

Table of Contents

1. Programme
2. K&L Gates London Firm Profile
3. Speaker Biographies
4. Panel 1

Powerpoint Presentation - Corporate Attitudes and Practices in International Arbitration - The School of International Arbitration study
Gerry Lagerberg - PWC

Powerpoint Presentation - When is arbitration the right choice? And not the right one?
John Boos - K&L Gates

The Recorder - Practice Center - Coming To America
Wednesday, September 27, 2006

High Commercial Court of the Russian Federation - Letter of Information
No. 96, dated December 22, 2005

Westlaw - 412 F.Supp.2d 24 - (Cite as: 412 F.Supp.2d 24)

Westlaw - 126 F.3d 15 - (Cite as: 126 F.3d 15)

Powerpoint Presentation - Drafting an Effective Arbitration Clause
Peter Morton - K&L Gates

K&L Gates Arbitration Symposium - Drafting an Effective Arbitration Clause -
Check List of Elements in an Arbitration Clause
Peter Morton - K&L Gates

5. Panel 2

Summary of the Conclusions of the ICC Commission on Arbitration Task Force on "Techniques for Controlling Time and Cost in Arbitration"
K&L Gates

Powerpoint Presentation - Controlling Costs and Reducing Delay
Ian Meredith - K&L Gates

Powerpoint Presentation - Controlling Costs and Reducing Delay
Richard Paciaroni - K&L Gates

Document Disclose in International Arbitration: Innovative Ways to Manage Electronic Documents - April 11, 2007
Martha Dawson - K&L Gates

Powerpoint Presentation - Innovative Ways of Managing Document Disclosure
Martha Dawson - K&L Gates

6. Panel 3

Powerpoint Presentation - The Role of Mediation in Arbitration
William Wood QC - Brick Court Chambers

7. Panel 4

Powerpoint Presentation - Arbitration Chinese - Foreign Business Disputes: The Hong Kong Option
Christopher To - Hong Kong International Arbitration Centre

Brief Overview of Hong Kong Arbitration

Dispute Resolution Services - Hong Kong International Arbitration Centre

Procedures for the Administration of International Arbitration - Hong Kong International Arbitration Centre

The Pre-eminence of Hong Kong in International Commercial Arbitration

Powerpoint Presentation - Dispute Resolution Culture in Asia
Wing Cheung - K&L Gates

Comparing the Effectiveness of Arbitration Clauses and Alternative Dispute Resolution - Provisions in Contracts: Recent Far East Experience
Ian Pennicott QC - Keating Chambers

Hot Issue in Asian Arbitration - Arbitration: Is it Becoming a Process of Last Resort?
Ian Pennicott QC - Keating Chambers

8. Panel 5

UNCTAD - Investment Instruments Online - Bilateral Investment Treaties

Treaty Between United States of America and the Argentine Republic
Concerning the Reciprocal Encouragement and Protection of Investment

The World Bank Group - ICSID Cases - List of Pending Cases

Powerpoint Presentation - Commercial and Other Forms of Political Risk
Insurance

Jane Harte-Lovelace - K&L Gates

Powerpoint Presentation - International Arbitration as a Tool in Effective Risk
Management

Clare Tanner - K&L Gates

Investment Treaties - Taking Advantage of the Protections on Offer
Cross Border Quarterly - July - September 2006

International Arbitration as a Tool in Effective Risk Management

Programme

- 08:30 Registration and Breakfast - Carlyle Suite
- 09:00 Welcome - The Ballroom
Ian Meredith - K&L Gates
- 09:10 **Panel 1 - When is arbitration the right choice?**
- Dr Eberhardt Kuhne - K&L Gates - Chair
Gerry Lagerberg - PWC
Jack Boos - K&L Gates
Peter Morton - K&L Gates
Rocio Peña Echarri - CEMEX
- 10:00 Coffee - Carlyle Suite
- 10:15 **Panel 2 - Controlling costs and reducing delay**
- John Magnin - K&L Gates - Chair
Professor John Uff CBE QC - Keating Chambers
Ian Meredith - K&L Gates
Richard Paciaroni - K&L Gates
David Burt - DuPont
- 11:15 **Innovative ways of managing document disclosure**
Martha Dawson - K&L Gates
- 11:45 Coffee - Carlyle Suite
- 12:00 **Panel 3 - The role of mediation in arbitration**
- Michael S. Greco - K&L Gates - Chair
William Wood QC - Brick Court Chambers
Christopher Lau SC
Matthew Forsyth - Sapient

- 13:00 Lunch - Carlyle Suite
- 14:00 **Panel 4 - Hot issues in Asian arbitration**
- James Hudson - K&L Gates - Chair
Christopher Lau SC
Christopher To - Hong Kong International Arbitration Centre
Wing Cheung - K&L Gates
Ian Pennicott QC - Keating Chambers
David Burt - DuPont
- 15:15 Coffee - Carlyle Suite
- 15:30 **Panel 5 - Managing political risk**
- Ian Meredith - K&L Gates - Chair
Professor Philippe Sands QC - Matrix Chambers
Jorge Carrillo - Legal Manager ENI E&P (Venezuela) SpA
Jane Harte-Lovelace - K&L Gates
Clare Tanner - K&L Gates
- 16:45 Closing comments
Michael S. Greco - K&L Gates
- 16:55 Close
- 17:00 Champagne Reception - Rosebery Room

International Arbitration as a Tool in Effective Risk Management

London – 19 April 2007
Mandarin Oriental Hyde Park Hotel

Corporate counsel from leading companies, arbitrators, representatives of arbitral institutions and arbitration practitioners will explore issues facing executives and corporate counsel with responsibility for managing international arbitrations.

Topics will include:

- When is arbitration the right choice?
- What makes an effective arbitration clause?
- Controlling costs and reducing delay in international arbitration
- Innovative ways to manage document disclosure
- The role of mediation in arbitration
- Hot issues in Asian arbitration
- How to manage political risk, including an overview of the protections offered by Investment Treaties

Panellists will include:

- Corporate counsel from DuPont, Sapient, Eni and CEMEX
- Leading arbitrators and mediators from Europe, the U.S.A. and Asia
- A representative of the ICC Task Force on reducing costs and delay in arbitration
- The Secretary General of the Hong Kong International Arbitration Centre
- PricewaterhouseCoopers — commissioners of a recent survey on corporate attitudes and practices in international arbitration
- Leading counsel from Brick Court Chambers, Matrix Chambers and Keating Chambers, London

K&L | GATES

www.klgates.com

Kirkpatrick & Lockhart Preston Gates Ellis LLP
1400 LAWYERS ON THREE CONTINENTS

Panel 1 - When is arbitration the right choice?

Topics

- Corporate attitudes and practices towards international arbitration
- Update on key influencing factors in deciding whether to arbitrate
- Getting your arbitration clause right

Panel 2 - Controlling costs and reducing delay

Topics

- The recommendations of the ICC Task Force on controlling time and costs in arbitration
- Innovative ways to manage document disclosure

Panel 3 - The role of mediation in arbitration

Topics

- The case for classic mediation by a third-party neutral
- The case for tribunal conciliation

Jack Boos - Partner in K&L Gates' San Francisco office, focusing on U.S. and international business litigation, arbitration and mediation and international claims. Jack has served extensively as both arbitrator and counsel.

David Burt - Corporate Counsel, DuPont, USA. David's practice centres on litigation, international arbitration (in the U.S., Asia and Europe) and other forms of ADR.

Jorge Carrillo - Legal Manager ENI E&P (Venezuela) SpA.

Wing L. Cheung - Consultant to K&L Gates' Hong Kong office focusing on arbitration and litigation and copyright piracy.

Martha Dawson - Partner in K&L Gates' Seattle office. Martha co-leads K&L Gates' unique practice group dedicated to review and management of records, including electronic documents (the e-Discovery Analysis and Technology Group).

Rocio Peña Echarri - International Legal Counsel, CEMEX S.A.B de C.V., Madrid, for Europe, the Middle East and Africa.

Matthew Forsyth - General Counsel, Sapient (Europe).

Michael S. Greco - Partner in K&L Gates' Boston office and the Immediate Past President of the 414,000 member American Bar Association, with extensive experience as trial counsel, arbitrator and mediator.

Jane Harte-Lovelace - Partner and Solicitor Advocate in K&L Gates' London Office. Jane leads the Insurance Coverage Group in the London Office.

James Hudson - Partner in K&L Gates' London office, focusing on construction and engineering related disputes. James is a TeCSA-accredited adjudicator and a CEDR-accredited mediator.

Dr. Eberhardt Kühne - Partner in K&L Gates' Berlin office, focusing on international corporate transactions as well as arbitration and other forms of dispute resolution.

Gerry Lagerberg - Partner in the forensic services team of PricewaterhouseCoopers LLP (London), commissioner of a recent survey on corporate attitudes and practices regarding international arbitration.

Christopher Lau - Senior Counsel, Singapore. Leading arbitrator in the Asia Pacific region, with regular appointments by the ICC, SIAC, LCIA and HKIAC, amongst others.

Panellists

Panel 4 - Hot issues in Asian arbitration

Topics

- An overview of topical issues across the Asia region
- Factors driving the growth of Singapore and Hong Kong as regional centres for arbitration
- Enforcement issues across Asia including within the PRC
- The Asian dispute resolution culture

John Magnin - Partner and Solicitor Advocate in K&L Gates' London office. John leads the firm's UK Dispute Resolution & Litigation Practice Group.

Ian Meredith - Partner in K&L Gates' London office and the firm's Arbitration Group. Ian is a Fellow of the Chartered Institute of Arbitrators and a CEDR-accredited mediator.

Peter Morton - Partner in K&L Gates' London office, focusing on commercial arbitration and litigation, and member of the Chartered Institute of Arbitrators.

Richard Paciaroni - Partner in K&L Gates' Pittsburgh office, focusing on construction litigation and arbitration.

Ian Pennicott QC - Member of Keating Chambers (London), specialising in construction, engineering, energy and professional negligence work in the U.K. and abroad, particularly in the Far East. Mr. Pennicott is a member of the Chartered Institute of Arbitrators, and accredited adjudicator and member of the Hong Kong Bar.

Professor Philippe Sands QC - Member of Matrix Chambers (London), Professor of Law and Director of the Centre of International Courts and Tribunals at University College London. Professor Sands has acted for Claimant and Respondent in many ICSID and investment disputes and is listed on the ICSID Panel of Arbitrators.

Panel 5 - Managing political risk

Topics

- A review of the growth of ICSID / Investment Treaty Arbitration
- A claimant's perspective on Investment Treaty claims
- Commercial and other forms of political risk coverage
- How to structure deals to take advantage of Investment Treaty protection

Clare Tanner - Associate in K&L Gates' London office, focusing on commercial litigation and arbitration, and a member of the Chartered Institute of Arbitrators.

Christopher To - Secretary-General, Hong Kong International Arbitration Centre.

Professor John Uff CBE QC - Member of Keating Chambers (London), a Vice-President of the London Court of International Arbitration and President of the Society of Construction Arbitrators. Professor Uff is a member of the ICC Task Force on Reducing Time and Costs in Arbitration.

William Wood QC - Member of Brick Court Chambers (London) and a leading commercial, CEDR-accredited mediator.

Schedule

- 08:30 Registration (coffee/pastries)
- 09:00 Welcome - Ian Meredith
- 09:10 *Panel 1 - When is arbitration the right choice?*
- 10:00 Coffee
- 10:15 *Panel 2 - Controlling costs and reducing delay*
- 11:15 Innovative ways of managing document disclosure - Martha Dawson
- 11:45 Coffee
- 12:00 *Panel 3 - The role of mediation in arbitration*
- 13:00 Lunch
- 14:00 *Panel 4 - Hot issues in Asian arbitration*
- 15:15 Coffee
- 15:30 *Panel 5 - Managing political risk*
- 16:45 Closing comments - Michael S. Greco
- 16:55 Close
- 17:00 Champagne Reception



Registration

Please indicate if you wish to join in person or via webcast by sending an e-mail to eventslo@klgates.com or by telephoning Kathie Lowe at +44 (0)20 7360 8248.

Alternatively you can register online by visiting the Events page at www.klgates.com.

5.5 CPD points available

Webcast

With access to an Internet-enabled PC and telephone line you will be able to join any of our sessions in real-time. You can listen to the panel members as they give their presentations, follow their Powerpoint slides on screen and email questions or comments to put to the speakers. You will have online access to our delegate pack, enabling you to download notes or contact details that are of particular interest to you or your business.

K&L | GATES

K&L Gates comprises approximately 1,400 lawyers in 22 offices located in North America, Europe and Asia, and represents capital markets participants, entrepreneurs, growth and middle market companies, leading FORTUNE 100 and FTSE 100 global corporations and public sector entities. For more information, please visit www.klgates.com.

K&L Gates comprises multiple affiliated partnerships: a limited liability partnership with the full name Kirkpatrick & Lockhart Preston Gates Ellis LLP qualified in Delaware and maintaining offices throughout the U.S., in Berlin, and in Beijing (Kirkpatrick & Lockhart Preston Gates Ellis LLP Beijing Representative Office); a limited liability partnership (also named Kirkpatrick & Lockhart Preston Gates Ellis LLP) incorporated in England and maintaining our London office; a Taiwan general partnership (Kirkpatrick & Lockhart Preston Gates Ellis) which practices from our Taipei office; and a Hong Kong general partnership (Kirkpatrick & Lockhart Preston Gates Ellis, Solicitors) which practices from our Hong Kong office. K&L Gates maintains appropriate registrations in the jurisdictions in which its offices are located. A list of the partners in each entity is available for inspection at any K&L Gates office.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

Data Protection Act 1998—We may contact you from time to time with information on Kirkpatrick & Lockhart Preston Gates Ellis LLP seminars and with our regular newsletters, which may be of interest to you. We will not provide your details to any third parties. Please e-mail london@klgates.com if you would prefer not to receive this information.

©1996-2007 Kirkpatrick & Lockhart Preston Gates Ellis LLP. All Rights Reserved.

London Office

Our principal practice areas in London include corporate finance, real estate, finance, construction, tax, insurance coverage, intellectual property, technology, and dispute resolution.

Our corporate finance group handles a wide range of transactions from start-ups to the largest and most complex transactions. We are involved in all aspects of fund raising, whether in the form of debt or equity, for institutions, as well as for companies and management. The group is dedicated to providing focused, cutting-edge legal advice to ensure that transactions are completed on time, on the right terms and at a sensible cost. We have extensive experience advising on all aspects of M&A transactions as well as on corporate finance deals on both the full list and the AIM market. Our tax group participates in structuring tax-efficient approaches to client transactions and effective executive and employee incentive schemes.

Our real estate group, recognized as one of the leading advisers in the UK property sector, offers a comprehensive and integrated portfolio of legal services. We have played a significant role in some of the largest and most complex property deals of recent times. The group has a wealth of experience covering not only mainstream property work, both transactional and advisory, but also strategic and practical advice on corporate and joint venture aspects, the financing of transactions, tax structures, construction issues (contentious and non-contentious), planning and environmental issues and dispute resolution.

Our finance group has a widely acknowledged excellent reputation for its advice to banks and borrowers on all aspects of mainstream lending and commercial real estate financing. Our work ranges from advising on straightforward bilateral and syndicated facilities through to transactions involving highly complex vehicles, structures and financing techniques.

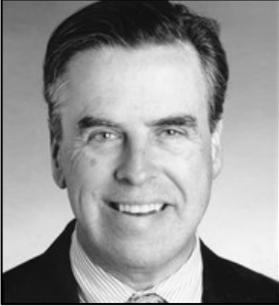
The construction and engineering group at the London office is at the forefront in delivering up to the minute legal and strategic advice. Our clients include national governments and local authorities, international property developers, major contractors, global construction organizations, individual manufacturers, insurance companies, investment management groups and commercial enterprises of every description. Our work also includes PFI/PPP projects, for both the public and private sectors and many of the largest investment groups, in which we provide high caliber legal advice in our role as appointed advisers to their investment and contracting teams.

Our intellectual property and technology practice group has extensive experience in the spectrum of fast-evolving IP issues including trademarks and passing-off, copyright, patents, designs, parallel imports, data protection, database rights, merchandizing rights, technology transfer and IP licensing. We advise clients in new and developing technologies such as e-business, WAP and a wide range of internet, intranet and website protection and enforcement issues including build agreements, hypertext linking, domain name registration and action against cybersquatters. We have recently advised on a large number of next-generation internet technologies, several of which are set to revolutionize the industries they serve. The group has a well deserved market leading reputation in sport and media related matters.

Our dispute resolution and litigation group has established an enviable reputation in dealing with all aspects of adjudication, domestic and international arbitrations, alternative dispute resolution and commercial litigation. The group advises on disputes in the banking, construction, employment, insolvency, planning and environment, private client trusts and offshore, property, sport and travel and leisure sectors. Our insurance coverage lawyers have extensive experience in presenting insurance coverage claims in the London Insurance Market and beyond. Insurance coverage lawyers in the firm's other offices also have extensive knowledge of the London Market and its structure, providing clients with a real advantage in litigation, arbitration and settlement of their disputes.

Speaker Biographies

Jack Boos	K&L Gates
David Burt	DuPont
Wing Cheung	K&L Gates
Martha Dawson	K&L Gates
Rocio Peña Echarri	CEMEX
Matthew Forsyth	Sapient
Michael S. Greco	K&L Gates
Jane Harte-Lovelace	K&L Gates
James Hudson	K&L Gates
Dr. Eberhardt Kühne	K&L Gates
Gerry Lagerberg	PWC
Christopher Lau SC	
John Magnin	K&L Gates
Ian Meredith	K&L Gates
Peter Morton	K&L Gates
Richard Paciaroni	K&L Gates
Ian Pennicott QC	Keating Chambers
Professor Philippe Sands QC	Matrix Chambers
Clare Tanner	K&L Gates
Christopher To	Hong Kong International Arbitration Centre
William Wood QC	Brick Court Chambers
Professor John Uff CBE QC	Keating Chambers



John L. Boos

AREAS OF PRACTICE

Jack Boos is a partner in K&L Gates' San Francisco office and co-chair of the firm's Arbitration practice group. His practice focuses on domestic and international business litigation, arbitration and mediation, investigations, construction, international expropriation and other claims, insurance coverage, intellectual property, employment, products and financial services. He is a veteran trial lawyer with numerous court and jury trials and arbitrations.

SAN FRANCISCO OFFICE

415.882.8005 TEL

415.882.8220 FAX

jack.boos@klgates.com

Mr. Boos has participated in various international proceedings and dispute resolution including representation of expropriation claimants against the Islamic Republic of Iran in the Iran-U.S. Claims Tribunal in The Hague. He also has appeared before the United Nations Compensation Commission in Geneva with respect to Gulf War claims against Iraq. He has spoken widely in the United States, Europe, Asia, and Australia on litigation, arbitration, construction, environmental and insurance coverage topics.

In 2006, Mr. Boos was invited by the Russian-American Rule of Law Consortium to speak to a conference of Russian jurists in Yuzhno-Sakalinsk Russia on the recognition and enforcement of foreign arbitral awards.

In addition to his experience as an advocate in various forms of dispute resolution, Mr. Boos has extensive service as an Arbitrator, Early Neutral Evaluator and Settlement Master including appointments by state and federal courts in California and by the Private Adjudication Center of Duke University.

His community service activities include leadership in youth sports in the San Francisco Bay Area, where he served eight terms as president of North Oakland Little League Baseball, and as a member of the Mayor's Sports Advisory Council.

PROFESSIONAL BACKGROUND

Before joining K&L Gates, Mr. Boos practiced in the San Francisco office of two other national firms where he was a partner and head of the litigation group. Prior to entering private practice he was Counsel and Legislative Assistant to a Member of Congress, Counsel to the U.S. House of Representatives Committee on Armed Services, and Counsel to the House of Representatives Select Committee on Intelligence to Investigate the Activities of the U.S. Intelligence Community.

PUBLICATIONS

- "Coming to America" (recognition and enforcement of foreign arbitral awards), *The Recorder*, Cal-Law, September 27 2006

PROFESSIONAL/CIVIC ACTIVITIES

- Bar Association of San Francisco
- American Bar Association

John L. Boos

COURT ADMISSIONS

- California Supreme Court
- U.S. Court of Appeals, Federal Circuit
- U.S. Court of Appeals, Ninth Circuit
- U.S. District Court for the Central District of California
- U.S. District Court for the Eastern District of California
- U.S. District Court for the Northern District of California
- U.S. District Court for the Southern District of California

BAR MEMBERSHIPS

California
District of Columbia

EDUCATION

J.D., Georgetown University
B.A., University of Dayton

REPRESENTATIVE/SIGNIFICANT MATTERS

- Represented Taiwan high-tech firm in infringement and unfair competition dispute
- Represented media firm in securities arbitration with communications conglomerate
- Represented joint ventures and exporters in disputes with Chinese, Swedish and U.S. entities for foodstuff damaged in People's Republic of China and stolen in Russia, including actions in Swedish, Chinese and California tribunals
- Represented two investor groups of expropriation claimants against the Islamic Republic of Iran in Iran-U.S. Claims Tribunal in The Hague, The Netherlands involving industrial park in Kermanshah
- Represented Mid East based internationally renowned collector of ancient Islamic art against Iraq in United Nations Compensation Commission, Geneva for theft of collection by Saddam and Uday Hussein
- Represented international art collector in dispute with European government over ownership of cultural artifacts
- Represented high-tech firm in Peoples Republic of China in action brought by U.S. investors
- Represented international joint venture in construction defect litigation involving commercial office park
- Lead attorney in prosecution of electrical change order claims by Asian construction company against Caribbean power authority in connection with erection of power plants
- Represented U.S. vessel owner against German component manufacturer in pilot project for incineration of toxic wastes at sea
- Represented German ship component manufacturer in U.S. Coast Guard inquiry into fire on cruise ship

John L. Boos

- Represented state government in defense of False Claims Act action brought by the federal government
- Represented state government agency in high-profile civil rights litigation involving death of mental health facility patient while being restrained
- Represented U.S. pharmaceutical company for transit damage to experimental South American rain forest ingredients for proposed product in clinical trials
- Defended wine industry consortium in California private attorney general Proposition 65 case alleging non-disclosure of lead in wine and in foil bottle wrappers
- Led the defense of a series of environmental cost-recovery actions against a major oil company. These actions involve claims for substantial cleanup costs in environmentally-sensitive sites as well as damages sought by developers for loss of use and diminution in value
- Represented a multi-national food distribution company in a trademark infringement dispute against a Swiss corporation
- Represented distributor and co-joint venturer in U.S. District Court action against Italian manufacturer of high tech mountaineering equipment for trade name infringement and intellectual property issues

David H. Burt
E. I. du Pont de Nemours and Company
Wilmington, Delaware USA



David H. Burt presently serves as Corporate Counsel to the DuPont Company. After a Vale Clerkship with the Supreme Court of Delaware in 1984, Mr. Burt practiced privately as a trial attorney. Since joining DuPont in 1995, he has been a member, and then leader, of the company's trial team in the Delaware courts. Since 1999, his practice has centered on commercial litigation, with special emphasis on international arbitration and other forms of alternative dispute resolution. As both "first-chair" trial counsel and collaborator with outside counsel, he has arbitrated in the US, Asia and Europe under the laws of several countries and various rule schemes. Most recently, Mr. Burt has been active in commercial plaintiff recovery actions, and in developing the Promoting Recoveries module of the DuPont Legal Model. He lives in Delaware with his wife Audrey Whiteside and two teenaged sons.



Wing L. Cheung

AREAS OF PRACTICE

Mr. Cheung is a consultant in the K&L Gates' Hong Kong office. Mr. Cheung's main area of practice is commercial litigation, with emphasis on shareholders and partnership disputes, trademark and copyright infringement, as well as employment matters. He also advises clients in relation to disciplinary and other proceedings before statutory tribunals.

Mr. Cheung was a public prosecutor for the Hong Kong government. He advised the Hong Kong police and other law enforcement agencies on criminal prosecutions and conducted trials and appeals in all levels of Hong Kong courts. He was also an administrative assistant to the Secretary for Justice of Hong Kong, where he was responsible for coordinating policy and other matters among government bureaus and external bodies of the Hong Kong government.

Immediately prior to joining K&L Gates, Mr. Cheung was a law draftsman in the Department of Justice of Hong Kong. He drafted legislation in both English and Chinese and regularly attended meetings of the Executive Council and Legislative Council of Hong Kong. He drafted legislation governing sports betting, the office of the Chief Executive Officer of the Securities and Futures Commission, and the prohibition of smoking in indoor public places and workplaces, among others.

For more than 10 years, Mr. Cheung has been a guest presenter on popular radio phone-in shows. He also produces short radio segments to promote the public knowledge of law.

PROFESSIONAL/CIVIC ACTIVITIES

- Member, School-Based Management Legal Advisory Panel, Education and Manpower Bureau, Hong Kong Government
- Council Member, Hong Kong Young Legal Practitioners Association

BAR MEMBERSHIPS

England
Hong Kong
Wales

EDUCATION

PCBA, Open University of Hong Kong, 2005 (Outstanding Student)
Advocacy Training Course, Middle Temple Advocacy, London, 1998
Course on Chinese Law, Fudan University, Shanghai, 1996
P.C.LL., University of Hong Kong, 1991
LL.B., University of Hong Kong, 1990

LANGUAGES SPOKEN

Mandarin, Cantonese

HONG KONG OFFICE

+852 2511 5100 TEL

+852 2511 9515 FAX

wingl.cheung@klgates.com



Martha J. Dawson

AREAS OF PRACTICE

In her 20 plus years of practice, Ms. Dawson has focused on commercial and complex litigation. As a former trial attorney, Ms. Dawson understands the important role that document requests, proper document production, and the management of documents play in litigation. Since 1997, Ms. Dawson's practice has focused on document-intensive litigation, allowing her to develop and expand skills in managing large document cases, including, specifically, electronic discovery.

Ms. Dawson co-leads K&L Gates' unique practice group dedicated to document review. That group, the E-Discovery Analysis and Technology Group (E-DAT Group), consists of more than one hundred lawyers and non-lawyer professionals. The group uses systematic processes and advanced technology to provide efficient document review legal services, especially with regard to electronic documents. These services have been extensively utilized in nationally prominent complex litigation.

Ms. Dawson has actively participated in the discussions regarding the proposed amendments to the Federal Rules of Civil Procedure. She is a member of the Lawyers for Civil Justice, and is also a frequent speaker and author on electronic discovery issues.

Ms. Dawson has worked on the design of several litigation support relational databases, served as a consultant in the development of the firm's Client Services Extranet sites, and worked closely with Attenex Corporation in the development of its Attenex Patterns™ E-Discovery Platform, an advanced technology document mapping software tool.

BAR MEMBERSHIPS

Washington

EDUCATION

J.D., University of Puget Sound/Seattle University, 1981 (magna cum laude)
B.A., University of Washington, 1978 (cum laude)

SEATTLE OFFICE

206.370.7980 TEL

206.370.6043 FAX

martha.dawson@klgates.com



Rocio Peña Echarri

Mrs. Peña works as in-house legal counsel of CEMEX in the EMEA region.

Mrs. Peña took a Law Degree with Business Administration diploma in ICADE University in Madrid. Immediately upon finishing her degree, she joined CEMEX in the framework of the Young Manager Training Programme in 1998, and after several months of training and rotation, she joined the International Legal Department . Her main lines of work included company and commercial law, mergers and acquisitions focused in the EMEA region.

After five years, she was sponsored by CEMEX to take an LL.M. at the London School of Economics, with her courses focused on shipping/trading law and international commercial transactions.

On her return to CEMEX, took additional responsibilities and has been focusing her work for the past few years on international shipping/commodities contracts and arbitration.

Matthew S. Forsyth

Matt Forsyth is currently Director, Legal and Assistant General Counsel, Europe and Asia for Sapient Corporation. Based in Sapient's London office, Matt is responsible for Sapient's Legal & Commercial Team and legal matters outside of North America, focusing on the UK, continental Europe and India. In earlier, US-based roles Matt has acted as Sapient's securities counsel, global employment counsel and industry counsel (commercial contracting).

Before joining Sapient Matt was Senior Corporate Counsel for Modus Media, of Westwood, Massachusetts, where he focused on mergers & acquisitions and other corporate matters. Prior to Modus Media Matt was in private practice with the Boston-based law firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., where he practiced in both the corporate and employment law groups.

Matt is a graduate of Harvard College and Boalt Hall School of Law, University of California, Berkeley.



Michael S. Greco

AREAS OF PRACTICE

Mr. Greco, the Immediate Past President of the 413,000-member American Bar Association, has more than thirty-five years of litigation and arbitration experience in business, employment and other matters, and has served as trial counsel, arbitrator and mediator in complex business disputes.

PROFESSIONAL BACKGROUND/CIVIC ACTIVITIES

ABA Presidency – Mr. Greco served as President of the American Bar Association in 2005-06. The over-arching theme of his term of office was renaissance – a rebirth and reaffirmation of the legal profession's core values and America's constitutional principles. His priorities as President included protecting the rights and freedoms of American citizens, safeguarding the independence of the judiciary and other institutions of America's democracy, addressing the legal needs of lower-income citizens, advancement of women, people of color and persons with disabilities in the legal profession, and improvements to the Association and the legal profession. During his term of office he created two ABA Commissions, five ABA Task Forces, and several Special Committees to implement his presidential initiatives and address issues of concern to the public and the legal profession.

His *ABA Commission on a Renaissance of Idealism in the Legal Profession*, co-chaired by US Supreme Court Associate Justice Ruth Bader Ginsburg and Theodore C. Sorensen, helped re-invigorate lawyers' historical commitment to providing pro bono legal services to those in need and volunteering public service in communities throughout America. Through the Commission's substantial efforts, a renaissance of idealism took hold in the legal profession and, with the collaboration of state and other bar associations across America, will continue to grow for the benefit of all.

His *ABA Commission on Civic Education and the Separation of Powers*, co-chaired by US Supreme Court Associate Justice Sandra Day O'Connor and former US Senator Bill Bradley, addressed the troubling but reliably documented fact that approximately half of Americans do not know the basics about their constitutional democracy due to lack of adequate civics education and therefore are not knowledgeable enough to protect vigorously the institutions of their democracy, particularly an independent judiciary. The Commission is continuing its efforts during the 2006-07 Association year, with the enthusiastic leadership and participation of Justice O'Connor and Senator Bradley and their Commission colleagues, to effect change in civics education policy in the fifty states.

In concert with the important civics education efforts of the *ABA Commission on Civic Education and the Separation of Powers*, he selected as the theme of Law Day “*Liberty under Law – Separate Branches, Balanced Powers*,” and appointed as Chair of Law Day 2006 Peter J. Kalis, Chairman and Managing Partner of Kirkpatrick & Lockhart Nicholson Graham [now K&L Gates]. Law Day, a national day set aside to celebrate the rule of law and the freedoms it ensures to all in America, was established by President

BOSTON OFFICE

617.261.3232 TEL

617.261.3175 FAX

michael.greco@klgates.com

Michael S. Greco

Eisenhower in 1958 at the suggestion of then ABA President Charles S. Rhyne. Under Mr. Kalis' able leadership, hundreds of Law Day programs for young and adult Americans were conducted in communities and schools across the country to underscore the importance of the separation of powers in our democratic government and to remind all that democracy will not long survive without a knowledgeable public that zealously protects it.

He appointed the *ABA Task Force on Access to Civil Justice*, chaired by Maine Supreme Judicial Court Associate Justice Howard Dana, Jr., to consider an idea whose time has come in America: providing desperately needed legal services to millions of poor Americans, 70-80% of whose legal needs annually go unmet, through a new paradigm – the creation and recognition of a civil right to counsel – or “*Civil Gideon*” -- paid by the state, in certain serious legal problems that threaten one's basic human needs, including family, shelter, and health. Such a right currently exists in numerous civilized nations and has existed in the US for indigents facing criminal charges since the 1963 US Supreme Court decision in *Gideon v. Wainwright*.

At the August 2006 Annual Meeting in Honolulu the ABA's 550-member House of Delegates adopted new policies implementing all the recommendations of the *Renaissance* and *Civic Education Commissions* and the *Task Force on Access to Civil Justice*. In an historic vote for the Association, legal profession and society, the House voted unanimously to support creation of a defined civil right to counsel for America's poor.

He also appointed the *ABA Task Force on Hurricane Katrina* as that hurricane was still raging in order that the legal profession could provide free legal services to victims of *Katrina* and other hurricanes that devastated the Gulf States in the fall of 2005. The Task Force coordinated an unprecedented effort by thousands of America's lawyers to provide desperately needed free legal services to tens of thousands of hurricane victims.

The *ABA Task Force on the Attorney-Client Privilege* that he reappointed with an expanded membership continued to lead the Association's efforts vigorously to oppose the US Department of Justice's assault on American citizens' attorney-client privilege and to protect the bedrock right of Americans to representation by counsel, without federal government interference or coercion, as guaranteed by the Fifth and Sixth Amendments to the US Constitution. At the Hawaii Annual Meeting the ABA House of Delegates adopted new strong policies protecting the privilege and work product doctrine and opposing the Justice Department's efforts to erode them.

During his presidency he also appointed two bi-partisan, blue-ribbon task forces – the *ABA Task Force on Domestic Surveillance in the Fight against Terrorism*, and the *ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* – both comprised of distinguished constitutional scholars and former government leaders and judges, to protect Americans' constitutional rights, the doctrines of separation of powers and checks and balances, and America's democratic form of government.

Michael S. Greco

The *Task Force on Domestic Surveillance* carefully considered the US government's troubling program of spying on American citizens and issued a unanimous report and unanimous recommendations urging the President to respect the roles of Congress and the Judiciary, and to comply with the Constitution and existing federal laws, and urged immediate corrective action by Congress and the Courts. The ABA House of Delegates at its February 2006 Midyear Meeting in Chicago adopted the bi-partisan Task Force's recommendations by a near-unanimous vote.

The *Task Force on Presidential Signing Statements* thoroughly considered the use, and misuse, by a President of "signing statements" that indicate a President's intention, despite signing them, not to enforce new laws enacted by Congress. The bi-partisan Task Force issued a unanimous report with unanimous recommendations concluding that such misuse by a President of signing statements violates the Constitution, encroaches unlawfully on the powers of Congress, and poses a direct and grave threat to the separation of powers doctrine and the system of checks and balances that have sustained our democracy for more than two centuries. The Task Force urged immediate legislative action by Congress and judicial review by the Supreme Court of the United States to resolve the serious constitutional issues presented. At the August 2006 Annual Meeting in Honolulu the ABA House of Delegates adopted the Task Force's recommendations by an overwhelming vote.

During his presidency he also encouraged and supported two unprecedented, major diversity conferences, one sponsored by the *ABA Commission on Racial and Ethnic Diversity* and other partners that addressed the imperative of ensuring the flow of young people of color in the pipeline to the legal profession, and the other sponsored by the *ABA Commission on Mental and Physical Disability Law* and other partners that addressed the employment needs of lawyers with physical and mental disabilities.

He also supported efforts of the *Commission on Women in the Profession* to ensure the continued advancement of women in the legal profession, particularly women of color whose discrimination and professional plight was documented in a several years-long unprecedented survey and final report released at the Association's August Annual Meeting in Honolulu.

He also encouraged and directed the *ABA Commission on Immigration Law* to develop new Association policies to help address the situation of America's twelve million undocumented immigrants. As stated by Congressional leaders, the Commission's report and recommendations, which were overwhelmingly approved by the House of Delegates at the February Midyear Meeting, are helping Congress craft appropriate legislation. He also created, and appointed the boards of directors of, three new ABA legal centers.

The *ABA Center for Racial and Ethnic Diversity* was created to consolidate and coordinate the Association's many diversity programs. The *ABA Center for Rule of Law Initiatives* was created to consolidate and enhance the Association's growing and increasingly important international rule of law programs in Africa, Asia, Central Europe/Eurasia, and Latin America, which provide legal technical assistance and training

Michael S. Greco

to emerging democracies in more than forty countries on five continents, including former republics of the Soviet Union. The *ABA Resource Center for Access to Justice Initiatives* will assist efforts throughout the United States to improve ways by which legal services are delivered to our nation's poor, and to help implement a defined civil right to counsel, or “Civil *Gideon*.”

He encouraged, supported and helped implement an historic conference that the ABA in partnership with other organizations held in Washington, DC in November 2005 that had been planned for two years – the first ever and highly successful *ABA International Rule of Law Symposium*. It was attended by more than 400 lawyers, judges, academicians and world leaders from more than 40 nations on five continents to develop strategies for advancing the rule of law and justice throughout the world.

In his effort to unify the legal profession throughout the world to advance and protect the rule of the law in all nations, at a Paris conference of world bar leaders in November 2005 he authored and thereafter advocated the adoption and ratification of a *Statement of Core Principles* of the legal profession. The *Statement* was adopted unanimously by the one hundred world bar leaders in Paris, at his request by the American Bar Association House of Delegates at its Midyear Meeting in February 2006, and since then by dozens of bar groups throughout the world.

During his term as ABA president he negotiated and executed on behalf of the Association “collaboration” agreements between the ABA and the national bars of China, Russia and Japan, in order to provide for mutually beneficial exchanges of lawyers, legal knowledge and expertise, to conduct joint legal education programs, and to advance justice and the rule of law in our respective nations.

As a result of the year-long efforts and final report and recommendations of the special *ABA Long Range Planning Committee* that he appointed when he took office, the ABA Board of Governors in June 2006 unanimously adopted the first *Strategic Plan* in the Association's history and approved creation of the Association's first permanent *Long Range Planning Committee*.

He appointed the *ABA Executive Director Search Committee* which conducted a year-long national search for the Association's new Executive Director, Henry F. White, Jr., who took office on September 1, 2006.

As ABA President he traveled on more than 300 of his 365 days in office to every part of the United States, including forty-five states, Washington D.C. and Puerto Rico, and to approximately thirty nations, delivered more than 275 speeches, testified before Congressional committees and met with hundreds of government leaders abroad and in the US, lawyers and judges, bar associations and civic groups, and thousands of persons throughout the world.

Michael S. Greco

In addition to serving as its President, Mr. Greco has long been active in the American Bar Association, including serving on the Board of Governors, in the House of Delegates for more than twenty years, and as the elected ABA State Delegate from Massachusetts during 1993-2004. He chaired the Association's *Standing Committee on Federal Judiciary*, the *Section of Individual Rights & Responsibilities*, the *Executive Committee of the Conference of State Delegates*, the *Steering Committee of the Nominating Committee*, the *ABA Day in Washington Planning Committee*, and other committees. Following the September 11, 2001 terrorist attacks in the US, he served on the *ABA Task Force on Terrorism and the Law*, and helped develop ABA policies relating to the imperative of balancing national security and constitutional freedoms so that both are protected.

Mr. Greco is a member of the American Law Institute.

Massachusetts/New England Professional Activities – Mr. Greco served as president of the Massachusetts Bar Association, the New England Bar Association, the New England Bar Foundation and the Board of Trustees of Massachusetts Continuing Legal Education. As MBA president, among other initiatives, he and the Governor appointed a blue-ribbon *Commission on the Unmet Legal Needs of Children*, whose report and recommendations led to enactment of new statutes protecting the legal rights of children. He chaired the first-in-the-nation *Massachusetts Legal Needs for the Poor Assessment and Plan for Action*, and was co-founder and for seven years co-chair of *Bar Leaders for the Preservation of Legal Services for the Poor*, a national grassroots organization that helped preserve the Legal Services Corporation in the 1980s and early 1990s. By appointment of the Justices of the Massachusetts Supreme Judicial Court he chaired the Court's *Special Committee on Pro Bono Legal Services* in the late 1990s.

He served for eight years on Gov. William W. Weld's *Massachusetts Judicial Nominating Council*, and in 1993-94 served on Senator Edward M. Kennedy and Senator John F. Kerry's *Special Commission on Federal Judicial Appointments* that recommended candidates for vacancies on the federal bench, US Attorney and US Marshal. He also served as Vice-Chair of the *Board of Bar Overseers of the Massachusetts Supreme Judicial Court*, and on the *Board of Overseers of the Newton-Wellesley Hospital*.

Mr. Greco served as Special Counsel by appointment of, and to, the Justices of the Massachusetts Supreme Judicial Court and the Board of Bar Overseers in *United States v. Klubock*, and as Special Assistant Attorney General of the Commonwealth of Massachusetts in the *Dorchester Court* case.

He is a member of the Board of Directors of the New England (Business) Council, and during 1998-2004 served as Chair of the ground breaking *Creative Economy Initiative*, a regional economic/cultural development effort designed to attract investment in New England's Creative Economy.

Michael S. Greco

He clerked for the Hon. Leonard P. Moore on the U.S. Court of Appeals for the Second Circuit, and held an academic Fellowship at the University of Florence Law Faculty in Italy. Prior to law school he taught English at Phillips Exeter Academy in Exeter, N.H.

PRESENTATIONS/PUBLICATIONS

As a lecturer and writer Mr. Greco has addressed issues of trial practice, employment law, environmental law, professional malpractice, legal ethics, and arbitration, and for two years served as President of the Board of Trustees of Massachusetts Continuing Legal Education, Inc.

During his term as President of the American Bar Association, Mr. Greco delivered speeches to audiences throughout the US and abroad that may be accessed on the K&L Gates web site at www.klgates.com.

COURT ADMISSIONS

- Supreme Judicial Court of Massachusetts and all Massachusetts state and federal courts
- Supreme Court of the United States
- U.S. Court of Appeals for the First Circuit
- U.S. Court of Appeals for the Armed Forces
- U.S. District Court for the District of Massachusetts
- United States Tax Court

BAR MEMBERSHIP

Massachusetts

EDUCATION

J.D., Boston College Law School, 1972 (Editor in Chief, *Boston College Law Review*)
A.B., Princeton University, 1965

**LONDON**

+44 (0)20 7360 8172 TEL

+44 (0)20 7648 9001 FAX

jane.harte-
lovelace@klgates.com

Jane Harte-Lovelace

AREAS OF PRACTICE

Ms. Harte-Lovelace is a partner and solicitor advocate in the Litigation & Dispute Resolution practice group. She is involved in all aspects of commercial dispute resolution including litigation, arbitration and mediation.

Ms. Harte-Lovelace concentrates her practice in the insurance coverage group, advising corporate policyholders on wording and coverage issues, both before and after claims. She speaks regularly on insurance related issues, always from the perspective of the policy holder.

For over 20 years she has advised in the areas of international, commercial and banking disputes including international asset tracing and fraud related cases. In addition, her practice encompasses insurance coverage claims, property, partnership and shareholder disputes, commercial fraud, professional indemnity claims and all types of injunctive remedy.

Ms. Harte-Lovelace regularly acts for high-worth individuals in family and trust litigation where discretion and sensitivity to the stresses of litigation that the parties are undergoing are key strengths.

PROFESSIONAL BACKGROUND

Ms. Harte-Lovelace qualified as a lawyer in 1983. She joined the firm in 1993 having previously trained and been a partner at another City law firm.

PUBLICATIONS

- "Insurance Coverage Disputes: Crossing the Atlantic", *Cross-Border Quarterly*, January-March 2006
- "Insurance: Keeping it Covered", *Legal Week*, March 3, 2005

PRESENTATIONS

Speaker at Mealey's Asbestos Liability Forum, 17-18 November 2005

EDUCATION

Law School Finals, College of Law, Guildford, 1981
LLB, University of Exeter, 1979

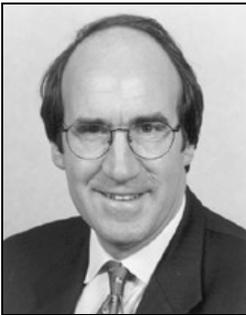
REPRESENTATIVE MATTERS

Recent work includes:

- Advising on D&O, business interruption and product liability insurance claims
- Advising a major listed company in relation to claim against professional advisers for negligence and negotiating terms of settlement.

Jane Harte-Lovelace

- Advising a wealthy individual in relation to various disputes with family members including Section 459 petition.
- Advising a major bank in relation to Enron related claim against another bank.
- Advising a property company on strategy for site clearance prior to major redevelopment.
- Advising a bank and co-ordinating litigation brought against it in several jurisdictions arising out of loan and guarantee.
- Advising listed company on insurance programme.
- Successfully acting for Respondents in arbitration arising from partnership dispute.
- Successfully acting for Claimant in trial concerning validity of break notice

**LONDON OFFICE**

+44 (0)20 7360 8150 TEL

+44 (0)20 7648 9001 FAX

james.hudson
@klgates.com

James J. S. Hudson

AREAS OF PRACTICE

Mr. Hudson is a partner in the Dispute Resolution and Litigation practice group focusing on construction and engineering related disputes. He has extensive experience of litigation, arbitration and other forms of alternative dispute resolution including mediation and adjudication (both as lawyer and adjudicator). His practice has included representing building owners, contractors, sub-contractors and professionals in connection with a variety of multi-million pound projects involving the design and construction of office buildings, hotels, hospitals, public buildings, apartment blocks, gas platforms, oil rigs, liquefaction plants, waste to energy plants, sewage disposal plants and major infrastructure projects.

PROFESSIONAL BACKGROUND

Mr. Hudson joined K&L Gates as a partner in 1998. Prior to joining K&L Gates Mr. Hudson was a partner at a large London law firm for over thirteen years after having worked there as an assistant lawyer for five years. Prior to this Mr. Hudson also practiced as a barrister for five years.

PROFESSIONAL/CIVIC ACTIVITIES

- Past Chairman of the Technology & Construction Solicitors Association (TeCSA), (Vice-President)
- International Bar Association, (Member)
- Society of Construction Law, (Member)
- TeCSA, (Accredited adjudicator)
- CEDR, (Accredited mediator)
- Recommended as a "Leading Individual" in Chambers 2007.

EDUCATION

Law School Finals, College of Law, 1977

Bar Finals, Council of Legal Education, 1972

LLB, Kings College London, 1971

REPRESENTATIVE ENGAGEMENTS

- Acted for a mechanical and electrical sub-contractor, Haden Young, in proceedings in the Technology and Construction Court (TCC) in relation to a multi-million pound claim against Bovis Lend Lease, a contractor, for the cost of mechanical works in connection with the White City Development for the BBC.
- Acted for a contractor, Costain Skanska Joint Venture in various disputes with the employer, the electrical and the mechanical sub-contractors involving both adjudications and proceedings in the TCC concerning the major refurbishment of the Great Western Royal Hotel now the Hilton Hotel, Paddington.
- Acted for a civil and structural engineering contractor, O'Rourke Civil Engineering, in proceedings in the TCC against Bovis Lend Lease, a contractor, in relation to sums due under a series of contracts of a value of some £30m for site roads, car parks, hard landscaping, substructure and super structure works at a Retail and Leisure Centre at Braehead, Glasgow.

James J. S. Hudson

- Acted for ConocoPhillips in proceedings in the TCC against Snamprogetti, an engineering contractor, in relation to a claim for damages arising out of the design of a compression system for a gas platform in the North Sea.
- Acted for a major pharmaceutical company, ICI, in proceedings in the TCC against Bovis (the management contractor), GMW (the architect) and Oscar Faber, (the consulting engineer) in connection with the refurbishment of ICI's headquarters at Milbank in which ICI sought to recover the multi-million pound overspend; also defended proceedings by Bovis against ICI seeking summary judgment on a claim in excess of £1m due under an architect's certificate.
- Acted for a P&O distribution company in proceedings in the TCC against a contractor suing out of breaches of warranty in relation to the late completion and defective construction of a warehouse and distribution centre.
- Acted for a shopfitting/management contractor in proceedings in the TCC against a major retailer, House of Fraser, in relation to sums due for works carried out and services provided at its store at Bluewater Shopping Centre.
- Acted for an electrical contractor/cable manufacturer in an arbitration in relation to its multi-million pound claim under a contract for the supply and installation of electrical equipment and cabling for a major infrastructure project, the Jubilee Line.
- Acted for a process engineering contractor in an arbitration in relation to its multi-million pound claim against a public utility for extras in connection with the design and construction of a pilot liquefaction plant.
- Acted for a Maltese joint venture between an Italian mechanical and electrical contractor and a Maltese contractor, defending international arbitration proceedings under the UNCITRAL Rules brought by its plumbing subcontractor in connection with a new hospital project.
- Acted for a joint venture between a contractor and a mechanical and electrical contractor in an ad hoc adjudication against a government department in relation to the joint venture's multi-million pound claim and the department's various counter-claims arising out of the construction of a major public building.
- Acted for a major civil engineering contractor defending adjudication proceedings commenced by one of its subcontractors in relation to a waste to energy plant.
- Acted for a design and build contractor defending adjudication proceedings brought by a road surfacing subcontractor in relation to its claims for additional sums arising out of a major bypass project.
- Acted for O'Rourke in relation to its purchase of John Laing Construction including advising in relation to claims and contractual provisions.

