards.

Although both texts exclude the right to ordinary appeal of awards before domestic courts, they establish different mechanisms. On the one hand, under the Uniform Act, parties may file set-aside proceedings seeking annulment of the award, only on limited grounds, before national courts of the seat of arbitration; the national court judgment in the set-aside proceedings is subject to ultimate appeal (*pourvoi en cassation*) before the CCJA. On the other hand, the CCJA Rules allow more limited grounds for the set-aside proceedings, which do not take place before a national court but directly before the CCJA; and from which there is no further right to appeal.

Furthermore, the enforcement of awards, crucial from a practical view, requires particular attention. Under the Uniform Act, the award must be submitted to a national court for an enforcement order (*exequatur*), and enforcement may be refused only if the award is clearly contrary to international public policy of the Member States. Judgments refusing enforcement are only subject to ultimate appeal before the CCJA. Under the CCJA Rules, enforcement orders are issued by the President of the CCJA, may only be refused on limited grounds, and such refusal may be appealed before the CCJA. It is important to notice that when an enforcement order is granted by the CCJA, the award becomes enforceable in all Member States, which is a practical advantage of the CCJA Rules over the Uniform Act.

Thus, OHADA offers a modern set of rules applicable to arbitration, which may prove really effective. However, it also contains several pitfalls and subtleties that need to be understood and carefully considered.

The accession of the DRC to OHADA and its arbitration mechanisms is undoubtedly positive news for companies operating in the country, including in its thriving mining industry. One may hope that the DRC will go one step further by also ratifying the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The DRC would then have the full toolkit of a modern arbitration law and be better positioned to attract the most sophisticated foreign investors.

Developments at CIETAC – The New Arbitration Rules 2012 and the Rift with the Shanghai and Shenzhen Sub-Commissions

Annie Lau (Hong Kong)

The New 2012 Rules

On 1 May 2012, the China International Economic and Trade Arbitration Commission ("CIETAC") implemented a new set of arbitration rules (the "2012 Rules") to replace its old rules which had been in force since 1 May 2005 (the "2005 Rules"). The 2012 Rules represent a significant revision of the 2005 Rules. Key changes include the following:

Seat of arbitration

The 2005 Rules permitted parties to agree to a place of arbitration outside mainland China. To provide further flexibility, Article 7.2 of the 2012 Rules empowers CIETAC to determine any appropriate location, including a location outside mainland China, as the seat of arbitration, where parties have failed to reach an agreement or their agreement is ambiguous.

Consolidation of arbitrations

The consolidation of two or more related arbitration proceedings was not permitted under the 2005 Rules, but can be desirable to minimize the risk of inconsistent outcomes arising from parallel proceedings and to allow related disputes to be resolved in a more coordinated and efficient manner.

Under Article 17 of the 2012 Rules the consolidation of arbitrations can be made, subject to two requirements:

(a) the request of a party or where CIETAC believes it necessary; and
(b) on *agreement* of *all the other parties* in the related proceedings.

Article 17 requires the *separate agreement of all the parties* concerned to show the clear intention to consolidate parallel arbitration proceedings. Although potentially important to maintain the enforceability of the final award, the requirement to agree may render the consolidation of arbitrations

under the 2012 Rules more challenging, as any uncooperative party can block a consolidation by refusing to agree.

Language
Article 71.1 of the 2012 Rules now empowers CIETAC, in the absence of agreement by the parties, to designate *"Chinese or any other language… having regard to the circumstances of the case"*. This amendment will help resolve disputes where the relevant documents are written in a language other than Chinese.

Interim measures
Article 21.1 of the 2012 Rules maintains the existing procedure for CIETAC to submit applications under PRC law for *conservatory measures* directed at preserving property or evidence to the relevant PRC courts.

However, Article 21.2 of the 2012 Rules confers additional power on an arbitral tribunal constituted under the 2012 Rules to grant *interim measures* under other (non PRC) applicable laws before the issuance of the final award. These measures include, for example, the disposal of perishable goods, prohibition against distribution of profits before the determination of disputes amongst joint venture parties, and prohibition against a party from infringing intellectual property rights.

Autonomy in the arbitration-mediation process
Article 45 of the 2012 Rules allows the parties to an arbitration to attempt mediation without engaging the arbitral tribunal. Under this provision, CIETAC will assist parties to conciliate in a *"manner and procedure it considers appropriate"* if parties do not wish to have the conciliation conducted by the members of the arbitral tribunal.

Summary procedure
The monetary threshold for the summary procedure has been raised. Under Article 54 of the 2012 Rules, unless otherwise agreed between the parties, the summary procedure now applies to cases where the amount in dispute does not exceed RMB2,000,000 (equating to just over US$300,000 at current rates). Previously, the threshold was RMB500,000. This amendment should result in more CIETAC arbitrations being conducted in an expedited manner with lower costs for the parties.

Controversy – Rift with Shanghai and Shenzhen Sub-Commissions

While the implementation of the 2012 Rules is a welcome development which enhances CIETAC's competitiveness as a provider of international arbitration services, the Shanghai sub-commission of CIETAC announced that it had split from CIETAC Beijing on the same day that the 2012 Rules came into force. The Shenzhen sub-commission subsequently followed suit. In addition to declaring themselves as an independent arbitral institution, both sub-commissions have published a separate set of arbitration rules and established their own panel of arbitrators. Pending further developments, parties choosing to adopt the 2012 Rules should take notice of this development and take care in drafting the agreement to arbitrate.