Dr. Eberhardt Kühne

BERLIN OFFICE

+49.(0)30.220.029.250 TEL

+49.(0)30.220.029.499 FAX

eberhardt.kuehne

@klgates.com

AREAS OF PRACTICE

Eberhardt Kühne is a partner in the firm's Berlin office. His practice focuses on business transactions (including cross border M&A transactions and international joint ventures). He advises leading European institutional investors on large commercial property projects and transactions and foreign companies on entry into German regulated markets (transport sector and postal services). Eberhardt's practice encompasses also corporate dispute resolution (litigation and arbitration).

PROFESSIONAL BACKGROUND

Eberhardt Kühne joined K&L Gates in January 2007. From 1999 through 2006 he was partner with a major European law firm in their Berlin office. Prior to that, since 1993 he was partner with a law firm in Hamburg and trained with a major New York City law firm. He clerked with the Hanseatic regional high court in Hamburg (Second State Exam).

PUBLICATIONS

Eberhardt occasionally publishes on corporate and finance matters.

PRESENTATIONS

Eberhardt occasionally gives lectures at the European Corporate Governance Institute (ECGI).

PROFESSIONAL/CIVIC ACTIVITIES

German-American Lawyers Association (Member)

German Society for Agricultural Law (Member)

Atlantik-Brücke e.V., a renowned association supporting German-American relations (Member)

PROFESSIONAL MEMBERSHIPS

International Bar Association (Member)

EDUCATION

M.C.J. Program, New York University School of Law

First State Exam, Universities of Heidelberg, Geneva and Bonn

LANGUAGES SPOKEN

German, English and French.

Gerry Lagerberg



Gerry Lagerberg is a Partner in the Forensic Services team of PricewaterhouseCoopers LLP, based in London, where he leads the International Arbitrations practices. He has over twenty years of experience of acting as an expert witness or as an independent expert to determine disputes and in conducting forensic investigations.

Much of his work has involved the determination and quantification of loss and damage and in providing expert evidence on liability issues in audit and accounting disputes. His work has covered a breadth of accounting and financial disputes, including breach of contract and loss of profits claims, warranty disputes, fraud, insurance claims and acquisition disputes arising from sale and purchase agreements. He has been an expert witness in both litigation and arbitration proceedings and has given expert evidence in proceedings in London, New York, Paris, Stockholm and Toronto.

He has advised parties and acted variously as an expert or a mediator in disputes in the oil, defence, engineering and construction industries. He has given evidence in a large number of acquisition related claims arising from breaches of warranties or disputed completion accounts, which have been the subject variously of litigation, arbitration or expert determination. As an independent expert accountant, he has determined acquisition disputes involving parties and businesses from numerous countries including Sweden, Switzerland, Germany, France, Greece, the United States, Ireland, Thailand, Singapore and Montenegro as well as the United Kingdom.

Gerry is a Fellow of the Institute of Chartered Accountants in England & Wales and an Accredited Mediator from the Centre for Effective Dispute Resolution. He maintains an interest in the workings of the law and was called to the Bar at Grays Inn in London in 1983, though this interest is not such that he would wish to practice as a lawyer! He leads PwC's sponsorship of research by the School of International Arbitration, Queen Mary, University of London. The first study, "*International arbitration: corporate attitudes and practices 2006*" was published in May 2006. The second study is due to be published in May 2008.

Gerry Lagerberg
PricewaterhouseCoopers LLP
Plumtree Court
London EC4A 4HT
Tel: + 44 (0) 20 7213 5912
Fax: + 44 (0) 20 7804 4349
E-mail: gerry.j.lagerberg@uk.pwc.com

Brief C.V.

Christopher Lau, Senior Counsel, Chartered Arbitrator

Singapore Office

39 Robinson Road #07-01

Robinson Point

Singapore 068911

Tel: +65 6428 9420

Arbitrator's Fax: +65 6226 0546

Email: christopherlau@atmdlaw.com.sg

Website: www.atmdlaw.com.sg

Qualifications

- Barrister-at-Law, Gray's Inn, London
- Advocate & Solicitor, Supreme Court, Singapore
- Fellow, Singapore Institute of Arbitrators
- Fellow, Chartered Institute of Arbitrators (UK)
- Chartered Arbitrator (UK)
- Fellow, Australian Centre for International Commercial Arbitration

Appointments

- Judicial Commissioner, Supreme Court of Singapore 1995-1998
- Senior Counsel, Supreme Court, Singapore
- Regional Panel Arbitrator, Singapore International Arbitration Centre (SIAC)
- Accredited Arbitrator, Hong Kong International Arbitration Centre
- Member of Panel of Arbitrators, Australian Centre for International Commercial Arbitration
- Member of Panel of Arbitrators, Singapore Chamber of Maritime Arbitration
- Member of the First Panel Arbitrators, Kuala Lumpur Regional Centre for Arbitration
- Member of Panel of Arbitrators, Korean Commercial Arbitration Board
- Member of Panel, Beijing Arbitration Commission
- Member of Asia-Pacific Regional Grouping (APRAG) Panel of Arbitrators
- Member of the Board of Directors (as an independent non-executive director), Chair, Audit Committee (AC) and a member of the Enterprise Risk Management Committee (ERMC) of Neptune Orient Lines Limited, Singapore
- Member of Governing Board of the United Nations IMO International Maritime Law Institute, Malta
- Door Tenant, 3 Verulam Buildings, Gray's Inn, London, WC1R 5NT, UK

Arbitration Experience

Christopher has served as chairman of the tribunal, as co-arbitrator and as sole arbitrator in international and domestic arbitrations both institutional and ad hoc in commercial disputes including disputes in relation to power plant projects, building & construction, financial transactions, international investments & joint ventures, international trade, maritime and insurance. Institutional appointments have included ICC, SIAC, LCIA and KCAB.

Career

Christopher has been in practice for about 33 years. He has wide experience in commercial matters and has acted for a wide range of clients from shipowners, P&I Clubs, Singapore Statutory Boards, banks, public corporations to MNC's.

Areas of Expertise

Commercial, maritime, building & construction and competition law.

**LONDON OFFICE**

+44 (0)20 7360 8168 TEL

+44 (0)20 7648 9001 FAX

john.magnin@klgates.com

John Magnin

AREAS OF PRACTICE

Mr. Magnin is a partner and member of the London Office's Commercial Litigation practice. He is involved in a broad range of commercial dispute resolution including litigation, arbitration, mediation, dispute avoidance and risk management. His experience includes private and public company disputes, international contractual disputes, warranty claims, fraud, defamation, enforcement of restrictive covenants, protection of confidential information, boardroom disputes, agency disputes, proceedings under the Companies, Insolvency and Financial Services legislation, as well as regulatory and disciplinary proceedings.

Mr. Magnin regularly handles and advises on injunction proceedings, international litigation, and conflicts of laws. His work ranges across a wide spectrum of commercial activity including internet, computer and software disputes; sport, entertainment and media related matters; anti-money laundering law and regulation; investment, banking, life assurance and financial services regulation and disputes; sale of goods, manufacturing and trading disputes.

PROFESSIONAL BACKGROUND

John joined the firm in 1985 and became a partner in 1992. He is a solicitor advocate and is recommended in Legal Experts, Legal 500 and Chambers for Commercial Litigation.

PROFESSIONAL/CIVIC ACTIVITIES

- Law Society's Cross Border and International Reference Group (Member)
- LCIA European Users' Council (Member)

EDUCATION

LLB Law, University College London, 1984

REPRESENTATIVE MATTERS

Recent work includes:

- Acting in an ICC arbitration over the sale of electricity power plant;
- Acting in an ICC arbitration concerning an investment in the Middle East;
- Acting on a contractual dispute concerning a landmark building;
- Advising the vendors of an international investment management business on the defence of warranty and indemnity claims; and
- Acting for World Wrestling Entertainment in quantum proceedings pursued by the World Wide Fund for Nature over the initials "WWF".

John Magnin

Past work includes:

- Advising on the postponement and re-staging of the 34th Ryder Cup matches;
- Acting for the Press Association in the British Horseracing Board litigation;
- Acting for the Chairman of Sheffield Wednesday FC in successful defence of libel action brought by Ken Bates;
- Acting for stock, derivatives, commodity, oil and metals traders on a range of disputes;
- Advising investment banks and stock brokers on FSA-related matters;
- Acting for listed companies on claims arising from acquisitions and disposals;
- Advising the Estate of the late Diana, Princess of Wales;
- Kazakhstan Mineral Resources Corporation -v- Tykaz joint venture dispute;
- Sheikh Fahad -v- Grupo Torras;
- PGA European Tour -v- KLO re: Dubai Desert Classic; and
- Palan -v- Nosebag re: "Video Killed the Radio Star".



Ian Meredith

AREAS OF PRACTICE

Mr. Meredith's practice focuses on International Commercial Disputes across a range of sectors. He is a CEDR Accredited Mediator and a Fellow of the Chartered Institute of Arbitrators. His practice encompasses alternative dispute resolution, international arbitration and both domestic and multi-jurisdictional litigation.

REPRESENTATIVE MATTERS

Alternative Dispute Resolution

Mr. Meredith has represented a number of clients engaged in disputes, which have been settled after the application of alternative dispute techniques including mediation, mini-trial and Med-Arb. He was a leading member of a team that was successful in winning the CEDR Award for law firm commitment to mediation on two occasions in the 1990's.

International Arbitration

Over recent years, Mr. Meredith's practice has become increasingly focused upon International Arbitration. He has arbitrated disputes under the ICC, LCIA, UNCITRAL and LMA rules amongst others as well as acting in relation to a number of ad hoc arbitrations and arbitrations proceeding under the rules of various trade bodies.

Mr. Meredith has been involved in the arbitration of several disputes flowing from investment within and relating to Russia and various countries of the former Soviet Union. Other disputes have related to metals trading, speciality chemicals, oils & gas exploration, insurance coverage and a wide range of other industrial sectors.

He has represented clients engaged in disputes in a number of countries, including Russia, Ukraine, Austria, Poland, South Africa, Switzerland, Egypt, Italy, Germany and France.

Mr. Meredith also advises on political risk issues in the context of investments across a range of sectors, including Natural Resources. He is increasingly involved in the structuring of investments to provide scope to invoke Multilateral and/or Bilateral Investment Treaty protections.

Domestic and International Litigation

Mr. Meredith has project managed significant disputes involving sums exceeding US\$2billion across a range of jurisdictions including Russia, Brazil, Venezuela, Egypt, Italy, Spain, France, BVI, Cayman, Bermuda, Japan, Switzerland, Malta and various states in the US and in Canada. Those disputes have extended across a diverse range of business sectors including power generation, combustion equipment, metals, oil & gas, telecoms, industrial coatings, beverages, finance and investment and sport.

Individual disputes have concerned post-acquisition issues (including completion account and warranty claims), boardroom disputes (including minority shareholder actions),

LONDON

+44 (0)20 7360 8171 TEL

+44 (0)20 7648 9001 FAX

ian.meredith@klgates.com

Ian Meredith

professional negligence (malpractice) claims, commercial trading, trade finance and Bank defence. He has taken disputes through appellate courts and has several reported cases.

REPORTED CASES

- *Re A Company* (Ghyllbeck Driving Range, Ltd.) 93 BCLC, Page 1126, First Instance decision of J. Vinelot.
- *Centremodel Projects, Ltd v. RBS* (2000) ALL ER 919 Court of Appeal (Gibson, Brooke and Robert Walker) reported July 4, 2000.
- *Samson Lancastrian v. RBS* (2000) CLC 1457 Court of Appeal. (House of Lords 2005).
- *Gencor ACP and Others v. Dalby and Others* (2000) ALL ER 1067, First Instance decision of J. Rimer reported July 27, 2000.
- *Motorola Credit Corporation v. Cem Uzan and ORS* (2002) ALL ER (Comm 945), TLR 10/07/2002, 2002 C.P.Rep.69, Court of Appeal 26 June 2002.

PROFESSIONAL BACKGROUND

- Joined the firm in June 2003 having previously been Head of the International Commercial Dispute and Arbitration department at the London Office of a highly regarded US law firm.
- Ian qualified as a solicitor in 1988.

PROFESSIONAL/CIVIC ACTIVITIES

- Chartered Institute of Arbitrators (Fellow)
- CEDR Accredited Mediator
- China Trade Law Report (Editorial Board)
- Arbitration World (Editor)
- LCIA European Users' Council (Member)
- IBA (Member)
- Association Suisse de L'Arbitrage (ASA) (Member)
- ICC Task Force on "Trusts and Arbitration" (Member)

EDUCATION

DipICarb, Chartered Institute of Arbitrators, 2006
LLB (Hons), Leicester University, 1985

Peter R. Morton

EDUCATION

LPC, Nottingham Law School, 1995 (Distinction)
PGDp, Nottingham Law School, 1994 (Commendation)
BSc, Bristol University, 1992

REPRESENTATIVE MATTERS

- Acting for a Western European state electricity company in ICC arbitration proceedings involving a substantial claim for breach of contract on the sale of electricity generators
- Acting for the investment arm of an Asian government in relation to ICC arbitration proceedings in respect of a failed property investment in the Middle East
- Acting for policy holders in insurance coverage arbitrations in London under the Arbitration Act 1996
- Advising on commodities/trade association arbitrations
- Defending various professional negligence claims, including defending a multi-million pound claim for alleged negligence by a firm of actuaries in the first ever reported case involving actuarial negligence (which ultimately went to the Court of Appeal)
- Acting in a multi-million pound dispute with the Sultan of Brunei's brother
- Advising Ryder Cup Limited on the consequences of the postponement of the 2001 Ryder Cup and disputes arising from the postponement
- Advising the National Greyhound Racing Club (NGRC) on its disciplinary rules and procedures
- Defending High Court proceedings challenging decisions of the stewards of the NGRC, including the successful appeal in *Flaherty -v- NGRC* (Sept 2005), a decision with significant implications for sports governing bodies
- Acting for the PGA European Tour in defending claims made



Peter R. Morton

AREAS OF PRACTICE

Mr. Morton is a partner in the Dispute Resolution & Litigation practice group. He focuses on commercial litigation and arbitration and is a member of the firm's cross-departmental Sports practice group and the firm's Arbitration group.

Mr. Morton is involved in all aspects of commercial litigation and arbitration for clients ranging from multi-national corporations and sports governing bodies to commercial entrepreneurs.

Over recent years, Mr. Morton has dealt with substantial High Court trials and appeals as well as both administered and ad-hoc arbitrations with cases stretching across a variety of areas including breach of contract, breach of warranty, breach of natural justice, breach of fiduciary duty and professional negligence.

Many of the cases Mr. Morton deals with are international contractual disputes, involving issues of jurisdiction as well as arguments on the merits.

PROFESSIONAL BACKGROUND

Mr. Morton qualified as a lawyer in 1997.

PUBLICATIONS

- "Selection of Arbitrators," *Arbitration World*, Summer 2006
- "One more reason to choose Arbitration: recent European cases on jurisdiction," *Arbitration World*, Winter 2005
- "Sporting Appeal (re implications of *Flaherty -v- NGRC*)," *Legal Week*, October 13 2005
- "Appeal Court backs Sports Tribunal Authority," *World Sports Law Report*, September 2005
- "Terrorism and event cancellation: protective measures," *World Sports Law Report*, July 2005
- "Cancellations: Event cancellation and force majeure," *World Sports Law Report*, February 2004

PRESENTATIONS

- "Selection and appointment of party-nominated arbitrators," April 2006
- "*Precis -v- Mercer* - Lessons to be learnt," April 2005
- "Introduction to Arbitration and Arbitration Clauses," January 2005
- "Event Cancellation & Force Majeure," *International Sports Law Conference*, January 2004

PROFESSIONAL/CIVIC ACTIVITIES

- Chartered Institute of Arbitrators (Member)

LONDON OFFICE

+44(0)20 7360 8199 TEL

+44(0)20 7648 9001 FAX

peter.morton@klgates.com



Richard F. Paciaroni

PITTSBURGH OFFICE

412.355.6767 TEL

412.355.6501 FAX

richard.paciaroni@klgates.com

AREAS OF PRACTICE

Mr. Paciaroni's practice is concentrated in the area of commercial litigation with emphasis on construction litigation and product liability claims. In the construction field, his practice includes both national and international representation of owners, engineers, general contractors and specialty subcontractors in matters involving the offshore oil & gas, steel, heavy & highway, pulp and paper, power generation, cogeneration and general building construction industries on matters ranging from \$1 million to \$2.5 billion. Mr. Paciaroni's experience includes both private and public works projects, bonding and insurance claims, mechanic's liens and Miller Act claims, government contracting, the drafting and negotiation of construction contracts and toxic mold litigation.

PROFESSIONAL BACKGROUND

K&L Gates, 1986-date, partner since 1994

Project Engineer with LTV Steel Corporation 1981-1984

COURT ADMISSIONS

- Supreme Court of Pennsylvania
- Supreme Court of the United States of America
- United States Court of Appeals, Third, Fifth and Tenth Circuits
- United States District Courts for the Western District of Pennsylvania and the Central District of Illinois
- *Pro Hac Vice* admission to state and federal courts throughout the United States including Texas, Massachusetts, New Jersey, California, Ohio and Kansas.

PROFESSIONAL/CIVIC ACTIVITIES

- Selected "Pennsylvania SuperLawyer" for Construction by *Philadelphia Magazine* (2004)
- Allegheny County Bar Association (former Chair, Construction Law Section)
- American Bar Association (Forum Committee on the Construction Industry, Tort and Insurance Practice Section)
- International Bar Association
- American Institute of Architects
- American Iron and Steel Engineers
- American Society of Civil Engineers
- Association of Iron and Steel Engineers
- Construction Specifications Institute
- International Bar Association
- Pennsylvania Bar Association (Construction Litigation Section, Civil Litigation Section, Federal Practice Section)
- ADR Training and Experience
 - AAA Basic Arbitrator Training (1991)
 - AAA Construction Industry Arbitrator Training (1997)
 - AAA Arbitrator II Training (2002)
 - Member of AAA National Panel of Arbitrators since 1991

Richard F. Paciaroni

PUBLICATIONS

- Co-author, “Construction Law,” *Forensic Science and Law*, 2006.
- Author, “Avoiding Legal Pitfalls on Engineering Project,” presented at *Avoiding Legal Pitfalls* seminar, November 16, 2004.
- Author, “Preparing for the Coming Electronic Discovery Wars – Lessons from the Trenches,” *K&LNG Alert*, December 2000.

PRESENTATIONS

- Panelist, December 9, 2004 *Construction Superconference*, San Francisco, California “How to Deal with the Teflon A/E.”
- Panelist, January 23, 2003, Pennsylvania Bar Institute Program entitled “Dealing with Mold Claims – Understanding the Issues Prior to Construction.”
- Speaker, October 13, 2004, K&LNG Seminar on “Mold-Reducing Liability.”
- Speaker, October 14, 2004, Client Worldwide Retreat – “Electronic Discovery and Lessons from the Trenches.”

BAR MEMBERSHIP

Pennsylvania

EDUCATION

J.D., Duquesne Law School, 1986 (*cum laude*; Senior Staff Member, *Duquesne Law Review*)

B.S. (Civil Engineering), Drexel University, 1981

Profile

Name: Ian Pennicott QC
Call: 1982
Silk: 2003
Email: ipennicott@keatingchambers.com
Clerks email: silksteam@keatingchambers.com
Clerks: [John Munton](#) (Senior Clerk)
[Chris Sunderland](#)
[Bob Bryant](#)



Ian Pennicott was called to the Bar in 1982 and has been a practising barrister in Keating Chambers since 1989. Between 1984 and 1989, he practised at the Bar in Hong Kong. He is still a member of the Hong Kong Bar with full rights of audience.

His practice covers a broad spectrum of advisory; drafting and advocacy work in construction and engineering, as well as professional negligence claims involving architects, engineers, surveyors and valuers. Ian Pennicott also advises in alternative dispute resolution, and is active in adjudication (as advisor, advocate and adjudicator) and arbitrations (as advocate and arbitrator). He is experienced in off-shore oil and gas and railway cases, has acted in local authority, environmental and regulatory work, and has recent experience in shipbuilding contracts.

Recently, he has been involved in arbitrations relating to a large manufacturing facility in Indonesia, a power station in Pakistan, a water-pipe line on Ascension Island a fast ferry vessel. In Hong Kong he has been (and still is) involved in a number of substantial building and engineering disputes.

Professional CV

BA in Law, Kingston Polytechnic	1980
LI.M., Corpus Christi College, Cambridge	1981
Called to the Bar (Middle Temple)	1982
Called to the Hong Kong Bar	1984
Practised at Hong Kong Bar	1984-89
Keating Chambers	1989
Queen's Counsel	2003
TECBAR Accredited Adjudicator	2003
Public Access Training	2004

Membership

Technology and Construction Bar Association (TECBAR)
Commercial Bar Association (COMBAR)
Chartered Institute of Arbitrators

Recommendations

"...the high esteem in which he is held by clients."
Chambers & Partners 2007

"Hardworking and very approachable"
Chambers & Partners 2006

“...unstuffy and informal...”

“...trusted performer...”

Chambers & Partners 2005

Examples of recent work

Construction & Engineering

- Representing an employer in a substantial ‘short piling’ dispute in Hong Kong.
- Acting for a University in relation to contracts concerning extensive new student accommodation.
- Advising a local authority in relation to its term maintenance contracts.
- Acting for the Hong Kong Housing Authority in the Hong Kong Courts in relation to claims arising from the construction of nine commercial / residential tower blocks.
- Acting for the main contractor in arbitration proceedings arising from a project to construct a major new residential apartment block in Central London.
- Representing a ferry operator in a dispute with a shipbuilder concerning defects in a passenger carrying vessel.
- Representing a well-known broadcaster in a dispute concerning a water-pipe line supply installation in the mid-Atlantic.
- Representing a contractor in a dispute with insurance brokers and engineers following the partial subsidence of an industrial building.
- Acting as an adjudicator in disputes concerning water treatment facilities.
- Acted for the main contractor in arbitration proceedings relating to disputes arising from the development of Addis Ababa international airport.

Energy

- Advising in relation to an open cast mining dispute.
- Advising the employer on Bond issues relating to upgrade works at a nuclear power station.
- Acted for a major US Corporation defending claims in the English Courts (Technology and Construction Courts) concerning alleged breaches of contract relating to the construction of a natural gas liquification plant in Africa.
- Advised the employer on contractual issues arising from a pipeline expansion project in the Far East.

Reported cases

CFW Architects v Cowlin Construction Ltd [2006] CILL 2335 TCC

Edmund Nuttall Ltd v RG Carter Ltd [2002] BLR 312 and [2002] 82 Con LR 24 TCC

RG Carter Ltd v Edmund Nuttall Ltd [2002] BLR 232 TCC

Linden Homes South East Ltd v LBH Wembley Ltd [2003] 87 Con LR 180 TCC

BICC Ltd v Parkman Consulting Engineers Parkman Consulting Engineers v Cumbrian Industrials Ltd [2000] 78 Con LR 18 TCC [2001] 79 Con LR 112 CA [2002] BLR 64 CA

Publications

Contributor, Keating on Construction Contracts - Eighth Edition (2006).

Editorial team, Keating on Building Contracts (5th, 6th and 7th editions) and First Supplement to the 7th Edition (2003).

Joint Editor Halsbury's Laws of England, Volume 4(3) Building Contracts.

Ian Pennicott has lectured to various firms of solicitors and others, most recently conducting seminars on "strike out" applications under Part 24 of the Civil Procedure Rules, the Society of Construction Law Delay and Disruption Protocol and global claims.

▪

Other Information

Ian is a keen golf player and supporter Southampton Football Club.

▪

[<< Back to Barristers profiles](#)

All images on this web site are illustrative only and their use is not intended to imply anything other than artistic license. | [Legal Notice](#) | Developed by [3internet](#)

T. 020 7404 3447 (Practice manager, Zoe Mellor)
E. philippesands@matrixlaw.co.uk

Year of call 1985 Silk 2003



Main Areas of Practice

Public International Law
International Arbitration
Natural Resources and Environmental Law
Public Law

Philippe is Professor of Law and Director of the Centre of International Courts and Tribunals at University College London. His practice includes advice and litigation in public international law, arbitration, EU, and natural resources and environmental law, advising or acting for governments, international organisations, the private sector and NGOs. Called to the Bar in 1985 and appointed Silk in 2003, he has also been a member of the Irish bar since 2003.

Philippe co-directs the Project on International Courts and Tribunals (PICT) at London University and New York University. He has served as Specialist Adviser to the House of Lords Select Committee on Science and Technology and has been nominated to the list of arbitrators in the field of natural resources and the environment maintained by the Secretary General to the Permanent Court of Arbitration. Philippe is listed on the ICSID Panel of Arbitrators.

Over recent years, Philippe has developed a practice in general international law, covering a wide range of subjects. Areas in which he currently advises and litigates include:

- foreign investment disputes under bilateral investment treaties and NAFTA, acting for claimants and respondents
- maritime boundary disputes in the Caribbean, Atlantic and Pacific Oceans
- international claims relating to natural resources, pollution and environmental assessment
- international trade disputes, including agricultural preferences and genetically modified organisms
- issues relating to the immunity of serving and former heads of state from the jurisdiction of national and international courts
- international claims relating to the use of force and allegations of torture and genocide and other violations of fundamental human rights
- cases relating to individual violations of international criminal laws

Philippe has appeared before many international courts, including the European Court of Justice; the International Court of Justice; the World Trade Organisation dispute settlement organs; the International Tribunal for the Law of the Sea; and the Special Court for Sierra Leone. He has appeared in arbitrations under the rules of the International Centre for the Settlement of Investment Disputes, the Permanent Court of Arbitration and the International Chamber of Commerce; the World Bank Inspection Panel; and the Special Court for Sierra Leone).

Philippe also appears regularly before the English courts.

T. 020 7404 3447 (Practice manager, Zoe Mellor)
E. philippesands@matrixlaw.co.uk

Notable Cases

International Courts

[Prosecutor v Charles Taylor](#) Special Court for Sierra Leone, Decision on Immunity for Jurisdiction, 31 May 2004

[Application for Revision of the Judgment of 11 September 1992](#) (El Salvador v Hungary), ICJ, 18 December 2003

[Ireland v United Kingdom](#) (OSPAR Arbitration), 2 July 2003

[The MOX Case \(Ireland v UK\)](#) ITLOS Order on Provisional Measures, 3 December 2001, ITLOS

[International Centre for the Settlement of Investment Disputes, Tradex](#), Hellas SA v Republic of Albania, Award of 29 April 1999

[The M/V "Saiga" \(No. 2\) \(Saint Vincent and the Grenadines v Guinea\)](#) International Tribunal for the Law of the Sea, Order on Provisional Measures, 11 March 1998

[Case concerning the Gabčíkovo-Nagymaros project \(Hungary/Slovakia\)](#) ICJ, 25 September 1997

[Legality of the Threat or Use of Nuclear Weapons](#) ICJ, Advisory Opinion, 8 July 1996

English Courts

[R v Secretary of State for the Home Department ex parte Mullen](#) House of Lords, 29 April 2004

[R \(on the Application of Abbassi\) v Secretary of State for Foreign Affairs](#) Court of Appeal Civil Division, 6 November 2002

[R v Secretary of State for the Home Department, ex parte The Kingdom of Belgium; R v Secretary of State for the Home Department, ex parte Amnesty International Limited and others](#) Divisional Court (Simon Brown LJ, Latham, Dyson JJ), 15 February 2000

Publications

Principles of International Environmental Law
(2nd edition, Cambridge University Press, 2003)

From Nuremberg to The Hague
(Cambridge University Press, 2003)

Bowett's Law of International Institutions
(5th edition, Sweet & Maxwell, 2001), with Pierre Klein

The Manual of International Courts and Tribunals, editor,
with Shany and Mackenzie, (Butterworths, 1999)

The International Court of Justice and Nuclear Weapons
- collection of essays, edited with Laurence Boisson de Chazournes, (Cambridge University Press, 1999)

Opinions, Memoranda and Lectures

Memorandum on International Law and the Use of Force,
prepared for the House of Commons Select Committee on
Foreign Affairs (1 June 2004)

Opinions, Memoranda and Lectures (contd).

Opinion on ICC and Article 98(2) Agreements
(with James Crawford SC and Ralph Wilde) (5
June 2003)

American Unilateralism - ASIL Conference,
Washington DC (14 March 2002)

Arbitrating Environmental Disputes - ICSID
Lecture, Washington DC (10 November 2000)

Directories' recommendations

'Leading Silk' (joint 2nd) in Environmental Law
and Leading Silk in Public International Law
A "'Top-level performer" [with] a vibrant
international environment practice.'
Chambers UK, 2005

Leading Silk in Environmental Law and Public
International Law: 'An esteemed name'
'Overwhelming praise from solicitors'
Legal 500 2005



Clare Tanner

AREAS OF PRACTICE

Ms. Tanner is an associate in the Commercial Litigation practice group. She is involved in a broad range of commercial dispute resolution with a particular focus on banking and financial services. She works primarily for corporate and institutional clients with a focus on pensions and banking related disputes. Her general commercial experience includes professional negligence claims against valuers and surveyors, breach of contract disputes, nuisance, shareholder disputes, disputed possession and debt recovery.

LONDON

+44(0)20 7360 8258 TEL

+44(0)20 7648 9001 FAX

clare.tanner@klgates.com

REPRESENTATIVE MATTERS

Ms. Tanner recently worked on the successful multi-million pound claim brought by the Trustees of Wasps Football Club arising from the negligent under-valuation of their ground; the defence of a claim against a Plc brought by a disappointed prospective purchaser of a subsidiary; defending a bank against a claim alleging breach of trust and negligent misrepresentation; and the defence of a pensions consultancy in relation to alleged defects in a trust deed.

Examples of work include:

- Claim against a bank for mis-use of confidential information following withdrawal of offer of £100 million loan facility.
- Defeating a substantial claim against a bank for recovery of the bank's fees for the provision of a £10 million facility.
- Advising an aircraft manufacturer whose sale of a military aircraft was threatened by the intervention of its former selling agent.

PROFESSIONAL BACKGROUND

Ms. Tanner qualified as a lawyer in 1998 and joined the firm upon qualification.

EDUCATION

LPC, College of Law, Chester, 1996

CPE, College of Law, Chester, 1995

BA (Hons), History, Manchester University, 1993

Christopher Wing TO (39 years old)

BEng (Hons), LLB (Hons), LLM, MA, DipCD,HNC, FCIArb, FHKIArb, FSIArb, FIET, FHKIoD, CEng, MHKIE, HKCS, ARAeS, RPE (ENS, INF, MIE)

Contact Information

c/o Hong Kong International Arbitration Centre
38/F Two Exchange Square
Central
Hong Kong
Tel: (852) 2525 2381
Fax: (852) 2524 2171
Email: christopher@hkiac.org

Professional Experience

Secretary-General of the Hong Kong International Arbitration Centre since 1998. Secretary-General of the Asian Domain Name Dispute Resolution Centre since 2002. Chairman of the Hong Kong Internet Registration Corporation from 2004 to now. Former Engineer (Avionics) and Purchasing Executive with Cathay Pacific Airways Limited from 1991 to 1997. Manager Training and Qualifications at the Hong Kong Institution of Engineers from 1997 to 1998.

Primary Practice Areas

Arbitration, Mediation, Adjudication, Negotiation, Intellectual Property, Avionics, Manufacturing of Electronic Components, Domain Name Disputes, Ecommerce and Corporate Governance

Education

- Further and Adult Education Teachers' Certificate, Education Department, Hong Kong
- Further and Adult Education Teachers' Certificate, City and Guilds of London Institute
- HNC Business Studies, Coatbridge College, United Kingdom
- Diploma in Company Direction, Hong Kong Institute of Directors
- BEng (Hons) Manufacturing Systems with Electronics, Glasgow Caledonian University
- LLB (Hons) Law, City University of Hong Kong
- MA Arbitration and Dispute Resolution, City University of Hong Kong
- LLM Commercial Law, University of Northumbria at Newcastle
- Holder of various aircraft type (Airbus/Boeing/Lockheed) maintenance certificates

Selected Honors, Awards

- Director of the Year 2001-2002 (awarded by the Hong Kong Institute of Directors)
- Nominated by peers as one of the world's leading practitioners in Commercial Arbitration – The International Who's Who of Commercial Arbitrators 2005, 2006 and 2007.
- Prince of Philip Engineering Awards
- Awarded Young Global Leader 2007 by the World Economic Forum
- Adjunct Professor of Law of the School of Law, City University of Hong Kong from 4 July 2005.
- Adjunct Professor of Engineering of the Department of Electronic Engineering, City University of Hong Kong from 1 December 2005.

Dispute Resolution Experience and Training

- Certificate of Commercial Mediation (Accord Group) 1999.
- Certificate of Training World Intellectual Property Organisation workshop on Arbitration of Intellectual Property Disputes and on WIPO Domain Name Dispute Resolution.
- External Examiner of the Hong Kong University (SPACE) Postgraduate Diploma in Construction Law, Arbitration and Mediation from 4 August 2003.
- Associate External Examiner of the LW4114 Dispute Resolution for the LLB programme of the City University of Hong Kong from 27 November 2000 to 1 December 2004.
- Lecturer and External Examiner at City University of Hong Kong Masters Degree in Arbitration and Dispute Resolution since 1997
- Committee Member of the City University of Hong Kong – MA in Arbitration and ADR
- Guest Lecturer at the Hong Kong Polytechnic University MSc in Construction Law and Arbitration
- Speaker at various international conference and seminars on Dispute Resolution (over 200) since 1998
- Co-author/contributing author of articles and books on Arbitration, ADR and Corporate Governance since 1998
- Attended over 150 international conferences/seminars on Arbitration and ADR since 1998
- Vice-Chair of the Inter-Pacific Bar Association Dispute Resolution and Arbitration Committee from 1 May 2002 to 3 May 2006.
- Chair of the Inter-Pacific Bar Association Dispute Resolution and Arbitration Committee from 3 May 2006.
- Council Member of the Hong Kong International Arbitration Council since 1998
- Council Member of the Hong Kong Mediation Council since 1996
- Council Member of the Hong Kong Institute of Arbitrators since 2003
- Committee Member of the Chartered Institute of Arbitrators (East Asia Branch) since 2004
- Panel Member (Arbitrator) China International Economic & Trade Arbitration Commission
- Panel Member (Arbitrator) Korean Commercial Arbitration Board
- Panel Member (Arbitrator) Kuala Lumpur Regional Centre for Arbitration, Malaysia
- Panel Member (Arbitrator) I-CASS, Japan
- Panel Member (Arbitrator) Australian Centre for International Commercial Arbitration
- Panel Member (Arbitrator) International Institute for Conflict Prevention and Resolution, New York
- The President's List of Expert Witnesses, Adjudicators and Arbitrators of the Institution of Engineering and Technology
- The Hong Kong Institution of Engineers Internal List of Arbitrators and Mediators
- Panel Member (Arbitrator) Singapore Institute of Arbitrators
- Panel Member (Arbitrator) Wuhan International Arbitration Court
- Panel Member (Arbitrator) National Mongolian Arbitration Court
- Approved List of Tutors (Entry/ Introduction Course) of the Chartered Institute of Arbitrators.
- Member of the Hong Kong Institute of Arbitrators Arbitration Law Reform Committee
- Forum Secretary of the China Arbitration Forum

Professional

- Fellow of the Chartered Institute of Arbitrators
- Fellow of the Hong Kong Institute of Arbitrators
- Fellow of the Singapore Institute of Arbitrators
- Fellow of the Institution of Engineering and Technology
- Fellow of the Hong Kong Institute of Directors
- Member of the Hong Kong Computer Society
- Member of the Hong Kong Institution of Engineers
- Member of the Hong Kong Corporate Counsel Association

- Member of the Society of Construction Law, Hong Kong
- Member and Council Member of the Intelligent Transport Systems, Hong Kong
- Member of the Hong Kong Mediation Council
- Member of the Business and Professionals Federation of Hong Kong
- Associate Member of the Royal Aeronautical Society
- Chartered Electrical Engineer of the United Kingdom Engineering Council
- Registered Professional Engineer of the Hong Kong Institution of Engineers (ENS, INF, MIE)
- Listed in Asia Law and Practice In-house Counsel Register 2006.

Civic Associations

- Advisor to Shantou University Law School, Mainland of China.
- Research Supervisor for Postgraduate Degree Dissertations of the City University of Hong Kong School of Law from 1 June 2005.
- Speakers' Bureau of the Federation of Hong Kong Business Associations Worldwide from 24 January 2002
- Advisory Council Member of the Independent Power Producers Forum
- Advisor to the Hong Kong Computer Society – e-Commerce Division
- Member of the Board of Advisors, the Academy of Experts
- Advisory Group Member of Wan Chai District Council: Searching for the Future of Wan Chai – Urban Renewal Strategy Review, Wan Chai District Council.
- Member of the Working Group on Wan Chai Development, Wan Chai District Council.
- Advisory Board member of the Institute for Law and Technology of the Centre for American and International Law
- Advisory Board member of the Institute for Transnational Arbitration of the Centre for American and International Law
- Member of the Practice and Standards Committee of the Chartered Institute of Arbitrators (United Kingdom)
- Member of the Practice and Standards Sub-Committee on Mediation of the Chartered Institute of Arbitrators (United Kingdom)
- Council Member of the Hong Kong Institute of Directors
- Committee Members of the Hong Kong Institute of Certified Public Accountants Ethics Committee from 29 January 2004.
- Committee Member of the Hong Kong Institute of Certified Public Accountants Complaints Oversight Committee.
- Committee Member of the ADR (2004-2006), Electronics, Information Technology, Continuing Professional Development Committees (2005- 2006 and 2006-2007) and Information sub-panel (2006 to now) of the Hong Kong Institution of Engineers
- Board Member of the City University of Hong Kong Alumni Association of the School of Law (Hon. Secretary from 30 October 2004 to 19 January 2006 and Public Relations Committee Chair from 20 January 2006 to now).
- Board Member and Hon. Secretary of the KELY Support Group
- Board of Governors of the Eagles Foundation
- Past Chairman of the Younger Members Committee of the Institution of Electrical Engineers
- Committee Member of the Institution of Engineering Technology -Hong Kong Branch (22 September 2006 to now)
- President of St Stephen's College Alumni Association (March 2004 to August 2006)
- Council Member of St Stephen's College
- Director and Chairman of the Hong Kong Internet Registration Corporation Limited
- Chairman of the Hong Kong Internet Forum
- Specialist –Aircraft Maintenance in Electrical, Electronic and Mechanical Components of the Hong Kong Quality Assurance Agency from 13 May 1999.
- Member of the Appeal Board Panel – Amusement Rides (Safety) Ordinance Chapter 449 from 3 December 2004.

- Member of the Appeal Board Panel – Lifts and Escalators (Safety) Ordinance, Chapter 327 from 1 December 2005.
- Member of Appeal Boards Panel – Education – section 59(1) of the Education Ordinance, Chapter 279.
- Member of the Education and Manpower Bureau – Qualifications Framework Working Sub-group on Aircraft Engineering Works from 26 January 2006.
- IT Director’s Forum Committee Member of the Hong Kong Productivity Council
- Appointed as a Member of the Preparatory Committee for the Research and Development Centre on Logistics and Supply Chain Management Enabling Technologies by the Commissioner of Innovation and Technology of the HKSAR Government on 14 September 2005 to 17 April 2006.
- Appointed as a Member of the Board of Directors of the Hong Kong Research and Development Centre for Logistics and Supply Chain Management Enabling Technologies Limited on 18 April 2006.
- Member of the Hong Kong Government Internet Infrastructure Liaison Group 2004 to now.
- Member of the Hong Kong Trade Development Council Professional Services Development Committee from 1998 to 2004.
- Member of the Digital, Information and Telecommunications Committee of the Hong Kong General Chamber of Commerce from January 2006 to now.
- Part-time evening Lecturer at the Institute of Vocational Education – Department of Business Administration from 1991 to 2005.
- Study guide author and external examiner of Deakin’s University MBA (Technology Management) and Graduate Diploma of Management 1997 to 1999.
- President of the Institute of Compliance Officers from 2006 to now.
- Facilitator of the Hong Kong Institute of Directors from 2005 to now.
- Member of the Asia Society from 2005 to now.
- Member of the Rotary Club of Kowloon.
- Co-opt Member of the Business and Professional Federation of Hong Kong from 2006 to now.
- Executive Committee Member of the Business and Professional Federation of Hong Kong from 7 September 2006 to now.
- Member of the IT and E-Commerce Committee of the Licensing Executives Society International from October 2005 to now.
- Committee Member of the Hong Kong Corporate Counsel Association from 27 September 2006 to now.
- Elected by Country Code Names Supporting Organization (ccNSO) <http://ccnso.icann.org/> to serve on the Nomination Committee <http://www.icann.org/committees/nom-comm/> of the Internet Corporation for Assigned Names and Numbers on 8 December 2006.
- Nominate by the Hong Kong Government in October 2006 as a member (observer status) of the International Standards Organisation technical groups TC20 Aircraft and Space Vehicles and JTC1/SC25 Information Technology: Interconnection of Information technology Equipment.
- Member of the Council of the Distinguished Advisors of the Straus Institute for Dispute Resolution at Pepperdine University School of Law in the United States of America from 20 December 2006.
- Nominated as a member of the Advisory Group on Company Formation, Registration, Re-registration, and Company Meeting and Administration Provisions by the Financial Services and Treasury Bureau of the Hong Kong Government on 26 January 2007.
- Listed as a Subject Specialist on the Hong Kong Council for Academic Accreditation Register.

Bill Wood QC



Bill studied law at Oxford and then Harvard Law School. He became a barrister in 1980 and he took silk in 1999. He is a member of Brick Court Chambers. He trained as a mediator with CEDR in December 1999 and has been enthusiastically involved in mediation ever since. Mediation in London and abroad now occupies most of his professional time.

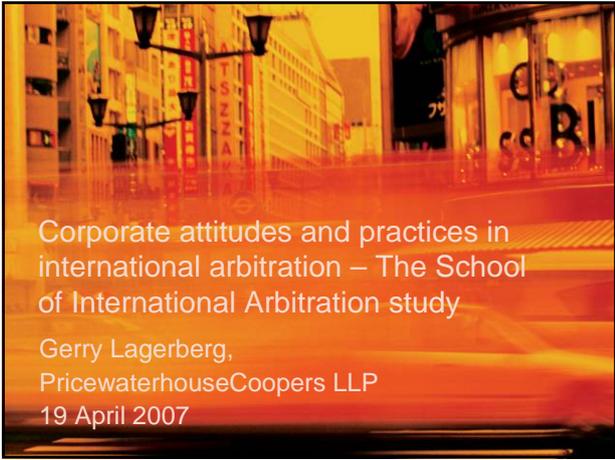
Bill's principal area of activity, both as a mediator and as an advocate, is commercial disputes, with particular emphasis on insurance and aviation cases. But he now mediates across a wide range of cases. These include disputes over information and data rights, sport, personal injuries, products liability, professional negligence, education, financial services, competition and regulatory disputes.

Bill lives in Oxfordshire and is a member of the Panel of Independent Mediators, the CEDR panel and of the CEDR teaching faculty. He has lectured on mediation extensively both in the UK and abroad and he writes about mediation issues for *The Lawyer* magazine. In March of this year he delivered the annual Master's Lecture to the Worshipful Company of Arbitrators on the subject, "Mediation - The Next Ten Years".

JOHN UFF CBE QC PhD BSc (Eng) FICE FCI Arb FREng

John Uff originally qualified in engineering, but has practised as a barrister since 1970, specialising in all types of engineering and construction disputes, both as Counsel and as Arbitrator. He has extensive experience of international disputes in most parts of the world, most recently in Australia, Bermuda and Egypt. He also writes and lectures extensively in construction law and dispute resolution. He was the founding Director of the Centre of Construction Law at Kings College, London, where he held the Nash Chair of Engineering Law until 2002 and is now Emeritus Professor.

He has sat on many influential boards and committees including the DTI Committee on arbitration law, ICE Council and legal affairs committee, DOE committee on liability and insurance, the Standing Committee on Structural Safety and the Hazards Forum. He is a member of the Court and a vice-president of the LCIA and, since June 2004, President of the Society of Construction Arbitrators. Public appointments have included Chairman of the Inquiry into Yorkshire Water (1996) Chairman of the Inquiry into the Southall Railway accident (1999) and joint Chairman, with Lord Cullen, of the Inquiry into Railway Safety (2001). He was appointed CBE in 2002 and awarded the ICE Gold Medal in 2003.



Corporate attitudes and practices in international arbitration – The School of International Arbitration study

Gerry Lagerberg,
PricewaterhouseCoopers LLP
19 April 2007



Introduction

- Why are non-lawyers interested in international arbitration?
- The study – what the market is saying
- Key findings
- Conclusions from, and for, the corporate market

 2 



Why are non-lawyers interested in international arbitration?

- Dispute resolution is crucial to managing risk, eg

WACC = [$K_e * (1 - (d/(d+e)))$] + [$K_d * (d/(d+e))$], where

$K_e = [(1 + R-f) * (1 + CRP) - 1] + (\beta * EMRP)$, and
 $K_d = [(1 + R-f) * (1 + CRP) - 1 + DM] * (1-T)$

- Risk. Investment appraisal – ROI and viability
- It comes down to hard cash

 3 

Survey Overview



Why was the survey conducted?

- To obtain empirical evidence of the attitudes and practices of corporations towards International Arbitration
- Methodology:
 - Academic rigour based on “perceptions”
 - Global coverage
 - On-line questionnaire (130), in-depth interviews (40)
 - 12 perceptions considered
 - Exclude investment treaty issues



4



Perception:
Corporations prefer to use international arbitration rather than international litigation as a means of resolving cross border disputes.

Partially True



5



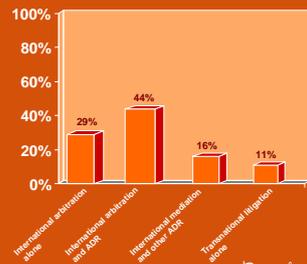
Perception: Preferred Dispute Resolution Method



Participants' Experience:

International Arbitration, Litigation & ADR	32%
Litigation & ADR	16%
International Arbitration	11%
International Arbitration & ADR	9%
ADR	7%
Litigation	4%
Litigation & International Arbitration	2%
None	19%

Participants' Preference:



6



Perception:
International arbitration is favoured for solving cross border disputes because it offers distinct advantages that outweigh the disadvantages.

True




7



Perception: Reasons for Using Arbitration

Most Important Reason Reported by Survey Participants for Using Arbitration:

Enforcement of Awards:	29%
Privacy:	21%
Selection of Arbitrators:	20%
Flexible Procedure:	13%
Other	17%

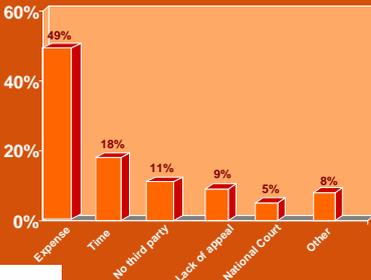



8



Perception: Reasons for Using Arbitration

Top Reported Disadvantages of International Arbitration:



Disadvantage	Percentage
Expense	49%
Time	18%
No third party	11%
Lack of appeal	9%
National Court	5%
Other	8%





Perception:
Corporations involved in international transactions usually have a dispute resolution policy in place to be prepared for any disputes that may arise.



Partially True



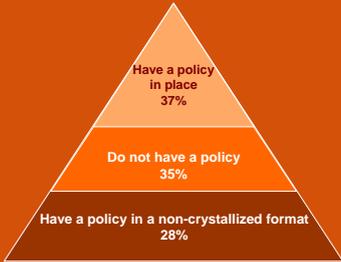
10



Perception: Dispute Resolution Policy



Participants' Dispute Resolution Policy



Policy Status	Percentage
Have a policy in place	37%
Do not have a policy	35%
Have a policy in a non-crystallized format	28%



11



Perception:
Corporations will always try to include an international arbitration clause in their contracts. This should provide an advantage in the event of a dispute.



Partially True



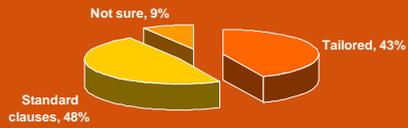
12



Perception: Dispute Resolution Clause



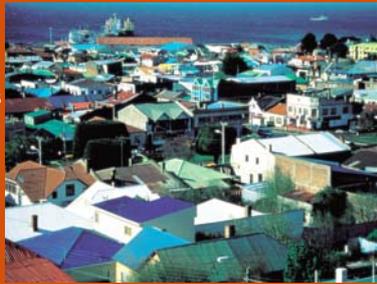
Types of Arbitration Clauses Preferred



13



Perception:
Legal considerations
are the most
important factor
in choice of venue
for arbitration.



Partially True



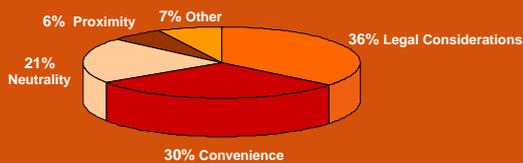
14



Perception: Choice of Venue



Main reason for choice of venue in international arbitration



15



Perception:
International arbitration is less costly than transnational litigation.

False




16

Perception: Expense of international arbitration

How Did Survey Participants perceive the expense of International Arbitration?

13%	Less expensive
23%	About the same
26%	More expensive to a great extent
38%	More expensive to some extent




17

Perception:
Corporations retain their usual external litigation firms when conducting international arbitration cases.

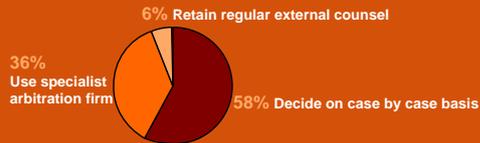
False




Perception: Selection of counsel in international arbitration



International corporations use specialist firms for international arbitrations



19



Conclusions from, and for, the corporate market



- The clear, understood, advantages of international arbitration are stimulating DEMAND. Growth is coming from capital seeking and emerging economies.
- But, there are issues to be better managed on the SUPPLY side – costs, delay, enforcement in practice?
- Opportunity for the legal community to shape a “win-win” future for themselves and their clients? But beware of pitfalls for the unwary.



20



Thank you

- The survey is available at: www.pwc.com/arbitrationstudy
- The report is available at vol 15(3-4) *American Review of International Arbitration* pp525-590, published in June 2006
- More information available from: gerry.lagerberg@uk.pwc.com



21



K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

When is Arbitration the Right Choice?

John L. Boos
San Francisco Office
April 19, 2007

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Considerations

- Who benefits from a speedy outcome?
- Does the dispute involve novel legal issues? Is it worthwhile to have recourse to appellate courts.
- With future disputes in mind, is it smart to try to establish legal precedent? Or, to avoid setting one?
- Does the dispute call for the decider to possess expertise in the factual area?

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Considerations (Cont)

- Is the local court system
 - Accessible
 - Competent
 - Reliable
 - Relatively corruption-free
- Who benefits from public exposure of the dispute? Would a confidential proceeding help to mend the relationship going forward?
- Is Arbitration more cost-effective in the particular circumstances? Do you want to put financial pressure on the adversary?

Finality/Recognition and Enforcement

- The New York Convention is a widely recognized and reliable mechanism for going where the assets are.
- Note exceptions to recognition and enforcement
- Beware of extra-Convention stumbling blocks
 - Home – touting
 - Jurisdictional quirks

THE RECORDER

130TH YEAR NO. 188

www.callaw.com

WEDNESDAY, SEPTEMBER 27, 2006

ALM

Practice Center

LAW AND MANAGEMENT

COMING TO AMERICA



Enforcement of foreign arbitration awards not always a slam-dunk in U.S. courts

By Jack Boos

With the welcome emergence of arbitration as an attractive form of dispute resolution in developing countries, U.S. practitioners are increasingly tasked to effect, or thwart, the recognition and enforcement of foreign arbitral awards in U.S. courts.

Arbitration

While many arbitration regimes are exemplary, losing

parties often feel shortchanged and seek a second swipe at the dollar by trying to block enforcement in the U.S. This can be a daunting task. The smug practitioner, who assumes U.S. courts will rubber-stamp clearly correct foreign awards and reject those that are clearly incorrect, can be rudely surprised.

This was abundantly clear in June at a conference held in the Russian Far East which I addressed, sponsored by the Russian-American Rule of Law Consortium and the Russian-American Judicial Partner-

ship. Judging from the high level of participation from attorneys around the Pacific Rim, Russian judges and legal practitioners, there is keen interest in legal developments and pitfalls in international enforcement.

At the conference, Russian representatives proudly pointed out that they have established their own Arbitrazh Courts which already have attained praise both domestically and internationally. At the same time, they expressed puzzlement at U.S. courts' rejections of some awards out of Russia.

They pointed with dismay to the recent Washington, D.C., federal court decision that allowed superstar hockey player Alexander Ovechkin to play for the National Hockey League's Washington Capitals despite a Russian arbitral award of his contractual rights to a far less lucrative spot with a team in the Russian league.

Competition for global business, booming investment in countries with relatively undeveloped legal systems and investors' knee-jerk distrust that they will be disadvantaged when disputes arise have made

reliable arbitration regimes necessary to inspire investor confidence. The ability to enforce awards once rendered — or to prevent enforcement — is an important part of the equation.

International arbitration enforcement proceedings are governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified at 9 U.S.C. 201 et seq., which replaced a similar, but ineffective, regime under the old League of Nations. Some 135 countries have ratified the convention, including the United States in 1970 (with un-surprising reservations that it will enforce only commercial awards and only those made in ratifying countries.) The most recent signatories are Liberia and Afghanistan in 2005. China and the Russian Federation are long-time signatories as well.

The convention provides the following seven grounds for rejection of an award:

1. Invalidity of the agreement to arbitrate under the law of the place where made, for example, where it clashes with other law specifying that a dispute is not arbitrable;

2. Insufficient notice of the appointment of the arbitrator or the proceeding or insufficient opportunity to defend. This can implicate subsidiaries, against whom enforcement is sought when only the parent took part in the arbitration. But beware advising your client to disregard irregularities or take a head-in-the-sand approach where one has actual knowledge of problems; this is a dangerous roll of the dice to assume that you can have it both ways — win in arbitration or, if you lose, to challenge irregularities at the enforcement stage. An error-free proceeding is not required. For example, courts will defer to an arbitrator's discretion in not granting continuances to accommodate the testimony of an expert with visa problems, or in declining to receive testimony similar to that already received;

3. The award concerns matters not falling under, or beyond the scope, of the submission to arbitration;

4. The composition of the arbitral authority or the arbitral procedure was not

according to the agreement of the parties or the law of the host country, for example in the arbitrator selection process;

5. The award is not yet binding under the law of the place of arbitration or already has been purportedly set aside by a tribunal in the place where the award was rendered. Parties sometimes “forum shop” when a challenge is pending elsewhere.

6. The subject matter is not capable of arbitration under the laws of the place where enforcement is sought; and

7. The award is contrary to the public policy where enforcement is sought, not where the award was rendered. The U.S. courts have interpreted this to involve only those situations where “fundamental notions of morality and justice are involved.” This provision is very narrowly construed. Nonetheless, it has become a favorite, but seldom fruitful, default for award-resisters. Imaginative resisting parties have tried and failed to invoke this provision where the award enforced business arrangements purportedly inconsistent with the spirit of U.S. foreign policy objectives.

The last provision is clearly a difficult, but not impossible, standard to meet. A U.S. court opined in dicta, for example, that if a foreign arbitral award went directly against a U.S. party because it did not comply with the Iranian boycott, a U.S. court would probably refuse to enforce it on public policy grounds.

To state the obvious, courts in different countries often can have very different views of public policy. A Russian court recently refused to enforce a foreign arbitral award against a Russian member of a German-Russian joint venture on the public policy grounds that the German member who was to receive the award had not yet made a capital contribution to the venture. The Russian court apparently found the prospect of recovery by someone who had not contributed anything to be an offensive windfall.

While this can be criticized as a “home town” decision, the point is to consider carefully where enforcement is sought.

In addition to the seven grounds for rejection of an award, there are two other newly popular and extra-convention “hooks” to try to thwart enforcement. That is where the court's jurisdiction over the resisting party is questioned, also known as *forum non conveniens*.

Foreign parties seek enforcement in U.S. courts, even against non-U.S. entities, because of the internationally respected and well-developed U.S. court system as well as the likelihood of reachable assets in a U.S. jurisdiction. However, the courts are not always hospitable to enforcement efforts. Even where the losing party has assets in the forum, courts still may refuse enforcement on the grounds that the losing party has not had regular business contacts there. Others courts take an easygoing approach, likening the enforcement proceeding to a collection effort and enforcing to the extent those assets are available. In one celebrated case to collect on a multimillion dollar award in a foreign forum, the court found a bank account balance of only a few dollars, nearly depleted by bank fees. It enforced the award to that amount only, giving new meaning to the term “pennies on the dollar.”

Pro-enforcement is the name of the game in enforcing international arbitral awards. To be successful in resisting awards, U.S. practitioners need to heed the convention's ground rules.

First, the deck is stacked. Courts have readily acknowledged the strong “pro-enforcement bias.” There is a heavy presumption in favor of enforcement of a foreign award rendered in a signatory country.

Second, take nothing for granted. The burden of proof is on the party resisting the award.

Third, the “kitchen sink” approach to resisting an award does not work. The convention provides enumerated and very limited bases to prevent enforcement; “implied defenses” are rejected. Except as discussed below, these are the exclusive grounds that a court will consider.

Fourth, courts can, and do, enforce “wrong” outcomes. Much like intra-U.S. arbitration, the reviewing court

sees foreign arbitration as a creature of contract and is disinclined to upset the decision of the agreed-upon arbitrator without clearly compelling indications of corruption. It is not interested in, and will not revisit, whether the arbitral result was factually or legally correct.

Naturally, there can be exceptions. In a recent case involving an international toy retailer and a former Middle Eastern franchisee, the court mused that there was at least a theoretical interest in nonenforcement when arbitrators “manifestly disregard” applicable law, even while enforcing a very generous award that seemed to shred applicable New York law on speculative damages. However, short of the arbitrator setting fire to the statute book, there seems a disinclination to infer manifest disregard.

Fifth, beware waivers. The courts are ever on the lookout for indications that the resisting party has waived even apparently egregious procedural irregularities in the selection of arbitrators and the conduct of the proceedings. In one alarming situation, the court disregard-

ed the fact that one of the parties had conducted a “sting” operation that clearly demonstrated the other side’s willingness to accept a bribe because the bribe was not actually delivered and no effort was made to remove the allegedly greedy arbitrator. Unless an aggrieved party immediately objects to the arbitrator and makes a suitable record, the reviewing court will not provide relief. That means vigilance and aggressiveness during arbitration by local counsel for your client; the enforcement stage is too late.

International arbitration is a complex arena and there are many factors to weigh. The worst thing a foreign party can do is take the proceedings less seriously than warranted, for example, retaining inexperienced local counsel or conducting a less than robust defense. Even with the best efforts, perceived hometown advantage, language misunderstandings and logistical issues can all lead to a loss overseas. Worse, the winners may retain American counsel to get the award enforced in U.S. courts so

that collection efforts can take place here.

The strong “pro-enforcement bias” does not mean that your client necessarily is without means to defeat enforcement. In the case of hockey star Ovechkin, enforcement was denied by the U.S. court because he was careful to avoid the appearance of waiver. He did not take part in the Russian arbitration nor did he agree to arbitrate or recognize the tribunal’s jurisdiction over him. While Ovechkin is mainly known for his hockey prowess on offense, he came out millions of dollars ahead in this case because of strong defense.

Jack Boos is a partner in the San Francisco office of Preston Gates & Ellis and has years of international dispute resolution experience, including the Iran-U.S. Claims Tribunal in The Hague and the United Nations Compensation Commission. He can be reached at (415) 882-8005 or jboos@preston-gates.com.

HIGH COMMERCIAL COURT OF THE RUSSIAN FEDERATION

**LETTER OF INFORMATION
No. 96, dated December 22, 2005**

**SURVEY OF THE PRACTICE OF COMMERCIAL COURTS IN
HEARING CASES INVOLVING THE RECOGNITION AND
EXECUTION OF DECISIONS OF FOREIGN COURTS,
CHALLENGES TO DECISIONS OF ARBITRATION TRIBUNALS,
AND ISSUING ORDERS TO ENFORCE DECISIONS OF
ARBITRATION TRIBUNALS**

The Presidium of the High Commercial Court of the Russian Federation has discussed the Survey of the Practice of Commercial Courts in Hearing Cases Involving the Recognition and Execution of Decisions of Foreign Courts, Challenges to Decisions of Arbitration Tribunals, and Issuing Orders to Enforce Decisions Of Arbitration Tribunals and, in accordance with Article 16 of the Federal Constitutional Law “On Commercial Courts in the Russian Federation”, is notifying the commercial courts of the recommendations it has formulated.

A.A. IVANOV
Chairman
High Commercial Court of the
Russian Federation

**SURVEY OF THE PRACTICE OF COMMERCIAL COURTS IN
HEARING CASES INVOLVING THE RECOGNITION AND
EXECUTION OF DECISIONS OF FOREIGN COURTS,
CHALLENGES TO DECISIONS OF ARBITRATION TRIBUNALS,
AND ISSUING ORDERS TO ENFORCE DECISIONS OF
ARBITRATION TRIBUNALS**

8. A commercial court may decline to recognize or enforce the decision of a foreign court if it establishes that the decision was issued in a dispute that falls under the exclusive purview of the commercial courts in the Russian Federation.

A Russian limited liability company (hereinafter - “Company”) filed a

claim in a commercial court against a Ukrainian limited liability company to invalidate a contract for the purchase/sale of an aircraft.

The claim was denied in the decision of the court of original jurisdiction, which was upheld by the rulings of the courts of appeal and final appeal. The courts held that under a decision of an economic court of Ukraine, the contract was invalid and the Ukrainian company was the owner of the aircraft.

The courts failed to take into account the fact that no process was initiated to recognize and enforce the Ukrainian economic court's decision within the Russian Federation.

The Company petitioned the High Commercial Court of the Russian Federation to review the indicated judicial acts under its supervisory powers. Having examined the validity of the reasoning laid out in the petition and the response to it, the Presidium reached the following conclusions:

The Russian Federation and Ukraine are participants in the 1992 Agreement. Under Article 7 of the indicated Agreement, its member states shall mutually recognize and enforce legally valid decisions of courts having competent jurisdiction.

Under Article 8 of the 1992 Agreement, a decision of a foreign court shall be enforced upon the request of an interested party. According to Article 241, part 2 of the APK RF [*Commercial Procedure Code of the Russian Federation*], issues involving the recognition and execution of a decision of a foreign court shall be decided by a commercial court upon a request by a party to the dispute that was considered by the foreign court. No such request was submitted to the commercial courts of the Russian Federation.

The courts also failed to take into account the following:

The aircraft never left the territory of the Russian Federation, and was continually located in an airport hangar within the Russian Federation.

The aircraft was entered in the State Register of Civil Aircraft of the Russian Federation.

Under Russian Law, an aircraft that is subject to state registration shall be considered to be real property (Article 130 of the GK RF [*Civil Code of the Russian Federation*]).

In relation to foreign decisions issued on disputes, the object of which is this type of property, the 1992 Agreement and Russian Procedural Law stipulate special regulation.

According to Article 9, item “c” of the 1992 Agreement, execution of the decision of a foreign court may be denied if, in accordance with the Agreement, the dispute was decided by a court lacking competent jurisdiction. By virtue of the provisions of Article 4, item 3 of the 1992 Agreement, claims by business entities for title to real property shall be considered exclusively by a court of the member state of the CNG [*Commonwealth of Independent States*] in which the property is located.

The APK RF also stipulates that the decision of a foreign court may be recognized and enforced within the Russian Federation in the event that the case considered by the foreign court does not fall under the exclusive jurisdiction of a court in the Russian Federation (Article 244, part 1, item 3).

Under Article 248, part 1, item 2 of the APK RF, cases involving disputes, the object of which is real property, shall fall under the exclusive jurisdiction of the commercial courts of the Russian Federation if such property, or title to it, is located within the Russian Federation.

The economic court of Ukraine recognized the Ukrainian company’s title to the indicated aircraft. Thus, a foreign court considered a dispute the object of which was the title to real property that was located within the Russian Federation and had been entered into the State Register of Civil Aircraft of the Russian Federation.

Based on the provisions of Article 4, item 3 of the 1992 Agreement and Article 248 of the APK RF, such a dispute may not be considered by an economic court of Ukraine.

Consequently, the decision of the Ukrainian economic court cannot be recognized in the Russian Federation, and cannot serve as a basis to grant or decline a claim concerning real property that is located within the Russian Federation and has been entered into a Russian state register.

In consideration of the above, the Presidium of the High Commercial Court of the Russian Federation overturned the indicated judicial acts and sent the case back for a new hearing in the court of original jurisdiction. The procedural particularities involved in considering petitions to dispute decisions of arbitration tribunals and international commercial arbitrations *[text appears to have been cut off]*

9. A commercial court shall dismiss proceedings on a case involving the reversal of an arbitration tribunal's decision if it establishes the existence in the arbitration agreement of a provision to the effect that the arbitration tribunal's decision is final.

A Russian enterprise (hereinafter - "Petitioner") petitioned a commercial court to overturn a decision of a regional arbitration tribunal.

Under the finding of the court of original jurisdiction, case proceedings were dismissed based on Article 150, part 1, item 1 of the APK RF.

The Petitioner filed an appeal, requesting that the finding be overturned and the case returned to the court of original jurisdiction for a hearing of the claim on the merits.

The court of final appeal found no grounds on which to grant the appeal.

As seen from the case materials, under the arbitration tribunal's decision, recovery was ordered from the Petitioner (buyer) to the limited liability company (supplier) for the latter's expenses on goods purchased from the other party and the arbitration fee.

Believing the decision in question to be in violation of the foundational principles of Russian law, the petitioner appealed to a commercial court to overturn it..

The court of original jurisdiction established the following.

The object of the arbitration hearing was a dispute involving the performance of a contract of sale and delivery. The contract stipulated as

follows: all disputes involving the present contract, including those concerning its existence, validity, termination, and performance, shall be subject to consideration in a defined regional arbitration tribunal in accordance with the regulations thereof; the arbitration tribunal's decision shall be final.

According to Article 230 of the APK RF, the decision of an arbitration tribunal on disputes arising from civil law relationships while conducting business or other economic activities may be challenged by the parties participating in the arbitration tribunal hearing by filing a petition with a commercial court to overturn the arbitration tribunal's decision.

Federal Law No. 102-FZ "On Arbitration Tribunals in the Russian Federation", dated July 24, 2002, also contains provisions on challenging decisions of arbitration tribunals. However, Article 40 of the indicated Law states that an arbitration tribunal's decision may be challenged by a party to the case, by filing a petition to reverse the decision with a court having competent jurisdiction, within three months from the day the party filing the request received the arbitration tribunal's decision, unless the arbitration agreement stipulates that the arbitration tribunal's decision is to be final.

The court of original jurisdiction ascertained that the arbitration agreement contained a clause to the effect that the arbitration tribunal's decision was to be final. The agreement and the indicated clause were signed by the appropriate persons within the bounds of their authority. Based on the above, the commercial court considered it established that the will of the parties was to ascribe finality to the arbitration tribunal's decision, and dismissed the case proceedings on the basis of Article 150, part 1, item 1 of the APK RF.

The court of final appeal, upholding the judicial act of the court of original jurisdiction, indicated that under Article 238, part 4 of the APK RF a commercial court, in considering a petition to issue an order to enforce a decision of an arbitration tribunal, shall verify the existence or absence of the grounds stipulated in Article 239 of the Code. These grounds are similar to the grounds for a commercial court to overturn a decision of an arbitration tribunal, as defined in Article 233 of the Code. For this reason, violations that are committed by an arbitration tribunal in considering a case and constitute grounds to overturn its decision may be discovered at the stage when an enforcement order is issued. In these circumstances, the dismissal

of proceedings in this case does not deprive the petitioner of the possibility of further judicial protection of his rights and lawful interests.

10. A commercial court may not overturn a decision of an international commercial arbitration if it was issued in a state that is not a participant in the European Convention of 1961 on Foreign Commercial Arbitration.

A Russian open joint-stock company petitioned a commercial court to overturn an arbitration decision issued by an ad hoc international commercial arbitration (Stockholm, Sweden) and to recover a monetary judgment from the petitioner in the claim of a Swiss company and an Austrian company.

The finding of the court of original jurisdiction granted the stated demand.

The court of final appeal upheld that finding.

In considering the petition to overturn a foreign arbitration decision, the courts were guided by Article 230, part 5 of the APK RF, according to which, in cases where stipulated by an international agreement of the Russian Federation, a foreign arbitration decision may be challenged under Chapter 30, paragraph 1 of the indicated Code, if statutory norms of the Russian Federation were applied in making such a decision.

Since the parties that entered into the arbitration agreement were located in Austria and the Russian Federation— parties to the European Convention on International Commercial Arbitration of 1961— the commercial courts, guided by Article 1 of the Convention, reached the conclusion that its provisions applied to the decision of the indicated court.

However, the courts failed to take into account the following:

The decision of the ad hoc international commercial arbitration (Stockholm, Sweden), a petition to overturn which was filed with a commercial court of the Russian Federation, applied the Law of Sweden “On Arbitration” of 1999. The applicable substantive law was that of the Russian Federation, the proceedings were held in the Russian language, and the dispute was heard by Russian arbiters.

Article IX, item 1 of the European Convention on International Commercial Arbitration of 1961 provides for the possibility of overturning an arbitration decision in the state in which, or under the laws of which, that decision was issued. However this item is applied only in relation to states that are participants in that Convention. Sweden is not a participant state in the European Convention on International Commercial Arbitration of 1961.

Article IX of the indicated Convention does not touch on issues involving the possibility, grounds, or procedures for overturning arbitration decisions by states that are not Convention participants. Such issues are regulated by the domestic legislation of the corresponding states and by international agreements.

Therefore the clause of that Convention, to the effect that a decision of an international commercial arbitration may be overturned in the Russian Federation, does not apply to decisions issued in Sweden.

The Law of Sweden “On Arbitration” of 1999 allows for an arbitration decision to be overturned within three months of the day the party received the final text of the decision, and applies to arbitrations that took place in Sweden, regardless of the presence of an international element in the dispute (Articles 33, 34, and 46 of the Law). Consequently a decision, a petition to overturn which is submitted to an arbitration court of the Russian Federation, may be challenged in Sweden.

Given these circumstances, the Presidium of the High Commercial Court of the Russian Federation dismissed the case of the open joint-stock company’s petition to overturn the decision of the ad hoc international commercial arbitration (Stockholm, Sweden), based on Article 150, part 1, item 1 of the APK RF.

11. A commercial court shall overturn the decision of an arbitration tribunal as it pertains to an entity that is not a participant in the arbitration, if a decision was made regarding that entity’s rights and obligations.

A limited liability company (hereinafter - “LLC”) petitioned a commercial court to overturn an arbitration tribunal’s decision, which had declared invalid all transactions performed by the LLC from March 1, 2002, through December 1, 2002. To substantiate its demand, the LLC pointed to

the fact that the decision contained rulings on issues outside the bounds of the arbitration agreement.

In its response to the petition, the company that had been the plaintiff in the arbitration objected, indicating that an arbitration tribunal's decision cannot be reviewed on the merits.

In its finding, the court of original jurisdiction denied the petition. The court indicated that the arguments cited by the LLC concerned circumstances of the case that had been evaluated when the dispute was considered by the arbitration tribunal. By virtue of the provisions of Article 233, part 1 of the APK RF, a commercial court may not review an arbitration tribunal's decision on the merits.

A closed joint-stock company – an entity that had not participated in the original court hearing (hereinafter - “Joint-stock Company” [“JSC”]) - appealed the finding to the court of final appeal, requesting that the arbitration tribunal's decision be overturned on the grounds stipulated in Article 233, part 2, item 3 of the APK RF.

In its response, the company objected to this appeal and requested that case proceedings be dismissed, citing Article 230, part 2 of the APK RF, which establishes that decisions of arbitration tribunals on disputes arising from civil law relationships during the performance of business or other economic activities may be challenged by the parties participating in the arbitration tribunal hearing. The JSC was not a party in the arbitration tribunal hearing and did not participate in the process. Therefore it is not entitled to assert a demand to overturn a judicial act issued on the basis of the results of an examination of the indicated petition.

The court of final appeal rejected this argument of the company based on Article 42 of the APK RF (“if a commercial court adopted a judicial act concerning the rights and obligations of persons who did not participate in a case, such persons may appeal that judicial act. Such persons shall enjoy the rights and bear the obligations of persons who are participants in the case”) and Article 4 of the APK RF (an interested party may petition a commercial court for the defense of his violated or challenged rights and lawful interests).

In testing the lawfulness of the finding issued by the court of original

jurisdiction, the court of final appeal established the following.

The dispute concerning the invalidity of the contract entered into by the company and the LLC was referred to an arbitration tribunal. The contract contained an agreement to refer all disputes arising from it, including those concerning its validity, to an arbitration tribunal. Meanwhile, the arbitration tribunal issued a decision according to which all transactions performed by the LLC between March 1, 2002 and Dec. 1, 2002, were declared invalid. As a result, the contract of sale and delivery entered into by the LLC and the JSC was also declared invalid.

The joint-stock company was not informed of the selection of arbiters, or of the time and place of the session of the arbitration tribunal. The JSC learned of the tribunal's decision from the company, after that decision was issued.

In accordance with Article 233, part 2, item 3 of the APK RF, an arbitration tribunal's decision may be overturned if the party that petitioned the commercial court to overturn the arbitration tribunal's decision submits evidence that the arbitration tribunal's decision was issued on a dispute not foreseen by the arbitration agreement or not falling under its terms, or it contains rulings on issues outside the scope of the arbitration agreement.

Taking into account of the fact that the arbitration tribunal invalidated all transactions performed by the company between March 1, 2002 and Dec. 1, 2002, while the agreement to submit all disputes to an arbitration tribunal was made in regard to disputes flowing from the contract entered into by the company and the LLC, the court of final appeal reached the conclusion that the decision regarding contracts entered into by the LLC with third parties was outside the scope of the arbitration agreement.

According to Article 233, part 2, item 3 of the APK RF, if rulings on issues covered by an arbitration agreement can be separated from those not covered by such agreement, the commercial court may overturn only that portion of the arbitration tribunal's decision that contains rulings on issues not covered by the agreement to submit the dispute to an arbitration tribunal.

Keeping in mind the fact that the commercial court's jurisdiction is based on an agreement made between the company and the LLC, and taking into account the fact that the arbitration tribunal declared invalid all

agreements entered into from March 1, 2002 to December 1, 2002, including the indicated contract of sale and delivery, the court of final appeal reached the conclusion that the arbitration tribunal's decision should be overturned as it pertains to invalidating the LLC's agreements with third parties, as one that was made on issues outside the bounds of the arbitration agreement. The arbitration tribunal's decision should not be overturned as it pertains to invalidating the agreement entered into by the company and the LLC.

12. In considering a petition to overturn a decision of an arbitration tribunal, a commercial court may not reexamine the decision on the merits.

A business owner petitioned a commercial court to overturn an arbitration tribunal's decision, under which a monetary judgment was entered against the business owner, payable to a limited liability company (hereinafter – LLC), for amounts owing for construction work performed as well as a late payment penalty.

In its finding, the court of original jurisdiction overturned the arbitration tribunal's decision.

The LLC petitioned the court of final appeal to overturn the finding, indicating that the decision of the arbitration tribunal was lawful and well-founded, based on the merits of the dispute, and was consistent with the facts of the case as ascertained by the court based on a full and comprehensive study of the evidence.

In evaluating the validity of the finding, the court of final appeal established the following:

The business owner who petitioned the commercial court believed, based on the merits of the dispute, that the arbitration tribunal's decision was illegitimate and unfounded. The petition contained a motion to obtain the case file from the arbitration tribunal. In its reply to the petition, the LLC also moved to obtain the case file from the arbitration tribunal in order to substantiate the legitimacy of its decision.

The court granted the motions.

Having studied the case file, the court of original jurisdiction reached the conclusion that the arbitration tribunal had improperly applied the

provisions of Article 753 of the GK RF, which constitutes grounds for overturning it.

The court of final appeal found this conclusion to be unfounded.

Article 232, part 2 of the APK RF stipulates: when preparing a case for hearing the judge may, upon a motion by both parties to the arbitration, request the case file from the arbitration tribunal when the decision on that case is being challenged in commercial court, following the rules for requesting evidence provided in the Code. In accordance with part 4 of that same article, when considering the case the commercial court shall establish in a court session the presence or absence of grounds to overturn the arbitration tribunal's decision, as stipulated in Article 233 of the Code, by means of studying the evidence presented to the court in support of the claims and objections asserted.

In Article 233 of the APK RF and Article 42 of Federal Law No. 102-FZ "On Arbitration Tribunals in the Russian Federation", dated July 24, 2002 (hereinafter - "Law") there is a list of grounds that must be present before a decision of an arbitration tribunal may be overturned. Article 46, item 1 of the Law contains a direct prohibition on commercial courts casting doubt on the validity of a decision made by an arbitration tribunal.

It follows from these standards of the APK RF and the Law that in studying case materials, including those obtained from an arbitration tribunal, a commercial court is limited to establishing the presence or absence of grounds for overturning the arbitration tribunal's decision.

The court of original jurisdiction reached the conclusion that there were grounds to overturn the arbitration tribunal's decision due to the incorrect application of the provisions of Article 753 of the GK RF, in essence reevaluating the specific circumstances of the case and considering the dispute over the money judgment on the merits.

In doing so, the commercial court exceeded its authority as defined by the requirements of Article 31, item 1 and Article 233 of the APK RF and Article 5 of the Law, based on which the authority to consider the merits of a dispute that was assigned to the jurisdiction of an arbitration tribunal rests with the arbitration tribunal.

None of the other grounds provided in Article 233 of the APK RF for overturning the decision of an arbitration tribunal were cited by the business owner or found by the court of final appeal. Therefore the finding of the court of original jurisdiction overturning the arbitration tribunal's decision was reversed, and the petition denied.

14. A petition to issue an order enforcing a decision of an arbitration tribunal shall be considered by the commercial court for the debtor's location or place of residence or, if the location or place of residence is unknown, according to the location of the debtor's property.

A closed joint-stock company (hereinafter –“Joint-stock Company”, “JSC”) petitioned a commercial court to issue an order enforcing a decision of an interregional arbitration tribunal, under which a judgment was granted in its favor on a contract debt owed it by a limited liability company (hereinafter – “Company”).

In its finding, the court of original jurisdiction returned the petition due to the commercial court's lack of jurisdiction over the case, based on Article 129, part 1, item 1 of the APK RF.

In its appeal the JSC argued that the court, in returning the petition to issue an enforcement order, had incorrectly applied standards of procedural law, since the issue of jurisdiction should be decided in conformance with the requirements of Article 38, part 8 of the APK RF.

In its response to the appeal, the Company indicated that the provision of Article 236, part 3 of the APK RF, according to which a petition to issue an order enforcing a decision of an arbitration tribunal is to be submitted to the commercial court of the constituent member of the Russian Federation for the debtor's location or place of residence or, if the location or place of residence is unknown, according to the location of the property of the debtor/party to the arbitration, is a special provision and therefore has higher priority in its application.

The court of final appeal found no basis on which to overturn the challenged judicial act.

In returning the petition to issue an order enforcing the decision of the interregional arbitration tribunal, the court of original jurisdiction proceeded

on the basis of a proper interpretation of the provisions of Article 38, part 8 of the APK RF.

Article 38 of the APK RF contains a rule that jurisdiction over disputes involving the consideration of petitions to challenge or to enforce decisions of arbitration tribunals belongs to the commercial courts of the constituent member of the Russian Federation in which the arbitration tribunal's decision was made.

Based on the above-cited Article, a case shall fall under the jurisdiction of the commercial court of the constituent member of the Russian Federation in which the arbitration tribunal's decision was made, if one party to the arbitration submits a petition to challenge the arbitration tribunal's decision while the other party to the arbitration simultaneously submits a petition to issue an order enforcing the decision in question.

In accordance with Article 236, part 1 of the APK RF, the rules established in Chapter 30, paragraph 2 shall be applied by a commercial court when considering petitions to issue orders to enforce decisions of arbitration tribunals. Thus this paragraph contains standards that are applied when considering petitions to challenge decisions of arbitration tribunals and petitions to issue orders enforcing those decisions.

For this reason, in the absence of a petition to challenge an arbitration tribunal's decision, a petition to issue an order enforcing the tribunal's decision shall be submitted to the commercial court of a constituent member of the Russian Federation according to the debtor's location or place of residence or, if the location or place of residence is unknown, according to the location of the debtor's property.

Since the company did not challenge the arbitration tribunal's decision, the commercial court, taking note of the fact that the debtor's location was in a different city, drew the proper conclusion regarding its lack of jurisdiction over this case of a petition to issue an order enforcing the decision of the interregional arbitration tribunal.

20. In considering a petition to issue an order enforcing an arbitration tribunal's decision, a commercial court shall not reevaluate the factual circumstances established by the arbitration tribunal.

A closed joint-stock company (hereinafter –“petitioner”) petitioned a commercial court to issue an order enforcing the decision of a regional arbitration tribunal. That decision had awarded the petitioner a judgment against a limited liability company (hereinafter – “company”) for the cost of poor quality dairy products and for expenses incurred in conducting an expert examination.

The court of original jurisdiction issued a finding granting the petition.

In its appeal, the company asserted that the commercial court had no foundation for issuing the enforcement order, since the arbitration tribunal’s decision was not in conformance with existing law. In the company’s opinion, the arbitration tribunal’s decision violated the standards of Articles 458, 510 of the GK RF.

The court of final appeal found no grounds to overturn the disputed judicial act.

As followed from the case materials, the arbitration tribunal established that a contract of sale and delivery had been entered into by the petitioner (the buyer) and the company (the supplier). Upon receipt of the dairy products, the buyer discovered that their quality failed to conform to the terms of the agreement, due to the products having been frozen.

In arguing that the order to enforce the arbitration tribunal’s decision should be denied, the company cited the conclusions of experts who established that the goods were partially fit for consumption. The company also asserted that the reduction in the dairy products’ quality occurred at the fault of the transporter, who failed to take measures to ensure optimal transport procedures in winter conditions.

Following Article 46, item 1 of the Federal Law “On Arbitration Tribunals in the Russian Federation”, a commercial court may not examine circumstances that have been established by an arbitration tribunal, nor review an arbitration tribunal’s decision on the merits.

The court of final appeal rightly held that the evaluation of the fidelity with which standards of substantive law are applied, and the examination of evidence that was considered by an arbitration tribunal, are directed at

reviewing the arbitration tribunal's decision on the merits and reevaluating circumstances of the case that were established by the arbitration tribunal. Thus it upheld the appealed action.

21. A commercial court shall issue an order enforcing a decision of an arbitration tribunal on a dispute foreseen in an arbitration agreement, which *[the decision]* was not a subject of a hearing in a State court.

A bank petitioned a commercial court to issue an order enforcing a decision of an arbitration tribunal.

The court of original jurisdiction issued a finding denying the petition on the following grounds: the parties altered the jurisdiction for disputes arising from the agreement in favor of the State commercial court; and the claims flow from the improper execution of a commercial court's decision and not from the agreement, which stipulates the possibility of having disputes involving it considered by an arbitration tribunal.

In its appeal, the bank petitioned to overturn the finding, believing that the arbitration stipulation in the agreement, regarding the consideration of disputes between the parties by an arbitration tribunal, was not annulled by the parties' agreement.

Under a ruling of the court of final appeal, the judicial act thus issued was overturned, on the following grounds:

The agreement between the parties established that all disputes involving that agreement or obligations supplemental to it, in the event they could not be resolved through negotiation, would be subject to consideration by a certain arbitration tribunal.

Despite the arbitration stipulation, the bank petitioned the commercial court to award a judgment against the debtor for amounts owed under the agreement, as well as interest for use of credit during the period from October 1, 1998, through March 31, 2000. The claim was granted. The bank then petitioned the arbitration tribunal with a claim against the debtor for interest for use of monetary resources belonging to another during the period from April 1, 2000, through March 31, 2001. This claim too was granted. Since the debtor failed to carry out the arbitration tribunal's decision voluntarily, the bank petitioned the commercial court to issue an

enforcement order for compulsory recovery of the interest.

In declining to issue an enforcement order, the court of original jurisdiction proceeded from the fact that the basis for imposing interest was not the contract between the parties, but the decision of the commercial court awarding recovery of the debt. Moreover, the court deemed, the fact that a commercial court considered a dispute arising under a contract that contained an arbitration clause altered the jurisdiction of the dispute as agreed upon in the contract, while the bank and the debtor had not made any new agreement on the consideration of disputes in an arbitration tribunal.

The court of final appeal pointed out the erroneous nature of these arguments.

Current law contains no such basis for annulling an arbitration stipulation as a hearing by a commercial court of another dispute under the same contract.

In referring the dispute to a commercial court, the parties altered the dispute resolution procedure. However the scope of issues presented to the commercial court for consideration was limited. By their tacit actions, the parties altered, in relation to the dispute that was the object of the claims, the understanding that disputes would be referred to an arbitration tribunal. The possibility of appealing to an arbitration tribunal was not forfeited in regard to disputes flowing from relationships that were not an object of the claims.

In these circumstances, the court of final appeal reached the conclusion that there was no basis on which to deny the order to enforce the decision of the arbitration tribunal, issued in relation to a dispute that was not an object of the hearing in the State commercial court.

22. An agreement to refer a dispute to an arbitration tribunal shall remain in force, even upon the expiration of the contract containing such an agreement, unless the parties have otherwise agreed.

An enterprise petitioned a commercial court to issue an order enforcing the decision of an arbitration tribunal, which had awarded a judgment in favor of the enterprise, imposing payment of a debt owed by an open joint-stock company under a contract.

In its finding, the court of original jurisdiction declined to issue an enforcement order on the grounds that the arbitration clause was no longer in force.

In its appeal, the petitioner requested that the indicated finding be overturned, since the court failed to take into account the conditions stipulated in Article 425 of the GK RF for the termination of obligations, drew the wrong conclusion regarding the invalidity of the arbitration agreement due to the expiration of the contract, and also failed to appraise the debtor's arguments concerning a violation of the procedure for selecting arbiters and the lack of timely notice of the arbitration.

The court of final appeal considered that the finding should be overturned and the case referred for a new hearing, on the following grounds:

As seen from the case materials, the arbitration tribunal granted the petitioner's claim against the debtor due to the latter's incomplete payment for products delivered by the former in fulfillment of a contract they had made.

In its response, the debtor objected to the claim, asserting that the arbitration agreement was invalid due to the expiration of the contract.

In declining to issue an order enforcing the arbitration tribunal's decision, the court of original jurisdiction reasoned that since the contract containing the arbitration clause had expired, the arbitration clause had expired as well. Consequently, the opportunity for the case to be considered by an arbitration tribunal had been forfeited.

The court of final appeal deemed this conclusion unjustified, for the following reasons:

According to Article 17 of the Federal Law "On Arbitration Tribunals in the Russian Federation", an agreement on arbitration shall be autonomous and shall not be dependent on other terms of a contract.

In this case, the law did not establish, and the parties' agreement did not stipulate, a clause concerning the termination of the obligation to refer a dispute to an arbitration tribunal upon the expiration of the contract. Thus

the clause, contained in the contract, that all disputes arising under that contract are to be heard by an arbitration tribunal, is autonomous. It does not cease to be in effect, nor become obsolete, upon the expiration of the contract.

23. A commercial court may not overturn a decision of an arbitration tribunal if a party to the arbitration was duly notified of the date of the arbitration and presented its case, unless there are some other grounds for a reversal.

A foreign company petitioned a commercial court to recognize and enforce a decision of an international commercial arbitration (hereinafter – “arbitration”), which was made in a dispute between the company and a Russian limited liability company (hereinafter – “LLC”). [The dispute involved a petition] to declare an independent work contract cancelled due to a material breach of contractual obligations by the LLC (the customer) and to impose payment of interest, amounts of guarantee losses, and lost profits.

The contract contained a clause on referring disputes arising from it to arbitration.

In its finding, the court of original jurisdiction declined to recognize or enforce the arbitration decision on the grounds that the LLC had not been duly informed of the arbitration session and had no opportunity to present its case, and also because the power of attorney issued to its representative did not contain authority for the latter to participate in the arbitration sessions. In the court’s opinion, the arbitration should have sent notice of the time and place of the session to the address of the LLC’s state registration.

The court of final appeal let this finding stand without altering it.

The Presidium of the High Commercial Court of the Russian Federation overruled those judicial acts and granted the foreign company’s claim to enforce the arbitration decision, on the following grounds:

The LLC entered an agreement regarding arbitration, selected an arbiter to hear the dispute, appointed a representative to communicate with the arbitration institution, and issued the latter a power of attorney. The latter, among others, conferred the authority to exercise the rights of plaintiff, respondent and third party on behalf of the LLC, as well as the

right to obtain documents relating to the arbitration hearing from the arbitration tribunal and to examine them.

The representative sent the arbitration tribunal a response to the claim, as well as a counterclaim, on behalf of the LLC and on the letterhead of a legal firm whose address coincided with the LLC's actual address. The arbitration tribunal corresponded with the LLC, sending documents to the indicated address.

It follows from the representative's correspondence with the arbitration, which he conducted on behalf of the LLC, that the representative was notified of the arbitration session in a timely manner.

Thus the court of original jurisdiction, in assessing the matter of the LLC's notification of the arbitration session, should have considered the power of attorney in the representative's name, as well as the arbitration's correspondence with that person.

In declaring the procedure by which the LLC was notified of the arbitration session to be improper, the court of original jurisdiction indicated that the LLC's last known address, to which the arbitration should send notification, was the address of its state registration.

Meanwhile, there was a different address on the LLC's stationary that it sent to the foreign company during their collaboration.

It could be seen from evidence in the case file that at the time the arbitration process was initiated, that address was the respondent's last known address. In addition, there are postal service documents in the case that bear witness to the fact that at the beginning of the arbitration process, the LLC was absent from the address of its state registration. There was no evidence among the case materials attesting that the LLC had notified the arbitration and the foreign company of a change in address.

According to Article V, part 1 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, recognition and enforcement of an arbitration decision may be denied at the request of the party against which it was directed, only if that party submits evidence, including evidence that the party against whom the decision was issued was not duly notified of the appointment of an arbiter or of the

arbitration hearing, or for other reasons was unable to present its case, to a competent authority for the location where the recognition and enforcement are requested.

Untimely or improper notification of a party of the time and place of a case hearing, or lack of opportunity for other reasons to present one's case in arbitration, is also cited as a basis for declining to recognize or enforce a foreign arbitration decision in Article 239, part 4 and article 244, part 2 of the APK RF.

Having assessed, in accordance with Article V, part 1, item "b" of the above-named Convention, the totality of all the evidence presented both in oral and written form, the High Commercial Court of the Russian Federation, in the interests of legal clarity, reached the conclusion that there was in fact an opportunity for the respondent to present its case to the arbitration, and that there were no grounds to decline to recognize and enforce the arbitration decision.

24. A commercial court shall decline to issue an order enforcing an arbitration tribunal's decision if it establishes that the arbiter had a direct or indirect interest in the outcome of the case.

A limited liability company (hereinafter – "LLC") petitioned for an order enforcing an arbitration tribunal's decision to recover amounts owed by a renter under a rental agreement that contained an arbitration clause.

Having examined the case materials and evaluated the arguments contained in the response to the petition, the court established the following.

The parties entered into a contract that contained an arbitration clause stipulating that disputes involving contract performance would be referred to the arbitration tribunal of the chamber of commerce and industry for the respondent's location. The clause stipulated that one arbiter would be appointed for each side in the dispute, and that these arbiters would independently choose a presiding arbiter from the chamber's list of arbiters.

It follows from the case materials that the arbiter appointed by the LLC was one of its founders, which was confirmed by the record of a meeting of the founders, the founding agreement, and the LLC's charter. The renter objected to the dispute being heard by a tribunal thus composed,

pointing to the arbiter's conflict of interest. His objections were not sustained by the tribunal.

The court indicated that the LLC's founder does have a conflict of interest. Since the dispute was considered by an arbiter who is a founder of the LLC, the court reached the conclusion that the arbiter in this case had a conflict of interest.

According to Article 239, part 2 of the APK RF, a commercial court may decline to issue an order enforcing an arbitration tribunal's decision, if the party in the arbitration whom the tribunal decided against presents evidence that the composition of the tribunal or the arbitration procedure did not conform to the parties' agreement or federal law.

In accordance with Article 46 of the Federal Law "On Arbitration Tribunals in the Russian Federation", a court having competent jurisdiction shall decline to issue an enforcement order in the event that evidence is presented to the effect that the composition of the arbitration tribunal did not conform to the requirements of Articles 8, 10, 11 and 19 of the Law. Article 8 of the Law stipulates that a person who is selected or appointed as an arbiter shall be an individual who is capable of impartially deciding the dispute and has no direct or indirect interest in the outcome of the case, who is independent of the parties and has agreed to perform the duties of arbiter.

In light of the above, the commercial court denied the petition to issue an order enforcing the arbitration tribunal's decision.

25. A commercial court shall decline to issue an order enforcing an arbitration tribunal's decision if it establishes that a person acting as arbiter was not eligible to be an arbiter under the laws of the Russian Federation.

A foreign company petitioned a commercial court to recognize and enforce a decision of a permanent arbitration tribunal located within the Russian Federation.

In its response to the petition, the debtor asserted that the composition of the arbitration tribunal that had examined the dispute did not conform to statutory requirements.

In examining the case materials, the commercial court established that

a person who held a position as a civil servant in a judicial body had acted as an arbiter in the case. This arbiter's place of employment and position were indicated in the list of arbiters of the arbitration tribunal in question; the parties did not deny having knowledge of his position.

During the period when the dispute was being heard by the arbitration tribunal, Federal Law No. 119-FZ "On the Foundations of the Civil Service of the Russian Federation", dated July 31, 1995, was in effect. Under Article 11 of this Law, a civil servant may not engage in other paid activities except educational, scientific, or other creative activities. According to paragraph 1 of the appendix to the arbitration tribunal's regulations, an arbiter shall be paid a fee for hearing a case - that is, the performance of arbitral functions is remunerated. Since the activities of arbiter do not fall under the category of educational, scientific, or other creative activities, they did not belong to the types of paid activities permitted by the indicated Law.

Enforcement of decisions of arbitration tribunals is carried out on the basis of enforcement orders issued by courts based on the outcome of hearings on petitions to issue such enforcement orders.

Article 239, part 2, item 4 of the APK RF provides that a commercial court may decline to issue an enforcement order if the party in the arbitration hearing whom the arbitration tribunal decided against submits evidence that the composition of the arbitration tribunal, or the arbitration procedure, did not conform to the parties' agreement or to federal law.

Since a person acting as arbiter was not eligible to perform these functions, the commercial court justifiably came to the conclusion that the composition of the arbitration tribunal failed to conform to federal law, and on the basis of Article 239, part 2, item 4 of the APK RF it denied the petition to issue an order enforcing the arbitration tribunal's decision.

26. A commercial court shall decline to recognize or enforce a decision of an international commercial arbitration or arbitration tribunal, if the decision made was beyond the scope of the arbitration agreement against an entity that was not a party to the arbitration agreement and did not take part in the hearing of the case.

An Italian firm (hereinafter - "Firm") petitioned a commercial court to recognize and enforce a decision of the ad hoc international commercial

arbitration (Stockholm, Sweden) (hereinafter - "Arbitration"), which had been issued in regard to a Russian open joint-stock company (hereinafter - "Company").