The Revised 2012 Swiss Rules

Johann von Pachelbel (Frankfurt)

The Swiss Rules of International Arbitration were introduced in 2004 ("2004 Swiss Rules") by a group of Swiss chambers of commerce and industry as a joint effort to promote institutional arbitration in Switzerland. This initiative has been well received by the arbitration community, and almost six hundred proceedings have been administered under these rules in the past 7 years. Based on this experience (and as we reported in June 2012) the Swiss Rules of International Arbitration have now been revised ("2012 Swiss Rules" or "Revised Rules") and will apply to arbitration proceedings initiated on or after 1 June 2012 unless otherwise agreed by the parties. The Revised Rules apply to both international and domestic arbitration, provided that the arbitration agreement refers to the Swiss Rules of International Arbitration. The launch in 2012 included a renaming of the arbitration institution to "Swiss Chambers' Arbitration Institution" and a renaming of the entity previously known as the Arbitration Committee to "Arbitration Court".

To give a feel for the character of Swiss institutional arbitration, one can note that half of the 87 new proceedings submitted in 2011 under the 2004 Swiss Rules were conducted by a sole arbitrator and

one third of the proceedings were conducted as expedited proceedings (see below). Half of the parties were from Western Europe, 24% from Switzerland and 8% from Eastern Europe and Russia, 8% from Asia and the Middle East, and 3% from North America.

The Revised Rules follow a common trend to promote greater time and cost efficiency and the major amendments of the 2012 Swiss Rules relate to the following aspects:

- Additional powers to the Arbitration Court;
- Increase of efficiency and speed of the proceedings (including expedited proceedings);
- Expanded possibilities for consolidation and joinder of proceedings;
- Interim measures of protection (including *ex parte* proceedings);
- Introduction of new Emergency Arbitrator proceedings.

Additional Powers to the Arbitration Court

The Arbitration Court has been given greater powers to supervise the arbitration proceedings by expressly conferring the required powers on the Arbitration Court to the fullest extent possible under the law applicable to the arbitration. This includes, for example, the Arbitration Court's power to intervene in the arbitral proceedings, to extend the term of office of the arbitral tribunal and to decide on the challenge of an arbitrator on grounds not provided for in the Revised Rules but found in the applicable *lex arbitri* (Article 1.4). Moreover, the Arbitration Court may not only extend but also shorten those time limits it has fixed or for which it has the authority to fix or amend (Article 2.3). Furthermore, the arbitral tribunal is now obligated to consult with the Arbitration Court prior to requesting the parties to deposit an advance or to request supplementary deposits from the parties (Articles 41.1 and 41.3).

Efficiency and Speed of the Proceedings and Costs

The 2012 Swiss Rules introduce several amendments intended to enhance the speed and cost efficiency of the proceedings. The amendments to the Revised Rules refer to the different stages of the proceedings. At the beginning of the proceedings a more "front-loaded" emphasis can be identified. For example, the parties are required to designate the arbitrator(s) already in the Notice of Arbitration or in the Answer to the Notice of Arbitration respectively (Articles 3.3(h) and 3.7). Further, the Revised Rules now require that the challenge of an arbitrator be raised within 15 days after the circumstances giving rise to the challenge became known to the relevant party (Article 11), while no deadline applied under the 2004 Swiss Rules. Another step towards efficiency follows from the new requirement that the Statement of Claim and the Statement of Defence, as a rule, be accompanied by documents and other evidence on which the parties rely (Articles 18.3 and 19.2).

The Expedited Procedure as part of the 2004 Swiss Rules has found much acceptance in the past (one third of proceedings in 2011). Unless the parties agree otherwise, the Expedited Proceedings shall apply to disputes of less than CHF 1 million (just over US$1 million at current rates). The disputes are to be decided by a sole arbitrator within six months (Article 42). One important feature is the exchange of only one round of substantive briefs. If the arbitration agreement in a dispute of such limited value provides for a three-arbitrator-panel, the Secretariat of the Court can invite the parties to refer the case to a sole arbitrator (Article 42.2 (c)). In practice, the Secretariat of the Court may also invite parties to apply the Expedited Procedure rules in disputes of more than CHF 1 million.

Consolidation and Joinder

The topics of consolidation of proceedings and joinder of parties have been much debated recently in the arbitration community. As in the past, the 2012 Swiss Rules continue to provide for the consolidation of arbitration proceedings. This applies to parallel proceedings between the same parties but also to proceedings between parties that are not identical (Article 4.1). The Arbitration Court is granted a wide discretion and makes its decision only after consultation with the parties and the arbitrators involved and in consideration of the individual circumstances. A consolidation may—at least theoretically—be decided even in case of a party's objection. The Revised Rules give the Arbitration Court the power to revoke the arbitrators

appointed and confirmed before the consolidation and restart the appointment process according to section II of the 2012 Swiss Rules. Moreover, in case of consolidation the parties of all arbitrations concerned are deemed to have waived their right to designate an arbitrator.

The joinder of parties is provided for in Article 4.2 and entitles the tribunal, after consultation with all parties and third parties, to decide on a request of a third party to join pending proceedings or on a party's request to join a third party. The Revised Rules contain only minor changes to the joinder provisions in the 2004 Swiss Rules. The amendments include the possibility to join more than just one (third) party to the existing arbitration and the requirement of the arbitral tribunal to take into account all relevant circumstances and not only circumstances it deems relevant.