The Arbitration's decision established that an agreement to create a joint venture, entered into by the Firm and the Company, was terminated due to substantial violations of its provisions by the Russian side. The joint venture was subject to reorganization, and the Company was required to pay the firm the amount of the latter's contribution to the joint venture's authorized capital as well as expenses entailed in the construction of a production line and in the venture's operations.

In its finding, the court of original jurisdiction granted the Firm's motion.

The court of final appeal overturned the finding and denied the petition on the grounds that the Arbitration's decision contained rulings on issues outside the scope of the founders' agreement and the arbitration clause contained therein. Further, the decision dealt not only with the relationship of the founders but also the status of the joint venture created by the parties.

The Presidium of the High Commercial Court of the Russian Federation found no grounds to overturn the challenged ruling of the court of final appeal, indicating as follows:

The arbitration clause found in the agreement entered into by the Firm and the Company stipulated that disputes involving the creation of the joint venture, that is, disputes involving the parties' obligations in creating a legal entity in Russia, would be referred to arbitration. The Arbitration's decision, however, dealt not only with the Firm's withdrawal from the legal entity created within the Russian Federation, but also with the current economic operations and reorganization of that entity. However, no agreement was made between the joint venture and the Firm for disputes to be heard in international commercial arbitration. Consequently, the Arbitration exceeded the scope of the arbitration clause.

In accordance with Article V, part 1, item "c" of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, recognition and enforcement of an arbitration decision may be denied at the request of the party against which it was directed, only if that

party submits evidence that the decision in question was issued on a dispute not stipulated or not falling under the terms of the arbitration agreement or clause in a contract, or contains rulings on issues beyond the scope of the arbitration agreement or clause in a contract, to a competent authority for the location where the recognition and execution are requested.

In light of the above, the ruling of the court of final appeal, declining to recognize and enforce the Arbitration decision, was allowed to stand unchanged.

27. A commercial court shall deny a petition to issue an order enforcing a decision of an arbitration tribunal that requires a registering body to register a title to real property to a party to an arbitration, since issues of a public nature (the registration of real property) cannot be considered in an arbitration tribunal.

A closed joint-stock company (hereinafter – “Petitioner”) petitioned a commercial court to issue an order enforcing a decision of an arbitration tribunal that was created under the auspices of a law firm.

The arbitration tribunal recognized the petitioner’s title to an unfinished site of real property (the parking garage of a preventive/restorative care center), and required the registering body to register that title.

In its response to the petition, a limited liability company (hereinafter - “LLC”), objected to the enforcement order, asserting the dispute considered by the arbitration tribunal could not be a subject of arbitration.

In considering the petition, the court established the following:

The petitioner and the LLC had entered into a contract for the purchase/sale of the site of real property. The contract contained an agreement, according to which the parties committed themselves to refer disputes involving or flowing from the indicated contract to the arbitration tribunal at the law firm for resolution.

In doing so, the parties reached agreement regarding the referral of disputes arising out of debtor-creditor relations to be considered by the arbitration tribunal. Disputes flowing from proprietary legal relationships

were not stipulated in the arbitration agreement.

Meanwhile, the object of the arbitration was the recognition of title to the unfinished site of real property. Granting the asserted demands, the arbitration tribunal issued a decision to alter the deed of title, which was not provided for in the arbitration agreement.

The arbitration tribunal at the law firm imposed upon the registering body an obligation to register a transfer of title to real property.

According to Article 1 of the Federal Law “On Arbitration Tribunals in the Russian Federation”, any dispute flowing from civil law relations may be referred to an arbitration tribunal, unless otherwise established by federal law.

The indicated provision of the Law does not deal with the effect of any other law of the Russian Federation, by virtue of which certain disputes may not be referred to an arbitration tribunal, or may be referred to an arbitration tribunal only in accordance with provisions other than those contained in the indicated Law.

Based on Article 4, part 6 of the APK RF, upon an agreement of the parties, a dispute arising from civil law relationships that falls under the jurisdiction of a commercial court may be referred by the parties to an arbitration tribunal, unless otherwise established by federal law.

Thus, by virtue of the standards cited above, cases arising from administrative-legal and other public relationships may not be referred to arbitration tribunals.

Article 2 of Federal Law No. 122-FZ “On State Registration of Title to Real Property and Transactions Involving Such Property”, dated July 21, 1997, determines that state registration is the only proof of the existence of a registered title and represents the legal act of recognition and confirmation by the state of the emergence, transfer, or termination of title to real property.

Based on the above-cited standard, the legal relationship involving the registration of a title is of a public nature, and the arbitration tribunal’s decision requiring the registering body to perform the corresponding actions

has public legal consequences.

According to Article 17 of the indicated Law, legally valid judicial acts shall constitute a basis for state registration of the existence, emergence, termination, transfer, or restriction (encumbrance) of title to real property and transactions involving the latter.

This provision attests to the fact that the issuance of title to real property belongs to the exclusive jurisdiction of the State courts.

In the circumstances outlined above, the arbitration tribunal's decision, which required the registering body to register a title to real property to a party in an arbitration, broaches issues of a public nature, which cannot be considered in an arbitration tribunal.

The petition to issue an order enforcing the arbitration tribunal's decision was denied.

28. A commercial court shall grant a petition to overturn an arbitration tribunal's decision if it establishes that the decision concerned issues belonging to the exclusive jurisdiction of commercial courts in the Russian Federation.

An arbitration tribunal considered a dispute between a foreign company and an open joint-stock company [JSC] that were parties to a contract stipulating that disputes flowing from it were to be heard in an arbitration tribunal, and issued a decision in favor of the foreign company. The decision awarded recovery of a debt for work performed, interest for use of monetary resources belonging to another, and the arbitration fee. This same decision granted the company's claim for payment of amounts due it by means of the enforced seizure of the building being withheld by the foreign company, and determined the original sale price per square meter of space in that building.

The JSC petitioned a commercial court to overturn the arbitration tribunal's decision.

In its finding, the court of original jurisdiction granted the petition and overturned the arbitration tribunal's decision.

The court of final appeal upheld the finding.

The courts held that the object of the claim that was heard in the arbitration tribunal was a title to real property, disputes about which cannot be heard by an arbitration tribunal, in accordance with Article 248 of the APK RF.

The foreign company appealed to the High Commercial Court of the Russian Federation to reexamine the indicated judicial acts under its supervisory powers.

After examining the foundations for the arguments set forth in the petition and the response to it, the Presidium established the following:

According to Article 233, part 3, item 1 of the APK RF, a commercial court shall overturn the decision of an arbitration tribunal if it establishes that under federal law, the dispute considered by the arbitration tribunal may not be a subject of arbitration.

Based on Article 1, items 2 and 4 of the Law of the Russian Federation “On International Commercial Arbitration” (hereinafter – “Law”), disputes from contractual and other civil law relationships arising through engagement in external trade and other types of international economic contacts may, upon agreement of the parties, be referred to international commercial arbitration, if the commercial undertaking of at least one of the parties is located abroad.

In light of the above, the Presidium of the High Commercial Court indicated as follows: the judicial acts, as they pertain to overturning the arbitration tribunal’s decision to seize a site of real property and determining the original cost for purposes of its sale, are justified and should be allowed to stand unchanged; as they pertain to overturning the arbitration tribunal’s decision to grant the foreign company’s demands for a money judgment, the judicial acts are to be overturned.

29. A commercial court shall decline to recognize or enforce a decision of an international commercial arbitration, if it establishes that the consequences of carrying out such a decision conflict with the public policy of the Russian Federation.

A Russian open joint-stock company (hereinafter: "Joint-stock Company", "JSC") and a foreign firm (hereinafter: "Firm") petitioned a commercial court to recognize and enforce a decision of an international commercial arbitration (hereinafter: "Arbitration"), issued in another country. That decision had awarded recovery of losses from a Russian joint venture and one of its founders in an amount over 20 million USD.

In its finding, the commercial court granted the petition.

The respondents appealed to the High Commercial Court of the Russian Federation, requesting that the finding be overturned and that [the Court] decline to recognize and enforce the Arbitration's decision within the Russian Federation.

The Presidium of the High Commercial Court overturned the indicated judicial act and referred the case for a new hearing, based on the following:

The Arbitration's jurisdiction was based on an arbitration clause contained in a contract on procedures for the reorganization of the joint venture and the withdrawal of the JSC and the firm from its founders.

Under the arbitration clause, disputes involving the reorganization of the joint venture into a limited liability company, the transfer by the JSC and the Firm of their shares to the founders of the limited liability company, and payment by the founders for that transfer in the form of property, were eligible for consideration in the Arbitration.

In its decision, the Arbitration did not broach the issue of the fate of the stock (shares) in the joint venture's authorized capital. At the same time, the Arbitration found that the joint venture and the JSC were obliged to pay the foreign firm the value of [its] contribution to the authorized capital. Consideration was not given to the fact that the foreign firm made its contribution to the joint venture's authorized capital by way of property, in the form of equipment that had not been imported into the Russian Federation and was in storage in the city of Bremen (FRG) at the time the dispute was being heard.

Meanwhile, a dispute between the JSC and the joint venture over the contract for the equipment storage had previously been considered by a

commercial court of the Russian Federation, which had required the JSC to return the indicated property to the founder.

Thus the contribution to the joint venture's authorized capital by the foreign founders was in fact not accomplished. Moreover, carrying out the arbitration tribunal's decision in the form of a recovery of the value of the contribution to the joint venture's authorized capital without resolving the issue of the fate of the shares issued in payment of that contribution, as well as the fate of the property located outside the Russian Federation, contradicts the public policy of the Russian Federation, which presumes the good faith and equality of parties entering into private relationships and the proportionality of civil liability measures to the guilty violation.

The Presidium of the High Commercial Court of the Russian Federation indicated that during the new hearing of the petition to recognize and enforce the Arbitration's decision, the court should, keeping in mind the disputing parties' equal right to judicial relief, study a number of issues: Is the contract that was referred to the Arbitration for consideration compatible with the decisions based on it? Is the issue of the redistribution of the joint venture's stock (shares) compatible with the amounts awarded under the Arbitration's decision? Is the joint venture's reorganization realistic, and what is the value of the property transferred into its authorized capital but stored in Bremen, FRG? To what extent does the possibility of returning to the founder the property contribution to the authorized capital of a joint venture created within the Russian Federation in the form of an open joint-stock company, or of seizing that contribution from both the joint venture itself and one of its founders, conform to the public policy of the Russian Federation? Only after elucidating these questions should the commercial court resolve the issue of carrying out the Arbitration's decision or some part thereof.

Upon a new hearing of the case and after examining the questions posed above, the commercial court declined to recognize or enforce the arbitration decision, inasmuch as the consequences of enforcing such a decision conflict with the public policy of the Russian Federation, which is founded on the principles of the equality of parties in civil relationships, good faith in their conduct, and the proportionality of civil liability measures to the consequences of a violation, taking into account culpability.

30. A commercial court shall overturn a decision of an arbitration

tribunal and decline to issue an order enforcing the tribunal's decision, if the decision violates the foundational principles of Russian law, in particular if it is based on forged documents.

A foreign company filed a claim with an international commercial arbitration (hereinafter – “Arbitration”) operating within the Russian Federation, against a Russian open joint-stock company (hereinafter - “Joint-stock Company”, “JSC”), in the amount of a debt that emerged due to the latter's breach of obligations under a purchase/sale contract for a motor vessel and its subsequent seizure from the company.

The Arbitration's jurisdiction to settle disputes between the parties was established in the indicated contract.

In its decision, the Arbitration granted the demands in part, including the recovery of losses in the form of lost profits under a time charter dated October 31, 1997, entered into by the foreign company with a US company, during the period from December 21, 1998 through June 30, 2000.

The foreign company petitioned the Moscow Municipal Court to issue an order enforcing the indicated decision, while the JSC petitioned for the decision to be overturned.

In a finding of the judicial board on civil matters of the Moscow Municipal Court, upheld by a finding of the Supreme Court of the Russian Federation, the foreign company's petition to issue an order enforcing the Arbitration decision was granted, while the LLC's petition was denied.

As a result, the LLC petitioned the Arbitration to reverse its decision based on newly discovered facts.

The petitioner cited the following as newly discovered facts: At its request, a copy of a certificate of registration for the US company, which was formed by Russian citizens, was received from the secretary of the state of Delaware, USA. According to that certificate, it was registered on May 10, 2001. Consequently, the US company was not in operation during the period from December 21, 1998 through June 30, 2000.

Under the Arbitration's ruling, the LLC's petition was denied, since the Law of the Russian Federation “On International Commercial

Arbitration” does not provide such an arbitration with the authority to review a decision it has issued due to newly discovered facts.

The LLC petitioned the Moscow Municipal Court with a motion to review the finding of the judicial board on civil matters based on newly discovered facts.

In its finding, that board reversed the contested finding due to newly discovered facts, and the case of the foreign company’s petition to issue an order enforcing the Arbitration decision, along with the LLC’s counter-petition to overturn it, was referred to a commercial court.

Under the finding of the commercial court of original jurisdiction, the LLC’s petition to overturn the arbitration decision was denied, and the foreign company’s petition to issue an order enforcing that decision was granted.

The court of final appeal upheld the finding.

The LLC submitted a petition to the High Commercial Court of the Russian Federation to reexamine the indicated actions of the commercial courts under its supervisory powers. The LLC requested that those actions be overruled, asserting that the arbitration decision had violated the public policy of the Russian Federation, since the foreign company had submitted to the arbitration, as proof of damages in the form of lost profits, a time charter dated October 31, 1997, which had been entered into with a non-existent US company.

In its response, the foreign company objected to the petition being granted.

Having weighed the validity of the arguments set forth in the petition, the response to it, and the oral arguments of the parties’ representatives at the hearing, the Presidium made the following conclusions:

By virtue of Article 34 of the Law of the Russian Federation “On International Commercial Arbitration”, an arbitration decision may be overturned by a court with competent jurisdiction in the matter, if the grounds indicated in item 2 of that article are present.

At the time the decision was issued, the arbitration was not aware of the circumstances cited by the LLC (concerning the forged time charter dated October 31, 1997, and the US company's lack of legal status during the period from December 21, 1998 through June 30, 2000).

In these circumstances, taking into account the provisions of the indicated Law that do not allow for reexamining decisions of international commercial arbitrations due to newly discovered facts, the commercial courts of original jurisdiction and final appeal were justified in denying the LLC's petition to overturn the arbitration decision.

At the same time, one cannot recognize as lawful the judicial acts of the commercial courts in granting the foreign company's petition to issue an order enforcing the Arbitration decision.

In accordance with Article 36, part 1, item 2 of the indicated Law, [a petition to] enforce an arbitration decision may be denied if such decision conflicts with the public policy of the Russian Federation.

In reversing, due to newly discovered facts, the finding by which it had granted the foreign company's petition to issue an order enforcing the Arbitration decision and denied the LLC's petition to overturn the indicated decision, and in referring the case for a hearing by the commercial court, the judicial board for civil matters proceeded on the following basis: The LLC received, after the Arbitration had issued its decision, documents pointing to the forged nature of the time charter dated October 31, 1997, and the US company's lack of legal capacity during the period from December 21, 1998 through June 30, 2000. This, in the judicial board's opinion, could attest to bad faith conduct (abuse of rights) by the party that demanded compensation for losses, and it conflicts with the public policy of the Russian Federation.

In light of this finding, the commercial courts, in considering the foreign company's petition to issue an order enforcing the Arbitration decision, should have examined the indicated circumstances and given them an appropriate legal assessment.

Given these circumstances, the Presidium of the High Commercial Court of the Russian Federation ruled that the disputed judicial acts of the commercial courts be overruled insofar as they grant the foreign company's petition to issue an order enforcing the Arbitration decision, and that the

overruled portion of the case be referred to the court of original jurisdiction for a new hearing for the purpose of examining the issue of the US company's actual ability to enter into contracts and its legal capacity under US law from 1998 to 2000.

31. A commercial court shall grant a petition to enforce a decision of a foreign court, unless the means of enforcing the decision stipulated in the operative part of the decision conflicts with the public policy of the Russian Federation.

The international commercial arbitration court of the Chamber of Trade and Industry of Ukraine (hereinafter - "arbitration") ordered a Russian limited liability company (hereinafter - "debtor") to pay a debt in US dollars to a Ukrainian company.

Since the decision was only partially carried out by the debtor on a voluntary basis, the Ukrainian company (hereinafter - "petitioner") petitioned the commercial court to recognize and enforce the arbitration decision as it pertained to recovering the remaining amount of the debt.

Denying the petition, the commercial court of original jurisdiction cited the fact that the means of payment within the Russian Federation is the ruble. Since the arbitration decision called for recovering the debt in a foreign currency, to recognize and enforce that decision would conflict with the public policy of the Russian Federation. The court, moreover, deemed that recovering the debt in an amount less than the amount named in the arbitration decision and without documentary confirmation, also constitutes grounds for denying the enforcement order.

The petitioner appealed to the High Commercial Court of the Russian Federation to reexamine the indicated finding under its supervisory authority. The Presidium overruled the finding and referred the case for a new hearing on the following grounds:

Examining the case materials, the court failed to take into account the facts that the debtor did not challenge the amount of the debt subject to recovery, did not submit a response, and did not appear at the court session. Consequently, the petitioner had no need to prove the existence of the debt.

Article 140, item 2 of the GK RF allows for the possibility of using

foreign currency within the Russian Federation, following legally established procedure.

The currency legislation of the Russian Federation does not prohibit settlements from being opened and conducted in foreign currency among residents and nonresidents.

Thus there were no grounds to declare the procedure for paying a debt stipulated in a foreign decision to be in conflict with the laws and public policy of the Russian Federation.

32. When there are circumstances that make it difficult to carry out an arbitration tribunal's decision, a commercial court may postpone execution of a finding to issue an order enforcing a decision.

An owner-operated farm petitioned a commercial court to defer enforcement of an arbitration tribunal's decision, under which the commercial court had issued an enforcement order to recover a debt in favor of a bank.

In its finding, the court of original jurisdiction granted the debtor a deferral in carrying out the arbitration tribunal's decision.

The judgment creditor (the bank) appealed the finding to the court of final appeal, citing a violation of Article 324 of the APK RF.

The court of final appeal denied the appeal, based on the following:

In accordance with Article 324 of the APK RF, a commercial court may, on a petition by a debtor, defer or extend the execution of a judicial act and alter the means and procedure for its execution.

Grounds for granting a deferral or extension in executing a judicial act is constituted by the existence of circumstances making it difficult to enforce the judicial act.

In granting the deferral in executing the finding, the court of original jurisdiction cited documents submitted by the debtor. These confirmed the latter's extremely difficult financial situation, resulting from a prolonged drought, heavy wage debts, and debts owed to the [State] budget and

extrabudgetary funds, including the report of an expert appraisal of losses.

In such circumstances, the court legitimately established the existence of circumstances making it difficult to carry out the arbitration tribunal's decision, and granted a deferral in enforcing it.

C

Briefs and Other Related Documents

United States District Court, District of Columbia.
Moscow DYNAMO, Petitioner
v.
Alexander M. OVECHKIN, Respondent
No. 05-2245(EGS).

Jan. 18, 2006.

Background: Russian sports club petitioned to confirm foreign arbitral award finding professional hockey player in breach of contract and banning him from playing for another club for the 2005-2006 season. Player moved to dismiss for lack of subject matter jurisdiction.

1Holding: The District Court, Sullivan, J., held that no "exchange of letters" or other agreement to arbitrate could be found in expired contract from one season, club's letter offering renewal, and player's contract with a different club for the subsequent season, and therefore the court lacked subject matter jurisdiction under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA).

Motion granted.

West Headnotes

[1] T  **112**

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or Consensual
Basis. Most Cited Cases
(Formerly 33k1.1 Arbitration)

T  **515**

25T Alternative Dispute Resolution
25TV Foreign Dispute Resolution Proceedings
25Tk515 k. Enforcement and Recognition of
Awards. Most Cited Cases
(Formerly 33k82.5 Arbitration)

Treaties 385  **8**

385 Treaties
385k8 k. Construction and Operation of
Particular Provisions. Most Cited Cases
When contract law principles demonstrate the
existence of an arbitration agreement between the
parties, courts will find that Article II of the United
Nations Convention on the Recognition and
Enforcement of Foreign Arbitral Awards is satisfied
and that subject matter jurisdiction is proper;
conversely, the Court cannot impose arbitration on
parties if they have not contractually agreed to it. 9
U.S.C.A. § 201.

[2] T  **112**

25T Alternative Dispute Resolution
25TIII Arbitration
25TIII(A) Nature and Form of Proceeding
25Tk112 k. Contractual or Consensual
Basis. Most Cited Cases
(Formerly 33k1.1 Arbitration)

T  **230**

25T Alternative Dispute Resolution
25TII Arbitration
25TII(E) Arbitrators
25Tk228 Nature and Extent of Authority
25Tk230 k. Agreement or Submission
as Determinative. Most Cited Cases
(Formerly 33k29.1 Arbitration)
Principle of arbitration exists because arbitration is
a creature of contract, and thus the powers of an
arbitrator extend only as far as the parties have

412 F.Supp.2d 24
(Cite as: 412 F.Supp.2d 24)

agreed they will extend.

[3] T ⇨ 515

25T Alternative Dispute Resolution

25TV Foreign Dispute Resolution Proceedings

25Tk515 k. Enforcement and Recognition of Awards. Most Cited Cases

(Formerly 33k82.5 Arbitration)

There was no agreement in writing, evidenced by any exchange of letters or otherwise, to arbitrate dispute between professional hockey player and Russian sports club, at least not based merely on expired contract for one season, unilateral and unacknowledged offer by club to renew contract for subsequent season, and player's new contract with another club, and therefore a purported arbitration award rendered in Russia did not provide subject matter jurisdiction to confirm the award under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (CREFAA). 9 U.S.C.A. § 201.

*24 William Stuart Heyman, Tydings & Rosenberg LLP, William C. Sammons, Baltimore, MD, for Petitioner.

Robert M. Bernstein, Proskauer Rose, LLP, Washington, DC, Edward T. Werner, Peter J.W. Sherwin, Steven H. Holinstat, Proskauer Rose LLP, New York, NY, for Respondent.

MEMORANDUM OPINION

SULLIVAN, District Judge.

Petitioner, Moscow Dynamo ("Dynamo"), a Russian sports club, filed a petition *25 pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201 (the "Convention"), seeking confirmation of an award against respondent, Alexander M. Ovechkin, who is currently playing professional ice hockey for the Washington Capitals (the "Capitals"). Dynamo claims that Ovechkin is contractually obligated to play for Dynamo during the 2005-2006 hockey season, and it seeks enforcement of a Russian arbitration award finding Ovechkin in breach of that contract and banning him from playing the 2005-2006 season for any

club other than Dynamo. Pending before the Court is Ovechkin's Motion to Dismiss for Lack of Subject Matter Jurisdiction. A hearing on the motion was held on December 21, 2005. Upon careful consideration of Ovechkin's motion, the response and reply thereto, oral arguments, the governing statutory and case law, and the entire record, the Court concludes that it does not have subject matter jurisdiction. Accordingly, petitioner's claim is **DISMISSED WITH PREJUDICE**.

I. Background

Respondent, Alexander Ovechkin, is a professional ice hockey player. He played hockey in Russia as a teenager with the Moscow Dynamo organization and Russian national teams. Pet. at ¶ 10. The Capitals selected him as their first overall pick in the 2004 National Hockey League ("NHL") draft on June 26, 2004, but the 2004-2005 NHL season was cancelled due to collective bargaining disputes between the league and the players' union. Pursuant to a contract dated July 1, 2004, Ovechkin played hockey for Moscow Dynamo, a member of Russia's Professional Hockey League ("PHL"). This contract was a Standard Player's Contract, and it required that all disputes arising out of the contract be arbitrated by the Arbitration Committee. The contract expired on April 30, 2005. On April 26, 2005, Dynamo sent a letter to Ovechkin, which offered him a new contract for the 2005-2006 season with a 30% pay raise. Pet.'s Opp. at Ex. C. Ovechkin neither responded nor acknowledged receipt of this letter.

On June 20, 2005, the NHL dispute had still not been resolved, and Ovechkin signed a one-year PHL contract with a second Russian hockey club, the Avangard Omsk ("Avangard"), for the 2005-2006 season. Pet. at ¶ 12. Like the 2004-2005 contract Ovechkin signed with Dynamo, this contract was a Standard Player's Contract and included an arbitration clause. On that day, Ovechkin agreed to a "Confidential Addendum to the Avangard Contract," which contained a compensation provision and a null and void clause. According to that addendum, the Avangard

412 F.Supp.2d 24
(Cite as: 412 F.Supp.2d 24)

contract would become effective on July 21, 2005, “only in the case the player does not sign the agreement with the NHL Club Washington Capitals.” Pet. Opp. at Ex. G. The Avangard Contract would be automatically void if Ovechkin signed a contract offered by an NHL team prior to midnight on July 20, 2005.

Dynamo contends that its April 26, 2005 letter to Ovechkin constituted a “qualifying offer” under PHL regulations. Pet. at ¶ 11. Under PHL regulations, a team that extends a valid qualifying offer retains “matching rights” to a player if the player signs a contract with another team. If a former team matches the financial aspects of the second contract, then the former team and the player automatically become parties to a binding contract, and the player must play for the former team. Award, Pet. at Ex. A at 5. To be enforceable, a matching offer is required to match only the term and the financial aspects of the player's new contract. Other, non-financial*26 terms need not be matched. *Id.* at 4. Dynamo sent a letter to Avangard on July 1, 2005 which claimed to exercise its matching rights with respect to Ovechkin. Pet.'s Opp. at Ex. H.

On July 14, 2005, it was widely reported that the NHL and the Players Association had reached a deal on a new collective bargaining agreement. Although the parties disagree as to precisely when the Avangard contract was voided, it is undisputed that the Capitals announced on August 5, 2005 that Ovechkin had agreed to terms. Pet. Ex. C, doc. 2. After the announcement, Dynamo advised the Capitals that it had exclusive rights to Ovechkin's services for the 2005-2006 season and commenced arbitration on October 6, 2005. Dynamo sought an order enjoining Ovechkin from working for the Capitals or any other team until his contract with Dynamo expires on April 30, 2006.

The Arbitration Committee of the Russian Ice Hockey Federation (the “Arbitration Committee”) held a hearing on October 20, 2005. Ovechkin did not attend the hearing in person or through counsel, although the Arbitration Committee found he was properly served with the date and location of the hearing and a copy of the claim. An agent for

Ovechkin did attend the hearing as an observer only and not as a representative of Ovechkin.

The next day, on October 21, 2005, the Arbitration Committee entered an award in favor of Dynamo. Award, Pet. Ex. A. Although Ovechkin had not signed a 2005-2006 contract with Dynamo, the Arbitration Committee nevertheless found a valid contract between Dynamo and Ovechkin for the 2005-2006 season based on a combination of: 1) the 2004-2005 contract Ovechkin signed with Dynamo; 2) the April 26, 2005 letter, which it construed as a proper exercise of Dynamo's matching rights; and 3) the Avangard contract. Award, Pet. Ex. A at 5. The Arbitration Committee held:

“Dynamo has offered to Ovechkin in a timely manner a new contract with a 30% increase of the total amount of compensation, thus reserving the matching rights with respect to signing the contract with Ovechkin; and Dynamo in a timely manner has agreed to match the financial conditions of the preliminary contract between Avangard and Ovechkin. Thereby, the contract between Dynamo and Ovechkin has come into full force and effect as of July 1, 2005”

Award, Pet. Ex. A at 4. As part of the award, the Arbitration Committee enjoined Ovechkin from working for any professional hockey club other than Dynamo until April 30, 2006. *Id.* Ovechkin, his agents, the Capitals, and the NHL all received notice of the Award.

II. Standard of Review

Ovechkin moves to dismiss this action pursuant to Fed.R.Civ.P. 12(b)(1), alleging that this Court lacks subject matter jurisdiction over Dynamo's claims. A complaint may be dismissed for lack of subject matter jurisdiction only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. In our review, this court assumes the truth of the allegations made and construes them favorably to the pleader.” *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C.Cir.2003). In the Rule 12(b)(1) context, the

412 F.Supp.2d 24
(Cite as: 412 F.Supp.2d 24)

petitioner bears the burden of establishing jurisdiction. *Tripp v. Executive Office of the President*, 200 F.R.D. 140, 142 (D.D.C.2001); *Vanover v. Hantman*, 77 F.Supp.2d 91, 98 (D.D.C.1999).

III. Discussion

Article II of the United Nations Convention on the Recognition and Enforcement*27 of Foreign Arbitral Awards (the "Convention") provides that: Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201. Article II further states: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Id.* Without an agreement in writing that satisfies this provision, there is no subject matter jurisdiction. *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1291 (11th Cir.2004).

Ovechkin moves to dismiss on the grounds that this Court has no subject matter jurisdiction over Dynamo's petition because there is no signed agreement in writing to arbitrate this dispute. Ovechkin argues, and Dynamo concedes, that Ovechkin never signed a 2005-2006 standard PHL contract with Dynamo, which would have included an arbitration clause. Dynamo responds that the "written agreement" requirement is satisfied by three documents that constitute an "exchange of letters" contemplated by Article II: 1) the 2004-2005 contract Ovechkin signed with Dynamo; 2) the April 26, 2005 letter, which it construed as a proper exercise of Dynamo's matching rights; and 3) the Avangard contract. In other words, Dynamo argues that the same documents upon which the Arbitration Committee found its jurisdiction over

this matter should also satisfy the "written agreement" jurisdictional requirement of Article II. ^{FN1}

FN1. In its response to Ovechkin's motions, Dynamo suggested that the issue of whether Moscow Dynamo properly exercised its matching rights, and therefore bound Ovechkin to play for it during the 2005-2006 season, has already been decided by the Arbitration Committee. Pet.'s Opp. at 6. At the hearing, however, Dynamo conceded this Court has to make an independent determination of whether there was an agreement to arbitrate in order to determine the issue of this Court's jurisdiction.

"To determine whether an award falls under the Convention, and thus, whether the district court has jurisdiction over the action to compel arbitration or to confirm an award, courts look to the language of the Convention." *Czarina*, 358 F.3d at 1291 (citing *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir.1994); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210, 215 (2d Cir.1999)). Because Ovechkin never exchanged a written document of any kind with Dynamo after the expiration of his 2004-2005 contract, the Court must decide whether the 2004-2005 contract Ovechkin signed with Dynamo, the April 26, 2005 letter from Dynamo to Ovechkin, and the Avangard contract constitute an "exchange of letters" that contain an agreement to arbitrate.

1. Dynamo's Argument that Ovechkin Agreed, in Writing, to Arbitrate this Dispute

[1][2] Dynamo is correct that when contract law principles demonstrate the existence of an arbitration agreement between the parties, courts will find that Article II is satisfied and that subject matter jurisdiction is proper. *See Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440 (3d Cir.2003) (affirming the district court's holding that the parties were *28 required to arbitrate their dispute even though they had not signed an arbitration agreement because an agreement to

412 F.Supp.2d 24
(Cite as: 412 F.Supp.2d 24)

arbitrate was incorporated by reference from a previous document exchanged by the parties). Conversely, the Court cannot impose arbitration on parties if they have not contractually agreed to it. “Th[e] principle of arbitration exists because arbitration is a creature of contract, and thus the powers of an arbitrator extend only as far as the parties have agreed they will extend.” *Czarina*, 358 F.3d at 1293. In this case, Dynamo has presented no evidence that Ovechkin expressed his affirmative acceptance of an agreement to arbitrate.

[3] Dynamo mistakenly analogizes the “exchange” in this case to the exchange by the parties in *Standard Bent Glass*. In *Standard Bent Glass*, the plaintiff, a Pennsylvania corporation, brought an action against a manufacturer in Finland, alleging defects in a glass fabricating system. Negotiations had begun in March of 1998, and they reached a critical juncture on February 1, 1999, when plaintiff faxed an offer to purchase the system from defendant. On February 2, 1999, Glassrobots responded with a cover letter, invoice, and a standard sales agreement that included an arbitration clause. Later that day, plaintiff faxed a return letter that requested five specific changes to Glassrobots’ sales agreement. The letter concluded, “Please call me if the above is not agreeable. If it is we will start the wire today.” *Id.* at 442. The parties continued to modify the agreement by faxing changes to one another until August 5, 1999, when the parties signed the Acceptance Test Protocol, which stated: “We undersigners hereby certify the performance and acceptance test according to the Sales Agreement TSF II 200/320 between Standard Bent Glass Corp., USA and Glassrobots Oy has been carried out.”

The court held that Glassrobots’ February 2, 1999 sales agreement was an offer that plaintiff accepted when it proposed five specific modifications. It held plaintiff’s conduct on February 2 “constituted a definite and seasonable expression of acceptance that evinced the formation of a contract rather than a counteroffer or a rejection.” *Id.* at 446. After finding a valid contract based on the terms of the February 2, 1999 sales agreement, the court then concluded the arbitration clause of that sales

agreement was incorporated in the exchange of faxes culminating in the August 5, 1999 Acceptance Test Protocol. *Id.* at 449-50.

The unilateral conduct of Dynamo pales in comparison with the factual exchange of correspondence between the parties in *Standard Bent Glass*. In *Standard Bent Glass*, the parties had engaged in written negotiations with one another via facsimile for over a year. The Third Circuit found actual conduct by the plaintiff on February 2, 1999 and August 5, 1999 that constituted an expression of acceptance and which kept the arbitration clause of the February 2, 1999 agreement in play.

In the present case, however, no such written exchange of correspondence exists. Ovechkin never responded, expressly or impliedly, to Dynamo’s “matching letter” of April 26, 2005. Communications with Dynamo came to a screeching halt when Ovechkin’s contract expired on April 30, 2005. Unlike the plaintiff in *Standard Bent Glass*, Ovechkin made no modifications of a previous contract. Rather, Dynamo asks the Court to infer Ovechkin’s agreement to arbitrate based on nothing more than an expired agreement to do so, a unilateral matching offer from Dynamo, and Ovechkin’s agreement to play for Avangard for the 2005-2006 season, which was subject to a null and void clause. The Avangard contract is not a letter from *29 Ovechkin to Moscow Dynamo, let alone an agreement to arbitrate with Moscow Dynamo. The Court cannot find any evidence of an exchange of documents between the parties at all, let alone “a definite and seasonable expression of acceptance” by Ovechkin to a 2005-2006 contract with Dynamo. *See Standard Bent Glass Corp.*, 333 F.3d at 446.

Dynamo’s other cited cases are distinguishable on the same grounds. In each of those cases, the party opposing arbitration had affirmatively demonstrated its acceptance of an agreement to arbitrate. *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir.1987) (finding an agreement to arbitrate because the parties had transacted business in a series of exchanges of purchase orders and confirmation notes, when the confirmation notes included an arbitration clause); *Chloe Z Fishing*

412 F.Supp.2d 24
(Cite as: 412 F.Supp.2d 24)

Co., Inc. et al. v. Odyssey Re (London) Ltd., 109 F.Supp.2d 1236, 1247-51 (S.D.Cal.2000) (holding that defendant agreed to arbitrate because plaintiff's insurance broker submitted "slips" to the defendant requesting insurance pursuant to the terms of the standard insurance policies, which contained arbitral clauses, and the defendant affixed its stamp on the slips and issued certificates of insurance to plaintiffs' broker which referred to the standard insurance policies); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F.Supp. 1229, 1240 (S.D.N.Y.1992) (finding plaintiff had agreed to arbitrate because defendant had signed and sent to plaintiff a Memorandum Agreement requiring arbitration in Russia and, although plaintiff initially rejected the arbitration provision, it subsequently sent a letter affirmatively purporting to rely on various provisions of the contract it had rejected).

In sum, Dynamo has pointed to no factual predicate or legal authority to support its argument that a written agreement to arbitrate can be found absent a written exchange demonstrating both parties' agreement to arbitrate with one another. The Court is not persuaded to imply Ovechkin's written consent to arbitrate when he never communicated with Dynamo, let alone negotiated an arbitration clause with a third party, subsequent to the expiration of his 2004-2005 contract. The Court is aware of no alchemical formula that can transform an expired contract, Dynamo's unilateral matching offer, and Ovechkin's signed contract with a third party into a "definite and seasonable expression of acceptance" by Ovechkin of Dynamo's offer to play for that team for the 2005-2006 season. To the contrary, Dynamo's patchwork of documents, without more, persuasively supports the argument that Ovechkin wished to end his relationship with Dynamo once and for all.

This Court does not reach the issue of whether, under Russian contract law, the parties agreed to a 2005-2006 contract and, in doing so, to arbitration. Rather, the Court makes the narrow determination that the documents identified by Dynamo and the Arbitration Committee do not satisfy Article II's requirement that there be an "agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen

or which may arise between them in respect of a defined legal relationship" Convention, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C. § 201.

IV. Conclusion

For the reasons stated herein, it is by the Court hereby ORDERED that Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction is GRANTED AND THIS CASE IS DISMISSED WITH PREJUDICE. An appropriate Order accompanies this Memorandum Opinion.

*30 ORDER

For the reasons discussed in the accompanying memorandum opinion, it is hereby

ORDERED that respondent's Motion to Dismiss is **GRANTED**; and it is

FURTHER ORDERED that petitioner's claim is **DISMISSED WITH PREJUDICE**; and it is

FURTHER ORDERED that petitioner's Motion to Request a Status Conference is **DENIED AS MOOT**; and it is

FURTHER ORDERED that the Clerk shall enter final judgment in favor of defendant and against plaintiff.

D.D.C.,2006.
Dynamo v. Ovechkin
412 F.Supp.2d 24

Briefs and Other Related Documents (Back to top)

• 1:05cv02245 (Docket) (Nov. 18, 2005)

END OF DOCUMENT

P

Briefs and Other Related Documents
Yusuf Ahmed Alghanim & Sons v. Toys "R" Us,
Inc.C.A.2 (N.Y.),1997.

United States Court of Appeals,Second Circuit.
YUSUF AHMED ALGHANIM & SONS, W.L.L.,
Petitioner-Appellee,

v.

TOYS "R" US, INC.; TRU (HK) Limited,
Respondents-Appellants.
No. 1757, Docket 96-9692.

Argued June 25, 1997.
Decided Sept. 10, 1997.

Foreign licensee filed petition to confirm arbitration award entered in dispute under international licensing agreement. The United States District Court for the Southern District of New York, Lawrence M. McKenna, J., 1996 WL 728646, granted petition, and licensor appealed. The Court of Appeals, Miner, Circuit Judge, held that: (1) Convention on the Recognition and Enforcement of Foreign Arbitral Awards applied to decision to confirm arbitration award; (2) district court had authority under the Convention to apply the Federal Arbitration Act's (FAA) implied grounds for setting aside award; (3) arbitrator did not manifestly disregard law of lost profits by awarding \$46 million in future lost profits to licensee; and (4) award would not be set aside on grounds Court of Appeals disagreed with arbitrator's interpretation of underlying licensing agreement.

Affirmed.

West Headnotes

[1] Alternative Dispute Resolution 25T ↻515

25T Alternative Dispute Resolution
25TV Foreign Dispute Resolution Proceedings
25Tk515 k. Enforcement and Recognition of
Awards. Most Cited Cases
(Formerly 33k72.1 Arbitration)
Convention on the Recognition and Enforcement of

Foreign Arbitral Awards applied to decision to confirm arbitration award entered in commercial dispute between United States licensor and foreign licensee involving conduct and contract performance in Middle East. 9 U.S.C.A. § 202.

[2] Alternative Dispute Resolution 25T ↻515

25T Alternative Dispute Resolution
25TV Foreign Dispute Resolution Proceedings
25Tk515 k. Enforcement and Recognition of
Awards. Most Cited Cases
(Formerly 33k76(1) Arbitration)
District court had authority under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to apply the Federal Arbitration Act's (FAA) implied grounds for setting aside award entered under Convention. 9 U.S.C.A. §§ 1 et seq., 207.

[3] Alternative Dispute Resolution 25T ↻515

25T Alternative Dispute Resolution
25TV Foreign Dispute Resolution Proceedings
25Tk515 k. Enforcement and Recognition of
Awards. Most Cited Cases
(Formerly 33k76(1) Arbitration)
To extent that Convention on the Recognition and Enforcement of Foreign Arbitral Awards prescribes exclusive grounds for relief from award under Convention, application of Federal Arbitration Act's (FAA) implied grounds for relief from award would be in conflict, and is thus precluded. 9 U.S.C.A. §§ 1 et seq., 208.

[4] Alternative Dispute Resolution 25T ↻515

25T Alternative Dispute Resolution
25TV Foreign Dispute Resolution Proceedings
25Tk515 k. Enforcement and Recognition of
Awards. Most Cited Cases
(Formerly 33k85.5 Arbitration)
Federal Arbitration Act (FAA) applied in action to enforce nondomestic arbitration award rendered in

126 F.3d 15
(Cite as: 126 F.3d 15)

United States under Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C.A. §§ 1 et seq., 201-208; Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. V(1)(e), 9 U.S.C.A. § 201 note.

[5] Alternative Dispute Resolution 25T ↔511

25T Alternative Dispute Resolution
 25TV Foreign Dispute Resolution Proceedings
 25Tk511 k. What Law Governs. Most Cited Cases
 (Formerly 33k85.5 Arbitration)

Alternative Dispute Resolution 25T ↔515

25T Alternative Dispute Resolution
 25TV Foreign Dispute Resolution Proceedings
 25Tk515 k. Enforcement and Recognition of Awards. Most Cited Cases
 (Formerly 33k85.5, 33k2.2 Arbitration)

Treaties 385 ↔8

385 Treaties
 385k8 k. Construction and Operation of Particular Provisions. Most Cited Cases
 (Formerly 33k2.2 Arbitration)
 Under Convention on the Recognition and Enforcement of Foreign Arbitral Awards, party may seek to vacate or set aside award in state in which, or under law of which, award is rendered; moreover, such motion is to be governed by domestic law of rendering state, despite fact that award is nondomestic within meaning of Convention. 9 U.S.C.A. §§ 1 et seq., 201-208; Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. V(1)(e), 9 U.S.C.A. § 201 note.

[6] Alternative Dispute Resolution 25T ↔515

25T Alternative Dispute Resolution
 25TV Foreign Dispute Resolution Proceedings
 25Tk515 k. Enforcement and Recognition of Awards. Most Cited Cases
 (Formerly 33k85.15 Arbitration)
 Under Convention on Recognition and Enforcement of Foreign Arbitral Awards, when action for

enforcement is brought in foreign state, state may refuse to enforce award only on grounds explicitly set forth in Convention. 9 U.S.C.A. §§ 1 et seq., 201-208; Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. V(1)(e), 9 U.S.C.A. § 201 note.

[7] Alternative Dispute Resolution 25T ↔374(7)

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(H) Review, Conclusiveness, and Enforcement of Award
 25Tk366 Appeal or Other Proceedings for Review
 25Tk374 Scope and Standards of Review
 25Tk374(7) k. Questions of Law or Fact. Most Cited Cases
 (Formerly 33k73.7(7), 33k73.7(4) Arbitration, 170Bk855.1, 170Bk776)
 Court of Appeals reviews district court's findings of fact in action to confirm arbitration award for clear error and its conclusions of law de novo.

[8] Alternative Dispute Resolution 25T ↔354

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(H) Review, Conclusiveness, and Enforcement of Award
 25Tk353 Confirmation or Acceptance by Court
 25Tk354 k. In General. Most Cited Cases
 (Formerly 33k72.1 Arbitration)
 Confirmation of arbitration award is summary proceeding that merely makes what is already final arbitration award judgment of the court.

[9] Alternative Dispute Resolution 25T ↔363(6)

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(H) Review, Conclusiveness, and Enforcement of Award
 25Tk360 Impeachment or Vacation
 25Tk363 Motion to Set Aside or Vacate
 25Tk363(6) k. Scope of Inquiry in

126 F.3d 15
 (Cite as: 126 F.3d 15)

General. Most Cited Cases

(Formerly 33k77(4) Arbitration)

Review of arbitration awards is very limited in order to avoid undermining twin goals of arbitration, namely, settling disputes sufficiently and avoiding long and expensive litigation; accordingly, showing required to avoid summary confirmation of award is high.

[10] Alternative Dispute Resolution 25T ↩️307

25T Alternative Dispute Resolution

25TII Arbitration

25TII(G) Award

25Tk302 Making and Formal Requisites

25Tk307 k. Findings, Conclusions, and

Reasons for Decision. Most Cited Cases

(Formerly 33k52.5 Arbitration)

Alternative Dispute Resolution 25T ↩️363(6)

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk360 Impeachment or Vacation

25Tk363 Motion to Set Aside or Vacate

25Tk363(6) k. Scope of Inquiry in

General. Most Cited Cases

(Formerly 33k77(4) Arbitration)

Arbitrator's decision is entitled to substantial deference, and arbitrator need only explicate his or her reasoning under contract in terms that offer even barely colorable justification for outcome reached in order to withstanding judicial scrutiny.

[11] Alternative Dispute Resolution 25T ↩️314

25T Alternative Dispute Resolution

25TII Arbitration

25TII(G) Award

25Tk313 Conformity to Submission

25Tk314 k. In General. Most Cited

Cases

(Formerly 33k57.1 Arbitration)

Alternative Dispute Resolution 25T ↩️329

25T Alternative Dispute Resolution

25TII Arbitration

25TII(G) Award

25Tk327 Mistake or Error

25Tk329 k. Error of Judgment or

Mistake of Law. Most Cited Cases

(Formerly 33k63.1 Arbitration)

Arbitration awards may be vacated or modified in limited circumstances where arbitrator's award is in manifest disregard of terms of agreement, or where award is in manifest disregard of the law. 9 U.S.C.A. §§ 10, 11.

[12] Alternative Dispute Resolution 25T ↩️329

25T Alternative Dispute Resolution

25TII Arbitration

25TII(G) Award

25Tk327 Mistake or Error

25Tk329 k. Error of Judgment or

Mistake of Law. Most Cited Cases

(Formerly 33k63.1 Arbitration)

Arbitrator did not manifestly disregard New York law on lost profits for breach of contract when awarding damages for breach of international licensing agreement, where arbitrator was well aware of and carefully applied New York's law on lost profits and concluded that law did not preclude damages award. 9 U.S.C.A. §§ 10, 11.

[13] Alternative Dispute Resolution 25T ↩️329

25T Alternative Dispute Resolution

25TII Arbitration

25TII(G) Award

25Tk327 Mistake or Error

25Tk329 k. Error of Judgment or

Mistake of Law. Most Cited Cases

(Formerly 33k63.1 Arbitration)

Arbitrator did not manifestly disregard law of lost profits by awarding \$46 million in future lost profits to foreign licensee in action for breach of international licensing agreement, although licensee had lost \$6.65 million over ten years under agreement and had offered to relinquish its rights for \$2 million; licensee's past losses did not necessarily negate expectation of future profits. 9 U.S.C.A. §§ 10, 11.

[14] Alternative Dispute Resolution 25T ↩️

126 F.3d 15
(Cite as: 126 F.3d 15)

374(1)

25T Alternative Dispute Resolution
25TII Arbitration
25TIII(H) Review, Conclusiveness, and
Enforcement of Award
25Tk366 Appeal or Other Proceedings for
Review
25Tk374 Scope and Standards of
Review
25Tk374(1) k. In General. Most
Cited Cases

(Formerly 33k63.3 Arbitration)
Interpretation of contract terms is within province
of arbitrator and will not be overruled simply
because Court of Appeals disagrees with that
interpretation.

[15] Alternative Dispute Resolution 25T ↩328

25T Alternative Dispute Resolution
25TII Arbitration
25TIII(G) Award
25Tk327 Mistake or Error
25Tk328 k. In General. Most Cited
Cases

(Formerly 33k63.3 Arbitration)
Arbitration award in international contract dispute
would not be set aside on grounds Court of Appeals
disagreed with arbitrator's interpretation of
underlying licensing agreement. 9 U.S.C.A. §§ 10,
11.

Michael S. Feldberg, Schulte Roth & Zabel LLP,
New York City (Antoinette Passanante, Schulte
Roth & Zabel LLP, Dennis J. Block, Stephen A.
Radin, Weil, Gotshal & Manges, New York City, of
counsel), for Respondents-Appellants.
Joseph D. Pizzurro, Curtis, Mallet-Prevost, Colt &
Mosle, New York City (Herbert M. Lord, Michelle
A. Rice, Curtis, Mallet-Prevost, Colt & Mosle,
New York City, of counsel), for Petitioner-Appellee.