The 2004 version of the rules on consolidation have been applied in some cases. In comparison, only a few joinder requests have been handled in the past. In both situations important questions may arise in view of the contractual nature of arbitration (party-autonomy), or, if for example a party objects against a consolidation or joinder. These questions also need to be answered according to the applicable (mandatory) provisions of the *lex fori* (is the consolidation or joinder valid according to the relevant law at the seat of the arbitration?). Also, the enforceability of awards rendered in disputes following a consolidation or joinder may be doubtful, because fundamental rights of the parties are concerned (right to appoint an arbitrator; scope of the arbitration agreement; requirement of equality of the parties etc.). Thus, these rules need to be applied thoughtfully in practice.

Interim Measures of Protection

As in the past, the tribunal may grant interim measures either in the form of an order or an interim award. Additionally, the 2012 Swiss Rules explicitly provide that the tribunal may "modify, suspend or terminate" any such measure granted upon application of a party or, in exceptional circumstances and with prior notice to the parties, on its own initiative (Article 26.1). At the same time, the parties are not deemed to have waived their right to apply for interim measures with a judicial authority (Article 26.5).

A much-debated question is whether an arbitral tribunal may decide on an application for interim protection without hearing the other party first (*ex parte* measure). The Revised Rules give the tribunal the power to grant *ex parte* measures in exceptional circumstances, i.e. to "rule on a request for interim measures by way of a preliminary order before the request has been communicated to any other party", provided that such communication is made at the latest together with the preliminary order and that the other parties are immediately granted an opportunity to be heard (Article 26.3). At the same time, the Revised Rules clarify that the tribunal has the competence to rule on any compensation claim for damage caused by an unjustified interim measure or preliminary order (Article 26.4).

Emergency Arbitrator

Another modern feature is the availability of pre-arbitral interim relief in situations where a party needs urgent interim protection before the arbitral tribunal is constituted. Following the recently revised arbitration rules of other renowned international arbitration institutions such as the Stockholm Chamber of Commerce (SCC), the Singapore International Arbitration Center (SIAC) and the International Chamber of Commerce (ICC), the 2012 Swiss Rules also introduce a new and detailed provision on an Emergency Relief procedure (Article 43). These rules apply based on an opt-out concept, i.e. they are available unless the parties agree otherwise.

The emergency procedure requires that an emergency arbitrator is appointed by the Court as soon as possible after the receipt of the application, the registration fee (CHF 4,500) and the advance for the costs of the emergency proceedings (CHF 20,000) and that a decision on an application be made within fifteen days from the date on which the Secretariat transmitted the file to the emergency arbitrator (Article 43.7). The Arbitration Court has the power to extend this deadline. The emergency arbitrator is entitled to modify, suspend or terminate his/her decision at any time thereafter. The same applies once the arbitral tribunal is constituted. The emergency arbitrator must ensure that both parties be heard on the application. Further, the Court shall terminate the emergency relief proceedings if the

Notice of Arbitration is not submitted within ten days from the receipt of the application for emergency relief (Article 43.3), a deadline which can be prolonged in exceptional cases only. The emergency arbitrator may not serve as arbitrator in any arbitration relating to the dispute unless otherwise agreed by the parties (Article 43.11).

Summary and Outlook

The 2012 Swiss Rules represent a modern set of rules for domestic and international arbitration and will certainly support the future development of institutional arbitration in Switzerland as one of the most sophisticated arbitration centres. A key factor in the anticipated success of the Revised Rules is likely be the clear approach towards greater time and cost efficiency which is what parties increasingly seek.

'Asymmetric' Dispute Resolution Clauses: A Recent Russian Decision

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It is not uncommon for parties to transactions to provide for resolution of their disputes by more than one means, depending on the circumstances. For example, a dispute resolution clause providing for court proceedings may allow one party the option to arbitrate—particularly where that party perceives that it may face difficulty enforcing a court judgment. Conversely, an arbitration agreement may provide that one party retains an option to litigate. Typically, such 'asymmetric' dispute resolution clauses tend to reflect some fundamental commercial inequality between the parties, one of which is in a position to negotiate what may amount to a substantial advantage in the resolution of disputes. Such clauses are a commonplace of Loan Market Association (LMA) syndicated loan agreements, for example. The law can vary, from jurisdiction to jurisdiction, as to the permissibility or otherwise of such arrangements. For instance, Italy has regularly upheld such clauses, and France is considered likely to do so. In *Debenture Trust Corp plc v. Elektrim Finance BV* and others (2005), a case which featured one party's option to arbitrate disputes otherwise subject to the jurisdiction of the English courts, it was held by the English Commercial Court that a clause which compelled one party to refer any dispute to arbitration, but granted an option to another party to issue court proceedings, was valid and enforceable. In Germany, however, such provisions have been held to be unenforceable. A recent decision has given rise to interesting questions regarding the current position in Russia.

In 2009, the Russian Telecommunications Company ("RosTeleCom") contracted for the purchase of telephones from Sony Ericsson's Russian subsidiary Mobile Communications AB ("Sony"), pursuant to an English-law general distribution agreement (the "Agreement"). Whilst the Agreement provided for London-seated ICC arbitration, it purported to allow Sony to bring court proceedings in Russia to enforce an undisputed debt. RosTeleCom brought proceedings against Sony in the Moscow Commercial Court in May 2011, seeking replacement of defective telephones. Sony successfully challenged RosTeleCom's breach of the 'asymmetric' arbitration clause, and the decision was upheld twice on appeal. RosTeleCom appealed to the Supreme Commercial Court of the Russian Federation in Moscow (the "Supreme Commercial Court").

In March 2012, a three-judge panel of the Supreme Commercial Court (the "Panel") found that Sony's carve-out from the arbitration clause was contrary to principles of due process and party equality, violated Article 6 of the European Convention of Human Rights, and was therefore invalid. The case was referred to the Presidium of the Supreme Commercial Court (the "Presidium"). In a summary ruling given in June, the Presidium referred to the reasoning of the Panel, overturned the judgments below, and sent the matter back to the Moscow Commercial Court for a new hearing. The fully-reasoned judgment of the Presidium was handed down on 1 September 2012. It is reported that the Presidium held that "based on the general principles of protection of civil law rights, an agreement on dispute resolution cannot grant only one party (the seller) under a contract the right of recourse to a competent state court and deprive the second party (the buyer) of an analogous right. Where such an agreement is concluded, it is invalid as violating the

balance of the parties' rights. Accordingly, a party whose right is infringed by such an agreement on dispute resolution also has the right of recourse to a competent state court, having exercised the guaranteed right to judicial protection on equal terms as its counterparty".

It is not entirely clear from the Presidium's judgment whether it is intended that, in the case of an 'asymmetric' dispute resolution clause, the entire clause including the arbitration agreement should be deemed invalid or just that portion of it which entitles one party to opt unilaterally to litigate, such that either party when bringing a claim could decide to refer the dispute to arbitration or to the competent state courts. Commentators suggest that referral of the case back to the Moscow Commercial Court may indicate that the Presidium's intention was indeed to 'convert' a unilateral option to litigate into a bilateral option. It is not known for the present when the parties will be heard again in the Moscow Commercial Court. We will report further in due course. In the meantime, caution should be exercised by any party involved in negotiating such an 'asymmetrical' dispute resolution clause which may at some point find itself the object of scrutiny in the Russian courts.

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New York Courts Offer Further Support for Parties to International Arbitrations

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New York courts have always had certain attractions as a forum for litigation in connection with international arbitration due to their sophistication, willingness to accommodate parties from all over the world, and location in the global business hub that is New York. In recent years, New York courts have even more aggressively accommodated litigation requests related to international arbitrations as well as court actions involving international disputes.

This article addresses how the law in New York has been adapting to the proliferation of international arbitration as a means of international dispute resolution. Specifically, this article outlines recent New York case law which may lend support to arbitration parties seeking pre-arbitration attachment, discovery in support of arbitration, and in some cases post-judgment/post-award turnover orders even when the parties, subject matter, and forum of the arbitration are located outside of the United States.

Pre-Arbitration Attachment

In 2005, the New York Legislature amended Section 7502(c) of the State's Civil Practice Law and Rules (CPLR) to authorize New York courts to attach assets on behalf of a creditor in anticipation of an award that will be rendered in a foreign arbitration proceeding.

The First Department of New York's Appellate Division, the state's intermediate appellate court, held in *In re Sojitz Co. v. Pritvhi Information Solutions* that even where the dispute in arbitration would fall outside the subject matter and personal jurisdiction of New York's courts, under CPLR 7502(c), a New York court may attach assets held in New York for security purposes on an arbitration party's application. 82 A.D.3d 89 (1st Dept. 2011).

Sojitz concerned a dispute under a sales agreement between the petitioner Sojitz, a Japanese company with its principal place of business in Tokyo, and the respondent Pritvhi, an Indian company whose principal place of business was in Hyderabad, India. The sales agreement provided for the shipment of equipment manufactured in China to India and was governed by English law, with any disputes to be resolved by arbitration in Singapore. When a dispute arose over payment, Sojitz applied in New York state court for an order of attachment against assets held by Pritvhi in New York and alleged that it would commence arbitration in Singapore within 30 days. The lower court issued an order of attachment against Pritvhi's assets in New York.

The Appellate Division affirmed, observing that "the Legislature amended CPLR 7502 (c) . . . and in doing so granted the courts of New York authority to issue preliminary injunctions and attachments in aid of all arbitrations including those involving

foreign parties or in which the arbitration is conducted outside of New York." The court found "nothing fundamentally unfair" about the attachment.

Discovery in Support of International Arbitration

New York courts have also led the way in aiding international arbitration by granting requests for discovery in support of arbitration. Other federal courts have recently followed suit.

For example, in *Application of Consorcio Ecuatoriano de Telecomunicaciones SA v. JAS Forwarding (USA), Inc.*, the United States Court of Appeals for the Eleventh Circuit held that, under 28 U.S.C. § 1782, a party to an arbitration in Ecuador was entitled to take discovery from its opponent located in the United States. No. 11-12897 (11th Cir. June 25, 2012). The court outlined a four-part test for eligibility to take such discovery: (1) the request must be made "by a foreign or international tribunal," or by "any interested person"; (2) the request must seek the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the court ruling on the application for assistance.

The central question before the court was whether the Ecuador arbitration constituted a "proceeding in a foreign or international tribunal" as contemplated by the statute. The Eleventh Circuit held that an arbitration body qualifies as an "international tribunal" if it is "a first-instance decision making body that can receive evidence and bind the parties with its ruling" and if its ruling is subject to judicial review. This was an issue of first impression in the Eleventh Circuit, although the United States Court of Appeals for the Second Circuit, which sits in Manhattan and encompasses New York, Connecticut and Vermont, had allowed local discovery in support of an international arbitration earlier in 2011. *See* 13D Wright & Miller, Federal Practice & Procedure § 3569 & n.10 (3d ed. 2012).