Before: MINER and McLAUGHLIN, Circuit
Judges, and SCULLIN, District Judge.^{FN*}

FN* The Honorable Frederick J. Scullin,
Jr. of the United States District Court for

the Northern District of New York, sitting
by designation.

MINER, Circuit Judge.
Appeal from a judgment entered in the United
States District Court for the Southern District of
New York (McKenna, J.) denying respondents'
cross-motion to vacate or modify an arbitration
award and granting the petition to confirm the
award. The court found that while the petition for
confirmation was brought under the Convention on
the Recognition and Enforcement of Foreign
Arbitral Awards, respondents' cross-motion to
vacate or modify the award was properly brought
under the Federal Arbitration Act, and thus those
claims were governed by the Federal Arbitration
Act's implied grounds for vacatur. Nonetheless,
the court granted *17 the petition to confirm the
award, finding that respondents' allegations of error
in the arbitral award were without merit.

For the reasons that follow, we affirm.

BACKGROUND

In November of 1982, respondent-appellant Toys "R"
Us, Inc. (collectively with respondent-appellant
TRU (HK) Limited, "Toys 'R' Us") and
petitioner-appellee Yusuf Ahmed Alghanim &
Sons, W.L.L. ("Alghanim"), a privately owned
Kuwaiti business, entered into a License and
Technical Assistance Agreement (the "agreement")
and a Supply Agreement. Through the agreement,
Toys "R" Us granted Alghanim a limited right to
open Toys "R" Us stores and use its trademarks in
Kuwait and 13 other countries located in and
around the Middle East (the "territory"). Toys "R"
Us further agreed to supply Alghanim with its
technology, expertise and assistance in the toy
business.

From 1982 to the December 1993 commencement
of the arbitration giving rise to this appeal,
Alghanim opened four toy stores, all in Kuwait.
According to Toys "R" Us, the first such store,
opened in 1983, resembled a Toys "R" Us store in
the United States, but the other three, two of which
were opened in 1985 and one in 1988, were small

126 F.3d 15
(Cite as: 126 F.3d 15)

storefronts with only limited merchandise. It is uncontested that Alghanim's stores lost some \$6.65 million over the 11-year period from 1982 to 1993, and turned a profit only in one year of this period.

Following the Gulf War, both Alghanim and Toys "R" Us apparently concluded that their relationship needed to be altered. Representatives of Alghanim and Toys "R" Us's International Division met in September of 1991 and February of 1992. Alghanim expressed a desire for Toys "R" Us to contribute capital toward Alghanim's expansion into other countries. Alghanim advised that it would be willing to proceed in the business only under a new joint venture agreement that would shift a substantial portion of responsibility for capital expenditures to Toys "R" Us. Toys "R" Us was unwilling to take on a greater portion of this responsibility.

On July 20, 1992, Toys "R" Us purported to exercise its right to terminate the agreement, sending Alghanim a notice of non-renewal stating that the agreement would terminate on January 31, 1993. Alghanim responded on July 30, 1992, stating that because its most recently opened toy store had opened on January 16, 1988, the initial term of the agreement ended on January 16, 1993. Alghanim asserted that Toys "R" Us's notice of non-renewal was four days late in providing notice six months before the end of the initial period. According to Alghanim, under the termination provision of the agreement, Toys "R" Us's failure to provide notice more than six months before the fifth year after the opening of the most recent store automatically extended the term of the agreement for an additional two years, until January 16, 1995.

On September 2, 1992, Toys "R" Us sent a second letter. Toys "R" Us explained that, on further inspection of the agreement, it had determined that the initial term of the agreement expired on December 31, 1993, and it again gave notice of non-renewal. In this letter, Toys "R" Us also directed Alghanim not to open any new toy stores and warned that failure to comply with that direction could constitute a breach of the agreement.

Through the balance of 1992 and 1993, the parties

unsuccessfully attempted to renegotiate the agreement or devise a new arrangement. In September of 1993, the parties discussed Alghanim's willingness to relinquish its rights under the agreement. In one discussion, Amin Kadrie, Alghanim's chief operating officer and the head of its toy business, offered to "release the business right now" if Toys "R" Us would "give us \$2 million for the losses we've incurred [in] trying to develop this business." (J.A. 457.) Toys "R" Us declined, offering instead to buy Alghanim's inventory at Alghanim's cost. The parties could not agree upon a reconciliation.

At the end of 1993, Toys "R" Us contracted with Al-Futtaim Sons Co., LLC ("Al-Futtaim") for the post-Alghanim rights to open Toys "R" Us stores in five of the countries under the agreement, including Kuwait, *18 and with ATA Development Co. ("ATA") for the post-Alghanim rights to open Toys "R" Us stores in Saudi Arabia. These two companies initially offered \$30 million for the rights, and eventually paid a total of \$22.5 million.

On December 20, 1993, Toys "R" Us invoked the dispute-resolution mechanism in the agreement, initiating an arbitration before the American Arbitration Association. Toys "R" Us sought a declaration that the agreement was terminated on December 31, 1993. Alghanim responded by counterclaiming for breach of contract.

On May 4, 1994, the arbitrator denied Toys "R" Us's request for declaratory judgment. The arbitrator found that, under the termination provisions of the agreement, Alghanim had the absolute right to open toy stores, even after being given notice of termination, as long as the last toy store was opened within five years. The parties then engaged in substantial document and expert discovery, motion practice, and a 29-day evidentiary hearing on Alghanim's counterclaims.

On July 11, 1996, the arbitrator awarded Alghanim \$46.44 million for lost profits under the agreement, plus 9 percent interest to accrue from December 31, 1994. The arbitrator's findings and legal conclusions were set forth in a 47-page opinion.

126 F.3d 15
(Cite as: 126 F.3d 15)

Alghanim petitioned the district court to confirm the award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("Convention"), 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted at 9 U.S.C. § 201.^{FN1} Toys "R" Us cross-moved to vacate or modify the award under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, arguing that the award was clearly irrational, in manifest disregard of the law, and in manifest disregard of the terms of the agreement. The district court concluded that "[t]he Convention and the FAA afford overlapping coverage, and the fact that a petition to confirm is brought under the Convention does not foreclose a cross-motion to vacate under the FAA, and the Court will consider [Toys "R" Us's] cross-motion under the standards of the FAA." (J.A. 569-70 (citation omitted).) By judgment entered December 20, 1996, the district court confirmed the award, finding Toys "R" Us's objections to the award to be without merit. This appeal followed.

FN1. The Convention, frequently referred to as the "New York Convention" or the "1958 Convention," was enacted and opened for signature in New York City on June 10, 1958, and entered into force in the United States after ratification on December 29, 1970, as codified at 9 U.S.C. §§ 201-208.

DISCUSSION

I. Availability of the FAA's Grounds for Relief in Confirmation Under the Convention

Toys "R" Us argues that the district court correctly determined that the provisions of the FAA apply to its cross-motion to vacate or modify the arbitral award. In particular, Toys "R" Us contends that the FAA and the Convention have overlapping coverage. Thus, Toys "R" Us argues, even though the petition to confirm the arbitral award was brought under the Convention, the FAA's implied grounds for vacatur should apply to Toys "R" Us's cross-motion to vacate or modify because the cross-motion was brought under the FAA. We agree

that the FAA governs Toys "R" Us's cross-motion.

A. Applicability of the Convention

[1] Neither party seriously disputes the applicability of the Convention to this case and it is clear to us that the Convention does apply. The Convention provides that it will apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards *not considered as domestic awards* in the State where their recognition and enforcement are sought.

Convention art. I(1) (emphasis added). The Convention does not define nondomestic awards. See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir.1983). However, 9 U.S.C. § 202, one of the provisions implementing the Convention, provides that[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

In *Bergesen*, we held "that awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." 710 F.2d at 932 (quoting 9 U.S.C. § 201). The Seventh Circuit similarly has interpreted § 202 to mean that "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention." *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir.), *cert. denied*, 516 U.S. 914, 116 S.Ct. 300, 133 L.Ed.2d 206 (1995).

© 2007 Thomson/West. No Claim to Orig. U.S. Govt. Works.

126 F.3d 15
 (Cite as: 126 F.3d 15)

The Convention's applicability in this case is clear. The dispute giving rise to this appeal involved two nondomestic parties and one United States corporation, and principally involved conduct and contract performance in the Middle East. Thus, we consider the arbitral award leading to this action a non-domestic award and thus within the scope of the Convention.

B. Authority Under the Convention to Set Aside An Award Under Domestic Arbitral Law

[2] Toys "R" Us argues that the district court properly found that it had the authority under the Convention to apply the FAA's implied grounds for setting aside the award. We agree.

Under the Convention, the district court's role in reviewing a foreign arbitral award is strictly limited: "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207; see *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 699 n. 11 (2d Cir.1978).

Under Article V of the Convention, the grounds for refusing to recognize or enforce an arbitral award are:

- (a) The parties to the agreement ... were ... under some incapacity, or the said agreement is not valid under the law ...; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings ...; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ...; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties ...; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Convention art. V(1). Enforcement may also be

refused if "[t]he subject matter of the difference is not capable of settlement by arbitration," or if "recognition or enforcement of the award would be contrary to the public policy" of the country in which enforcement or recognition is sought. *Id.* art. V(2). These seven grounds are the only grounds explicitly provided under the Convention.

In determining the availability of the FAA's implied grounds for setting aside, the text of the Convention leaves us with two questions: (1) whether, in addition to the Convention's express grounds for refusal, other grounds can be read into the Convention by implication, much as American courts have read implied grounds for relief into the FAA, and (2) whether, under Article V(1)(e), the courts of the United States are authorized*20 to apply United States procedural arbitral law, i.e., the FAA, to nondomestic awards rendered in the United States. We answer the first question in the negative and the second in the affirmative.

1. Availability Under the Convention of Implied Grounds for Refusal

[3] We have held that the FAA and the Convention have "overlapping coverage" to the extent that they do not conflict. *Bergesen*, 710 F.2d at 934; see 9 U.S.C. § 208 (FAA may apply to actions brought under the Convention "to the extent that [the FAA] is not in conflict with [9 U.S.C. §§ 201-208] or the Convention as ratified by the United States"); *Lander Co. v. MMP Invs., Inc.*, 107 F.3d 476, 481 (7th Cir.1997), cert. denied, 522 U.S. 811, 118 S.Ct. 55, 139 L.Ed.2d 19, (1997). However, by that same token, to the extent that the Convention prescribes the exclusive grounds for relief from an award under the Convention, that application of the FAA's implied grounds would be in conflict, and is thus precluded. See, e.g., *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir.1996)

In *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (Rakta)*, 508 F.2d 969 (2d Cir.1974), we declined to decide whether the implied defense of "manifest disregard" applies under the Convention, having decided that

126 F.3d 15
(Cite as: 126 F.3d 15)

even if it did, appellant's claim would fail. *See id.* at 977. Nonetheless, we noted that “[b]oth the legislative history of Article V and the statute enacted to implement the United States' accession to the Convention are strong authority for treating as exclusive the bases set forth in the Convention for vacating an award.” *Id.* (citation and footnote omitted).

There is now considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award. *See, e.g., M & C*, 87 F.3d at 851 (concluding that the Convention's exclusive grounds for relief “do not include miscalculations of fact or manifest disregard of the law”); *International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Industrial Y Comercial*, 745 F.Supp. 172, 181-82 (S.D.N.Y.1990) (refusing to apply a “manifest disregard of law” standard on a motion to vacate a foreign arbitral award); *Brandeis Intsel Ltd. v. Calabrian Chems. Corp.*, 656 F.Supp. 160, 167 (S.D.N.Y.1987) (“In my view, the ‘manifest disregard’ defense is not available under Article V of the Convention or otherwise to a party ... seeking to vacate an award of foreign arbitrators based upon foreign law.”); *see also* Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 265 (1981) (“the grounds mentioned in Article V are exhaustive”). This conclusion is consistent with the Convention's pro-enforcement bias. *See, e.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 & n. 15, 94 S.Ct. 2449, 2457 & n. 15, 41 L.Ed.2d 270 (1974); *Parsons*, 508 F.2d at 973. We join these courts in declining to read into the Convention the FAA's implied defenses to confirmation of an arbitral award.

2. Nondomestic Award Rendered in the United States

[4] Although Article V provides the exclusive grounds for refusing confirmation under the Convention, one of those exclusive grounds is where “[t]he award ... has been set aside or

suspended by a competent authority of the country in which, or under the law of which, that award was made.” Convention art. V(1)(e). Those courts holding that implied defenses were inapplicable under the Convention did so in the context of petitions to confirm awards rendered abroad. These courts were not presented with the question whether Article V(1)(e) authorizes an action to set aside an arbitral award under the domestic law of the state in which, or under which, the award was rendered.^{FN2} We, *21 however, are faced head-on with that question in the case before us, because the arbitral award in this case was rendered in the United States, and both confirmation and vacatur were then sought in the United States.

FN2. In both *Celusa Del Pacifico S.A. v. A. Ahlstrom Corp.*, No. 95 Civ. 9586, 1996 WL 103826 (S.D.N.Y. Mar. 11, 1996), and *Avraham v. Shigur Express Ltd.*, No. 91 Civ. 1238, 1991 WL 177633 (S.D.N.Y. Sept. 4, 1991), district courts in this Circuit refused to recognize the applicability of the FAA's implied grounds for relief to nondomestic awards that had been rendered in the United States and were subject to confirmation under the Convention. However, in neither case did the district court address the significance of Article V(1)(e).

We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award. The district court in *Spector v. Torenberg*, 852 F.Supp. 201 (S.D.N.Y.1994), reached the same conclusion as we do now, reasoning that, because the Convention allows the district court to refuse to enforce an award that has been vacated by a competent authority in the country where the award was rendered, the court may apply FAA standards to a motion to vacate a nondomestic award rendered in the United States. *See id.* at 205-06 & n. 4.

The Seventh Circuit has agreed, albeit in passing, that the Convention “contemplates the possibility of

126 F.3d 15
 (Cite as: 126 F.3d 15)

the award's being set aside in a proceeding under local law." *Lander*, 107 F.3d at 478 (citing Article V(1)(e)). Likewise, the United States District Court for the District of Columbia has found that, in an arbitration conducted in Egypt and under Egyptian law, nullification of the award by the Egyptian courts falls within Article V(1)(e). See *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907, 909 (D.D.C.1996).

Our conclusion also is consistent with the reasoning of courts that have refused to apply non-Convention grounds for relief where awards were rendered outside the United States. For example, the Sixth Circuit in *M & C* concluded that it should not apply the FAA's implied grounds for vacatur, because the United States did not provide the law of the arbitration for the purposes of Article V(1)(e) of the Convention. 87 F.3d at 849. Similarly, in *International Standard*, the district court decided that only the state under whose procedural law the arbitration was conducted has jurisdiction under Article V(1)(e) to vacate the award, whereas on a petition for confirmation made in any other state, only the defenses to confirmation listed in Article V of the Convention are available. 745 F.Supp. at 178.

This interpretation of Article V(1)(e) also finds support in the scholarly work of commentators on the Convention and in the judicial decisions of our sister signatories to the Convention. There appears to be no dispute among these authorities that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state.^{FN3} As one commentator has explained:

FN3. Although most courts and commentators assume that Article V(1)(e) is applicable to the state in which the award is rendered, we note that Article V(1)(e) specifically contemplates the possibility that an award could be rendered in one state, but under the arbitral law of another state. See Convention art. V(1)(e) ("or has been set aside or suspended by a competent authority of the country in which, or under the law of

which, that award was made" (emphasis added)). In the rare instance where that is the case, Article V(1)(e) would apply to the state that supplied the arbitral law under which the award was made. See, e.g., *van den Berg*, *supra*, at 350. This situation may be so rare as to be a "dead letter." See *id.* at 28.

The possible effect of this ground for refusal [Article V(1)(e)] is that, as the award can be set aside in the country of origin on *all* grounds contained in the arbitration law of that country, including the public policy of that country, the grounds for refusal of enforcement under the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin. This might undermine the limitative character of the grounds for refusal listed in Article V ... and thus decrease the degree of uniformity existing under the Convention.

van den Berg, *supra*, at 355; see also Case No. 2 Nd 502/80 (Feb. 1, 1980) (Aus.), excerpted in 7 Y.B. Com. Arb. 312, 313 (1982) (in action to set aside an arbitral award, court applies "the law of the country in which the award has been made"). The defense in Article V(1)(e)

*22 incorporates the entire body of review rights in the issuing jurisdiction... If the scope of judicial review in the rendering state extends beyond the other six defenses allowed under the New York Convention, the losing party's opportunity to avoid enforcement is automatically enhanced: The losing party can first attempt to derail the award on appeal on grounds that would not be permitted elsewhere during enforcement proceedings.

Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 Int'l Law. 693, 694 (1988).

Indeed, many commentators and foreign courts have concluded that an action to set aside an award can be brought *only* under the domestic law of the arbitral forum, and can never be made under the Convention. See *Shenzhen Nan Da Indus. & Trade United Co. v. FM Int'l Ltd.*, 1992 H.K. Law Digest C6 (Sup.Ct.H.K. Mar. 2, 1991), excerpted in 18 Y.B. Com. Arb. 377, 382 (1993) ("Various

126 F.3d 15
(Cite as: 126 F.3d 15)

decisions have made clear that the Convention is not applicable for setting aside awards. The court of the country of origin of the award is the only court competent to rule.”); van den Berg, *supra*, at 20 (“[T]he Convention is not applicable in the action for setting aside the award.”); *id.* (“These provisions affirm the well-established principle of current international commercial arbitration that the court of the country of origin is exclusively competent to decide on the setting aside of the award.”); Jan Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 Va. J. Int’l L. 211, 242 (1981) (“[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.”).

There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law. The Convention succeeded and replaced the Convention on the Execution of Foreign Arbitral Awards (“Geneva Convention”), Sept. 26, 1927, 92 L.N.T.S. 301. The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad, *see* Geneva Convention arts. 1(d), 4(2), 92 L.N.T.S. at 305, 306, the so-called requirement of “double *exequatur*.” *See* Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 Wm. Mitchell L.Rev. 867, 876-77 (1996); W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int’l L.J. 1, 9 (1995). This requirement “was an unnecessary time-consuming hurdle,” van den Berg, *supra*, at 267, and “greatly limited [the Geneva Convention’s] utility,” Craig, *supra*, at 9.

The Convention eliminated this problem by eradicating the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad. In so doing, the Convention intentionally “liberalized procedures for enforcing foreign arbitral awards,” Volz & Haydock, *supra*, at 878; *see* Scherk, 417 U.S. at

519-20 & n. 15, 94 S.Ct. at 2457 & n. 15; *Parsons*, 508 F.2d at 973 (noting “[t]he general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention”).

[5] Nonetheless, under the Convention, the power and authority of the local courts of the rendering state remain of paramount importance. “What the Convention did not do ... was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration.” Craig, *supra*, at 11. Another commentator explained: Significantly, [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference.

*23 Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049, 1070 (1961). From the plain language and history of the Convention, it is thus apparent that a party may seek to vacate or set aside an award in the state in which, or under the law of which, the award is rendered. Moreover, the language and history of the Convention make it clear that such a motion is to be governed by domestic law of the rendering state, despite the fact that the award is nondomestic within the meaning of the Convention as we have interpreted it in *Bergesen*, 710 F.2d at 932.

[6] In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or

126 F.3d 15
(Cite as: 126 F.3d 15)

modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. *See* Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.

II. Application of FAA Grounds for Relief

[7] Having determined that the FAA does govern Toys “R” Us’s cross-motion to vacate, our application of the FAA’s implied grounds for vacatur is swift. The Supreme Court has stated “that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948, 115 S.Ct. 1920, 1926, 131 L.Ed.2d 985 (1995). We review the district court’s findings of fact for clear error and its conclusions of law *de novo*. *See id.*

[8][9] “[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court.” *Florasynt, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir.1984). The review of arbitration awards is “very limited ... in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.” *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir.1993). Accordingly, “the showing required to avoid summary confirmation is high.” *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir.1987).

[10] More particularly, “[t]his court has generally refused to second guess an arbitrator’s resolution of a contract dispute.” *John T. Brady & Co. v. Form-Eze Sys., Inc.*, 623 F.2d 261, 264 (2d Cir.1980). As we have explained: “An arbitrator’s decision is entitled to substantial deference, and the arbitrator need only explicate his reasoning under the contract ‘in terms that offer even a barely colorable justification for the outcome reached’ in order to withstand judicial scrutiny.” *In re Marine*

Pollution Serv., Inc., 857 F.2d 91, 94 (2d Cir.1988) (quoting *Andros Compania*, 579 F.2d at 704).

[11] However, awards may be vacated, *see* 9 U.S.C. § 10, or modified, *see id.* § 11, in the limited circumstances where the arbitrator’s award is in manifest disregard of the terms of the agreement, *see Leed Architectural Prods., Inc. v. United Steelworkers, Local 6674*, 916 F.2d 63, 65-66 (2d Cir.1990), or where the award is in “manifest disregard of the law.” *Fahnestock & Co. v. Waltman*, 935 F.2d 512, 515-16 (2d Cir.1991); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir.1986). We find that neither of these implied grounds is met in the present case.

A. Manifest Disregard of the Law

[12] Toys “R” Us argues that the arbitrator manifestly disregarded New York law on lost profits awards for breach of contract by returning a speculative award. This contention is without merit. “[M]ere error in the law or failure on the part of the arbitrator[] to understand or apply the law” is not sufficient to establish manifest disregard of the law. *24*Fahnestock*, 935 F.2d at 516 (quotations omitted). For an award to be in “manifest disregard of the law,”

[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term “disregard” implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Merrill Lynch, 808 F.2d at 933.

In the instant case, the arbitrator was well aware of and carefully applied New York’s law on lost profits.^{FN4} The arbitrator specifically addressed *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 502 N.Y.S.2d 131, 493 N.E.2d 234 (1986), which contains New York’s law on the subject and upon which Toys “R” Us relied in its arguments,^{FN5} and concluded:

126 F.3d 15
(Cite as: 126 F.3d 15)

FN4. There is no dispute that New York law controls.

FN5. In *Kenford*, lost profits were unavailable to the prevailing party because such an award would "require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty." 67 N.Y.2d at 262, 502 N.Y.S.2d 131, 493 N.E.2d 234; see *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 425, 646 N.Y.S.2d 76, 668 N.E.2d 1370 (1996).

I do not think the *Kenford* case rules out damages in this case. *Kenford* disallowed damages based on future profits from concessions in a domed stadium that was never built.... In this case [Alghanim], which is forced into the estimating posture because of [Toys "R" Us's] breach, bases its damages not on its own experience but on [Toys "R" Us's]. [Toys "R" Us] has hundreds of toy stores worldwide. Since it has been found that the Agreements require [Toys "R" Us] to provide a wide variety of services, similar to what it provides its own toy stores, I find that [Alghanim's] method of estimating damages is reasonable and believable, and provides a sound basis on which to fashion the award.

(J.A. 557.) We find no manifest disregard of the law in this analysis.

[13] Toys "R" Us also argues that the arbitrator manifestly disregarded the law of lost profits by ignoring the facts that (1) Alghanim's toy business had lost a total of \$6.65 million over the course of its existence under the agreement, and (2) Alghanim itself offered to relinquish its rights for \$2 million. Toys "R" Us further contends that the calculation of lost profits was irrational. We reject these contentions as well.

The fact that Alghanim lost \$6.65 million over ten years does not make the arbitrator's award of future lost profits of \$46 million "completely irrational." Past losses do not necessarily negate any expectation of future profits. See, e.g., *Lamborn v. Dittmer*, 873 F.2d 522, 533 (2d Cir.1989) ("[W]e

reject outright the suggestion in Dittmer's papers that a business with no history of profits is necessarily valueless.").

As to the purported \$2 million buyout offer, no witness has testified that the \$2 million figure was an estimate of the value of Alghanim's toy business. Kadrie, the primary Alghanim officer involved with the toy business, testified that, in his understanding, settlement with Toys "R" Us would serve to provide Alghanim "some relief on the cost of liquidating [its] inventory." (J.A. 405-06.) Accordingly, Alghanim argues that \$2 million was the value Alghanim placed on its inventory at the time. Furthermore, according to a Toys "R" Us executive, Kadrie, in making this offer, expressly stated that the \$2 million was to recoup losses Alghanim had incurred in trying to develop the business. Therefore, there is no proof that this figure was Alghanim's, or anyone else's, estimation of the value of the business. Thus, the arbitrator did not manifestly disregard lost profits law in refusing to treat the \$2 million figure as a buyout offer.

We also reject Toys "R" Us's contention that the arbitrator's calculation of lost profits was in manifest disregard of the law. Toys "R" Us contends that the actual operating results of the Toys "R" Us stores in the territory since the breach of the agreement have been lower than the arbitrator's valuation would suggest. The arbitrator explicitly addressed this issue, reasoning that *25 [Alghanim's] damages are to be calculated as of September 2, 1992 and are based on what its rights were worth at that time. More importantly, since the start of this case in late 1993 it has been clear that large stakes are involved and that [Toys "R" Us's] actual results of operations in the Middle East could have a bearing on this case. The record does not provide a sufficient basis to disentangle [Toys "R" Us's] actual results ... from what might have been the business results of [Toys "R" Us's] Mid-East venture if this case had never existed.

(J.A. 558.) There is no manifest disregard in the arbitrator's refusal to credit actual operating results for the period following the breach in calculating the value of the business at the time of the breach.

126 F.3d 15
 (Cite as: 126 F.3d 15)

Toys "R" Us also argues that the arbitrator was wholly irrational in calculating the value of the Saudi Arabian rights as the \$15 million ATA initially offered for those rights, when ultimately ATA only paid \$7.5 million. However, the fact that a disinterested third party valued the Saudi Arabian rights at \$15 million near the time of the breach provides a rational basis for accepting that valuation. Therefore, we see no manifest disregard in the arbitrator's use in his calculations of the bid price, rather than the actual closing price, for the sale to ATA. Thus, we see no merit in Toys "R" Us's contentions of manifest disregard of the law.

B. Manifest Disregard of the Agreement

Toys "R" Us also argues that the district court erred in refusing to vacate the award because the arbitrator manifestly disregarded the terms of the agreement. In particular, Toys "R" Us disputes the arbitrator's interpretation of four contract terms: (1) the termination provision; (2) the conforming stores provision; (3) the non-assignment provision; and (4) the deletion provision. We find no error.

[14] Interpretation of these contract terms is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424 (1960). We will overturn an award where the arbitrator merely "mak[es] the right noises-noises of contract interpretation-" while ignoring the clear meaning of contract terms. *In re Marine Pollution*, 857 F.2d at 94 (quotation omitted). We apply a notion of "manifest disregard" to the terms of the agreement analogous to that employed in the context of manifest disregard of the law.

[15] As to each of these contract provisions, Toys "R" Us merely takes issue with the arbitrator's well-reasoned interpretations of those provisions, and simply offers its own contrary interpretations. Toys "R" Us does not advance a convincing argument that the arbitrator manifestly disregarded the agreement. We will not overturn the arbitrator's award merely because we do not concur

with the arbitrator's reading of the agreement. For the reasons stated by the district court, we find the arbitrator's interpretation of the contractual provisions supportable.

We have carefully considered Toys "R" Us's remaining contentions and find them all to be without merit.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

C.A.2 (N.Y.), 1997.

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.
 126 F.3d 15

Briefs and Other Related Documents (Back to top)

- 1997 WL 33484150 (Appellate Brief) Reply Brief for Respondents-Appellants (Apr. 17, 1997)
- 1997 WL 33633312 (Appellate Brief) Reply Brief for Respondents-Appellants (Apr. 17, 1997) Original Image of this Document with Appendix (PDF)
- 1997 WL 33484149 (Appellate Brief) Brief for Petitioner-Appellee (Mar. 24, 1997)
- 1997 WL 33633311 (Appellate Brief) Brief for Petitioner-Appellee (Mar. 24, 1997) Original Image of this Document (PDF)
- 1997 WL 33484148 (Appellate Brief) Brief for Respondents-Appellants (Feb. 21, 1997)
- 1997 WL 33633310 (Appellate Brief) Brief for Respondents-Appellants (Feb. 21, 1997) Original Image of this Document (PDF)

END OF DOCUMENT

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Drafting an Effective Arbitration Clause

Peter Morton
K&L Gates, London
19 April 2007

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

The perennial problem

- Arbitration clause treated as standard boilerplate - the 'midnight clause'
- Insufficient attention to matters provided (e.g. seat, number of arbitrators)
- Insufficient care in drafting
- Failure to take advice from local lawyers at the proposed seat

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

"The cardinal rule of drafting an international arbitration agreement is to avoid the type of ambiguity and equivocation that will later delight a party wishing to drag its feet" (William W Park, 1997)

Topics Covered

- Essential elements of an arbitration clause
- Optional additional provisions
- Common mistakes

Essential Elements (1)

- Agreement to arbitrate
- Type of arbitration
 - Institutional/Administered
 - Choice of institution – e.g. consider rules, practices and charges
 - Ad hoc
 - Consider making an institution an "appointing authority"

Essential Elements (2)

- Scope (categories of dispute covered)
- Method of appointment of arbitrators
- Number of arbitrators (one or three)

Essential Elements (3)

- Place/seat of the arbitration
 - Practical convenience
 - Neutrality
 - Legal factors
 - Scope for court interference
 - Scope for annulment/setting aside of the award
 - Ease of enforcement (has the country of the seat joined the NY Convention?)

Essential Elements (4)

- Language
- Governing law of the contract (separate provision preferably)

Optional Elements (1)

- Procedure
 - Specification of procedure - e.g. documents only - no final hearing
 - Disclosure/evidence – e.g. application of IBA Rules
 - ‘Fast track’ arbitration – be realistic and specify consequences if time limits not met

Optional Elements (2)

- Remedial Powers
 - Provisional/interim relief
 - Costs
 - Interest
 - Punitive damages
 - Award currency

Optional Elements (3)

- Limits on rights of appeal/challenge
- Confidentiality
- Qualifications of the tribunal

Common Mistakes (1)

- Absence of agreement to arbitrate
 - Incomplete reference is fatal:

"In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce in Paris"

- Ineffective incorporation by reference

Common Mistakes (2)

- Overly prescriptive clauses
 - Danger of ending up with an inappropriate procedure and/or unrealistic timetable
 - Generally 'less is more'

Common Mistakes (3)

- The sloppy multi-tiered clause
 - When does each stage/step begin and end?
"The parties shall mediate so long as one party believes settlement through mediation is possible, after which the parties shall submit the dispute to binding arbitration ..."
 - Are steps mandatory or optional?
"The parties agree to consider mediation, after which the dispute shall be resolved by ..."

Common Mistakes (4)

- The scarce or non-existent arbitrator

"... a legally qualified national of Belgium with a chemical engineering degree, fluent in Arabic"

Common Mistakes (5)

- Inadvertent limits on scope
 - Disputes “*under the contract*” to be referred to arbitration
 - Consider claims for misrepresentation, rectification, illegality of contract, for example
 - Recent *Fiona Trust* case in English Court of Appeal – “*arising out of*”, sufficient to cover claim that the contract was procured by bribery

Common Mistakes (6)

- Multi-party contracts
 - Draft with extreme care
- Multiple/inter-connected contracts
 - Can be difficult to avoid fragmentation of dispute resolution mechanisms

For the adventurous ...

- “High/low” and “baseball” arbitrations
- Initiator plays away

- Options to arbitrate

REMEMBER ...

- Wise to stick with the safety and simplicity of the institutions' model clauses
- Depart from model wording with great care.
- Don't over-prescribe
- Are all essential elements covered?
- Not all seats are the same – take local advice as necessary

DRAFTING AN EFFECTIVE ARBITRATION CLAUSE

Peter Morton, K&L Gates, London

CHECK LIST OF ELEMENTS IN AN ARBITRATION CLAUSE

(A) ESSENTIAL ELEMENTS

The following are the essential elements that should be included in all well-drafted arbitration clauses:

1. Agreement to arbitrate.
2. Type of arbitration (institutional/administered -v- ad hoc).
3. Scope of the arbitration agreement (categories of dispute covered).
4. Method of appointment of arbitrators.
5. Number of arbitrators.
6. Place/seat of the arbitration. *(NB. Take local advice if the arbitration regime of the seat is unfamiliar.)*
7. Language of the arbitration.
8. Governing law of the contract (preferably outside of the arbitration clause).

NB. Considerable care needs to be taken in drafting arbitration clauses for multi-party (i.e. more than 2 parties) arbitrations and multi-contract arbitrations.

(B) OPTIONAL ELEMENTS

The following are additional, optional provisions that may be considered:

1. Procedure - for example:
 - (a) specification of procedure
 - (b) disclosure/evidence (e.g. IBA Rules)
 - (c) 'fast track' arbitration
2. Remedial powers - for example:
 - (a) provisional/interim relief
 - (b) costs
 - (c) interest
 - (d) punitive damages
 - (e) award currency
3. Rights of appeal
4. Confidentiality
5. Qualifications of the Tribunal
6. Waiver of sovereign immunity

DRAFTING AN EFFECTIVE ARBITRATION CLAUSE

Peter Morton, K&L Gates, London

1. Introduction

Too often the dispute resolution provision in international commercial contracts is thrown in at the last minute, without much thought or analysis, and treated as one of the standard "boilerplate" provisions appearing at the back of the contract.

Having negotiated hard over commercial terms, the dispute resolution provision is often given little attention. Parties may not want to rock the boat at the last minute and risk losing the deal by negotiating over the dispute resolution provision. In some cases the provision may be a cut and paste from the last contract that one of the parties or their lawyer negotiated. This represents a dangerous approach.

There is no "one size fits all" dispute resolution provision which will be appropriate in all international commercial contracts. In each case the parties and their advisers ought to consider factors such as the parties' nationalities and relationship, the nature of the transaction and the likely sums involved.

This note does not seek to examine the considerations and issues regarding dispute resolution provisions in general, and whether arbitration is the right choice. Rather, the note assumes that the parties have already decided to resolve their disputes by arbitration and seeks to offer practical guidance on drafting an effective arbitration clause.

Once a decision has been taken to resolve disputes by arbitration, it is of paramount importance that the parties:-

- Carefully consider what they would like their arbitration agreement to provide - for example as to the seat of the arbitration, number of arbitrators, the type of arbitration (administered or ad hoc) and so on.

Failure to do so can give rise to expensive and time-consuming procedures, ill-suited to the parties' interests.

- Take care in drafting their arbitration clause to ensure that it includes all requisite elements and correctly records the parties' intentions.

As William Park once put it, "*the cardinal rule of drafting an international arbitration agreement is to avoid the type of ambiguity and equivocation that will later delight a party wishing to drag its feet*"¹.

A badly drafted clause may (a) give rise to time-consuming and costly satellite litigation as the parties argue over the meaning and effect of the arbitration clause, and (b) ultimately lead to results different from those intended by the drafters.

The importance of clear drafting is growing all the more important with parties now increasingly seeking to challenge arbitration clauses, perhaps in the interests of buying time and gaining some negotiation leverage, and with an increasing use of specialised and tailored clauses.

This note will cover the following:-

- Essential elements that should be included in all well drafted arbitration clauses (section 2);
- Optional matters that may be included in arbitration clauses, but which are not strictly necessary (section 3); and
- Some general recommendations for effective drafting of arbitration clauses (section 4).

This note does not seek to cover the separate topic of drafting multi-party arbitration agreements or drafting arbitration agreements for multiple contracts. Drafting appropriate and effective arbitration clauses for multi-party and multi-contract arrangements is inherently difficult. Different drafting considerations are likely to apply in each particular case, and it is recommended that legal advice is taken when seeking to draft appropriate contractual arbitration mechanisms in such situations.

2. **Essential Elements**

The matters that should be included in all well drafted arbitration clauses are as follows:-

2.1 **Agreement to arbitrate**

It almost goes without saying, but it is crucial that the arbitration clause includes an agreement by the parties to resolve disputes by arbitration. Whereas omission of some

¹ William W. Park "When and why arbitration matters", G M Beresford Hartwell, ed., The Commercial Way to Justice (1997) p 73-99 at p 96.

of the other essential elements (referred to below) may merely result in delay or inconvenience, omission of this item is fatal to the arbitration proceeding.

2.2 **Type of arbitration**

Every arbitration clause ought to provide for which type of arbitration procedure is being invoked - whether institutionally administered arbitration or "ad hoc" arbitration.

(a) **Institutionally administered arbitration**

Institutionally administered arbitration provides:-

- the availability of institutional rules which will govern the arbitration procedure;
- administrative back up, for example in terms of fixing the amount of arbitrators' fees, taking money on account for and paying those fees, and other central costs of the arbitration;
- support in the initial formation of the tribunal;
- enhanced predictability and regularity in the process by virtue of the institution's established procedures and track record; and
- arguably, greater weight in the resulting award than an ad hoc arbitration award². As it was once put, "*there is something more majestic, more dignified and more comforting*" about institutional arbitration awards³.

However, institutional arbitrations will generally cost more, in light of the institution's charges in respect of the process, and in some cases the institution's involvement can lead to a more lengthy procedure.

The process of selection of an arbitration institution and the special characteristics of each is a topic in its own right. For the purposes of this paper, the important point to appreciate is that not all institutions are the same. By way of example only:-

² However, there must be some doubt over this perceived benefit, given the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") draws no distinction between institutional and ad hoc arbitration awards when it comes to enforcement.

³ Francis J Higgins, William G Brown and Patrick J Roach, Pitfalls in International Arbitration, 35 Bus. Law 1035, 1051 (1980).

- the fees and charges for some institutional arbitrations are calculated by reference to the sums in dispute, whereas some institutions charge on a straight hourly rate, both for their administrative staff and for the arbitrators;
- some institutional rules include a confidentiality provision, whereas others do not; and
- some institutions scrutinize the arbitrators' proposed award before it is delivered to the parties (which can result in the award being returned to the arbitrators for amendment), whereas others carry out no such process.

If you are unfamiliar with the particular proposed institution, then it is important that advice is taken or research carried out regarding the institution's rules, processes, charges, and any other special characteristics to ensure that the selected institution is an appropriate one.

(b) **Ad hoc arbitration**

An "ad hoc" arbitration is an arbitration proceeding outside the auspices of an arbitral institution. The parties agree on their own procedure (or adopt a set of stand-alone arbitral rules - for example the UNCITRAL Arbitration Rules), relying on the arbitration law of the seat to fill any gaps and the local courts to support the process should it falter.

Ad hoc arbitrations can be most appropriate where a dispute has already arisen and it is clear the parties are prepared to co-operate in the process. Assuming the parties do co-operate, ad hoc arbitration can end up being quicker and cheaper than institutional arbitration.

2.3 **Scope of the arbitration agreement**

The arbitration agreement should make provision for which categories of dispute are covered. Unless there is a desire to carve out particular categories of dispute which are to be determined by other means, it is advisable for the arbitration clause to be drafted broadly so as to catch all disputes regarding the parties' dealings and to avoid the risk of a multiplicity of disputes in different forums.

So, for example, claims for misrepresentation, rectification, claims of illegality and disputes as to whether the contract in fact exists may not be caught by a clause which only covers disputes arising "*under the contract*".

The model institutional clauses adopt a broader wording than merely claims "*under the contract*". For example the ICC clause covers disputes "*arising out of or in connection*

with the present contract" and the UNCITRAL clause covers "any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof".

Some clauses carve out particular categories of dispute (e.g., a valuation issue to be resolved by expert determination, with all other disputes to be resolved by arbitration). However, such clauses need drafting carefully as they can lead to disputes as to whether a particular issue falls to be resolved by arbitration or not.

2.4 Method of appointment of the arbitrators

All arbitration clauses should make provision for the formation of the arbitral tribunal.

If the parties are providing for institutional arbitration, the method of appointment of the arbitrators will generally be dealt with in the institutional rules, subject to any variations to that procedure upon which the parties may agree.

If the parties are providing for ad hoc arbitration, the parties should prescribe the procedure for the formation of the tribunal, whether in the clause itself or through a reference to certain arbitration rules which include such a procedure (e.g. the UNCITRAL Arbitration Rules). It is generally sensible, when opting for ad hoc arbitration, to nominate an institution as an "appointing authority". That way the named institution may step in to assist in the formation of the tribunal if the agreed process falters. Without a named appointing authority, significant difficulties and delays may occur in the formation of the tribunal⁴.

2.5 Number of arbitrators

It is good practice to make provision in the arbitration clause for the number of arbitrators.

A sole arbitrator ought to decide a dispute more quickly and at lower cost. However, if the contract is a substantial one under which disputes are likely to be significant in value and potentially complex, the parties may feel more comfortable in opting for a three person tribunal.

A three personal tribunal ought to bring a broader spread of expertise, a better chance of a fair hearing and a just award and will generally, through party-nominated co-arbitrators, provide the parties with an important say in the composition of the tribunal.

⁴ For example, under the UNCITRAL Arbitration Rules if the parties are unable to agree upon an arbitrator and there is no designated appointing authority, a party may then refer the matter to the Permanent Court of Arbitration in the Hague for it to designate an appointing authority (Article 6.2 of the UNCITRAL Rules).

It may be difficult to know, at the time of preparing the contract, if all disputes under the contract are likely to be sufficiently complex or substantial to warrant a three member tribunal. In those cases the parties may prefer to leave the question of the number of arbitrators open by providing for a tribunal of "one or three", or "one or more"⁵ arbitrators, with the parties then having the opportunity to agree, once the dispute has arisen, whether the matter is to be decided by one or three arbitrators, and in the absence of agreement the named appointing institution deciding the issue. That way the parties may avoid the risk of ending up with a three person tribunal dealing with a small claim, albeit in relation to a substantial contract.

2.6 **Place/seat of the arbitration**

The specification of the seat of the arbitration is one of the key items in a clause from which a number of other things will flow.

In considering an appropriate seat, it is important to select a country (or a city in a country) which:-

- (a) is conveniently located in view of the location of the parties, potential witnesses, arbitrators and lawyers;
- (b) appears neutral so as not to provide either party with "home advantage" (although this may be a matter of negotiation in the contract in question);
- (c) has joined the New York Convention. Designating a country that has joined the New York Convention significantly increases the likelihood of successfully enforcing the final award. Most contracting states have made the reciprocity reservation, so that only awards issued in countries which have joined the New York Convention are entitled to benefit from the reciprocal enforcement provisions;
- (d) does not have any domestic laws which substantially restrict the ability of the parties to conduct an arbitration. In some jurisdictions, local courts may interfere in international arbitrations sited within their territory; and
- (e) does not have any domestic laws which allow arbitration awards to be annulled or set aside, save on limited grounds.

The country's domestic law will govern procedural issues which are outside the scope of the arbitration rules selected by the parties. Further, there may well be applicable mandatory laws which will apply in any event, no matter what the parties agree or what any applicable institutional rules provide.

⁵ As in the model ICC arbitration clause.

Accordingly, if you are unfamiliar with the arbitration regime of the proposed seat of the arbitration, it is of paramount importance that advice is taken from local lawyers in the jurisdiction.

In the absence of a provision determining the seat within the arbitration clause, additional costs are likely to be incurred and delays suffered in resolving the issue. Further, the determined seat may end up being an inappropriate venue based on the sorts of factors described above.

2.7 **Language of the arbitration**

It is recommended that the arbitration clause specifies what the language of the arbitration is to be. The language of the arbitration would ordinarily follow that of the contract, not least as many disputes will involve issues regarding interpretation of the contract.

Whilst specifying the language of the arbitration is recommended in all arbitration agreements, it is particularly important where the two contracting parties do not share a common first language, and even more so if the contract has been prepared in two languages.

Whilst the intended language may appear obvious to those on your side, the other party may have other ideas. Making express provision will prevent any dispute and any consequent waste of time and costs in deciding which language should be used.

The language of the arbitration is worth considering carefully as it may have significant cost consequences (if substantial numbers of documents, submissions or witness evidence will require translation or interpretation), as well as an impact on selection of arbitrators, of counsel and on the overall character of the proceedings.

2.8 **Governing law of the contract**

It is possible for at least three different laws to apply to a dispute referred to arbitration:-

- The law governing the performance of obligations under the contract, known as the "governing law" or the "proper law of the contract".
- The law of the arbitration agreement. Given the arbitration agreement constitutes a separate agreement in its own right from the main contract, it is possible to include an express choice of law clause addressing the law applicable to the arbitration agreement. The law of the arbitration agreement

regulates the substantive matters relating to the arbitration agreement (e.g. the interpretation and validity of the arbitration agreement).

- The procedural law of the arbitration.

It is important that the contract should include a choice of law provision regarding the governing law of the contract (e.g. *"the governing law of the contract shall be the substantive law of [...]"*). It is sensible to keep the choice of governing law clause separate from the arbitration agreement so that it is clear that it relates to the contract as a whole.

Unless there are special reasons for doing so, there is no requirement that separate provision be made regarding the law of the arbitration agreement. In the absence of specific provision, the law of the arbitration agreement normally follows the governing law of the main contract⁶. Whilst the parties may, in theory, choose a different law to govern the arbitration agreement it is not generally recommended.

As for the procedural law of the arbitration, in the absence of agreement otherwise, the seat prescribes the procedural law of the arbitration. Although it is theoretically possible for the parties to choose to hold an arbitration in one country but make it subject to the procedural law of another, in practice this could give rise to great difficulty⁷.

3. **Optional Elements**

In addition to the essential items described above which should be regarded as absolute musts when drafting an arbitration clause, there are some optional provisions that might be included in an arbitration clause:

PROVISIONS REGARDING PROCEDURE

3.1 **Specification of procedure**

The parties may include in their arbitration clause specific provisions regarding the procedure to be adopted. For example, the parties might provide for a documents only procedure, so that submissions are to be made in writing only, with any supporting

⁶ Certainly under English law - *ABB Lummus Global Limited -v- Keppel Fels Limited* [1999] 2 Lloyd's Rep 24.

⁷ See Russell on arbitration, 22nd Edition, 2-101. Generally see sections 2-087 to 2-108 regarding the laws to be applied to an arbitration.

written evidence (documents and any witness statements), but with no cross-examination and no final hearing.

In making provision for the arbitration procedure, the parties will need to guard against the risk of being overly prescriptive. Rarely will the parties be able to safely predict all types of dispute that may arise. Therefore, if the parties prescribe the procedure in too much detail, they may end up with a dispute for which the agreed procedure is totally inappropriate, and perhaps even un-workable or un-achievable.

3.2 **Evidence / Disclosure**

If the parties have agreed, in advance, on the scope of disclosure or other evidential matters (for example as to the application of the IBA Rules on the Taking of Evidence in International Commercial Arbitration - in whole or in part) then express provision reflecting this may be made in the arbitration agreement. However, some parties prefer to retain the flexibility of deciding upon evidential matters once the dispute has arisen.

3.3 **'Fast Track' arbitration**

Arbitration agreements can establish fast track procedures that require an award to be made within a specified time period or otherwise set out an expedited timetable.

The risk with such fast track procedures, agreed in advance of the dispute arising, is that they may impose unrealistic time constraints which simply cannot be met.

If time limits are to be specified in the arbitration agreement, provision should be made as to what the consequences of failing to meet those time limits are. Otherwise, a challenge to the award for being out of time or other difficulties on enforcement may arise.

PROVISIONS REGARDING REMEDIAL POWERS

3.4 **Provisional / Interim Remedies**

Arbitration agreements can expressly grant the arbitral tribunal power to award the parties provisional or interim relief.

Before making provision in the arbitration agreement for provisional or interim remedies, it is important to check what any relevant institutional/arbitral rules and the procedural law of the arbitration (ordinarily the law of the seat, as described above), may provide. Many national laws and institutional rules provide the parties with the ability to seek provisional / interim relief from either the arbitrators themselves or the national court, in advance of the final award.

Arbitration clauses will fairly commonly provide that the arbitration clause does not bar either party from seeking urgent interim relief from the Court in appropriate circumstances. Again, in many jurisdictions such a provision may be unnecessary⁸.

3.5 **Costs**

Arbitration agreements may include provision regarding the power of the arbitrator(s) to award costs.

The parties should consider the procedural law of the arbitration⁹ and the provisions of any applicable institutional/arbitral rules¹⁰ to establish whether it may be necessary to make specific provision regarding costs in the arbitration clause.

Whilst most arbitrators will be used to allocating costs on a "loser pays" basis, some US arbitrators, for example, may decline to award costs to the winner if not required to do so in the arbitration clause or by the relevant rules of arbitration or the applicable procedural law of the seat.

If the parties would like the "loser pays" principle to apply and there is room for doubt as to whether the arbitrators would be required to award costs on that basis, then specific provision may be made in the clause.

3.6 **Interest**

Many institutional rules and national laws¹¹ expressly provide arbitrators with the power to award interest. In some circumstances it may be advisable to make provision in the arbitration agreement regarding the powers of the tribunal to award interest. The national law applicable to the arbitration proceeding and any applicable institutional/arbitral rules should be checked to establish whether separate provision may be necessary.

⁸ For example, section 44 of the Arbitration Act 1996 provides the Court with the power to make various orders in support of arbitration proceedings, including for the preservation of assets or evidence.

⁹ For example, for arbitrations seated in England, Wales or Northern Ireland, section 61(2) of the Arbitration Act 1996 provides that, unless the parties agree otherwise, the tribunal shall award costs on the general principle that costs should follow the event, except where it appears to the tribunal that, in the circumstances, it would not be appropriate.

¹⁰ For example, the LCIA Rules provide (Art 28.4) that "*unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate*".

¹¹ For example, for arbitrations seated in England, Wales or Northern Ireland, section 49 of the Arbitration Act 1996 provides the tribunal with the power to award simple or compound interest.

3.7 **Punitive damages**

In certain circumstances it may be advisable to make express provision regarding the tribunal's power to award punitive damages. For example, if the arbitration is seated in the US and/or one of the parties to the agreement is from the US, it may be sensible to make express provision as to whether or not punitive damages may be awarded by the tribunal.

Whilst it would be more common for such a provision to expressly prohibit the award of punitive damages, if the clause expressly permits the tribunal to award punitive damages, the parties should be aware that this may not be the end of the issue: difficulties may arise on enforcement as in some jurisdictions an award of punitive damages may be against public policy¹².

3.8 **Award currency**

If the parties wish the award to be issued in a particular currency, this may be provided for in the arbitration clause.

OTHER PROVISIONS

3.9 **Rights of appeal**

Parties may choose to include in their arbitration agreement a provision limiting or excluding the scope of review by the Court of the tribunal's award.¹³

To establish whether such a clause is necessary, the relevant institutional/arbitral rules and the law of the seat of the arbitration should be considered. Many national laws and institutional rules¹⁴ already limit the Court's power to review arbitration awards.

One should also consider the national laws of the seat of the arbitration to establish whether any such provision purportedly restricting the scope of review by the Court would be valid and effective according to those national laws¹⁵.

¹² A ground upon which enforcement may be refused under the 1958 New York Convention (Art V (2)(b)).

¹³ For example, under Swiss Law, when non-Swiss parties agree to arbitrate in Switzerland they can agree to waive their right to challenge the award in the Swiss Courts on the grounds set out Art 190 of the Private International Law Act 1987.

¹⁴ For example, the ICC Rules contain a provision (Art 28.6) which has been held by the English Court to exclude judicial review of awards (see *Arab African Energy Corporation Ltd -v- Olieprodukten Nederland BV* [1983] 2 Lloyds Rep 419.

¹⁵ For example, under the Arbitration Act 1996, the parties may, by agreement, exclude the parties' right to appeal to the court on a point of law (s69). However, the parties may not exclude the right to

3.10 Confidentiality

Under certain national laws, a duty of confidentiality applies to the arbitration proceedings. For example, under English law there is, under the common law (not within the Arbitration Act 1996) an implied duty of confidentiality attaching to arbitration proceedings. However, there is increasing doubt in many jurisdictions as to the scope of the duty of confidentiality attaching to arbitration proceedings.

Some institutional rules include a rule dealing with confidentiality of the arbitration proceeding¹⁶, whereas others do not¹⁷.

If confidentiality is a primary concern, it may be worth including an express confidentiality provision in the arbitration clause to supplement any existing protection offered by the national law of the seat of the arbitration and by any applicable institutional rules.

3.11 Qualifications of the Tribunal

If the parties would like their dispute decided by an arbitrator or tribunal with particular characteristics, a provision to that effect may be included in the arbitration clause.

In making such provision, the parties should be alive to the risk that if too many requisite characteristics are specified, or the qualifications specified are rare or restrictive, there may be an insufficient number of arbitrators to select from, or indeed no qualifying arbitrators at all.

Even to specify that all the tribunal must be fluent in a particular second language (beyond the language of the arbitration), will limit the pool of potential arbitrators significantly.

challenge an award for lack of jurisdiction (s67) or serious irregularity (s68), both of which are mandatory provisions.

¹⁶ LCIA Rules - Art 19.4 provides that non-parties cannot attend hearings and Art 30 provides an express obligation of confidentiality - "*Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.*"

¹⁷ Under the ICC Rules there is no express confidentiality provision other than to say that non-parties cannot attend the hearing (Art 21.3). The UNCITRAL Rules include a provision regarding the privacy of hearings (Art 25.4) and confidentiality of the Award (Art 32.5).

Similarly, if the drafting of the relevant qualification is too vague or subjective, it can give rise to a dispute as to whether the criteria are satisfied (for example, the old formula of "a commercial man").

It is extremely unwise to name a particular person to act as arbitrator in case the named person is unwilling or unable to act (perhaps by reason of illness or even death).

3.12 **Waiver of sovereign immunity**

Where a contracting party is a sovereign state or agency, it is advisable for the arbitration clause to include a waiver of sovereign immunity by that sovereign state / agency.

4. **Recommendations for effective drafting of arbitration clauses**

The following represent some general recommendations for the effective drafting of an arbitration clause:-

- It is advisable to stick with the simplicity of the short model clauses recommended by the leading arbitration institutions, which have been tried and tested over the years.
- If you are to depart from the model wording provided by the institutions, do so with great care.
- Avoid over-elaboration and over-prescription. The conventional wisdom is that '*less is more*'. The more you say in your clause the greater the scope for argument about the meaning of the clause and the greater the possibility that you will end up prescribing an inappropriate procedure.
- Be careful to ensure that all the "Essential Elements" referred to above (paragraphs 2.1 to 2.8) have been covered.
- Consider carefully the choice of the seat of the arbitration and take local advice where the arbitration regime of the proposed seat is unfamiliar.

Peter Morton
K&L Gates, London
April 2007

DRAFTING AN EFFECTIVE ARBITRATION CLAUSE

Peter Morton, K&L Gates, London

SAMPLE MODEL ARBITRATION CLAUSES

(A) **INSTITUTIONAL ARBITRATION**

● **ICC Model Arbitration Clause**

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by [one or more]/[one]/[three] arbitrator[s] appointed in accordance with the said Rules.

Note: It would be sensible to add to this model wording:-

- The seat, or legal place, of the arbitration shall be [City and/or Country]

- The language of the arbitration proceedings shall be [.....]

Provision should also be made (preferably outside the arbitration clause) regarding the governing law of the contract - eg "The governing law of the contract shall be the substantive law of [.....]"

● **LCIA Model Arbitration Clauses**

For future disputes:

Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of [].

For existing disputes:

A dispute having arisen between the parties concerning [], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract [is/shall be] the substantive law of [].

● **ICDR (International Division of the AAA) Model Arbitration Clause**

Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution.

Note: It would be sensible to add to this model wording:-

- *The number of arbitrators shall be [one/three]*
- *The seat, or legal place, of the arbitration shall be [City and/or Country]*
- *The language of the arbitration proceedings shall be [.....]*

Provision should also be made (preferably outside the arbitration clause) regarding the governing law of the contract - eg "The governing law of the contract shall be the substantive law of [.....]"

(B) **AD HOC ARBITRATION**

• **Ad hoc arbitration governed by UNCITRAL Rules - UNCITRAL model wording**

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

Note :- Parties may wish to consider adding

- The appointing authority shall be...[name of institution or person]
- The number of arbitrators shall be...[one/three]
- The seat, or legal place, of the arbitration shall be...[City or Country]
- The language to be used in the arbitral proceedings shall be...

• **Ad Hoc Arbitration with Arbitrators to be Appointed by the LCIA - LCIA model wording**

All disputes arising out of or in connection with this agreement shall be finally settled by arbitration in accordance with [] rules and shall be decided by [one/three] arbitrators appointed by the London Court of International Arbitration, acting as appointing authority. The arbitration shall have its seat in [] {City and/or Country} and the arbitration proceedings shall be conducted in [] {language}.

The governing law of the contract shall be [].

**SUMMARY OF THE CONCLUSIONS OF THE ICC COMMISSION ON
ARBITRATION TASK FORCE ON "TECHNIQUES FOR CONTROLLING
TIME AND COST IN ARBITRATION"**

(A) ARBITRATION AGREEMENT

Keeping clauses simple (paras 1-2¹)

- Main purpose is to avoid uncertainty, and therefore the time and cost associated with resolving disputes that arise
- Suggest use of the most appropriate ICC standard clause. Modifications to the model clauses can give rise to unintended and undesirable consequences. In addition to the standard clause, specify the place of the arbitration, language of the arbitration and the law governing the contract. Be cautious about adding further provisions

Selection and appointment of Arbitrators (paras 3-5)

- Use an appropriate number of arbitrators for the size of the dispute. The flexibility of specifying a "one or three" person tribunal can be beneficial
- Where appropriate use the ICC to appoint arbitrators and avoid adding onerous special requirements

Fast-track procedures (para 6)

- Arbitration clauses providing for fast-track procedures should only be used with considerable thought. It is often difficult at the time of drafting to envisage the range of disputes that may arise

Time Limits for rendering the Award (para 7)

- Unrealistic deadlines are to be avoided. They can lead to jurisdictional and enforcement issues

¹ Paragraph references are to the numbered paragraphs within the Report "Techniques for controlling time and cost in arbitration", issued by the ICC Commission on Arbitration, dated 8 March 2007

Submission to ICC arbitration (para 8)

- Parties can decide to submit the dispute to the ICC after it has arisen and should consider points set out below when agreeing procedure

(B) INITIATION OF PROCEEDINGS

Selection of Counsel

Counsel with experience (para 9)

- Consider the most appropriate skill set and appoint counsel accordingly

Counsel with time (para 10)

- Consider other commitments of counsel over the projected period of the arbitration

Selection of Arbitrators

Use of sole arbitrator (para 11)

- A sole arbitrator may mean a quicker and cheaper arbitration if sufficient for the size of dispute

Arbitrators with time (para 12)

- Aside from considering arbitrators' other commitments and ensuring they have sufficient time to devote to the case, it is also worth communicating any particular need for speed at the outset

Selection and appointment by ICC (para 13)

- Asking the ICC to appoint arbitrators is likely to be quickest method of appointment and reduce risk of challenges
- Parties wishing to have additional input can ask the ICC for a list of suggested arbitrators to be agreed in consultation with the ICC

Avoiding objections (para 14)

- Avoid appointments which are likely to lead to challenges as this will inevitably delay proceedings

Selecting arbitrators with strong case management skills (para 15)

- A tribunal that is proficient in case management will assist in achieving a time and cost effective arbitration. This should be an important factor in choosing who to appoint

Request for Arbitration and Answer

Complying with the ICC Rules (paras 16-17)

- Claimant should consult Article 4 of ICC Rules and ensure it complies. Failure to do so causes delay and may require the Secretariat to revert to the party for clarification in accordance with Article 4(5)

(3) The Request shall, inter alia, contain the following information:

- (a) the name in full, description and address of each of the parties;*
 - (b) a description of the nature and circumstances of the dispute giving rise to the claim(s);*
 - (c) a statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;*
 - (d) the relevant agreements and, in particular, the arbitration agreement;*
 - (e) all relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10 and any nomination of an arbitrator required thereby; and*
 - (f) any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.*
- Full particulars are not required by the ICC Rules but omission is likely to lead to delay. Full particulars in the Request for Arbitration should be met with equally full particulars in the Response. This will also assist an efficient case management conference

(C) **PRELIMINARY PROCEDURAL ISSUES**

Language of the Arbitration

Determination of language by the arbitral tribunal (para 18)

- If the parties have not agreed on the language of the arbitration, the Tribunal can do so by means of a procedural order and should consider this prior to agreeing Terms of Reference

Proceedings involving two or more languages (para 19)

- Use of more than one language should only be considered where it will reduce time and cost
- If two languages are used, parties and the Tribunal should consider practical methods of keeping costs down such as the necessity of duplicate translations and which versions are to be binding

Relationship Among the Terms of Reference, the Provisional Timetable and the Early Case Management Conference

Terms of Reference

Summaries of claims and relief sought (para 24)

- The parties can be asked to draft a summary for inclusion in the Terms of Reference or the Tribunal can produce this in accordance with Article 18(1)(c). Cost can be reduced by specifying the length of document required

Use of discretion in apportionment of costs (para 25)

- Parties should be told by the Tribunal at the outset that, pursuant to Article 31 of the ICC Rules, there are costs risks in failing to comply with orders on procedure

"Article 31(3)

The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

Empowering chairman on procedural issues (para 26)

- The chairman of a three person tribunal may be authorised to sign procedural orders alone in the interests of expediency

Administrative Secretary to the arbitral tribunal (para 27)

- Appointment of a secretary may reduce time and cost and parties should consider the ICC Note on this issue

Need for a physical meeting (para 28)

- Terms of Reference may be signed without the need for all parties to meet, or could be agreed by telephone or video conference, where appropriate

Counterparts (para 29)

- Signing counterparts of the Terms of Reference may also save time and cost

Compliance with Article 18(3) (para 30)

- If one party refuses to co-operate in agreeing Terms of Reference, when submitted to the ICC pursuant to Article 18(3), ensure no provisions require both parties' approval

Early Case Management Conference

Timing of case management conference (para 31)

- Consider holding a case management conference as soon as both parties' cases are sufficiently clear

Proactive case management (paras 32-33)

- The Tribunal should be provided with as much information as possible to inform efficient decision making at the case management conference. A Tribunal who is familiar with the facts at the outset can make decisions which minimise time and cost
- The Tribunal can tell the parties at the outset that it intends to take a proactive attitude to case management

Client attendance (para 34)

- Client representatives may be useful at the case management conference

- All relevant representatives, including experts, should be kept well-informed of procedural timetables and key dates

Timetable for the Proceedings

Compliance with the provisional timetable (para 35)

- Tribunal and parties should make all reasonable efforts to comply. Extensions or revisions should only be used where necessary and the ICC promptly informed

Need for an evidence hearing (para 36)

- Avoiding the need for an evidence hearing by allowing the Tribunal to consider documents alone can result in significant costs savings

Fixing the evidence hearing date (para 37)

- If needed, an early date for an evidence hearing will ensure expediency and avoid the proceedings becoming excessively drawn out

Pre-hearing conference (para 38)

- A conference, possibly by telephone, to discuss practical arrangements for the evidence hearing should be considered
- Issues to consider include time allocation, transcripts, use of translations, order of witnesses and other practical arrangements

Use of IT (para 39)

- Parties should consider the assistance of IT and consult the relevant ICC publication. The online ICC service "NetCase" may also be of use
- Video and telephone conferences should also replace the need for physical meetings, where appropriate

Short and realistic time periods (para 40)

- Parties should choose the shortest time limits whilst maintaining sufficient realism to avoid challenges and disputes

Bifurcation and partial Awards (para 41)

- Both of these should be considered in appropriate cases to ensure efficient resolution of a dispute

Briefing everyone involved in the case (para 42)

- Briefing of all relevant people should be done at the earliest possible opportunity to avoid delays later. Key dates should also be diarised by all involved. This includes client representatives at all relevant levels, witnesses, internal and external lawyers and experts
- The importance of complying with deadlines should be emphasised to all involved

Settlement

Arbitral tribunal's role in promoting settlement (para 43)

- Parties should be made aware they are free to conduct settlement negotiations at all times and to request the arbitration is suspended if appropriate
- The ICC ADR Rules may provide useful guidance

(D) SUBSEQUENT PROCEDURE FOR THE ARBITRATION

Written Submissions

Setting out the case in full early in the proceedings (para 46)

- Parties should set out their cases as fully as possible at any early stage to enable key issues to be identified. This will ensure the procedure is efficient and resources are not wasted on irrelevant areas of the dispute

Avoiding repetition (para 47)

- Setting out arguments in full at an early stage should obviate the need for delays caused by repetition. The Tribunal should make appropriate directions to that effect, for instance when considering the need for post-hearing submissions

Sequential or simultaneous delivery (para 48)

- Consider which method of serving written submissions is more appropriate. Simultaneous exchange may be inefficient if it raises the need for detailed replies to be served

Specifying form and content (para 49)

- This should be clarified as early as possible, particularly where witness statements or the need for expert evidence are concerned

Limiting the length of submissions (para 50)

- Agreeing a limit on particular submissions can help focus the parties on key issues to be addressed

Limiting the number of submissions (para 51)

- Again, this will avoid repetition and focus the parties on the key issues

Documentary Evidence

Organisation of documents (para 52)

- Agree a coherent numbering system at the outset and use it in the Request for Arbitration and the Answer

Producing documents on which the parties rely (para 53)

- Parties should be encouraged to produce such documents rather than delay proceedings by raising requests for production of documents
- No documentary evidence should be needed in respect of agreed non-disputed facts

Establishing procedure for requests for production (para 54)

- A clear and efficient procedure for submission and exchange of documents should be agreed. Article 3 of the IBA Rules on the Taking of Evidence may assist
- Time frames should also be agreed and adhered to

Managing requests for production efficiently (para 55)

- Consider the application of all of the following, where appropriate: limiting the number of requests; limiting requests to those for relevant and material documents; establishing material time limits; and using the "Redfern Schedule" which prescribes column headings under which documents should be listed

Avoiding duplication (para 56)

- Avoiding duplication of production of documents to which both parties have access will save time and costs

Selection of documents to be provided to the arbitral tribunal (para 57)

- Arbitrators do not need to see documents which are not material to either party's case. It also prevents the Tribunal from preparing efficiently

Minimising creation of hard copies (para 58)

- Exchanging documents in electronic form should be considered. Refer to the ICC publication on "Using Technology to Resolve Business Disputes"

Translations (para 59)

- Agree how translation of documents should be dealt with
- Avoid the need for certification which will increase costs

Authenticity of documents (para 60)

- Consider providing that documents are to be deemed authentic unless challenged

Correspondence

Correspondence between counsel (para 61)

- Avoid unnecessary correspondence between counsel. The Tribunal may consider informing the parties that there will be costs penalties for persistent and unreasonable use of inter-counsel correspondence

Sending correspondence to the arbitral tribunal (para 62)

- Only send inter-counsel correspondence to the Tribunal when its decision is required. Such correspondence should be copied to the Secretariat in accordance with Article 3(1) of the ICC Rules

Witness Statements

Limiting the number of witnesses (para 63)

- Provision of witness statements and oral evidence should be limited as much as possible in the interests of saving costs
- The Tribunal may assist in indicating whose evidence it requires and the parties can cooperate by agreeing undisputed facts which do not require witness evidence

Minimising the number of rounds of witness statements (para 64)

- Minimise the number of rounds of witness statements and whether this should occur before or after production of documents

Expert Evidence

Presumption that expert evidence not required (para 65)

- It may be helpful to start with a presumption that no expert evidence is required

ICC International Centre for Expertise (para 66)

- This body may be able to assist in identifying appropriate expert witnesses

Clarity regarding the subject matter and scope of reports (para 67)

- To avoid duplication or superfluity, clarity should be sought at an early stage, preferably by agreement, as to scope and subject matter of expert evidence

Number of experts (para 68)

- No more than one expert per party except in exceptional circumstances

Number of reports (para 69)

- Consider a limit to number of rounds and agree simultaneous or sequential exchange

Meeting of experts (para 70)

- Such a meeting should be encouraged and experts instructed to draw up a list of those areas which are not in dispute

Use of single expert (para 71)

- Consider whether this is appropriate and whether the expert can be appointed by the Tribunal. Both may save time and cost
- A single joint expert needs a clear brief and a deadline for submission of his or her report

Hearings

Minimising the length and number of hearings (para 72)

- Limiting the number of hearings and those required to attend by all involved will have a significant cost-saving impact

Choosing the best location for hearings (para 73)

- Hearings need not be at the place of the arbitration, pursuant to Article 14(2) of the ICC Rules. There may well be a more cost-effective location

Telephone and video conferencing (para 74)

- Procedural hearings can be conducted efficiently through this method
- Witnesses may be able to give evidence by video link

Providing submissions in good time (para 75)

- Submissions should be provided to the Tribunal well in advance of any hearing so as to enable adequate preparation and avoid delay

Cut-off date for evidence (para 76)

- Consider the fixing of a cut-off date for service of evidence before a hearing, to be altered only in compelling circumstances

Identifying core documents (para 77)

- Consider providing the Tribunal with a reading list of key documents before a hearing. Deliver a bundle of core documents where appropriate

Agenda and timetable (para 78)

- Agree an agenda and timetable to ensure hearings run smoothly
- Consider, where appropriate, use of the chess clock principle

Avoiding repetition (para 79)

- If the Tribunal has been provided with core documents in advance of the hearing, the repetition of written submissions in oral opening statements may be avoided

Need for witnesses to appear (para 80)

- If possible, counsel can confer and reach agreement on this topic in advance of a hearing

Use of written statements as direct evidence (para 81)

- Costs can be saved by avoiding examination of witnesses and using witness statements as direct evidence

Witness conferencing (para 82)

- Consider whether this technique is appropriate for the dispute concerned

Limiting cross-examination (para 83)

- Consider limiting the time available to each party for cross-examination

Closing submissions (para 84)

- Post-hearing submissions may be avoided altogether or limited to solely oral or written submissions
- Where necessary, a list of questions could be provided by the Tribunal to focus parties on key issues, and a deadline for submission agreed

Costs

Using allocation of costs to encourage efficient conduct of the proceedings (para 85)

- The Tribunal has a discretion to award costs as it considers appropriate and will take into account unreasonable behaviour such as excessive document requests; excessive legal argument; excessive cross-examination; dilatory tactics; exaggerated claims; failure to comply with procedural orders; and unjustified interim applications

Deliberations and Awards (para 86)

- The Tribunal should ensure time is reserved in each arbitrators' diary for deliberation and preparation of the award after the hearing
- The Tribunal should act as promptly as possible and comply with Article 22(2) of the ICC Rules by indicating to the Secretariat when it anticipates submission of a draft award

"Article 22(2)

When the Arbitral Tribunal has declared the proceedings closed, it shall indicate to the Secretariat an approximate date by which the draft Award will be submitted to the Court for approval pursuant to Article 27. Any postponement of that date should be communicated to the Arbitral Tribunal."

K&L Gates

16 April 2007

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Panel 2 – Controlling Costs and Reducing Delay

Ian Meredith
K&L Gates, London
19 April 2007

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Guidelines Not Hard and Fast Rules

- Strong case management does not suit all cases
- It is dangerous to be overly prescriptive in the arbitration clause
- Selecting the right tribunal is key
- Early case assessment ensures the central issues are identified before the dye is cast

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Strong Case Management

- The tribunal's overriding duty is to deliver an enforceable award
 - A recalcitrant party needs to be handled carefully by the tribunal
 - "Strong case management" can mean different things in different circumstances

Strong Case Management (cont'd)

- The "Hwang" criteria
 - Terrorists or arbitration guerrillas
 - Conscientious objectors or arbitration atheists
 - Sceptics or arbitration agnostics

Strong Case Management (cont'd)

- Empower the tribunal when appropriate - do not leave a time bomb ticking
 - Dispute resolution clauses are often given inadequate attention when the contract is negotiated
 - Often difficult to know what will be in a clients' interests ahead of the dispute developing
 - Safer to empower a tribunal when you are comfortable with its members and that it is right for the specific dispute

Tribunal Selection

- Select arbitrators with time to devote to the case
- The Chair (or Sole Arbitrator) should know how to take a grip of a complex arbitration
- If the opposing party is intent upon delay and obfuscation, tribunal selection all the more important

Getting a Grip of the Central Issues

- Early case assessment crucial
- Technology can play an important role
- The First Organisational Meeting can set the tone for the rest of the arbitration
- An early appreciation of the central issues empowers a party to set an appropriate procedure
- Uncertainty breeds procrastination

A Few Options

- If you know the central issues at the outset, you may be able to incorporate “document production” with the written submission to accelerate the procedure
- Set a timetable for addressing document production issues at the FOM
- Do you need heavily finessed lay witness statements? Might summaries be sufficient?

A Few Options (cont'd)

- Are Tribunal appointed experts always a bad idea?
- Are pre-hearing and post-hearing briefs always necessary?
- Why not use the “chess clock” at the hearing?

Panel 2 – Controlling Costs and Reducing Delay

Ian Meredith
K&L Gates, London
19 April 2007

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Panel 2 – Controlling Costs and Reducing Delay

Richard F. Paciaroni
K&L Gates, Pittsburgh
19 April 2007

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Key Points

- Cost for large case international arbitration is now equal to litigation in many cases
- Cost of arbitration can drive a settlement
 - Budgets of US\$25MM to \$50MM
- The ICC Task Force conclusions re: cost control are helpful
- Clients and counsel must work together if costs are to be contained

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Cost Containment Measures

- Selection of location, language and governing law is critical to cost containment efforts.
 - Choose a location where transaction costs are reasonable – be flexible
 - Use only one language for the hearings
 - Avoid need for local law experts
- Do not over specify the qualifications for the arbitrators

Cost Containment Measures

- Empower the chairperson to resolve all procedural motions
- Agree on the extent of translation needed for documents
- Conduct meetings, interviews, etc. by video conference, be flexible as to location for the face to face meetings and hearings

Cost Containment Measures

- Consider the need for transcripts and post-hearing briefs
- Fix the time allotted for each party at the hearings.
 - 40 hours each for direct and cross
- Limit the number of experts

Cost Containment Measures

- Exchange documents in electronic form
- Use software to reduce lawyer review time on document productions
- Agree early on regarding the means and methods to be used in electronic document production
 - Format of production
 - Metadata
 - Claw-back of privileged documents
 - Non-waiver of privilege for inadvertent production

Cost Containment Measures

- Alternative fee arrangements
 - Have counsel put some “skin” in the game
 - Full contingency
 - Reduced rates with a success fee
 - Volume discounts

Panel 2 – Controlling Costs and Reducing Delay

Richard F. Paciaroni
K&L Gates, Pittsburgh
19 April 2007

Document Disclosure in International Arbitration: Innovative Ways to Manage Electronic Documents

Martha J. Dawson, K&L Gates

April 11, 2007

It is a fact today that 93% of corporate documents are created electronically, and 70% of electronic documents are never printed out.¹ In selecting international arbitration your goals include the timely resolution of your dispute and significant cost savings over traditional litigation. When preparing your case, however, it is important to consider electronically stored information (“ESI”) – especially that ESI which is never printed and would never be found in a paper format. Do you need ESI to make or defend your case?

With the recent amendments² to the United States Federal Rules of Civil Procedure to specifically address ESI, most U.S. lawyers and companies now have a better appreciation for the role of electronic documents in U.S. litigation. And many U.S. companies have felt the pain of the broader and often more costly U.S. model of discovery. But important lessons learned from U.S. discovery can be used in the international arbitration setting to advance your goals. In other words, you can rely on electronic documents without breaking the bank or defeating the goals that persuaded you to select arbitration in the first instance.

In the international arbitration setting, the right to discovery and document production, while present, is not as broad nor is it codified with the same level of detail as compared to U.S. discovery. The ICC Rules of Arbitration (‘ICC Rules’) and the International Bar Association Rules on the Taking of Evidence in International Arbitration (‘IBA Rules’) are the most commonly referenced written sources establishing discovery rights in international arbitrations. Of the two, only the IBA Rules explicitly recognizes a party’s right to document discovery as long as the documents requested are “material to the outcome of the case.”³

The ICC Rules are largely silent with regard to document production. However, a few ICC rules do provide guidance on arbitral authority for ordering discovery. ICC Rule 15(1), which is often cited as a source of arbitral authority to direct document production, allows the Arbitral Tribunal to apply any rules which the parties may settle on, whether or not reference is made to the rule of procedure of a national law to be applied to the arbitration. Additionally, Article 20(5) allows the arbitral tribunal to direct a party to provide additional evidence, which for all practical purposes provides the tribunal with the authority to order document production.

But, regardless of whether you are disclosing documents in support of your claim or defense, or are seeking or responding to a request for documents from another party in support of their claim or defense in arbitration, approaching the challenge of electronic documents with the right people, processes and technology can achieve all of your arbitration goals.

¹ Lyan, P. and Vatian, H. “How Much Information?”; [http://info.berkeley.edu/how_much-info/\(2000\)](http://info.berkeley.edu/how_much-info/(2000)).

² See FRCP Rules 26 and 34.

³ IBA Rules, Article 3(3)(b)

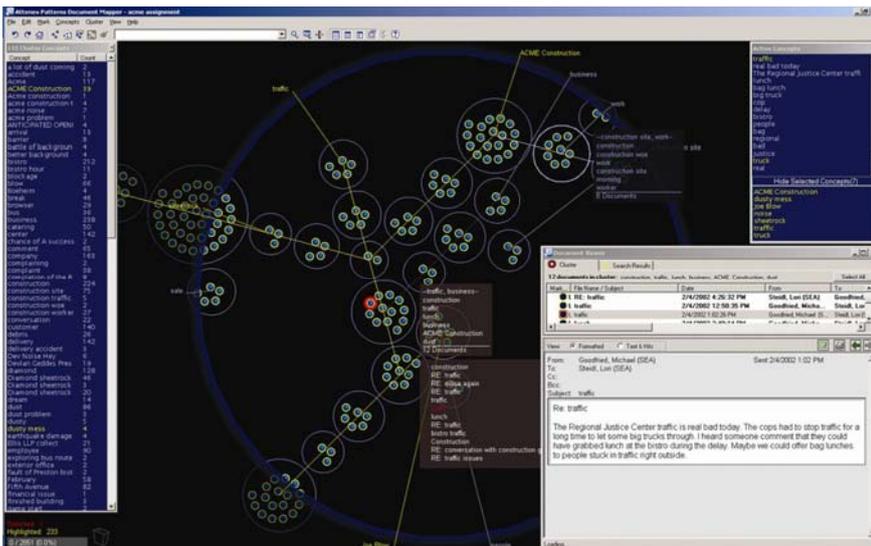
A Snapshot Review

Let's examine one approach to document disclosure in an international arbitration setting. A dispute has arisen. You have the key paper documents, but you have no idea what is in your electronic documents. You know that important discussions between the parties took place in email – but how do you find the documents that are critical to your case? In deciding whether to proceed with the arbitration you need to evaluate the strength of your claim, and you need to now what is in your electronic documents to do that.

We use an approach that we call a “snapshot review”. The idea is to identify a small number of people in your company likely to have been involved in the communications and quickly review their documents for key evidence in your case. For snapshot reviews, we rely on the power of information contained in the native⁴ document to assist in our review. A snapshot review can give you key information about your claims and defenses that you cannot find in paper documents.

Why is the native file format important? Native documents contain metadata (data about the data) and full text information with the content of the document. If you print a native document, or convert it to a static image such as PDF or TIF, the metadata can or will be lost. With the metadata we can search the contents of documents for key words, use deduplication technology, and use concept analysis tools to ensure an effective and efficient review of electronic documents.

Technology, such as the Attenex[®] Patterns[®] E-Discovery solution allows you to harness the power of the electronic document. The Patterns[®] tool provides a graphic user interface, shown below, that allows electronic documents to be searched and organized in a variety of ways, depending on the particular project and/or the needs and preferences of the person reviewing the documents.



The Attenex[®] Patterns[®] E-Discovery Tool

⁴ A native document is its original electronic format – an email message (.msg), an Office document (.xls, .doc, .ppt).

An additional feature is the ability to segregate documents that contain search hits, and to then view those documents with the search hits highlighted within the body of the document allowing documents to be reviewed quickly and efficiently. The “cluster by search hit” feature can be used to organize a collection of related documents around a specific document, person or a particular issue. Instead of wading through 5000 documents one at a time, the Patterns[®] software allows you to quickly identify the key documents within the 5000 by clustering them together by related nouns and noun concepts. The concept clustering user interface also allows users to quickly identify and discard unrelated or non-relevant items (represented visually by greater distance from the cluster center).

Additional efficiency can be gained through careful selection of review processes, such as deduplication. Deduplication tools can identify and suppress exact copies of documents so you only review a document once. The Patterns[®] tool will also identify and suppress (never delete) lesser included email conversations. For example, an email thread titled “Gaining traction in 2007” is sent from one person to three recipients. The first recipient replies to the original thread, which is in turn replied to by the second recipient, and then by the third recipient. By the end of the first day there may be 25 emails on the thread titled “Gaining traction in 2007”. None of the 25 emails is an exact duplicate, but various emails in the thread will contain earlier replies to the same thread. Advanced deduplication software can identify the email(s) that contain the entirety of the various threads, thus allowing the reviewer to focus on the complete conversation, and not the lesser included individual threads. This process and technology can save significant time and cost.

Before beginning any review, you should consider how to handle privileged documents, including what type of privilege log will be required. In U.S. litigation, privilege logs are often very detailed documents listing each document being withheld as privileged, the privilege asserted, and a description of the document with enough specificity to allow the opposing party to judge the validity of the privilege claim. The usefulness of these privilege logs can be called into question, especially given the high cost to prepare them. Engaging in early discussions with the other party and the arbitrator may allow for an agreement to do such things as limiting the scope to log only certain categories of documents or custodians, excluding documents created after the date that the dispute arose, excluding documents sent to or from outside counsel, not listing documents that have been redacted and produced as partially privileged, and the like. Tools such as the Patterns[®] tool can help you to quickly identify privileged documents and create the initial draft of the log from the native file’s metadata.

CONCLUSION

ESI can be an important source of documents in support of your claim or defense in an international arbitration. Without adopting the model, we can learn much from the U.S. model of discovery. Early focus on people, processes and technology can help to achieve your goal of a cost effective and timely resolution to your international arbitration, while allowing you to find and use the electronic documents that are important to your case.

About the Author:

Martha is the co-chair of K&L Gates e-Discovery Analysis and Technology Group (e-DAT Group). The e-DAT Group is dedicated to the review and management of records, including e-discovery.

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Innovative Ways of Managing Document Disclosure

Martha J. Dawson, K&L Gates
April 19, 2007

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Documents Relied Upon or Disclosed

- Documents relied upon to support your case
- Documents requested from opposing party or others
 - IBA Rules, Article 3(3)(b) – may request documents “material to the outcome of the case”
 - ICC Rule 15(1) and Article 20(5)

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

- 93% of all corporate documents are created electronically.
 - Source: Lyan, P. and Vatian, H. “How Much Information?”
 - <http://info.berkeley.edu/how-much-info/2000>
- 70% of electronic documents are never printed



What is Electronically Stored Information (ESI)?

- E-mail
- Word processed documents
- Databases, spreadsheets, presentations
- Calendars, address books, photos, program data
- Instant messages
- Video and audio recordings (including voicemail)

Where is ESI found?

Electronic Devices

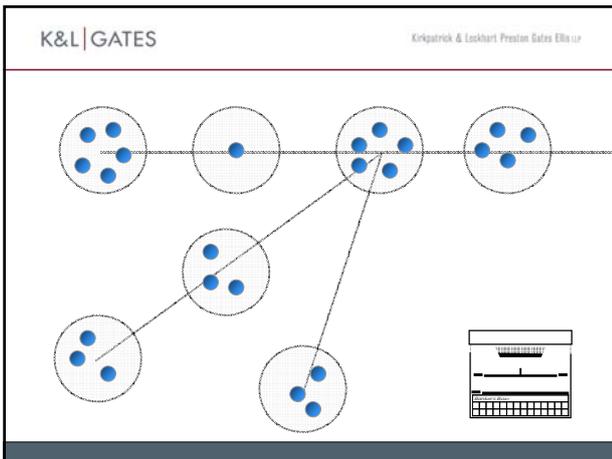
- Office Computers
- Home Computers
- Network Servers
- Digital Voice Mail Systems
- Blackberries
- "Smart" Cell Phones
- PDAs
- MP3 Players

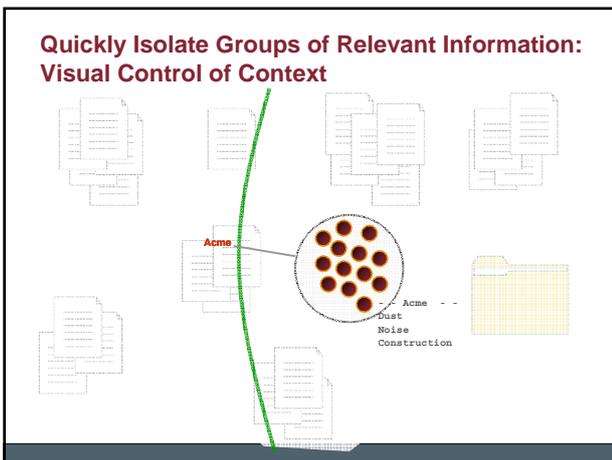
Portable Storage Media

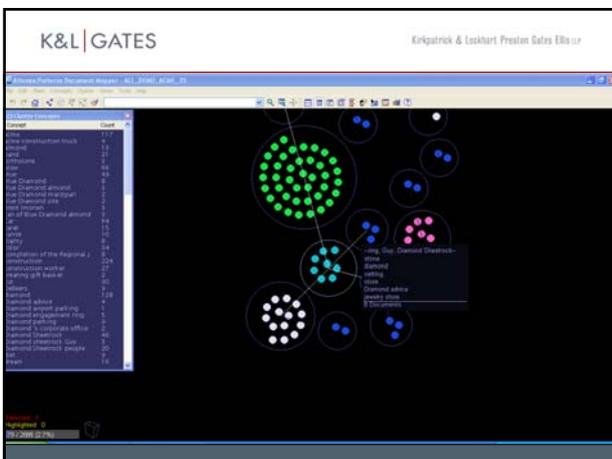
- Hard Drives
- DVD's
- CD's
- Floppy Disks
- Thumb Drives
- Flash Memory Cards
- Back Up Tapes
- Back Up Disks

People, Process, Technology

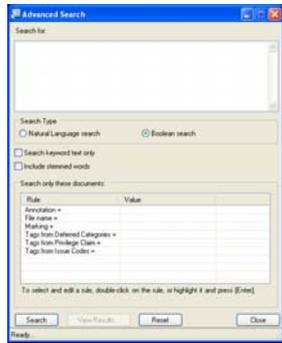








Attenex® Patterns®



www.ediscoverylaw.com

PUBLISHED BY
K&L | GATES

TOPICS

- Case Summaries
- E-Discovery Case Database
- Events
- Federal Rules Amendments
- News & Updates
- Resources
- Archives

- HOME
- CONTACT US
- OUR OFFICES
- E-Discovery Analysis & Technology Group

SEARCH

Enter keywords

SUBSCRIBE Add this blog to your feeds or subscribe by email [MORE...](#)

electronic discovery law

A blog on legal issues, news and best practices relating to the discovery of electronically stored information published by the Document Analysis Technology Group and Records Management Practice at K&L Gates.

Plaintiff's Disposal of "Crashed" Home Computer Warrants Adverse Inference Instruction

Posted on April 11, 2007 by K&L Gates

Teague v. Target Corp., 2007 WL 1041191 (N.D.A.C. Apr. 4, 2007)

In this employment litigation, defendant had asserted as an affirmative defense plaintiff's failure to mitigate her damages. During discovery, it was revealed that plaintiff owned a home computer from December 1995 until August 2004, which plaintiff had used to conduct her entire on-line job search after leaving defendant's employ, including researching job opportunities on the internet, submitting on-line employment applications, and exchanging emails with prospective employers. Plaintiff also used the computer to send and receive emails regarding her termination and her claims of gender discrimination. The computer was discarded approximately one year after plaintiff had released regarding her prospective claims and after she filed her charge of discrimination with the EEOC. Plaintiff claimed that she discarded the computer because it "crashed." Plaintiff admitted that she never took the computer to any type of computer professional to see if it could be repaired.

CONTINUE READING...

TAGS: Case Summaries

The role of mediation in arbitration

William Wood QC - Brick Court Chambers
19 April 2007

"A mediator may be able to provide solutions which are beyond the power of the Court to provide"

Brooke LJ, *Dunnett v Railtrack* 2002

"The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR."

Dyson LJ, *Halsey v Milton Keynes* 2004

"The Parties will:

1. Ensure that their representatives attend the mediation with the necessary full authority to settle the dispute.
2. Pay the mediator's fees in advance.
3. Provide the mediator with an agreed bundle of relevant documentation.
4. Each provide written submissions limited to a maximum of 20 pages.
5. At the outset of the mediation each make an opening presentation not exceeding 20 minutes in duration."

Excerpt from recent mediation agreement.
Mediation date 17th April 2007.



Arbitrating Chinese - Foreign Business Disputes : The Hong Kong Option

19 April 2007

Location Location Location?

What parties consider when deciding on an arbitral venue?

1. An up to date law based on Model Law
 - a. Party autonomy
 - b. Limited judicial intervention
 - c. Equal treatment of parties
 - d. Supportive judiciary
2. New York Convention
3. Open house on legal representation
4. Trained and experienced arbitrators
5. Access to trained and experienced lawyers
6. A pool of experts of varying disciplines
7. An independent arbitration Centre supplying administrative support services
8. Adequate communications
9. A liberal immigration policy
10. No withholding tax
11. Language capabilities
12. Adequate infrastructure
13. Safety and security
14. The application of the rule of law
15. Facilities for training and research, e.g. universities and arbitral institutions



18

1. INTRODUCTION

1.1 Options for Resolving Chinese-Foreign Business Disputes

- Negotiation
- Litigation
- Mediation and Conciliation
- Mediation / Arbitration (Med-Arb)
- Arbitration



3

1. INTRODUCTION (cont'd)

1.2 The Arbitration Advantages

- Flexibility of proceedings
- Confidentiality of Proceedings
- Speed and cost
- Expertise of arbitrator
- International enforceability



4

1. INTRODUCTION (cont'd)

1.3 The Arbitration Option :- Where and Under What Rules ?

- Inside China
- Outside China
- Hong Kong



5

2. ARBITRATION INSIDE CHINA

2.1 The Chinese Arbitration System

- PRC Arbitration Law (1994)
- New York Convention (1987)
- Arbitration Institutions
 - CIETAC and
 - 180+ local arbitration commissions



6

2. ARBITRATION INSIDE CHINA

(cont'd)

2.2 Caseload of Major Chinese Arbitration Bodies

Arbitration Commissions	Years		
	2003	2004	2005
Wuhan	3,050	4,363	5,013
Guangzhou	2,670	3,125	3,448
Shenzhen	1,744	1,751	2,110
Beijing	1,029	1,796	1,979
Tianjin	748	793	624
Shanghai	649	1,073	1,592
CIETAC	709	850	979



7

2. ARBITRATION INSIDE CHINA

(cont'd)

2.3 Caseload of Major International Arbitration Bodies

Organisation	Year						
	2000	2001	2002	2003	2004	2005	2006
AAA	649	649	672	660	600	580	*
ICC	566	566	593	580	561	561	593
CIETAC	534	562	468	422	462	979	981
HKIAC	298	307	320	287	280	281	394
SCC	73	74	55	82	50	56	141
LCIA	81	71	88	104	87	118	*
SIAC	83	99	114	100	129	103	119



* Statistics for 2006 are not available as of 2 March 2007.

8

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

- (1) All institutional, no ad hoc arbitration



9

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

- (2) Only Chinese arbitration bodies may administer arbitrations in China



10

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

- (3) Selection of arbitrators and their remuneration



11

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

- (4) Cost of arbitrations in China

Comparison of arbitration fees

Amount in Dispute (USD)	CIETAC * International (USD)	CIETAC Domestic (USD)	SCC (USD)	ICC (USD)
5 million	65,098	42,757	82,723-259,663	104,050-376,600
10 million	96,292	75,338	101,234-342,668	129,050-479,000
100 million	547,415	661,798	176,265-606,158	274,050-946,200
500 million	2,552,406	3,268,286	295,674-1,016,483	394,050-1,618,200



These figures do not include additional expenses for travel and accommodation where a party appoints a foreigner. These expenses are borne by the party (at least at first instance).

12

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

(5) Weak interim measures



13

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

(6) Arbitration with “Chinese Characteristics”



14

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

(7) The “Med-Arb” game – Let’s make a deal !



15

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

(8) "Equity" arbitrations



16

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

(9) Restrictions on representation



17

2. ARBITRATION INSIDE CHINA

(cont'd)

2.4 Thinking Twice: Ten Distinctive Features of Arbitration in China

(10) Enforcement



18

3. ARBITRATION OUTSIDE CHINA

3.1 Choosing a Venue

- Favorable legal environment
- New York Convention signatory
- Ready pool of arbitrators / experts
- Logistical support and convenience



19

3. ARBITRATION OUTSIDE CHINA

(cont'd)

3.2 Chinese Concerns

- Cost
- Distance
- Language / cultural environment

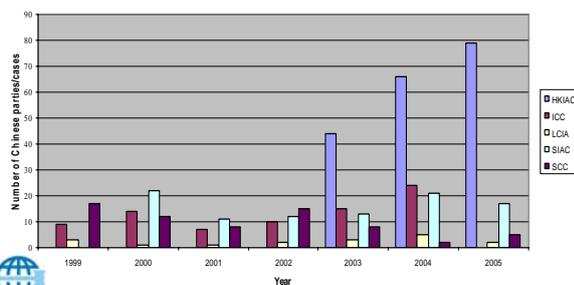


20

3. ARBITRATION OUTSIDE CHINA

(cont'd)

3.3 Arbitration Involving Chinese Parties: Key Players



21

3. ARBITRATION OUTSIDE CHINA

(cont'd)

	HKIAC	ICC	LCIA	SIAC	SCC
1999	NA	9	3	NA	17
2000	NA	14	1	22	12
2001	NA	7	1	11	8
2002	NA	10	2	12	15
2003	44	15	3	13	8
2004	66	24	5	21	2
2005	79	NA	2	17	5

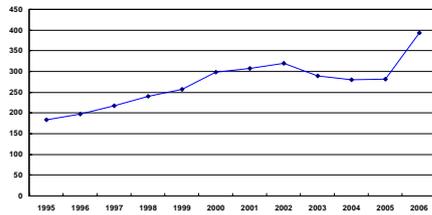


22

4. THE HONG KONG ADVANTAGE

4.1 Growth of Arbitration in Hong Kong

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Cases	184	197	218	240	257	298	307	320	289	280	281	394



23

4. THE HONG KONG ADVANTAGE

(cont'd)

- Amounts in dispute: average USD80 – over 100 million
- Parties from Mainland China, USA, Australia, Canada, UK, Netherlands, France, Netherlands, France, Germany, Japan, Korea, Singapore
- Marked growth in Mainland Chinese cases (50 cases in 2005)



24

4. THE HONG KONG ADVANTAGE

(cont'd)

4.2 Why Hong Kong?

- (1) Cultural and intangible factors
 - “China, but ...”
 - “One country, two systems”
 - World’s freest economy
 - Rule of law
 - International business and financial centre
 - Chinese language, culture ... and food



25

4. THE HONG KONG ADVANTAGE

(cont'd)

- (2) Legal infrastructure
 - Up-to-date Arbitration Ordinance (based on UNCITRAL Model Law)
 - Pro arbitration, specialist judges
 - Common law legal system
 - No restrictions on right of representation in arbitrations



26

4. THE HONG KONG ADVANTAGE

(cont'd)

- (3) Modern arbitration centre – the HKIAC
 - Designated Appointing Authority under the Arbitration Ordinance
 - Superb facilities in Exchange Square
 - Supports both ad hoc and administered proceedings, as chosen by the parties



27

CONCLUSION

- Avoid the “ping pong” game of China vs Europe / U.S.
- Adopt the “middle ground” and consider the Hong Kong advantage



31



Thank you !