Post-Judgment Turnover

In 2009, the New York Court of Appeals, the state's highest court, handed down a widely-discussed opinion in *Koehler v. Bank of Bermuda Limited*, 12 N.Y.3d 533 (2009). In *Koehler*, the court declared that a New York court may order a bank over which it has personal jurisdiction to turn over a judgment debtor's stock certificates which the bank holds outside of New York, even though that bank is a garnishee rather than a judgment debtor. The judgment creditor in *Koehler* was trying to enforce an out-of-state federal court judgment in New York by levying on stock certificates that the underlying judgment debtor had given to the bank as collateral for a loan. The bank, which had a New York branch, submitted to New York jurisdiction but argued that because the New York lower court did not have *in rem* jurisdiction over the stock certificates held in Bermuda, the court could not order their attachment. The Court of Appeals explained that as long as the lower court had jurisdiction over the bank, even in the absence of personal jurisdiction over the underlying judgment debtor or of *in rem* jurisdiction over the specific assets, the court could order the bank to turn over the certificates or their monetary equivalent to satisfy the underlying judgment.

Since 2009, courts have interpreted *Koehler* narrowly so as to exclude bank branches outside of the state if personal jurisdiction is disputed. But *Koehler* remains good law, and there is no apparent reason why the same approach might not be taken by New York courts to enforce an international arbitration award. Accordingly, this potential weapon is worthy of careful consideration by parties looking to collect on an international arbitration award even when the dispute has no obvious connection to the United States.

New Arbitration Rules in Poland: Lewiatan Court of Arbitration

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The Lewiatan Arbitration Court, the second most recognized arbitration institution in Poland, has recently adopted new rules of arbitration. With approximately 100 cases since its creation in 2005, and some high-profile events (such as the Dispute Resolution in M&A Transactions Conference in

May 2010 and the Summit of European Arbitration Institutions in October 2011), the Court has been successful in attracting increasing international recognition. The 2012 Arbitration Rules are the newest attempt to confirm its role as one of the leading arbitration institutions in Central Eastern Europe.

The main goal behind the new Rules—as declared by their drafters—was to depart from some of the traditional features of arbitration in Central Eastern Europe, which did not sit comfortably with modern cross-border arbitration practice. It is also clear that the drafters sought to propose their own approach to regulating some of the challenging and currently hotly-debated concepts in modern arbitration, such as an emergency arbitrator, time and cost control measures, and multi-party/contract arbitration.

Emergency Arbitrator

The Emergency Arbitrator rules are set out in Appendix II to the Rules. They are based on the opt-out model (i.e., they apply unless the parties agree to exclude them). Their aim is to allow the parties to obtain interim relief prior to the constitution of an arbitral tribunal. At the same time, they do not preclude the parties from seeking interim relief from a state court.

The Rules provide for some very tight deadlines (which may be extended in justifiable cases). The Emergency Arbitrator is appointed by the President of the Court within 2 business days of receiving the request to appoint and payment of the related fee. The Emergency Arbitrator shall issue an order concerning interim measures no later than 7 business days after a request to appoint an Emergency Arbitrator has been filed.

The Emergency Arbitrator proceedings are not conducted *ex parte*. On the contrary, following the appointment of the Emergency Arbitrator, the President of the Lewiatan Court shall deliver a copy of the request to the other party. There is no stated time limit for a respondent to file its reply to the request for the Emergency Arbitrator.

The Emergency Arbitrator enjoys broad discretion in adjudicating the application and may grant such interim measures as he/she considers appropriate, including interim measures aimed at securing evidence. Enforcement of the order to grant an interim measure may be made contingent on the requesting party providing appropriate security.

Time and cost control measures

Reduction of the time and cost of arbitration was, in the view of the drafters, one of the primary goals for revising the Lewiatan arbitration rules. To that end the Rules set out shortened time limits for, *inter alia*, filing a statement of defence, a counterclaim and a set-off claim (21 days after receipt of a statement of claim) as well as for issuing an award (6 months from the arbitral tribunal being constituted). Those time limits may be extended in justifiable cases, for example where the dispute is of a particularly complex nature.

The Rules expressly oblige both arbitrators and the parties to conduct the arbitration in an expeditious and cost-effective manner. Arbitrators in particular should act diligently, as any delay on their side may result in a reduction of their fees.

The Rules prescribe that, as soon as it is constituted, an arbitral tribunal shall hold a preliminary meeting on case management (aimed to promote time-saving and cost-efficient proceedings) unless it considers this unnecessary. The Rules provide the arbitral tribunal with other case-management tools, such as powers to issue Procedural Orders, for example regulating the timetable of proceedings, the rules governing the conduct of the arbitration etc.

Smaller claims (up to 50,000 PLN, equal to ca. €12,000) shall be subject to an amended “fast-track” expedited procedure and will be decided by a single arbitrator within three months of his or her appointment.

Appointment of a presiding arbitrator

The 2012 Lewiatan Rules provide for the specific manner of appointment of a presiding arbitrator (or sole arbitrator) if the party-appointed arbitrators (or the parties) fail to do so. The Nominating Committee (a body within the Lewiatan Court) shall only make the appointment after observing the following procedure: first, it will provide the party-appointed arbitrators or the parties with a list of five candidates. The arbitrators or the parties will then return the list of candidates within 7 days of receipt. The candidate who has not been deleted by any

arbitrator or by any party shall be nominated as the presiding arbitrator (or sole arbitrator). If one or more candidates remains undeleted, the Nominating Committee shall choose the presiding arbitrator (or the sole arbitrator) from among the undeleted candidates, taking into account the preferences of the arbitrators or the parties.

Other issues

While the Lewiatan Court still maintains its own list of arbitrators, the new Rules depart from the requirement that a presiding arbitrator or a sole arbitrator be appointed only from the list.

As concerns multi-party/contract arbitration, the drafters of the Rules decided not to follow the *Dutco* rationale, such that the new Rules provide that where multiple parties as a claimant or a respondent fail to appoint an arbitrator, the Nominating Committee shall nominate the arbitrator for that party only.

The Rules provide for broad confidentiality of arbitral proceedings.

Conclusion

Several factors contributed to the Lewiatan Arbitration Court's decision to rewrite its Arbitration Rules. Among them, Lewiatan was aware of recent revisions to some prominent arbitration rules such as UNCITRAL, ICC, Swiss Rules and CIETAC. Lewiatan wished to move its Rules towards "international best practices". A number of the revisions to the Rules illustrate the ongoing process of harmonization in the world of international arbitration. In some areas, though, the drafters chose to not follow the approach taken by others.

The key theme of the reform effort was improving efficiency and case management provisions. It was recognized that competition among arbitration institutions is strong, and only those institutions which can offer reliable, time and cost effective arbitration will get a chance to develop successfully.

Pioneering Deep Sea Mining Project Heads to Arbitration Signalling a New Type of Extractive Sector Dispute

Peter R. Morton and René Gayle (London)

Canadian mining company Nautilus Minerals has been embroiled in a dispute with the government of Papua New Guinea that could mark the end to its novel deep sea mining project in that country. It has suffered several additional blows, such as serious financial setbacks and strong opposition to the project by environmentalists, which further threaten the viability of its deep sea mining project, known as "Solwara 1", which involves the mining of copper and gold in the Bismarck Sea surrounding Papua New Guinea.

The Solwara Project

Deep sea mining involves digging deep under the seabed to extract copper and other metals, primarily through the use of robots that collect and break up the ore and then pump it through pipes to a surface barge for processing on land. Conceptually, the process has been of scientific and commercial interest for several years as the richness and vastness of the world's underwater resources is widely known. However, the difficulty, costs, and risks associated with deep sea mining have led most investors to shy away from such a venture.

Nevertheless, the scarcity of high quality copper and predictions of future shortages have made the prospect of mining copper underwater even more attractive and lucrative. The quality of the copper found sub-sea in the areas around Papua New Guinea and other parts of the Pacific is said to be of a grade of 7 percent, compared to the average land-based grade of 0.6 per cent. It is therefore plausible that the high potential gains persuaded Nautilus to embark on its pioneering Solwara project and for the government of Papua New Guinea to welcome the investment.

The Dispute

Despite the promising start, the project has encountered choppy waters. Nautilus was initially awarded a twenty-year lease to mine a site covering roughly 2,000 square miles of Papua New Guinea's

seabed, which is believed to hold approximately 125,000 tonnes of copper and 10 tonnes of gold. The dispute between Nautilus and the government of Papua New Guinea however centres around a separate agreement between the two entities signed in March 2011. The essential terms of this agreement were that the government would have a thirty percent equity stake in the project, in return for a proportionate share in the costs of development. However, the government has allegedly reneged on its contractual obligation, claiming that Nautilus has not fulfilled certain pre-conditions under the contract. The dispute has been submitted to *ad hoc* arbitration under the UNCITRAL Rules before the former chief justice of Australia, Murray Gleeson AC QC, who will act as sole arbitrator. The stalemate between Nautilus and the government may completely halt the project, intended to be the world's first underwater metals mine.

Environmental Opposition

In addition to the impasse with the government and other financial woes, Nautilus has also faced strong opposition from environmental groups. In fact, there are currently several websites devoted to campaigning against deep seabed mining. The environmental criticisms largely stem from the project's experimental nature and the supposed lack of understanding of the potential consequences on the marine environment and the social impact on the people of Papua New Guinea. Moreover, the contiguous nature of the sea means that environmental damage can spread far beyond the territorial waters of Papua New Guinea, expanding any potential liability of Nautilus.

Nautilus has retorted that it has taken several steps to ensure that its activities will not have any significant adverse effect on the environment or marine ecosystems. They also argue that their Environmental Impact Study was conducted by eminent scientists and that their mining lease was granted after three years of extensive preparation and consultation. However, environmentalists have still not let up, claiming more research needs to be done before the project is made operational.