Should you have any questions please feel free to discuss or refer to the HKIAC via the following channels :-

Website: <www.hkiac.org>
Address: 38th Floor, Two Exchange Square
Central, Hong Kong
Tel No.: (852) 2525 2381
Fax No.: (852) 2524 2171
Email: <adr@hkiac.org>

BRIEF OVERVIEW OF HONG KONG ARBITRATION

It has been 24 years since the idea of turning Hong Kong into an important arbitration centre for Asia first took seed. The Hong Kong International Arbitration Centre (HKIAC) opened its doors for business in 1985 and has enjoyed and continues to enjoy phenomenal success. It handles cases from all over the world, is a leading centre for the resolution of China related disputes and through its partnership with China International Economic Trade Arbitration Commission (CIETAC) in the Asian Domain Name Dispute Resolution Centre (ANDRC) has established itself as a major domain name resolution centre.

No Centre should rest on its laurels and all should strive to improve their services to the consumer. However it is worth noting that HKIAC has faced more problems than most Centres put together but has overcome them all and faces a very exciting future.

What then were these problems? As is known a Joint Declaration was signed by China and the United Kingdom on 19 December, 1984¹ which agreed to the transfer of sovereignty from United Kingdom to China on 30th June 1997. In the long lead up to this momentous event the doom and gloom merchants had a field day. Firstly many thought that the lead up to the change of sovereignty would mean the end of Hong Kong's tremendous economic progress. Secondly, many thought that China would not honour the Joint Declaration, which provided for "*One country- two systems*". They thought that Hong Kong law based on English common law would not survive, that expatriate judges would not remain in Hong Kong and that authorities in China would not countenance a thriving arbitration centre in Hong Kong.

Fortunately the gloom and doom merchants were proved quite wrong. The lead up to 1997 saw one of Hong Kong's strongest economic performances. Those who understood China realised that closer ties to China could only be to Hong Kong's advantage. The economic boom only ended when the Asian currency crisis began in Thailand in August 1997 – bad timing for Hong Kong and China. However conditions improved and now Hong Kong is undergoing another economic spurt.

As for the law and the commercial law in particular China has honoured the Joint Declaration. English common law is alive and well in Hong Kong. Expatriate judges are still on the bench and the post 1997 judicial appointments have been excellent attracting many senior lawyers who had perhaps been reluctant to accept appointment prior to 1997. The judges continue to be pro arbitration. There can be no question mark on their independence. Of utmost importance has been the Court of Final Appeal (CFA)². Under the Joint Declaration it was agreed that one foreign judge could serve on the CFA. What happened was that 4 permanent judges were appointed along with a number of non-permanent judges (NPJ) who formed a panel from whom the 5th judge was chosen. The list of NPJs is most impressive and includes a number of Law Lords from United Kingdom (Lords Nicholls, Millett, Hoffman, Scott and Woolf (recently Lord Chief Justice of England and Wales) as well as former Chief Justices of Australia and New Zealand. So in all substantive cases in the CFA one

¹ Refer to website <http://www.info.gov.hk/trans/jd/jd2.htm> for further details.

² Refer to website <http://sc.info.gov.hk/gb/www.judiciary.gov.hk/en/organization/judges.htm> for further details.

“foreign” judge will sit. One has to ask rhetorically what other sovereign state would permit foreign judges to sit on the highest Court of Appeal of one of its territories.

As for arbitration the Ordinance was amended with effect from 30th June 1997 so as to leave Hong Kong with one of the most up to date statutory regimes. It is based on the Model Law (which came into effect in Hong Kong on 6th April 1990) but with many improvements. The case law continues to be pro arbitration and fully consistent with the principles of the Model Law. The New York Convention continues to be fully honoured in Hong Kong. A specialist judge deals with all arbitration cases.

However one problem existed which continued after 1997. Although the New York Convention applied in Hong Kong since 21 April 1977 consequent upon the United Kingdom’s accession on behalf of Hong Kong and continues to apply consequent upon China’s accession in 1986, the Convention could not apply as between Hong Kong and China because only one sovereign state was involved. Consequent upon, the decision in the case of *Ng Fung Hong Ltd v. ABC* in 1998, it was held that awards made in China could not be enforced in Hong Kong under the then statutory provisions. Following discussions between the authorities in Hong Kong and the Mainland, a Memorandum of Understanding (MOU) was signed by the then Secretary of Justice of the Hong Kong Special Administrative Region Ms. Elsie Leung and the Vice-President of the Supreme People’s Court of the People’s Republic of China Mr. Shen Deyong on 21 June 1999. The MOU reflects the principles of the New York Convention and in essence continues the enforcement mechanisms in place prior to the handover of 1 July 1997.

So the happy position is now that awards made in the Mainland of China are enforced in Hong Kong and vice versa. Since the year 2000, a total of 71 arbitration awards from the Mainland of China have been enforced through the Courts of Hong Kong.

On the 14 June 2000, the arbitration law of Hong Kong was further amended to enable awards made in those non-convention states or territories (e.g. Albania, Brail, Iraq, New Foundland and Taiwan) summarily enforcement in Hong Kong.

The HKIAC caseload figures for the last ten years are as follows:

Year	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
Cases	197	218	240	257	298	307	320	289	280	281	394

Amounts in dispute range from HK\$ 10,000 to over HK\$ 710 million and parties’ nationalities ranges from American, Australian, British, Canadian, Chinese (Mainland of China), Chinese (HKSAR), Chinese (Macau SAR), Dutch, Filipino, French, German, Hungarian, Indian, Indonesian, Japanese, Korean, Malaysian, Nigerian, Polish, Qatari, Singaporean, Swiss, Taiwanese, Thai and Vietnamese.

A new phenomenon has been the increases of the number of cases where both parties before HKIAC are from the Mainland of China (5 cases in 2000, 7 cases in 2001, 13 cases in 2002, 14 cases in 2003, 20 cases in 2004, 15 cases in 2005 and 18 cases in 2006).

Thus it can be seen that Hong Kong is a favoured place for arbitrations involving, inter alia, Mainland Chinese parties.

It is also interesting to observe that the awards coming to Hong Kong for enforcement from China are not necessarily all CIETAC awards. In the period from 1990 to 1995, all of the awards coming to Hong Kong for enforcement from the Mainland of China were CIETAC awards. But now awards coming for enforcement come also from Chanzhou, Shantou, Shanghai, Nantong, Guangzhou, Beijing, Qingdao, Shenzhen, Xian and Haikou Arbitration Commissions (arbitral institutions now dealing with foreign-related arbitration) and a total of 13 such awards were referred to the Hong Kong Courts for enforcement since 2000.

Foreseeing the emergence of an increasing number of global disputes arising from abusive registration of domain names, HKIAC and CIETAC jointly established the Asian Domain Name Dispute Resolution Centre (ADNDRC) on 27 February 2002. The ADNDRC has been designated by the Internet Corporation for Assigned Names and Numbers (ICANN) as one of four (and the only one in Asia) approved dispute resolution service providers in the world to administer and provide neutrals for the resolution of disputes in relation to Internet domain name disputes. Since 2002, ADNDRC has handled a total of over 100 such domain name disputes.

Why is Hong Kong a popular venue for international arbitration especially involving disputes with Chinese parties? Some of the reasons have been set out above, namely an up to date Model Law based statutory regime, pro arbitration judges, specialist judges and adherence to the New York Convention and the common law. However, other reasons can also be discerned. Firstly, HKIAC is the default appointing authority under the Model Law and thus is able to make arbitral appointments without delay and with nominal cost. This situation differs markedly from the position that existed previously when it was necessary to apply to the court having obtaining leave to serve out of the jurisdiction etc. Secondly, HKIAC does not set arbitrator's fees. The result of this is that parties are not denied the arbitrator of their choice by an institution setting unrealistically low fees, which the chosen arbitrator cannot accept. Thirdly, by not adhering to an ad valorem system for the fixing of fees, parties to arbitration in Hong Kong are not forced to complete their arbitration in an unrealistic time scale, which can be created by the ad valorem system. Fourthly, HKIAC does not charge substantial administration fees like some of the other institutions the effect of which is to negate wholly or in part the savings made by those institutions, which impose low fees for arbitrators. HKIAC has always recognized that the major cost of any arbitration is that which the parties spend on their own representation. Which no institution can control.

HKIAC has been through some challenging times but has emerged with all its principles in tact. It is not intended to draw comparisons with other excellent Centres in Asia and elsewhere but it is difficult to think of anywhere else that offers a better statutory and logistic framework for the resolution of international commercial disputes.

Date: 26 March 2007



香港國際仲裁中心

Hong Kong International Arbitration Centre

Dispute Resolution Services

Hong Kong International Arbitration Centre ("HKIAC") was established by a group of the leading business and professional people in Hong Kong to be the focus for Asia of dispute resolution in 1985. It has been generously funded by the business community and by the Hong Kong Government but it is totally independent of both and it is financially self sufficient.

HKIAC aims to assist disputing parties to solve their disputes by arbitration and by other means of dispute resolution. The HKIAC places great emphasis in providing online dispute resolution services in a wide variety of areas including intellectual property and information technology.

Services provided by HKIAC include the following:

Information Services

HKIAC's free information service covers the following areas:

- Furnishing general information and assistance in connection with both international and domestic dispute resolution.
- Answering enquiries concerning any proposed conciliation, mediation, adjudication or arbitration in Hong Kong.
- Providing information on arbitration law and procedure relating to international arbitrations in Hong Kong.



- Giving information on appropriate forms of arbitration and alternative dispute resolution clauses.
- Advising on arbitrators' fees.
- Making any relevant enquiries of and arrangements with arbitration centres elsewhere in the world.

Mediation and Arbitration Services

- Operates panels of international and local arbitrators of experience and distinction and is happy to make their names available to potential arbitrants.
- Holds lists of accredited mediators in the category of Family and General, and can assist the parties with recommendations of suitable accredited mediators.

- Accredits mediators for use on the Court Annexed Family Mediation Scheme.
- Administers the mediation service for Hong Kong Government contracts.



Statutory Appointing Authority and the Hong Kong Courts

The HKIAC is the default appointing authority for arbitrators in Hong Kong, a function that was previously exercised by the Hong Kong courts. The Arbitration Ordinance also gives the HKIAC the power to decide whether an arbitral tribunal should consist of one or three arbitrators in international arbitrations if the parties cannot agree on such numbers.



The Hong Kong courts are supportive of arbitration and recognise the importance of non-interference in the arbitration process. Parties to arbitration in Hong Kong may be represented by anyone they choose. There is no restriction on lawyers or anyone else from other jurisdictions acting in Hong Kong as representatives or arbitrators in arbitrations.

Online Disputes Resolution Services

Domain Name Disputes Resolution Services

- **HKIAC** administers the Generic Top Level Domain Name (gTLD, .com, .net, .org, etc.) disputes as approved by Internet Corporation for Assigned Names and Numbers ("ICANN") under the auspices of Asian Domain Name Dispute Resolution Centre ("ADNDRC") <www.adndrc.org>.
- **HKIAC** has been approved to handle the following Country Code Top Level Domain Name Disputes: .hk (Hong Kong), .cn (the Mainland of China), .pw (Palau), as well as .ph (Philippines).



Registrar Transfer Disputes Resolution Services

- **HKIAC** also handles the Registrar Transfer Dispute Resolution Disputes under the organisation of ADNDRC.
- The Inter-Registrar Transfer Policy (available at ICANN's website at <www.icann.org>) of ICANN provides registrars wishing to dispute another registrar's alleged violations of the policy may initiate a dispute resolution proceeding with the appropriate registry operator or ADNDRC.

Internet Keyword Disputes Resolution Services

- **HKIAC** was approved by China Internet Information Centre ("CNNIC") <www.cnnic.net.cn> to handle Internet Keyword Disputes.
- Internet Keywords offer a logical extension of the traditional Domain Name System and allow people to navigate the web using common names in their own language and character sets. For example, users can use "HKIAC" or "香港仲裁" to look up the **Hong Kong International Arbitration Centre's** website instead of typing the full domain name <www.hkiac.org>.



HKIAC Webtrust Programme

- Webtrust Programme is a third party arbitration framework for the use and adoption by on-line merchants to handle consumer disputes on-line. It was jointly promulgated by the **HKIAC** and the Hong Kong Institute of Certified Public Accountants ("HKICPA") in January 2002. The **HKIAC** is the administrative organisation of the programme, responsible for appointing the arbitrator, administering the process, documents forwarding and supervision of the award. The **HKIAC** Electronic Transaction Arbitration Rules was adopted as the rules for the arbitration process of the programme.



In order to facilitate the efficiency and speedy disposition of domain name disputes, the **HKIAC**, with technology powered and supported by the Tradelink Electronic Commerce Ltd., has developed a proprietary on-line dispute resolution system for gTLDs and hkTLDs, which permits parties to conduct their domain name dispute cases by means of a sophisticated fully on-line web-based system. If parties would like to handle their cases off-line, submission by email, post and fax are also welcomed.

For further information please contact

Hong Kong International Arbitration Centre

38th Floor Two Exchange Square, 8 Connaught Place
Central, Hong Kong S.A.R., China

Tel: (852) 2525 2381

Fax: (852) 2524 2171

Email: adr@hkiac.org

Website: www.hkiac.org



Hong Kong International Arbitration Centre

PROCEDURES FOR THE ADMINISTRATION OF INTERNATIONAL ARBITRATION

(Adopted to take effect from 31 March 2005)

INTRODUCTION

These Procedures have been adopted by the Council of the Hong Kong International Arbitration Centre (HKIAC) for use by parties who seek the formality and convenience of an administered arbitration while maintaining the flexibility afforded by the UNCITRAL Arbitration Rules (Rules) and supersede HKIAC's previous procedures. For the avoidance of doubt these procedures do not supersede the HKIAC Securities Arbitration Rules. These Procedures may be adopted in an arbitration agreement or by agreement in writing at any time before or after a dispute has arisen.

Nothing in these Procedures shall prevent parties to a dispute under the UNCITRAL Rules from naming the HKIAC as appointing authority, nor from requesting certain administrative services from the HKIAC without subjecting the arbitration to the provisions contained in the Procedures.

Neither the designation of the HKIAC as appointing authority under the Rules nor a request by the parties or the tribunal for specific and discrete administrative assistance from the HKIAC shall be construed as a designation of the HKIAC as administrator of the arbitration as described in these Procedures. Conversely, unless otherwise stated, a request for administration by the HKIAC will be construed as a designation of the HKIAC as appointing authority and administrator pursuant to these Procedures.

SUGGESTED CLAUSES

1. The following model clause may be adopted by the parties to a contract who wish to have any future disputes referred to arbitration under the UNCITRAL Arbitration Rules with the HKIAC as the administrator of the arbitration in accordance with the Procedures:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in Hong Kong under the UNCITRAL Arbitration Rules in accordance with the Hong Kong International Arbitration Centre Procedures for the Administration of International Arbitration in force at the date of this contract.

* There shall be only one arbitrator.”

* This sentence must be deleted if a panel of three arbitrators is required.

2. Parties to an existing dispute in which neither an arbitration clause nor previous agreement with respect to arbitration exists, who wish to refer such dispute to arbitration under the UNCITRAL Arbitration Rules in accordance with the Procedures for the Administration of International Arbitration of the HKIAC may agree to do so in the following terms:

“We, the undersigned, agree to refer to arbitration in Hong Kong under the UNCITRAL Arbitration Rules in accordance with the Procedures for the Administration of International Arbitration of the Hong Kong International Arbitration Centre all disputes or differences arising out of or in connection with:

(Brief description of contract under which disputes or differences have arisen or may arise.)

* There shall be only one arbitrator.

Signed: _____ (Claimant)

Signed: _____ (Respondent)

Date: _____”

* This sentence must be deleted if a panel of three arbitrators is required.

Hong Kong International Arbitration Centre

PROCEDURES FOR THE ADMINISTRATION OF INTERNATIONAL ARBITRATION

(Adopted to take effect from 31 March 2005)

I. GENERAL PROCEDURES

1. Scope and Applicability

Where the Hong Kong International Arbitration Centre (HKIAC) has been designated, as administrator of the arbitration, either through an appropriate clause in the contract at issue, through a separate agreement at the time of such contract, or by designation of the parties subsequent to the dispute arising, the following Procedures for the Administration of International Arbitration (Procedures) shall apply.

2. Arbitration Rules

The UNCITRAL Arbitration Rules (Rules), with such modifications as noted herein, shall be the rules for any arbitration conducted under the Procedures.

3. Appointing Authority

Unless otherwise agreed by the parties, the HKIAC will perform the functions of the appointing authority as set forth in the Rules.

4. Administration of Proceedings

The HKIAC will administer the arbitration as set forth in these Procedures and shall be entitled to charge fees for its services as is set forth in the fee schedule in Appendix A. Where, in these Procedures, reference is made to a specific administrator, such administrator shall be the Secretary-General of the HKIAC or such agents, as he has designated to carry out such function on his behalf.

The HKIAC shall make available, or arrange for, such facilities and assistance for the conduct of the arbitration proceedings as may be required. Such facilities and assistance shall be those enumerated in paragraphs 9 through 16 of the Procedures as well as any secretarial or clerical assistance, telephone, telex and other communication facilities, photocopying, printing and other office facilities as may be required.

5. Place of Hearing

Pursuant to Article 16.1 of the Rules, unless otherwise specified in the contract at issue or by the parties to the arbitration, the arbitral tribunal shall determine the place of arbitration. In light of the administrative services provided by the HKIAC under the Procedures, unless otherwise stated, the tribunal will be presumed to choose the offices of the HKIAC in Hong Kong as the place of hearings for all arbitration under the Procedures. This presumption notwithstanding, the HKIAC is prepared to

administer arbitration in accordance with these Procedures in a location other than Hong Kong and will do so at the request and mutual agreement of the parties. In such case, all costs incurred as a result of administering the arbitration in a location other than Hong Kong shall be borne by the parties.

II. FUNCTIONS AS APPOINTING AUTHORITY

6. Appointment of the Arbitration Tribunal

The HKIAC shall carry out the functions as appointing authority for the purposes of appointing a tribunal as follows:

6.1 Where, pursuant to Article 6 or 7(3) of the Rules and paragraph 3 of these Procedures, the HKIAC is required to appoint a sole Arbitrator or the Presiding Arbitrator, the list procedure, as described in Article 6(3) of the Rules shall be followed. The list of names to be communicated by the HKIAC to the parties shall be drawn, by the administrator, from the HKIAC's Panel of Arbitrators with consideration given to the particular requirements of each case and subject to any conditions agreed upon by the parties.

6.2 Where, pursuant to Article 7(2)(a) of the Rules, three arbitrators are to be appointed, and the second party has failed to appoint an arbitrator within thirty days of notification by the first party of such party's appointment, the HKIAC, at the request of the first party and as appointing authority under paragraph 3 of these Procedures, shall appoint a second arbitrator.

7 Replacement of Arbitrators

Replacement of an arbitrator will be effected by the HKIAC in accordance with the Rules as necessary.

8 Consultation for the Purpose of Fixing Fees of Arbitrators

The fees for arbitrators appointed by the HKIAC are generally calculated by reference to work done by them in connection with the arbitration and are generally charged at hourly/daily rates. If the parties wish, the HKIAC will consult with the arbitral tribunal to establish the rates applicable to a particular case.

III. FUNCTIONS AS ADMINISTRATOR

9 Communications

9.1 Notwithstanding the provisions of the Rules, the Notice of Arbitration (Article 3), the Statement of Claims (Article 18), and the Statement of Defense (Article 19) shall be submitted to the HKIAC for forwarding to the other party.

9.2 Including such documents as listed in paragraph 9.1, all communication and notices between the parties and the arbitral tribunal in the course of arbitration

proceedings (except at meetings and hearings) will be addressed through the HKIAC.

- 9.3 When passed on by the HKIAC to a party, such communications and notices will be sent to the address of that party contained in the Notice of Arbitration or such other addresses as have been provided in writing to the HKIAC by that party.

10 Timing, Logistics, and Procedural Advice

- 10.1 The HKIAC will liaise with the arbitral tribunal and the parties to fix the time limits for the arbitration, as well as to establish the date, time and place of meetings, hearings, or otherwise, as required.
- 10.2 Upon request by the arbitral tribunal, the HKIAC will advise generally on applicable procedure under the Rules.

11 Costs

The costs of the arbitration as described in Articles 38 to 40 of the Rules shall be amended to include all reasonable fees assessed by the HKIAC for administration of the arbitration proceedings. Such fees are enumerated in Appendix A hereto.

12 Deposits

In lieu of the provisions of Article 41 of the UNCITRAL Arbitration Rules the following provisions shall apply:

- 12.1 The HKIAC administrator shall prepare an estimate of the cost of arbitration and may request each party to deposit an equal amount as an advance for those costs.
- 12.2 During the course of the arbitral proceedings the HKIAC may request supplementary deposits from the parties.
- 12.3 If the required deposits are not paid in full within thirty days after the receipt of the request, the HKIAC administrator shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the Arbitral Tribunal, after consultation with the HKIAC, may order the suspension or termination of the arbitral proceedings.
- 12.4 The HKIAC administrator may apply the deposits toward disbursements for the costs of arbitration.
- 12.5 After the award has been made, the HKIAC administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.
- 12.6 Any interest accrued on deposits while held by the HKIAC will be credited to the parties in the aforementioned accounting.

13 Hearing Rooms

Hearing rooms and retiring rooms shall be provided at the HKIAC for hearings before the arbitral tribunal. If rooms are not available at the HKIAC, the HKIAC will make arrangements for rooms in an alternative location. Any rental costs shall not be included in the administrative fee but rather shall be paid by the parties to the HKIAC.

14 Stenographic Transcripts

Stenographic transcripts of the proceedings shall be provided by the HKIAC upon request by the parties. Although the HKIAC will make arrangements for a stenographer at the request of the parties, the cost of such service shall not be included in the administrative fee, but rather shall be paid by the parties to the HKIAC.

15 Translation and Interpretation

Any necessary arrangements for live or written translation or interpretation services will be made by the HKIAC upon request of the parties. Although the HKIAC will make arrangements for such services, the cost of the services shall not be included in the administrative fee, but rather shall be paid by the parties to the HKIAC.

16 Registration of Awards

Upon request, the HKIAC will assist in the filing or registration of arbitral awards in countries where such filing or registration is required by law. The cost of any such filing or registration fee not be included in the administrative fee, but rather shall be paid by the party concerned to HKIAC.

APPENDIX A: FEE SCHEDULE

The following fees apply to any arbitration or related service conducted by or at the Hong Kong International Arbitration Centre. All fees are noted in Hong Kong dollars (“HK\$”).

1. Determination of Number of Arbitrators: HK\$4,000

A fee of HK\$4,000 shall be charged if the HKIAC, by request of a party, determines the number of arbitrators appropriate for an arbitration.

2. Appointment Fee: HK\$4,000

An appointment fee of HK\$4,000 shall be charged for the appointment of an arbitrator. This fee will cover all steps taken by the HKIAC in connection with the appointment of an arbitrator.

3. Arbitrator Fees

Arbitrator fees shall not be set by the HKIAC. As provided in paragraph 8 of these Procedures, however, the HKIAC will, at the parties’ request, consult with the arbitrators to assist the parties in setting fees for arbitration. Nevertheless the payment of fees is the responsibility of the parties. In such consultation, the parties may wish to consider the HKIAC’s Guide to applying for the appointment of an arbitrator or for a decision as to the number of arbitrators. (see HKIAC’s website www.hkiac.org for further details).

4. Administrative Fees

Fees for administrative functions performed by the HKIAC shall be according to the following schedule:

<i>Amount of Claim</i>	<i>Fee</i>
Up to HK\$1 million	HK\$15,000
Up to HK\$5 million	HK\$25,000
Up to HK\$50 million	HK\$50,000
Up to HK\$100 million	HK\$100,000
Over HK\$100 million	As determined by HKIAC Council

5. Administrative Facilities and Services

5.1 The administrative fees enumerated in paragraph 4 provide for basic administration of the arbitration.

5.2 The cost of administrative services not provided directly by the HKIAC, such as stenographic or interpretation services, shall be borne solely by the parties.

6. Settlement or Early Termination

6.1 If the dispute is settled prior to such time as an award is issued by the arbitral tribunal, any administrative costs already incurred by the HKIAC shall be included

as a cost to be paid by the parties. Such administrative costs will include any non-refundable booking fees. (see HKIAC's website www.hkiac.org for further details).

- 6.2 The parties will not be liable for administrative costs not yet incurred in any manner by the HKIAC.

The Pre-eminence of Hong Kong in International Commercial Arbitration

Hong Kong has been described as occupying centre stage in the arbitration world. Patrick Schindler sets out the facts which support this claim and considers why Hong Kong occupies a pre-eminent position in international commercial arbitration

Introduction

The facts are simple. The Hong Kong International Arbitration Centre (HKIAC) is the second largest commercial arbitration institution in Asia and the fourth largest in the world in terms of numbers of cases. In Asia it is second only to the China International Economic and Trade Arbitration Commission (CIETAC) – a remarkable fact given the difference in population between the two jurisdictions.

Between 2000 and 2005, the HKIAC received 1773 new international arbitration cases, including 281 in 2005 alone (www.hkiac.org). Impressive as these figures are, they do not tell the whole story. Hong Kong is also the seat of many ad hoc arbitrations not

administered by the HKIAC despite there being no other significant international arbitration institutional presence in Hong Kong.

The more interesting question is what has given Hong Kong its pre-eminent position? Consideration of these reasons is of wider significance than merely justifying the claim made regarding Hong Kong's position: these reasons go to the very nature of international arbitration, the important purposes it serves in an increasingly interdependent world and its significant contribution to facilitating trade.

The reasons usually advanced for Hong Kong's pre-eminence in the field of international arbitration include the strength of its legal institutions and their long history of

strict adherence to procedural fairness and the rule of law, the strength and flexibility of the Hong Kong International Arbitration Centre, a highly competent judiciary, the availability of knowledgeable and experienced arbitrators, and the incorporation of the United Nations Commission on International Trade Law Model Law on Arbitration (the Model Law) into the domestic arbitration law. Besides all of these factors is the special place of Hong Kong in China, fast emerging as one of the world's greatest economic forces. The special relationship between the Hong Kong Special Administrative Region and the People's Republic of China finds its expression so far as arbitration is concerned in the 1999 Agreement ►

Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the 1999 Agreement) and numerous other formal and informal arrangements between various bodies in the two jurisdictions.

Each of these reasons will be examined in turn.

Hong Kong's Legal Institutions

The Department of Justice (DOJ) states in its publication the 'Legal System in Hong Kong' printed in 2004:

The rule of law has played a vital role in Hong Kong's past success, and will continue to be essential for Hong Kong's future.

In an address given to mark the ceremonial opening of the legal year 2005 the Hon Chief Justice Andrew Li stated:

The rule of law is a cornerstone of our society. A Judiciary which is and which is perceived to be independent is of course fundamental to the rule of law and to the effective protection of individual rights and freedoms which are at the heart of our separate system.

This emphasis on the importance of the rule of law and on the independence of the judiciary is a legacy of Hong Kong's history, a legacy which the Government of Hong Kong intends should continue. In pursuit of this goal, the DOJ in its 2004 publication, under the heading 'Judiciary' states that judges are appointed on the recommendation of an independent statutory body and

enjoy security of tenure. The Chief Justice of the Court of Final Appeal and the Chief Justice of the High Court must be Chinese citizens who are permanent residents of Hong Kong with no right of abode in any foreign country. All judges must have been qualified as legal practitioners in Hong Kong or another common law jurisdiction.

A discussion of Hong Kong's legal institutions would not be complete without consideration of the role of common law. The DOJ 2004 publication refers to the role of the common law and the rules of equity in Hong Kong law, stating that

... reports of judgments handed down by judges have, since at least the 15th century, established in detail the legal principles regulating the relationship between state and citizen, and between citizen and citizen.

The common law's most distinguishing hallmark is reliance on a system of case precedent, not restricted to judicial decisions generated within any single jurisdiction, but case law from all jurisdictions throughout the common law world, Article 84 of the Basic Law provides that the courts of HKSAR may refer to the precedents of other common law jurisdictions.

By reason of its historical legacy, Hong Kong enjoys and, it seems, will continue to enjoy the benefits of an independent, educated judiciary who are not merely entitled to, but by tradition and the express provision of the Basic law, encouraged to draw

upon the best of common-law precedents from around the world. The importance of the contribution that this outward-looking view of the law to be applied to the resolution of disputes between parties makes to Hong Kong's pre-eminence in the field of arbitration cannot be overstated. It is important for at least two reasons. First, the best common law traditions encourage respect for party autonomy, which is a core value of arbitration. Secondly, Hong Kong arbitrators are part of a legal culture imbued with the legal tradition of looking at the best of legal precedents from around the world. This has very important implications for the quality that can be expected of arbitral decisions and in turn is an important basis for the position in the field of arbitration which Hong Kong enjoys.

A small, but concrete example of the beneficial consequences of an outward-looking attitude that looks to the best decisions in the common-law world, is the approach taken by Hong Kong courts to the emerging issue of the confidentiality of arbitration proceedings. Courts around the world have begun to grapple with the question of the scope of confidentiality of arbitration proceedings, even in the absence of an express confidentiality agreement between the parties. The best decisions seek to protect the expectation of confidentiality which is one of the core advantages of arbitration over litigation. Elsewhere, notably in courts in the United States of America, the expectation of confidentiality of arbitration proceedings is forced to yield to the local preference to protect discovery rights (see, *United States v Panhandle Eastern Corp* 118 FRD

346 (Del 1988); *Baxter International, Incorporated v Abbott Laboratories*, 297 F3d 544 (7th Cir 2002). In a recent appellate decision, a Hong Kong judge adopted the approach taken in England in *Department of Economic Policy and Development, City of Moscow v Bankers Trust Co and Anor* (2004) EWCA 314 (English Court of Appeal)) that favours the protection of confidentiality. In that case (*Linfield Limited (Plaintiff) and Taoho Design Architects Limited (1st Defendant) and Progress Construction Limited (2nd defendant)* (2006), CACV 58/2006),

proceedings is that they are confidential to the parties. It does appear that in some instances courts have considered the contents of awards. I do not consider it necessary for the purposes of this case to examine [the confidentiality question] because in my view, on the submissions made, there can be nothing relevant to be gained from it.

This statement recognizes the important fact that confidentiality is

auspices of the HKIAC and in Hong Kong in general. According to the HKIAC Revised Guide to Arbitration Under the Domestic Arbitration Rules 1993, parties are free to derogate from that framework and be subject to the rules in the Ordinance applicable to domestic arbitrations, and may opt entirely out of the rules set out in the Ordinance, subject to the principles of party autonomy and arbitrator impartiality enshrined therein.

Under art 34 of the Ordinance, the HKIAC is expressly mandated, for the purposes of international

“

The best decisions seek to protect the expectation of confidentiality which is one of the core advantages of arbitration over litigation.

”

where the court was asked by arbitrating parties seeking to have some of their costs paid by a third party to consider examining an earlier arbitral decision for evidence of fault of the third party, the judge responded as follows:

If the supposed fault of the third party was something that emerged from the arbitration proceedings, it would be necessary to consider the award in the arbitration proceedings. For my part, I perceive substantial difficulties in considering the award. The nature of arbitration

a central feature of arbitration in Hong Kong.

The HKIAC

HKIAC was established in 1985 by business leaders and professionals to be the focus for dispute resolution in Asia. It has been generously funded by the business community and by the Hong Kong Government but is totally independent of both and is financially self sufficient.

The Model Law, in conjunction with Part IIA of the Hong Kong Arbitration Ordinance (Cap 31) (the Ordinance), provides the baseline rules for the conduct of international commercial arbitrations under the

arbitrations, to appoint arbitrators pursuant to the Model Law where the method of appointing arbitrators chosen by the parties fails. Where the HKIAC appoints arbitrators, whether for ad hoc or institutional arbitrations, it selects them from its panel of arbitrators. Where however, the parties successfully select a panel of arbitrators by their own measures, they need not use HKIAC arbitrators.

The combined Model Law/ Ordinance/HKIAC regime affords the parties enormous procedural flexibility in the conduct of their arbitration on the one hand, while helping to reduce the complexity of costly negotiations over specific ►

procedures, on the other. This is made possible by the HKIAC's Procedures for the Administration of International Arbitration, which allows parties to opt into HKIAC administrative involvement in some or all aspects of their arbitration, ranging from the HKIAC's most basic statutory role as the arbitral Appointing Authority under the Model Law, to providing a place for the conduct of hearings, managing communications between parties, fixing time limits and evidentiary procedure, providing transcripts, translation services, and registration of awards. Thus the HKIAC's involvement in the arbitration can range from zero to complete, depending on the parties' wishes.

The Inviolability of the Arbitral Awards Rendered and Enforced in Hong Kong

There is no better indicator of the respect for arbitral awards in Hong Kong courts than their enforcement rate. In Hong Kong there is a very limited right of appeal of arbitral awards on the merits of a case. In a sample of 168 applications to Hong Kong courts between 1997 and 2003 against both Mainland and Hong Kong parties the enforcement rate was 96% (see Dennis Unkovic, 'Enforcing Arbitration Awards in China', 59-Jan Disp Resol J 68) and the Hong Kong court system's reputation for respect of arbitral awards has become so strong that none of the 21 applications for enforcement in Hong Kong in 2005 were opposed.

Hong Kong courts have shown great deference to the parties when determining whether a valid arbitration agreement exists. For example, they have even been willing to recognize arbitration agreements

referring to non-existent arbitral institutions and arbitral authorities, and are extremely reluctant to apply public policy grounds for invalidating awards, often limiting such relief to instances of fraud, criminal, oppressive or otherwise unconscionable behaviour.

While both the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Ordinance enable Hong Kong courts to overturn international and domestic arbitral awards that are contrary to the 'public policy' of the HKSAR, courts have limited this ground in the case of international arbitrations to cases invoking the HKSAR's 'most basic notion of morality and justice'.

Nonetheless, and consistent with its commitment to procedural fairness and the rule of law, the application of the English common law 'apparent bias' test allows parties to challenge the impartiality of arbitrators more easily than in other Asian jurisdictions, Mainland China in particular, which have been plagued by deficiencies in procedural fairness.

Knowledgeable and Experienced Arbitrators

Hong Kong is uniquely placed to provide international dispute resolution services. Its empathy with the Asian traditions of mediation and its legal and cultural tradition blend the best of East and West. In addition to accountants, architects, bankers, engineers, insurance experts and lawyers, there are thousands of other specialists who may be called on to assist in particular disputes. Hong Kong is home not only to lawyers qualified to advise on local law, but

to experienced lawyers from most major international trading nations who are qualified to advise on the laws of their respective jurisdictions and Hong Kong easily draws on this international reservoir of specialist knowledge.

The Adoption of the Model Law

The 1990 incorporation of the Model Law into the Ordinance for the purposes of international arbitrations represented an important step both symbolically and practically. Symbolically, it reaffirmed the world's understanding that Hong Kong placed a priority on the fluidity of international business in and through its borders and would not allow that priority to be trumped by factional domestic economic and political interests. Practically, it afforded greater certainty both to parties considering doing business in the territory and to parties seeking to have their disputes resolved in a neutral jurisdiction.

The operation of the Model Law places an emphasis on the resolution of disputes within the context of the arbitration proceeding. For example, a party challenging the validity of an arbitration agreement must first apply to the presiding arbitrators or the arbitral institution before seeking relief in a court. Further, under this regime an arbitrator has the power to rule on his or her own jurisdiction, whereas in other jurisdictions such a power must be expressly delegated by the institution in charge of the proceeding.

On the other hand, the Model Law does facilitate recourse to courts where fairness requires as much. For example, since arbitrators do not have the power in most cases to order interim measures of protection,

parties may apply directly to courts for such relief without having to make the application through the arbitrator as in some non-Model Law jurisdictions. Equally importantly, the combined effect of the Model Law and English common law principles applicable in Hong Kong make it easy to challenge the impartiality of an arbitrator. This is a critical element of a strong international arbitration regime since international arbitrators are susceptible to national biases, in addition to all of their other potential biases.

The procedural rules from the Model Law apply, subject to any derogation or alteration by the parties, enabling parties to broadly determine procedure, subject to fairness.

The 1999 Agreement

In order to further enhance the fluidity of international business and dispute resolution between the two jurisdictions, the SAR and PRC entered into the 1999 Agreement. Pursuant thereto, a party seeking to enforce an arbitral award made in Hong Kong against a party domiciled or with assets in the Mainland may apply to an Intermediate People's Court in the relevant region. A party seeking to enforce an arbitral award made in the Mainland, against a party domiciled or with assets in Hong Kong, may apply to the High Court of the HKSAR. The applicant must submit to the relevant court i) an application for enforcement which includes the legal particulars of the parties, the grounds for enforcement, and the place in which the subject property is located; ii) the arbitral award; and iii) the arbitration agreement. Upon receipt of the application for enforcement, the

court must enforce the award in accordance with the law of the place in which the application is made.

Enforcement of the award may be refused upon the same limited procedural and on the same substantive grounds as under the New York Convention. Mainland courts may refuse enforcement if the award is found to be contrary to 'the public interests of the Mainland' and Hong Kong courts may similarly refuse enforcement if it would be contrary to the 'public policy' of the HKSAR. Further, parties are precluded from seeking enforcement in both Hong Kong and the Mainland simultaneously. A party must first seek satisfaction in one jurisdiction, and may only subsequently apply for enforcement in the other if there is a shortfall in the amount recovered.

Practitioners in both Hong Kong and the Mainland have found the 1999 Agreement to be an open and progressive approach to the enforcement problem. Indeed the 1999 Agreement has resulted in a reciprocal monitoring relationship in the area of international commercial arbitration [which] hardly exists anywhere else in the world, with the result that the practice of international commercial arbitration in both Hong Kong and the Mainland has continued to proliferate. Experience since 1999 suggests that the 1999 Agreement has enhanced the level of arbitrations taking place in both places.

The HKIAC and CIETAC also have agreements for cooperation whereby representatives of each gain access to the local facilities of the other, with the result that the two institutions even have some common names on their rosters of arbitrators. This cooperation has helped instil comfort

in Mainland parties to the extent that some now choose Hong Kong as their arbitration's situs even when contracting with another Mainland party.

The Centre of Dispute Resolution in the 21st century

Unlike almost every other major international arbitration jurisdiction and its corresponding leading arbitral institution, such as China and its CIETAC, the United States and its American Arbitration Association, France and its International Chamber of Commerce, and the UK and its London Court of International Arbitration; Hong Kong and the HKIAC cannot attribute their enormous success in the international commercial arbitration arena to economic or demographic mass. Rather, Hong Kong's pre-eminence is attributable to the jurisdiction's educated and experienced pool of legal professionals, its championing of party autonomy, its external focus and commitment to banishing bias and domestic interests from the conduct of arbitrations and enforcement proceedings, and its longstanding legal tradition. As a result, Hong Kong is a place to go for neutral, just and efficacious dispute resolution – a pure arbitral jurisdiction. Long recognised as an important centre of trade and commerce, Hong Kong is rapidly becoming known as the pre-eminent centre in the world for international commercial arbitration.

Patrick Schindler
Barrister & Solicitor
Toronto, Canada
pfs@patrickschindler.com

K&L|GATES Kirkpatrick & Lockhart Preston Gates Ellis
高置及律師事務所

Dispute Resolution Culture in Asia

Wing L. Cheung 張永良
35/F, Two International Finance Centre
8 Finance Street, Central, Hong Kong

K&L|GATES Kirkpatrick & Lockhart Preston Gates Ellis
高置及律師事務所



- <http://www.missionimpossible.com/>

K&L|GATES Kirkpatrick & Lockhart Preston Gates Ellis
高置及律師事務所

1. What is Culture? 

- "the way of life, especially the general customs and beliefs, of a particular group of people at a particular time" (Cambridge Advanced Learner's Dictionary)
- the collective programming of the mind which distinguishes the members of one category of people from another
- the shared knowledge and schemes created by a set of people for perceiving, interpreting, expressing, and responding to the social realities around them
- most simply, the learned and shared behavior of a community of interacting human beings

2. What is Asia?



- the central and eastern part of Euroasia (traditionally the continents of Europe and Asia)
- approximately fifty countries
- roughly 49,694,700 km²
- Subregions
 - Central Asia (Kazakhstan, Uzbekistan, Afghanistan, Mongolia, former Soviet states in Caucasus region)
 - East Asia (Japan, Korea, eastern regions of China)
 - North Asia (Siberia / Asian part of Russia)
 - South Asia (India, Pakistan, Nepal, Sri Lanka, Maldives)
 - Southeast Asia (Thailand, Cambodia, Vietnam, Malaysia, Brunei, Philippines, Singapore, Indonesia, Hong Kong)
 - Southwest Asia / Middle East (Syria, Israel, Jordan, Iraq, Saudi Arabia, Kuwait)

3. Culture Paradigms – “high context” vs. “low context”

- “low context cultures”
 - US, Canada, Central and Northern Europe
 - Individualism, heterogeneity, overt communication
- “high context cultures”
 - Asian and Latin American countries
 - collective identity, homogeneity and covert communication



4. Categories of Dispute Resolution Culture

- US-influenced 
 - adopts US system to replace original system
 - driven by foreign investment
 - original system strongly influenced by Confucian ideals
 - China / Japan / Korea
- Combined 
 - combines an inherited colonial systems with international system
 - desire to becoming arbitration centres
 - HK / Singapore (c.f. Thailand / Indonesia)

4. Categories of Dispute Resolution Culture

- National
 - strong native system
 - extensive supervisory powers of the national courts
 - Pacific Islands / Malaysia



5. So is there an Asian Culture?

- Heterogeneous
- Chris Patten, "East and West" (p.158)
 - What is the value system that links umbilically the commuter in Japan, the forest-dweller in Irian Jaya, the mid-levels resident in a high-rise flat on Hong Kong's Victoria Island, the peasant in Sichuan setting out to try to find a job and a fortune in Shanghai or Guangdong?
 - What is it that, within China itself, holds to its capacious bosom the follower of traditional Confucianism, the classical Buddhist or Taoist, the disciple of Islam, the Maoist atheist, the agnostic consumerists, the evangelical Christian?



5. So is there an Asian Culture?

- How do you generalize so glibly about those who eat with

Chopsticks

or

with forks

or

with hands?



5. So is there an Asian Culture?



- Michael Pryles, "Dispute Resolution in Asia"
 - understanding the dispute resolution choices that transaction partners make in Asia requires us to look behind claims about Asian cultural uniformity

6. Illustration of the Heterogeneity

- Independence and impartiality of arbitrators



6. Illustration of the Heterogeneity



- Article 34 of Arbitration Law of China
 - In any of the following circumstances, an arbitrator must withdraw from the arbitration, and the parties shall have the right to apply for his withdrawal if he:
 - is a party or a close relative of a party or of a party's representative;
 - is related in the case;

6. Illustration of the Heterogeneity



- has some other relationship with a party to the case or with a party's agent which could possibly affect the impartiality of the arbitration;
- meets a party or his agent in private, accepts an invitation for dinner by a party or his representative or accepts gifts presented by any of them.

6. Illustration of the Heterogeneity



- Article 50 of Arbitration Law of Japan
 - An arbitrator who accepts, demands or promises to accept a bribe in relation to its duty shall be punished by imprisonment with labor for not more than five years. In such case, when the arbitrator agrees to do an act in response to a request, imprisonment with labor for not more than seven years shall be imposed.

6. Illustration of the Heterogeneity



- When a person to be appointed an arbitrator accepts, demands or promises to accept a bribe in relation to the duty to assume with agreement to do an act in response to a request, imprisonment with labor for not more than five years shall be imposed in the event of appointment.



7. Practical Points

- dispute resolution training of "Western" lawyers may not translate exactly to disputes dispute resolution in the "East"
- "black letter of the contract" vs. evolving relationship
- role of local, regional and central government as additional considerations
- requires a more "holistic approach" - to look at a far wider range of factors that extend beyond the strict analysis of the legal rights and liabilities



**Comparing the effectiveness of Arbitration Clauses and Alternative Dispute Resolution provisions in contracts:
recent Far East experience**

**by Ian Pennicott QC, Keating Chambers
Member of the Bar of England and Wales and of the Hong Kong Bar**

- (1) Benefits of ADR in disputes (even if ultimately to be resolved by arbitration) – recent research.
- (2) Brief review of English case law on enforceability of ADR clauses compared to arbitration clauses.
- (3) *Hyundai Engineering and Construction Co Ltd v Vigour Ltd* in the Hong Kong SAR Court of Appeal on enforceability of dispute resolution agreement.
- (4) Comments on distinction between UK authorities e.g. *Cable & Wireless v IBM* and Hong Kong SAR Court of Appeal approach in *Hyundai*.
- (5) Examples of mediation and other dispute resolution clauses from standard form construction contracts in Hong Kong and Singapore: Singapore Institute of Architects, Hong Kong Standard Form of Building Contract.
- (6) Conclusions on necessary elements in resolution clause and other drafting issues.

ARBITRATION: A PROCESS OF LAST RESORT?

1. Brief historical prospective: arbitration v. litigation.

2. The new order:
 - Parties to attempt to resolve differences
 - Dispute Resolution Boards
 - Mediation
 - Adjudication
 - Arbitration (Litigation).

3. Binding nature/enforceability of the new order methods.

4. Recurring issues:
 - Mistakes
 - Jurisdiction
 - Natural Justice/Bias
 - Insolvency.

5. Comparative time considerations.

6. A compromise: the 100 day arbitration?

Mandarin Oriental Hotel, London, 19 April 2007

Hot issues in Asian arbitration

ARBITRATION: IS IT BECOMING A PROCESS OF LAST RESORT?

IAN PENNICOTT QC, Keating Chambers

Bar of England and Wales

Hong Kong Bar

ARBITRATION: IS IT BECOMING A PROCESS OF LAST RESORT?

A. Introduction

1. The traditional choice of dispute resolution for commerce and industry, notably for sectors like construction and engineering, is between litigation and arbitration. In many Asian societies, the advantages of privacy and confidentiality have added further weight to the preference for arbitration over litigation. A typical expression of this was displayed at an early 1980s Singapore Institute of Arbitrators/Chartered Institute of Arbitrators Conference 'Arbitration for the Construction Industry: the Singapore Scene' at which Koh Kim Chuan described "*our Chinese mentality*" which "*abhors any attendance in the Court of Law*" and explained it in terms of "*face*": "*maintaining one's face or giving one's opponent face have much to do with the tendency not to bring disputes into the open.*"
2. Commercial contracts in Hong Kong, Singapore and Malaysia, to give three examples, have typically contained arbitration clauses (see the Hong Kong Government and RICS Forms of Contract, the SIA and PSSCOC (Government) Forms in Singapore and the PAM and PWD contracts in Malaysia, to take instances from the construction industry).
3. The growth of regional arbitration centres such as HKIAC and SIAC provide evidence of the attractions of arbitration, not only for domestic matters, but also demonstrate the provision of credible regimes for resolving disputes on international projects undertaken in the region, or potentially, beyond.

B. Changing trends: towards a new order?

4. The latter years of the 20th century witnessed a degree of disenchantment with arbitration. This was particularly marked in the US and the UK, where it was perceived as having acquired many of the expensive formalistic and legalistic characteristics of litigation. The length of arbitration and their cost was not, in many instances, materially different than going to court. One of the worst aspects was seen as the propensity of arbitration to lead to litigation, through arguments on points of law. Amongst other things this undermined the privacy point mentioned above. Nor was this confined to Western legal systems. Cases like *Seloga Jaya v Pembinaan Keng Ting (Sabah)* [1994] 2 MLJ 97 in Malaysia did little to enhance the status of arbitration as an efficient alternative to litigation. The contractor wished to enforce the arbitration agreement made with a sub-contractor on a Ministry of Defence project in Labuan, following a dispute over defective construction. The sub-contractor wished to proceed to litigation. First the Senior Assistant Registrar and then Judicial Commissioner (Ee Chin Seng) refused the contractor's application to stay proceedings pending arbitration. On a further appeal to the Supreme Court, the contractor succeeded in obtaining from Chief Justice Edgar Joseph Junior a finding that those who have agreed to submit their disputes to arbitration should normally be held to their bargain, especially as an arbitrator may well be more suitable for resolution of the dispute than a judge. The irony of having to undertake three court hearings and two appeals to establish this was not lost on the local industry.

5. While litigation and arbitration have not been swept away, commercial parties demanded new approaches to dispute resolution. The result has been the development of a range of alternative methods of dispute resolution (ADR). While this movement began largely in

the US, it has been carried on by the UK, Australia, New Zealand and other countries and adopted with considerable enthusiasm in SE Asia.