Potential Implications

The success or failure of the Solwara project is likely to be of interest to other companies within the extractive industry pondering whether deep sea metals mining might be or become a worthwhile venture. Currently, there is a rush to assess the ocean floor of the Indian and Atlantic oceans to determine whether, like the Pacific Ocean, metals such as copper, gold and silver exist in commercial quantities. Additionally, other countries within the Pacific, such as Fiji, the Solomon Islands, Tonga, Vanuatu and New Zealand have already been approached by investors expressing an interest in mining within their territorial waters. It is therefore plausible that the pioneering Solwara project, especially if successful, will trigger the emergence of deep-sea metals mining as a new form of mining within the extractive industry. Moreover, given the high usage of international arbitration as a preferred method of dispute settlement for parties in the extractive industry, this may also give rise to a new area of dispute within international arbitration. This may not only take the form of investor-state disputes, but also state-state disputes since states are likely to intensify any existing claims to waters beyond their exclusive economic zone in order to take advantage of resources existing within the extended area. The current border disputes among China, Vietnam, Indonesia, Taiwan and the Philippines over the South Sea and unsettled claims over the Arctic Sea among Russia, the United States, Norway, Denmark and Canada are prime examples of the potential for competing territorial claims over water resources.

What's Done is Done—Or is it? *Res Judicata* in Domestic and International Arbitrations in the Context of Insurance Coverage Disputes

Frank Thompson and Terry Eleftheriou (London)

Litigation proceedings can, in certain circumstances, be prevented or struck out on the basis of *res judicata* (literally "*judged matters*") in that it may be argued that issues raised by a party to the proceedings have been conclusively decided in previous proceedings and ought not to be capable of being raised again. The basis of this concept is that it is in the public interest for there to be finality of

litigation and parties should not have to go through the costs and expenses of re-litigating matters already decided.

This article considers the application of *res judicata* in the context of arbitration proceedings. The potential relevance of this concept is considered in the context of insurance/reinsurance coverage disputes submitted to arbitration where insurers are increasingly relying upon *res judicata* in an attempt to impose decisions made in earlier awards upon policyholders that are favourable to the interests of insurers.

Res Judicata - An Introduction

> *'A res judicata is a decision, pronounced by a judicial tribunal having jurisdiction over the cause and the parties, that disposes once and for all the matter(s) so decided, so that except on appeal it cannot be relitigated between the parties or their 'privies', that is, those who have a legal or beneficial interest in the litigation.'* (Spencer-Bower & Handley, *Res Judicata* (4th edition, 2009))

There are two distinct branches of *res judicata*: (1) cause of action estoppel and (2) issue estoppel. Cause of action estoppel applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties (or their "privies") and having involved the same subject matter. Issue estoppel may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided but then, in subsequent proceedings between the same parties (or their "privies") involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open the issue.

The identification of those who are "privies" of the parties to the earlier dispute is often a key consideration on whether an estoppel can arise on the grounds of *res judicata*. English law recognises that privies can be in blood (ancestors and heirs), in title (such as those who succeed in rights or liabilities upon death or insolvency) or "privies of interest". There is little by way of English law authority on what constitutes "privity of interest". While this is likely to include an assignee of rights under a contract (such as an insurance policy), it is doubtful if this extends to those whose interest in the earlier proceedings is merely financial: for example, a person who has agreed to indemnify a party or has given financial assistance to a party is unlikely to become a privy, although it is more likely that such a person could become a privy if they take a more "hands on" role in the matter in question.

Res Judicata in Arbitration Proceedings

The application of the principles of *res judicata* in the arbitration context may at first appear contrary to the confidentiality which normally attaches to arbitration awards. If an arbitration award is confidential, it may be considered that this precludes a party from relying on the award in subsequent proceedings as conclusive evidence of certain facts or matters.

However, in the context of a series of reinsurance disputes, the Judicial Committee of the Privy Council of the United Kingdom has decided that it was permissible for an award rendered in an earlier arbitration to be relied upon by the same parties but in a different arbitration to demonstrate that an issue estoppel does arise. This was despite the parties entering into an express confidentiality agreement in relation to the first arbitration—*Associated Electric & Gas Insurance Services Limited v. European Reinsurance Company of Zurich* [2003] UKPC 11. In this case the Privy Council applied what it considered to be a settled principle of English law that issue estoppel applies to arbitration as it does to litigation, as the parties, having chosen the tribunal to determine the dispute between them, are then bound for all purposes by the determination of that tribunal of any issue which is relevant to the decision of any dispute which is referred to that tribunal. The Privy Council thereby confirmed that, under English law, the principle of *res judicata* applies to arbitration.

However, whether a party is able to rely upon the principles of *res judicata* under English law can be a complex issue dependant on the particular circumstances of the case in question. This is illustrated by the decision of the English Court of Appeal in another reinsurance dispute—*Sun Life Assurance Company of Canada v. The Lincoln National Life Insurance Co* [2004] EWCA 1660. In this case it was held that a reinsurer was not entitled

to rely on an earlier arbitration award, in which the tribunal was of the opinion that certain risks were covered under a different reinsurance facility. As the reinsurer in this case had not been a party to the earlier arbitration proceedings, it was held that the parties in the second arbitration could not be bound by the decision in the first arbitration. The Court held that a decision of a tribunal is generally binding only as between the parties to the proceedings in which that decision is given. However, the Court also determined that issue estoppel could not apply in this case as the earlier decision had not been dispositive of the relevant issue. The first tribunal had already ruled that the reinsurance facility had been validly avoided for material non-disclosure and misrepresentation and accordingly, its determination of the issue relating to the coverage of certain risks had been merely collateral to its decision.

In relation to international arbitration, the application of the *res judicata* doctrine can be more uncertain and debatable. The rules prescribed in national legal systems for the application of *res judicata* principles tend to only apply to judgements of national courts and not arbitration awards. Moreover, the rules on the application of *res judicata* differ from one jurisdiction to the other. Accordingly, national laws cannot necessarily be relied upon to provide a consistent basis for the application of *res judicata* in the context of international arbitration.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is silent on *res judicata* save that Articles II and III of the Convention require member states to recognise arbitral awards as binding and to give effect to arbitration agreements. There appear to be only a handful of published arbitral awards that consider the preclusive effects of other awards granted in different jurisdictions. However, some guidance on the application of *res judicata* in relation to international commercial arbitration is provided, for example, in the Final Report on the topic of *res judicata* and arbitration prepared by the International Law Association's Commercial Arbitration Committee and in the consequent Toronto Recommendations on *res judicata* (these materials can be found at pages 27-39 of the Conference Report Toronto 2006 PDF and at Annex 2 of the Conference Resolution (English) Toronto 2006 PDF at http://www.ila-hq.org/en/committees/index.cfm/cid/19). These Recommendations were the product of a four year study by the Commercial Arbitration Committee, which had been commissioned by the International Law Association to look into the issue of *res judicata* in international arbitration. The Committee's Final Report and Recommendations provide some useful guidance to arbitral tribunals on the application of *res judicata* principles within the sphere of international commercial arbitration.

Implications for Policyholders

Insurers are at an advantage in that they will be routinely involved in arbitrations and other dispute resolution processes where decisions are made on the availability of coverage and the application of their policy terms and conditions in relation to particular facts or certain loss scenarios. Common issues of policy interpretation and application can arise where different policyholders are involved. Examples of this would be the application of force majeure and other exclusions following natural disasters and the insurance aggregation issues arising from the attacks on the World Trade Center.

In this type of situation, insurers may seek to rely on awards from earlier arbitrations where the outcome was favourable for insurers as dispositive of issues of facts or law in subsequent proceedings with their policyholders on the grounds that the matters are *res judicata*. Policyholders would be well advised to carefully scrutinise any contention by insurers that certain matters are *res judicata*. There may be considerable scope to argue that the earlier award should not have preclusive effects in the subsequent arbitration. For example, the issue may not have been dispositive in the first dispute, the earlier award may not have been made between the parties or their "privies" and there may be uncertainties as to the application of the *res judicata* doctrine at all, particularly where the first award was issued in a different jurisdiction.

Investment Treaty Arbitration in Africa: Summary Overview

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As with other foreign investments, particularly those in developing countries, investments in Africa are not without risk. Many African countries have executed international investment treaties in an effort to demonstrate their economic stability and to attract foreign investors. Along with exploring other protections, such as political risk insurance, proper investment structuring at the deal formation stage is critical so that investors can take advantage of the benefits of these treaties, including access to international dispute resolution mechanisms.

Of the over 2,500 bilateral and multilateral investment treaties in force worldwide, approximately 300 have been concluded by African states. The majority of African states also have signed and ratified both the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Statistics reflect that these treaties are used in practice—over twenty percent of investor-state claims have or had an African state party involved.

Concluded cases against African states include notable wins and losses by investors. For instance, a tribunal dismissed claims against Algeria, holding that breach of a contract did not amount to indirect expropriation where national laws permitted unilateral termination of a contract by the state upon payment of compensation. In a departure from other cases holding states to a requirement of a high level of protection notwithstanding civil unrest, the tribunal also determined there was no breach of the full protection and security standard because the investor was given the same treatment as nationals and a state's obligations are less substantial during periods of war or strife. *See L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award of 12 November 2008, at paras. 174-182.

Other tribunals, however, have come out in the investor's favour. For example, a tribunal upheld claims by Italian investors that the Egyptian government unlawfully confiscated property intended for a tourist resort and that it failed to meet its fair and equitable treatment obligations as well as its obligation to provide full protection and security to the investment. *See Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Majority Award of 1 June 2009. The tribunal rejected the state's claims that it needed to seize the property for a gas pipeline. Noting that 12 years had passed since the investors' land had been seized and no compensation had been paid, the majority of the tribunal determined the confiscation was unlawful. In addition, the majority noted that the police's failure to protect the investors from illegal seizure of their land, despite the investors' specific request for help, also contributed to a finding of a breach of the Italy-Egypt bilateral investment treaty. In addition to awarding damages for the taking of the property itself, the tribunal found that the claimants were entitled to receive from Egypt the amount of $6 million in legal costs, expert and other expenses.

Other notable decisions relating to African states include *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award of 22 April 2009, and *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008.

In *Funnekotter*, a tribunal determined that the Zimbabwean government breached protections owed to 13 Dutch farmers, who were forcibly evicted from their land without compensation. Although Zimbabwe initially conceded that it was prepared to offer restitution to the landowners, it later insisted that the investors were required to apply for valuation of their property according to Zimbabwean laws. The tribunal rejected this contention. It awarded what it determined to be full market-value compensation calculated as of the date of the taking.

In *Biwater*, a tribunal held Tanzania in breach of several provisions of the UK-Tanzania bilateral investment treaty in relation to Tanzania's treatment of a water-services firm. Despite finding multiple

treaty breaches, the tribunal awarded no damages, citing the bad financial condition of the investor's water project by the time that the Tanzanian government seized the company's assets and deported its local executives.

To protect investments from future problems and to have all options available, current and future investors in Africa or elsewhere around the globe should identify which bilateral or multilateral investment treaties may be available to provide protection. Not all treaties provide the same rights, so the strength of any available treaties needs to be carefully considered. Proper investment planning at an early stage of a project can help to optimize the available tax benefits and protect investments from future problems.