6. The preference now is to see dispute resolution in terms of a sequence of stages or levels; proceeding from the earlier stages to the later is sometimes referred to as multi-tier or 'cascade' dispute resolution.

7. The 'new order' can be expressed notionally as follows: (although it is not the case that all levels will be utilised in all industries or projects within those industries).

- Parties meet to negotiate
- Dispute Resolution Board/Advisor
- Mediation
- Adjudication
- Arbitration/Litigation

C. Enforceability and operation of the 'new order' of dispute resolution procedures

8. Hong Kong played a significant role in the development of alternative dispute resolution. As long ago as 1991, the Queen Mary Hospital project saw the trialling of a technique which has now become widely used. The refurbishment of the 56 year old hospital while

it continued to operate was perceived as being likely to generate numerous complex disputes. Accordingly, the contractor and the Government jointly appointed a Dispute Resolution Adviser, an early variant of the Dispute Resolution Board approach.

“The parties, at the time of agreeing re-appoint a Dispute Resolution Adviser, select one with no connection to either party. His task is to advise on the means of settling disputes and should be selected for that purpose. The Dispute Resolution Adviser would enter immediately upon his duties should a dispute arise during the progress of the works ... it may be within the competence of the Dispute Resolution Adviser to resolve, depending upon his qualifications. Alternatively, it may be a case for calling in an expert to hear the parties and resolve the matter. The choice is with the parties with the advice of the Adviser.”

9. It has also become relatively common for contracting parties in Hong Kong and other SE Asian countries to include in the dispute resolution agreement provision for the parties to try to resolve the dispute before proceeding to more formal mechanism. This has an echo in PRC Government Contracts. In the 1990s, as Western entities began to do business with China on a significant scale for the first time, it is was observed that *“Building contracts in China, which almost invariably involve at least one Government or quasi-Government party, will usually contain a provision, which seems strange to western lawyers, to the effect that the parties must attempt a settlement between themselves before a matter can be referred to arbitration.”* (Houghton, Construction Conflict Management and Resolution 1992). Such provisions are no longer strange to lawyers either in the West or in SE Asia. The question for clients and lawyers alike, however, is whether they are enforceable, as a preliminary to litigation or arbitration. In the UK, the courts have tried

to send the message that such provisions should be enforceable. Although there are technical difficulties, in that an agreement to negotiate was held in *Courtney & Fairbairn v Tolaini Bros* [1975] 1 WLR 297 to be an agreement which is unenforceable as lacking the necessary certainty, as a matter of policy, the courts have tried to uphold ADR agreements.

10. In *Bernhard's Rugby Landscapes v Stockley Park* [1997] 82 BLR 39, the court declared itself in favour of enforcing “a clear contractual provision which requires resort to alternative forms of dispute resolution prior to litigation or arbitration.” In *Cable & Wireless Plc v IBM UK* [2003] BLR 89 the court held that it would be contrary to public policy to refuse to enforce the parties’ contractual agreement to refer disputes to ADR.
11. However, such provisions have run into trouble in the English courts, despite these policy imperatives, largely because of poor technical drafting. In *Cott UK v FE Barber* [1997] 2 All ER 540, the court refused to grant a stay in favour of expert determination under a contract involving soft drinks manufacture price details of the procedure to be followed were uncertain and would produce confusion and delay. In *Halifax Financial Services v Intuitive Systems Ltd* (1999) 1 All ER (Comm) 303 a dispute resolution clause in a software design contract obliged the parties to meet at senior representative level prior to mediation. The court, refusing a stay pending completion of this requirement, observed that the courts had “consistently declined to compel parties to engage in co-operative processes, particularly in ‘good faith’ negotiation, because of the practical and legal impossibility of monitoring and enforcing the process”.

12. In Hong Kong, the SAR Court of Appeal recently took a similarly hard line in *Hyundai Engineering & Construction Co. v Vigour Ltd* [2005] BLR 416, where the contract on the KCRC Hotel and Office project, provided that “*the parties will not continue arbitration and will not bring any arbitration or court action forever*” and that disputes “*will be resolved and decided by the managing directors of the ultimate shareholder groups at the highest level*”, finally “*failing an ultimate agreement then both parties agree and submit to Third Party Mediation procedure*”.

Both the agreement to attempt to resolve disputes at managing director level and the agreement to submit to mediation were held to be unenforceable by the Hong Kong court, the former because it was no more than an agreement to agree and the latter because it was too imprecise and consisted merely of negotiation assisted by some unspecified third party.

13. Although the *Hyundai* case might be seen as something of a set-back for the ADR cause in Hong Kong, the better view is probably that the provision failed because of the poor technical drafting. The reality is that provision for mediation is common place in construction contracts, for example, throughout the region.

14. The Agreement & Schedule of Conditions of Building Contract for use in the Hong Kong Special Administrative Region (2005) contains:

Clause 41: a provision for reference of disputes to Designated Representatives, being a senior executive from each party nominated for the purpose.

Clause 42: *“If the dispute is not resolved by the Designated Representatives within 28 days of the dispute being referred to them ... either party may give a notice to the other party, by special delivery, to refer the dispute to mediation.”*

The parties are to agree on a mediator or, in default, the HKIA/HHIS will appoint one. The procedure will be according to HKIAC Mediation Rules.

15. It is only then that the arbitration provision can come into play, reinforcing the idea that arbitration, under the new order, has joined litigation in last place:

Clause 41.4: *“If the dispute is not settled by mediation within 28 days of the commencement of the mediation, either party may give notice to the other party, by special delivery, to refer the dispute to arbitration and the person to act as the arbitrator shall be agreed between the parties”.*

Note however the exception under clause 41.3(4) where *“A dispute under Article 5 shall be immediately referred to arbitration without first being referred to mediation.”* (Article 5 concerns replacement of Architect or Quantity Surveyor by the Employer).

16. Under the 7th edition of the Singapore Institute of Architects (SIA) Articles and Conditions of Contract (2005) the position is somewhat different.

The Mediation Clause, Clause 38, significantly, comes *after* clause 37, the Arbitration Clause. It provides that the Parties *may* refer their dispute “*for mediation under the Mediation Rules of the SIA*” before a SIA-appointed mediator but “*For the avoidance of doubt, prior reference of the dispute to mediation under this clause shall not be a condition precedent for its reference to arbitration by either the Contractor or the Employer.*”

17. Clause 35 of the Malaysian Pertubuhan Akitek Malaysia (PAM) form (1998) is in almost identical terms to this provision of the SIA as is clause 34.6(2) of the Public Sector Standard Conditions of Contract 5th edition (December 2006) in Singapore.
18. Mention has already been made of the use of the DRA in Hong Kong. The related technique of Dispute Board/Dispute Resolution Board (DB/DRB) is gaining even more importance in the international context. Dr. Robert Gaitskell Q.C. (Trends in Construction Dispute Resolution, Society of Construction Law, December 2005) observes that “*dispute boards have a good record: some 97% of disputes never go to arbitration or litigation.*” In September 2004, the International Chamber of Commerce (ICC) launched its Dispute Board Rules. A large part of the significance of this event in construction and engineering derives from the adoption in the mid 1990s of the Dispute Board approach by FIDIC for use in its standard form contracts. In the UK, the Institution of Civil Engineers (ICE) has followed this approach with its own contracts.
19. As Dr. Gaitskell concludes (Using Dispute Boards Rules under the ICC’s Rules: what is a dispute board and why use one? Society of Construction Law, D60, December 2005), “*The most striking effect of a properly appointed and functioning dispute board is its*

ability to catch problems right at the outset and prevent them festering and growing into disputes.”

20. Adjudication is seen by most commentators in those jurisdictions where it has been introduced by statute as a dominant cause of the reduction in arbitration activity. Indeed, the way in which statutory adjudication has been set up has the effect of moving arbitration to a later stage at the bottom of ‘new order’. The main examples of statutory adjudication to date are the UK’s Housing Grants Construction and Regeneration Act 1996, the New South Wales Building and Construction Industry Security of Payment Act 1999 (similar schemes have been adopted in other Australian states), the Construction Contracts Act 2002 in New Zealand and the Singapore Building and Construction Industry Security of Payment Act 2004.
21. These examples have been given added interest in Hong Kong, although no statutory scheme is in force there, by the inclusion of a contractual scheme for adjudication in Government contracts in an amended version of the dispute resolution clause 5CC clause 86 and the Government of the Hong Kong Special Administrative Region Construction Adjudication Rules 2004.
22. 5CC clause 86 (1A) provides that the decision of the adjudicator shall be final and binding upon the parties, and enforceable, unless or until either the dispute has been settled or it has been referred to arbitration and an arbitral award made or a settlement reached. The intention of this was made clear from the beginning in the English courts: it was to resolve disputes in the expectation that the majority would not go the further step

to arbitration or litigation, thereby reducing resort to those procedures. In 2001 (Construction Law, Vol.12, No.8, p.1) the Royal Institution of Chartered Surveyors reported a 10% drop in UK construction arbitration after 3 years of statutory adjudication and anecdotal evidence suggests that this figure has increased year on year since. It is too early to say whether the Hong Kong scheme, which only relates to Government contracts, will have a similar effect, but it is safe to say that it is intended to do so.

D. Challenges to adjudication: mistakes, jurisdiction, natural justice and bias

23. The fundamental difference between DRB's and mediation on the one hand and adjudication on the other, is that the former are unlikely to create legally enforceable rights and objections. Adjudication is very different.

24. The intention of the 1996 Act in the UK was to reduce the number of construction disputes dealt with in the Courts and by arbitration. This has undoubtedly been the case and parties in many cases accept the decision of the adjudicator, rather than then proceeding to litigation or arbitration. Nonetheless, there have been a very substantial number of challenges to adjudication decisions in the Courts. These challenges are usually made by way of opposition to the application for summary judgment to enforce the adjudicator's decision.

25. Key areas in which challenges have been made, and which are likely to be relevant to the Hong Kong contractual scheme, include:
 - (1) Mistakes by the adjudicator.

(2) Breaches of natural justice.

(3) Lack of jurisdiction.

(4) Insolvency.,

(1) Mistakes

26. The position of the UK Courts in relation to mistakes made by the adjudicator has been firm: mistakes, however bad, do not prevent the enforcement of an adjudication decision. A classic example occurred in *Bouygues v Dahl-Jensen* [2000] BLR 522. The adjudicator's award resulted in a net payment to Dahl-Jensen of approximately £200,000. The adjudicator reached this decision as a result of an error in considering the release of retention under the contract. If he had not made this error, the net result would have been an award of approximately £140,000 to Bouygues. The Court of Appeal was in no doubt that this error did not affect the enforceability of the decision. Buxton LJ stated:

“That was an error, but an error made when he was acting within his jurisdiction. Provided that the Adjudicator acts within that jurisdiction his award stands and is enforceable.”

27. Although it seems harsh on the facts of that case, it is submitted that this is the appropriate analysis. Otherwise, the Courts would be faced with investigating the merits of a decision on enforcement applications and the purpose of a swift, provisionally binding process would be defeated.

28. One apparent exception to the rule about mistakes has developed for accidental errors or omissions. It seems that, if a mistake is brought to the attention of the adjudicator, or he otherwise appreciates a mistake, within a reasonable time of the publication of his decision, he is entitled to correct it and the Court will only give effect to the corrected decision. This is similar to the slip rule in Court or arbitration, although the jurisdiction to correct slips in adjudication decisions is unclear, as there is nothing in the 1996 Act or Scheme which gives the adjudicator power to correct such slips.

(2) Breaches of natural justice and bias

29. The Courts in the UK have concluded that the principles of natural justice and procedural fairness apply to adjudications, although it will only be in the plainest of cases that a challenge will succeed.

30. In *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] BLR 1 the Court of Appeal described the common law rules of natural justice as two fold:

(1) The right to proper notice and effective opportunity to make representations before a decision is made.

(2) The right to an unbiased tribunal.

31. The allegation in that case was of apparent bias. It was not disputed that the rule against bias was applicable to adjudications under the 1996 Act. However, Dyson LJ made it clear that successful challenges would be rare, stating:

“It is easy enough to make challenges of breach of natural justice against an adjudicator. The purpose of the scheme of the 1996 Act is now well known. It is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicators’ decisions. It is only where the defendant has advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator’s award on that ground.”

32. In ***Carillion Construction Ltd v Devonport Royal Dockyard*** [2006] BLR 15 the Court of Appeal again warned against seeking to circumvent the provisions of the 1996 Act by unmeritorious challenges:

“The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator’s decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case; which...may, indeed, aptly be described as “simply scrabbling around to find some argument, however, tenuous, to resist payment”.

It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator’s reasons and identify points upon which to present a challenge under the labels “excess of jurisdiction” or “breach of natural justice”.... The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case.... The need to have the “right” answer has been subordinated to the need to have an answer quickly. The Scheme was not enacted in order to provide definitive answers to complex questions.....

In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator’s decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator’s decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest case) is likely to lead to a substantial waste of time and expense....”

33. There have been examples of cases in which the Courts have considered that an adjudicator has not conducted the proceedings impartially or as fairly as the limitations imposed by Parliament permit. In *Woods Hardwick v Chiltern Air-Conditioning* [2001] BLR 23, the adjudicator, on his own initiative, without consulting or informing the parties, consulted both parties' sub-contractors, the local authority litigation department and the RIBA helpline. He did not inform the respondent that he had obtained information from those sources or its content, despite paragraph 17 of the Scheme (which was applicable in that case) which required the adjudicator to make available to the parties any information to be taken into account in reaching his decision. Furthermore, he submitted a witness statement in the enforcement proceedings in Court, which left the impression that he was not impartial. In *Balfour Beatty Construction Ltd v Lambeth* [2002] BLR 288, the adjudicator effectively constructed for the claimant, who had failed to provide such information, an as-built programme and a critical path thereby making good "*fundamental deficiencies*" in the material presented by the claimant. The Court considered that he was making the claimant's case for it.
34. The New South Wales Court of Appeal has also recognised that a breach of the rules of natural justice may render an adjudicator's decision void. However, in the case of *Brodyn Pty Ltd & Dasein Constructions Pty Ltd v Davenport* [2004] NSW 394, the NSW Court of Appeal considered that the adjudicator's failure to consider Brodyn's claim for defects in the work flowed either from misinterpreting Brodyn's submissions or misapplying the law and did not amount to a denial of natural justice.

(3) Lack of jurisdiction

35. If an adjudicator has gone outside his jurisdiction by, for example, deciding matters which were not referred to him, his decision will be unenforceable. In the UK, as can be seen from the Court of Appeal cases quoted above, challenges will be successful only in the plainest of cases. In *Bouygues*, Chadwick LJ stated:

“The answer to [whether the decision is binding on the parties] turns on whether the adjudicator confined himself to a determination of the issues that were put before him by the parties. If he did so, then the parties are bound by his determination, notwithstanding that he may have fallen into error..... if the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.”

(4) Insolvency or inability to pay

36. It is clear from the UK experience that Courts will do all they can to uphold adjudicator’s decisions. However, where the successful party in the adjudication will be, or is likely to be, unable to repay any money awarded in accordance with the decision, the Court will not always enforce the judgment.

37. Where a party is a company in liquidation or a person in bankruptcy, there are provisions for set-off of mutual debts. In such a case, summary judgment will not be ordered on a claim arising out of an adjudication, which is necessarily provisional. In situations where the claimant is not technically insolvent but the Court considers it likely that it will not be able to repay the money, a stay of execution may be ordered. The principles governing the exercise of the Court’s discretion have recently been summarised in the decision of *Wimbledon Construction Company 2000 Ltd v Derek Vargo* [2005] BLR 374:

- (1) Adjudication (whether pursuant to the 1996 Act or standard form contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
- (2) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (i.e. the successful party in the adjudication) should not generally be kept out of its money.
- (3) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the Court must exercise its discretion with (1) and (2) firmly in mind.
- (4) The probable inability of the claimant to repay the judgment sum (i.e. the sum awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial or arbitration, may amount to special circumstances rendering it appropriate to grant a stay.
- (5) If the claimant is in insolvent liquidation or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted.
- (6) Even if the evidence of the claimant's present financial position suggests that it is probable that it would be unable to repay the judgment sum when it falls due, that would not usually justify the grant of a stay if:

- (a) The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or
- (b) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator.

E. Comparative time considerations

- 38. Privacy aside, the key driving forces of the new order of ADR (DRB's, mediation and adjudication) were the largely justified complaints that litigation and arbitration took too long and cost too much (based in terms of management time and money).
- 39. DRB clauses and mediation provisions will usually set a time frame for the parties to work to or the parties will reach an amicable accommodation with regard to time. Normally, the schedule can be expected to be relatively short: perhaps a few weeks or a couple of months at most.
- 40. Statutory (and contractual) adjudication has very tight time constraints. In the UK a period of time allowed from the Notice to Refer to the Adjudicator's Decision is 28 days, subject to an extension to 42 days if the Referring Party consents. In Hong Kong, the Government Contracts contain adjudication clauses which allow 56 days (subject to extension by agreement) for a decision to be reached. There is little doubt that the adjudication, particularly of complex disputes or where an "*ambush*" situation occurs, can engender a perception of a rough and ready form of justice. Indeed, the limited time

allowed has led to the criticism that certain types of dispute are simply unsuited to the adjudication process because their subject matter or complexity does not permit the dispute to be determined fairly or impartially within the set time limits: see *London & Amsterdam Properties v Waterman Partnership* [2004] 1 BLR 179; *AWG v Rockingham Motorway Speedway Ltd* [2004] EWHC 888. But compare these cases with *CIB Properties Ltd v Birse Construction* [2005] BLR 172 where the judge expressed the view that if an adjudicator could not discharge his duty to reach a decision impartially and fairly within the time prescribed time limits, he did not have to reach a decision.

F. A compromise: the 100 day arbitration procedure?

41. With experience gained by the use of alternative dispute resolution methods principally mediation, contractual adjudication and dispute review/resolution boards (or variants of these methods) and the passage of time, all such methods have been found to have both advantages and limitations. In certain cases there is no doubt that the limitations have led the parties to revert to litigation, particularly with the benefit of continuing reforms of the court system.
42. However, principally because of statutory adjudication, whose weaknesses and limitations have gradually been exposed over the past 8 years or so, has led parties and their professional advisers to reassess, in particular, the merits of arbitration and its ability to overcome the shortcomings of adjudication. That reassessment process has generated, amongst other things, the “100 day arbitration procedure” launched in 2004 by the Society of Construction Arbitrators. The procedure is available on the SCA website at www.arbitrators-society.org. The principal objective of the “100 day

arbitration procedure” is to strike a satisfactory balance between (i) a procedure which allows the resolution of a dispute to be strung out over many many months if not years; and (ii) a procedure (such as the UK Statutory Adjudication Procedure) which insists upon the determination of potentially large and complex disputes within 4-6 weeks but, with only “*temporary finality*”. Against these two extremes the perceived advantages of a 100 day arbitration are greater flexibility of the procedure, finality of the result and a greater ability to achieve equality of treatment of the parties. It is perhaps thought that lay clients in particular who become sceptical if not downright cynical about a process which they are expected to expensively fund over an indeterminate but often prolonged period may be more sympathetic to a procedure which promises a defined time frame for the resolution of any dispute. Further, the procedure may enable professional advisers to more accurately estimate the costs likely to be incurred. Conversely, the period of probably thought not to be too unreasonably short such that it would lead to a result which commands respect and acceptance from the parties and should not be open to the criticism that too short a period leads to rough and ready justice without a proper consideration of all the salient issues. For a detailed discussion of the 100 day arbitration procedure please see 2005 Construction Law Journal, page ... an article by Professor John Uff CBE QC.



About UNCTAD	Digital library	Events & Meetings	Press Room	Programmes	Statistics
--------------	-----------------	-------------------	------------	------------	------------

Investment Instruments... > Bilateral Investment T...

What are BITs?

INVESTMENT INSTRUMENTS ONLINE

UNCTAD Analysis of BITs

BILATERAL INVESTMENT TREATIES

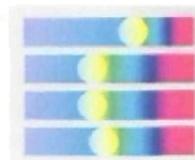
Methodology

IIA Compendium

The BITs search engine has been designed to provide a user-friendly way to retrieve either:

IIA website

- i. **all available BITs signed by one country**
- ii. **a specific BIT between two countries**



Contacts

Please refer to the help function [?] for search tips.

Quick Links: [Country List of BITs](#)



Bilateral investment treaty

between:

and: 

Last updated: 26 February 2007 11:00

TREATY BETWEEN
UNITED STATES OF AMERICA AND
THE ARGENTINE REPUBLIC
CONCERNING THE RECIPROCAL ENCOURAGEMENT
AND PROTECTION OF INVESTMENT

Signed November 14, 1991; Entered into Force October 20, 1994

The United States of America and the Argentine Republic, hereinafter referred to as the Parties;

Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and

having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

ARTICLE I

1. For the purposes of this Treaty,

a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value and directly related to an investment;

(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

b) "company" of a Party means any kind of corporation, company, association, state enterprise, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, and whether privately or governmentally owned;

c) "national" of a Party means a natural person who is a national of a Party under its applicable law;

d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capita gain; royalty payment; management, technical assistance or other fee; or returns in kind;

e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase, issuance, and sale of equity shares and other securities, and the purchase of foreign exchange for imports.

f) "territory" means the territory of the United States or the Argentine Republic, including the territorial sea established in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea. This Treaty also applies in the seas and seabed adjacent to the territorial sea in which the United States or the Argentine Republic has sovereign rights or jurisdiction in accordance with international law as reflected in the 1982 United Nations Convention on the Law of the Sea.

2. Each Party reserves the right to deny to any company of the other Party the advantages of this Treaty if (a) nationals of any third country, or nationals of such Party, control such company and the company has no substantial business activities in the territory of the other Party, or (b) the company is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

3. Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment.

ARTICLE II

1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Protocol. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Protocol, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall, unless specified otherwise in the Protocol, be not less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country.

2. a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For the purposes of dispute resolution under Articles VII and VIII, a measure may be arbitrary or discriminatory notwithstanding the opportunity to review such measure in the courts or administrative tribunals of a Party.

c) Each Party shall observe any obligation it may have entered into with regard to investments.

3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources.

4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality.

5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements.

6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investments, investment agreements, and investment authorizations.

7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.

8. The treatment accorded by the United States of America to investments and associated activities of nationals and companies of the Argentine Republic under the provisions of this Article shall in any State, Territory or possession of the United States of America be no less favorable than the treatment accorded therein to investments and associated activities of nationals of the United States of America resident in, and companies legally constituted under the laws and regulations of, other States, Territories or possessions of the United States of America.

9. The most favored nation provisions of this Article shall not apply to advantages accorded by either Party to nationals or companies of any third country by virtue of that Party's binding obligations that derive from full membership in a regional customs union or free trade area, whether such an arrangement is designated as a customs union, free trade area, common market or otherwise.

ARTICLE III

This Treaty shall not preclude either Party from prescribing laws and regulations in connection with the admission of investments made in its territory by nationals or companies of the other Party or with the conduct of associated activities, provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in this Treaty.

ARTICLE IV

1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation-') except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2) Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the provisions of this Treaty and the principles of international law.

3. Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of

national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.

ARTICLE V

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.

2. Except as provided in Article IV paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. The free transfer shall take place in accordance with the procedures established by each Party; such procedures shall not impair the rights set forth in this Treaty.

3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

ARTICLE VI

The Parties agree to consult promptly, on the request of either, to resolve any disputes in connection with the Treaty, or to discuss any matter relating to the interpretation or application of the Treaty.

ARTICLE VII

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority (if any such authorization exists) to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNICTRAL): or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.
6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.
7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.
8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.

ARTICLE VIII

1. Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision in accordance with the applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL), except to the extent modified by the Parties or by the arbitrators, shall govern.
2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. The UNCITRAL Rules for appointing members of three member panels shall apply mutatis mutandis to the appointment of the arbitral panel except that the appointing authority referenced in those rules shall be the Secretary General of the Permanent Court of Arbitration.
3. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within six months of the date of selection of the third arbitrator, and the Tribunal shall render its decisions within two months of the date of the final submissions or the date of the closing of the hearings, whichever is later.
4. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties.

ARTICLE IX

The provisions of Article VII and VIII shall not apply to a dispute arising (a) under the export credit, guarantee or insurance programs of the Export-Import Bank of the

United States or (b) under other official credit, guarantee or insurance arrangements pursuant to which the Parties have agreed to other means of settling disputes.

ARTICLE X

This Treaty shall not derogate from:

(a) laws and regulations, administrative practices or procedures, or administrative or adjudicatory decisions of either Party;

(b) international legal obligations; or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favorable than that accorded by this Treaty in like situations.

ARTICLE XI

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.

ARTICLE XII

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Article VII and VIII, shall apply to matters of taxation only with respect to the following:

(a) expropriation, pursuant to Article IV;

(b) transfers, pursuant to Article V; or

(c) the observance and enforcement of terms of an investment agreement or authorization as referred to in Article VII(I)(a) or (b),

to the extent they are not subject to the dispute settlement provisions of a Convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time.

ARTICLE XIII

This Treaty shall apply to the political subdivisions of the Parties.

ARTICLE XIV

1. This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Treaty at the end of the initial ten year period or at any time thereafter.

3. With respect to investments made or acquired prior to the date of termination of this Treaty and to which this Treaty otherwise applies, the provisions of all of the other Articles of this Treaty shall thereafter continue to be effective for a further period of ten years from such date of termination.

4. The Protocol shall form an integral part of the Treaty.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington on the fourteenth day of November, 1991, in the English and Spanish languages, both texts being equally authentic.

FOR THE UNITED STATES OF AMERICA:

FOR THE ARGENTINE REPUBLIC:

PROTOCOL

1. During dispute settlement proceedings pursuant to Article VII, a party may be required to produce evidence of ownership or control consistent with Article I(I)(a).

2. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national treatment in the following sectors:

air transportation; ocean and coastal shipping; banking; insurance; energy and power production; custom house brokers; ownership and operation of broadcast or common carrier radio and television stations; ownership of real property; ownership of shares in the Communications Satellite Corporation; the provision of common carrier telephone and telegraph services; the provision of submarine cable services; use of land and natural resources

3. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national treatment with respect to certain programs involving government grants, loans, and insurance.

4. With reference to Article II, paragraph 1, the United States reserves the right to make or maintain limited exceptions to national and most favored nation treatment in the following sectors, with respect to which treatment will be based on reciprocity:

mining on the public domain; maritime services and maritime-related services; primary dealership in United States government securities.

5. With reference to Article II, paragraph 1, the Argentine Republic reserves the right to make or maintain limited exceptions to national treatment in the following sectors:

real estate in the Border Areas; air transportation; shipbuilding; nuclear energy centers; uranium mining; insurance; mining; fishing.

6. The Parties understand that, with respect to rights reserved in Article XI of the Treaty, "obligations with respect to the maintenance or restoration of international peace or security" means obligations under the Charter of the United Nations.

7. The Parties acknowledge and agree that, to the extent of any conflict or inconsistency between the terms of this Treaty, and the terms of the Treaty of Friendship, Commerce, and Navigation between the Parties, entered into force December 20, 1854 (the "FCN Treaty-), the terms of this Treaty shall supersede the terms of the FCN Treaty, and shall control the resolution of such conflict.

8. The Parties confirm their mutual understanding that the provisions of this Treaty do not bind either Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of this Treaty.

9. Notwithstanding Article II(5) and in accordance with the terms of this paragraph, the Government of the Argentine Republic may maintain, but not intensify, existing performance requirements in the automotive industry. The Government of the Argentine Republic shall exert best efforts to eliminate all such requirements within the shortest possible period, and shall ensure their elimination within eight years of the date of the entry into force of this Treaty. The Government of the Argentine Republic shall further ensure that such performance requirements are applied in a manner which does not place existing investments at a competitive disadvantage against new entrants in this industry. The Parties shall consult at the request of either on any matter concerning the implementation of these undertakings. For the purposes of this paragraph, "existing" means extant at the time of signature of this Treaty.

10. The Parties note that the Argentine Republic has had and may have in the future a debt-equity conversion program under which nationals or companies of the United States may choose to invest in the Argentine Republic through the purchase of debt at a discount.

The Parties agree that the rights provided in Article V, paragraph 1, with respect to the transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment, remain or may be, as such rights would apply to that part of an investment financed through a debt-equity conversion, modified by the terms of any debt-equity conversion agreement between a national or company of the United States and the Government of the Argentine Republic, or any agency or instrumentality thereof.

The transfer of returns and of proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favorable than those accorded, in like circumstances, to nationals or companies of the Argentine Republic or any third country, whichever is more favorable.

11. The Parties note with satisfaction that the Argentine Republic is engaged in a process of privatization of various industries, including public utilities. They agree that they will undertake their best efforts, including through consultations, to avoid any misinterpretation regarding the scope of Article II(5) that would adversely affect this privatization process.

Embassy of the United States of America

Buenos Aires, August 24, 1992

No. 453

Mr. Minister:

I have the honor to refer to the Treaty between the United States of America and the Argentine Republic concerning the reciprocal encouragement and protection of investment, with Protocol signed at Washington, November 14, 1991 ("The Treaty").

During the negotiation of the Treaty, the Government of the United States of America and the Government of the Argentine Republic discussed the inclusion in Section 5 of the Protocol to the Treaty of the Argentine Mining Sector. Based on those discussions and subsequent discussions regarding this matter, I wish to propose the deletion of the term "Mining" from the list of sectors in Section 5 of the Protocol.

If the foregoing is acceptable to your Government, I have the honor to propose that this note, together with your reply to that effect shall constitute an agreement between the two Governments amending the Treaty, which shall be subject to ratification.

Accept, Mr. Minister, the renewed assurances of my highest consideration.

Dr. Guido Di Tella,

Minister of Foreign Affairs and Worship,

Buenos Aires.

DEPARTMENT OF STATE
OFFICE OF LANGUAGE SERVICES
Translating Division

LS No. 140114

LM

SPA/ENG

Minister of Foreign Relations and Worship

Buenos Aires, November 6, 1992

Mr. Ambassador:

I have the honor to address you with regard to your note dated August 24, 1992, which reads as follows:

[The Spanish translation of Ambassador Todman's note of August 24, 1992, agrees in all substantive respects with the original English text.]

In that regard I wish to state that my Government agrees with the terms of the transcribed note and, therefore, I have the honor to inform you that the aforesaid note and this reply constitute an agreement between our two Governments that will enter into force upon the exchange of instruments of ratification.

Accept, Sir, the assurances of my highest consideration.

[Signature]

His Excellency

Terence Todman,

Ambassador of the United States of America,

Buenos Aires, Argentina



ICSID

Cases

[ICSID Home](#) | [About ICSID](#) | [ICSID Convention, Regulations and Rules](#) | [Additional Facility Rules](#) | [ICSID Documents and Publications](#) | [List of Contracting States](#) | [ICSID Cases](#) | [Bilateral Investment Treaties](#) | [News from ICSID](#)

List of Pending Cases

1. **Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (Case No. ARB/97/3)**

Subject Matter

Water and sewer services concession agreement

(a) Original Arbitration Proceeding

Date Registered

February 19, 1997

Date of Constitution of Tribunal

December 1, 1997

Composition of Tribunal

President: Francisco Rezek (Brazilian)
Arbitrators: Thomas Buergenthal (U.S.)
Peter D. Trooboff (U.S.)

Outcome of Proceeding

Award rendered on November 21, 2000.

Published Decisions

Award of November 21, 2000, [English original] 16 *ICSID Rev.—FILJ* 641 (2001); 40 *ILM* 426 (2001); 125 *I.L.R.* 1 (2004); 26 *Y.B. Com. Arb.* 61 (2001) (excerpts); Spanish translation of English original in *La Ley* (Buenos Aires) Año LXV No. 25, February 5, 2001, p. 1.

(b) Annulment Proceeding

Date Registered

March 23, 2001

Date of Constitution of ad hoc Committee

May 18, 2001

Composition of ad hoc Committee

President: L. Yves Fortier (Canadian)
Members: James R. Crawford (Australian)
José Carlos Fernández Rozas (Spanish)

Outcome of Proceeding

Decision on Annulment rendered on July 3, 2002.

Published Decisions

Decision on the Challenge to the President of the Committee of October 5, 2001, [English original] 17 *ICSID Rev.—FILJ* 168 (2002); 6 *ICSID Rep.* 330 (2004); 125 *I.L.R.* 46 (2004); [Spanish original] 17 *ICSID Rev.—FILJ* 182 (2002).

Decision on Annulment of July 3, 2002, [English original] 19 *ICSID Rev.—FILJ* 89 (2004); 41 *ILM* 1135 (2002); 6 *ICSID Rep.* 340 (2004); 125 *I.L.R.* 58 (2004); French translation of English and Spanish originals in 130 *Journal du droit international* 195 (2003).

(c) Supplementary Decisions and Rectification Proceeding

Date Registered

August 23, 2002

Outcome of Proceeding

Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award rendered on May 28, 2003.

Published Decisions

Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision Concerning Annulment of the Award of May 28, 2003, 19 *ICSID Rev.—FILJ* 139 (2004); 8 *ICSID Rep.* 490 (2005).

(d) Resubmission

Date Registered

Request for resubmission of the dispute to a new Tribunal registered on October 24, 2003.

Date of Constitution of Tribunal

April 14, 2004

Composition of Tribunal

President: J. William Rowley (Canadian)
Arbitrators: Gabrielle Kaufmann-Kohler (Swiss)
Carlos Bernal Vereza (Mexican)

Status of Proceeding

Pending (the parties files submissions on costs on September 29, 2006)

2. Víctor Pey Casado and President Allende Foundation v. Republic of Chile (Case No. ARB/98/2)

Subject Matter

Publishing enterprise

Date Registered

April 20, 1998

Dates of Constitution of Tribunal

September 14, 1998
November 19, 1998 (reconstituted)
April 11, 2001 (reconstituted)
July 14, 2006 (reconstituted)

Composition of Tribunal

President: Pierre Lalive (Swiss)*
Arbitrators: Mohammed Chemloul (Algerian)**
Emmanuel Gaillard (French)****

- * (appointed following the resignation of Francisco Rezek (Brazilian))
- ** (appointed following the resignation of Jorge Witker (Mexican))
- *** (appointed following the disqualification of Mohammed Bedjaoui (Algerian))
- **** (appointed following the resignation of Galo Leoro Franco (Ecuadorian)**)

Status of Proceeding

Pending (The Tribunal holds a hearing in Paris on January 15-16, 2007)

Published Decisions

Decision on Provisional Measures of September 25, 2001, [French original] 16 *ICSID Rev.—FILJ* 567 (2001); [Spanish original] 16 *ICSID Rev.—FILJ* 603 (2001); English translation of French and Spanish originals in 6 *ICSID Rep.* 375 (2004).

3 . Antoine Goetz and others v. Republic of Burundi (Case No. ARB/01/2)

Subject Matter

Mining, banking and service enterprises

Date Registered

March 27, 2001

Date of Constitution of Tribunal

June 25, 2002

Composition of Tribunal

President: Prosper Weil (French)
Arbitrators: Jean-Denis Bredin (French)
Ahmed S. El-Kosheri (Egyptian)

Status of Proceeding

Pending (the proceeding is resumed on December 1, 2006)

4 . Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic (Case No. ARB/01/3)

Subject Matter

Natural gas transportation company

Date Registered

April 11, 2001

Date of Constitution of Tribunal

November 1, 2001

Composition of Tribunal

President: Francisco Orrego Vicuña (Chilean)
Arbitrators: Albert Jan van den Berg (Dutch) *
Pierre-Yves Tschanz (Swiss)

- * (appointed following the resignation of Héctor Gros Espiell (Uruguayan))

Status of Proceeding

Pending (the Tribunal is reconstituted and the proceedings are resumed on July 11, 2006)

Published Decisions

An electronic text of the Decision on Jurisdiction of January 14, 2004, is provided by *International Law in Brief* at <http://www.asil.org/ilib/Enron.pdf>.

Decision on Jurisdiction (Ancillary Claim) of August 2, 2004.

5. CMS Gas Transmission Company v. Argentine Republic (Case No. ARB/01/8)

Subject Matter

Gas transmission enterprise

(a) Original Arbitration Proceeding

Date Registered

August 24, 2001

Date of Constitution of Tribunal

January 11, 2002

Composition of Tribunal

President: Francisco Orrego Vicuña (Chilean)
Arbitrators: Marc Lalonde (Canadian)
Francisco Rezek (Brazilian)

Outcome of Proceeding

Award rendered on May 12, 2005.

Published Decisions

Decision on Objections to Jurisdiction of July 17, 2003, 42 *ILM* 788 (2003); 7 *ICSID Rep.* 492 (200); French translation of English original in 131 *Journal du droit international* 236 (2004) (excerpts).

Award of May 12, 2005; 44 *ILM* 1205 (2005).

(b) Annulment Proceeding

Date Registered

September 27, 2005

Date of Constitution of ad hoc Committee

April 18, 2006

Composition of ad hoc Committee

President: Gilbert Guillaume (French)
Members: Nabil Elaraby (Egyptian)
James R. Crawford (Australian)

Status of Proceeding

Pending (the Committee holds a hearing in Paris on March 27-28, 2007)

Published Decisions

Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of September 1, 2006

6. LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic (Case No. ARB/02/1)

Subject Matter

Gas distribution enterprise

Date Registered

January 31, 2002

Date of Constitution of Tribunal

November 13, 2002

Composition of Tribunal

President: Tatiana Bogdanowsky de Maekelt (Venezuelan)

Arbitrators: Francisco Rezek (Brazilian)

Albert Jan van den Berg (Dutch)

Status of Proceeding

Pending (the Tribunal issues Procedural Order No. 6 concerning the method for establishing damages on November 3, 2006)

Published Decisions

Decision of the Arbitral Tribunal on Objections to Jurisdiction of April 30, 2004

Decision on Liability of October 3, 2006

7. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines (Case No. ARB/02/6)**Subject Matter**

Service agreement

Date Registered

June 6, 2002

Date of Constitution of Tribunal

September 18, 2002

Composition of Tribunal

President: Ahmed S. El-Kosheri (Egyptian)

Arbitrators: Antonio Crivellaro (Italian)

James R. Crawford (Australian)

Status of Proceeding

Pending (the proceeding is stayed pursuant to the Tribunal's Decision on Jurisdiction of January 29, 2004)

Published Decisions

Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004; 8 ICSID Rep. 518 (2005); Declaration by one of the arbitrators of January 29, 2004; 8 ICSID Rep. 568 (2005).

8. Hussein Nuaman Soufraki v. United Arab Emirates (Case No. ARB/02/7)**(a) Original Arbitration Proceeding****Subject Matter**

Concession agreement regarding a port

Date Registered

June 18, 2002

Date of Constitution of Tribunal

October 23, 2002

Composition of Tribunal

President: L. Yves Fortier (Canadian)
Arbitrators: Aktham El Kholy (Egyptian)
Stephen M. Schwebel (U.S.)

Outcome of Proceeding

Award rendered on July 7, 2004.

(b) Annulment Proceeding**Date Registered**

November 12, 2004

Date of Constitution of ad hoc Committee

January 18, 2005

Composition of ad hoc Committee

President: Florentino P. Feliciano (Philippines)
Members: Omar Nabulsi (Jordanian)
Brigitte Stern (French)

Status of Proceeding

Pending (the Claimant files a revised submission on costs on March 20, 2007)

9. Azurix Corp. v. Argentine Republic (Case No. ARB/01/12)**(a) Original Arbitration Proceeding****Subject Matter**

Water and sewer services concession agreement

Date Registered

October 23, 2001

Date of Constitution of Tribunal

April 8, 2002

Composition of Tribunal

President: Andrés Rigo Sureda (Spanish)
Arbitrators: Marc Lalonde (Canadian)*
Daniel H. Martins (Uruguayan)

* (appointed following the resignation of Elihu Lauterpacht (British))

Outcome of Proceeding

Award rendered on July 14, 2006.

Published Decisions

Decision on Jurisdiction of December 8, 2003, 43 *ILM* 262 (2004); French translation of English original in 131 *Journal du droit international* 275 (2004) (excerpts).

Award of July 14, 2006

(b) Annulment Proceeding

Date Registered

December 11, 2006

Status of Proceeding

Pending (*ad hoc* Committee not yet constituted)

10. Ahmonseto, Inc. and others v. Arab Republic of Egypt (Case No. ARB/02/15)

Subject Matter

Textile enterprise

Date Registered

November 18, 2002

Date of Constitution of Tribunal

January 29, 2003

Composition of Tribunal

President: Pierre Tercier (Swiss)

Arbitrators: Ibrahim Fadlallah (Lebanese/French)

Alain Viandier (French)

Status of Proceeding

Pending (the Respondent files observations on the Claimants' new documents on March 8, 2007)

11. Sempra Energy International v. Argentine Republic (Case No. ARB/02/16)

Subject Matter

Gas supply and distribution enterprise

Date Registered

December 6, 2002

Date of Constitution of Tribunal

May 5, 2003

Composition of Tribunal

President: Francisco Orrego Vicuña (Chilean)

Arbitrators: Marc Lalonde (Canadian)

Sandra Morelli Rico (Colombian)

Status of Proceeding

Pending (the parties file post-hearing briefs on April 3, 2006)

Published Decisions

Decision on Objections to Jurisdiction of May 11, 2005.

12. AES Corporation v. Argentine Republic (Case No. ARB/02/17)

Subject Matter

Electricity generation and distribution operations

Date Registered

December 19, 2002

Date of Constitution of Tribunal

June 3, 2003

Composition of Tribunal

President: Pierre-Marie Dupuy (French)
Arbitrators: Karl-Heinz Böckstiegel (German)
Domingo Bello Janeiro (Spanish)

Status of Proceeding

Pending (following a request by the parties, the Tribunal further suspends the proceedings on December 29, 2006)

13. Tokios Tokelès v. Ukraine (Case No. ARB/02/18)

Subject Matter

Printing enterprise

Date Registered

December 20, 2002

Date of Constitution of Tribunal

April 29, 2003
August 23, 2004 (reconstituted)

Composition of Tribunal

President: Michael Mustill (British)*
Arbitrators: Daniel M. Price (U.S.)
Piero Bernardini (Italian)

* (appointed following the resignation of Prosper Weil (French))

Status of Proceeding

Pending (the parties file post-hearing briefs on March 27, 2006)

Published Decisions

Procedural Order No. 1 of July 1, 2003;

Decision on Jurisdiction of April 29, 2004, 20 ICSID Rev.—FILJ 205 (2005);

Dissenting Opinion of April 29, 2004, 20 ICSID Rev.—FILJ 245 (2005),

Procedural Order No. 3 of January 18, 2005.

14. Camuzzi International S.A. v. Argentine Republic (Case No. ARB/03/2)

Subject Matter

Gas supply and distribution enterprise

Date Registered

February 27, 2003

Date of Constitution of Tribunal

May 5, 2003

Composition of Tribunal

President: Francisco Orrego Vicuña (Chilean)
Arbitrators: Marc Lalonde (Canadian)
Sandra Morelli Rico (Colombian)

Status of Proceeding

Pending (the parties file post-hearing briefs on April 3, 2006)

Published Decisions

Decision on Objections to Jurisdiction of May 11, 2005.

15. Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru (Case No. ARB/03/4)

(a) Original Arbitration Proceeding

Subject Matter

Pasta factory

Date Registered

March 26, 2003

Date of Constitution of Tribunal

August 1, 2003

Composition of Tribunal

President: Thomas Buergenthal (U.S.)
Arbitrators: Jan Paulsson (French)
Bernardo M. Cremades (Spanish)

Outcome of Proceeding

Award rendered on February 7, 2005.

Published Decisions

Award of February 7, 2005, [English original] 19 *ICSID Rev.—FILJ* 359 (2004); [Spanish original] 19 *ICSID Rev.—FILJ* 389 (2004).

(b) Annulment Proceeding

Date Registered

July 1, 2005

Date of Constitution of ad hoc Committee

November 17, 2005

Composition of ad hoc Committee

President: Hans Danelius (Swedish)
Members: Andrea Giardina (Italian)
Franklin Berman (British)

Status of Proceeding

Pending (the Respondent files a rejoinder on December 15, 2006)

16. Metalpar S.A. and Buen Aire S.A. v. Argentine Republic (Case No. ARB/03/5)

Subject Matter

Motor vehicle enterprise

Date Registered

April 7, 2003

Date of Constitution of Tribunal

September 26, 2003

Composition of Tribunal

President: Rodrigo Oreamuno (Costa Rican)
Arbitrators: Duncan H. Cameron (U.S.)
Jean Paul Chabaneix (Peruvian)

Status of Proceeding

Pending (the Claimants file a reply on the merits on January 9, 2007)

17. M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador (Case No. ARB/03/6)

Subject Matter

Electric power generation project

Date Registered

April 8, 2003

Date of Constitution of Tribunal

September 11, 2003

Composition of Tribunal

President: Raúl E. Vinuesa (Argentine)
Arbitrators: Benjamin J. Greenberg (Canadian)
Jaime Irrázabal C. (Chilean)

Status of Proceeding

Pending (the Tribunal holds a hearing on the merits in Washington, D.C. on March 20-24, 2006)

18. Continental Casualty Company v. Argentine Republic (Case No. ARB/03/9)

Subject Matter

Insurance company

Date Registered

May 22, 2003

Date of Constitution of Tribunal

October 6, 2003

Composition of Tribunal

President: Giorgio Sacerdoti (Italian)
Arbitrators: V.V. Veeder (British)*
Michell Nader (Mexican)

* (appointed following the resignation of Elihu Lauterpacht (British))

Status of Proceeding

Pending (the Tribunal holds a hearing on the merits in Washington, D.C. on November 27-December 2, 2006)

19. Gas Natural SDG, S.A. v. Argentine Republic (Case No. ARB/03/10)

Subject Matter

Gas supply and distribution enterprise

Date Registered

May 29, 2003

Date of Constitution of Tribunal

November 10, 2003

Composition of Tribunal

President: Andreas F. Lowenfeld (U.S.)
Arbitrators: Henri C. Alvarez (Canadian)
Pedro Nikken (Venezuelan)

Status of Proceeding

Pending (following a request by the parties, the Tribunal suspends the proceedings on November 11, 2005)

Published Decisions

An electronic text of the Decision of the Tribunal on Preliminary Questions on Jurisdiction of June 17, 2005, is provided by *International Law in Brief* at <http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>.

20. Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic (Case No. ARB/03/13)

Subject Matter

Hydrocarbon and electricity concessions

Date Registered

June 6, 2003

Date of Constitution of Tribunal

February 6, 2004

Composition of Tribunal

President: Lucius Caflisch (Swiss)
Arbitrators: Albert Jan van den Berg (Dutch)
Brigitte Stern (French)

Status of Proceeding

Pending (the Respondent files a counter-memorial on the merits on January 11, 2007)

21. Miminco LLC and others v. Democratic Republic of the Congo (Case No. ARB/03/14)

Subject Matter

Diamond mining concessions

Date Registered

June 9, 2003

Date of Constitution of Tribunal

September 17, 2004

Composition of Tribunal

President: Ahmed S. El-Kosheri (Egyptian)
Arbitrators: Marc Lalonde (Canadian)
Catherine Kessedjian (French)

Status of Proceeding

Pending (the Tribunal holds a meeting in Paris on April 21, 2005)

22. El Paso Energy International Company v. Argentine Republic (Case No. ARB/03/15)

Subject Matter

Hydrocarbon and electricity concessions

Date Registered

June 12, 2003

Date of Constitution of Tribunal

February 6, 2004

Composition of Tribunal

President: Lucius Cafilisch (Swiss)
Arbitrators: Piero Bernardini (Italian)
Brigitte Stern (French)

Status of Proceeding

Pending (the Claimant files a reply on the merits on November 28, 2006)

Published Decisions

Decision on Jurisdiction of April 27, 2006

23. Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (Case No. ARB/03/17)

Subject Matter

Water services concession

Date Registered

July 17, 2003

Date of Constitution of Tribunal

February 17, 2004

Composition of Tribunal

President: Jeswald W. Salacuse (U.S.)
Arbitrators: Gabrielle Kaufmann-Kohler (Swiss)
Pedro Nikken (Venezuelan)

Status of Proceeding

Pending (the Respondent files a rejoinder on the merits on February 9, 2007)

Published Decisions

Order in Response to a Petition for Participation as *Amicus Curiae* of March 17, 2006

Procedural Order No. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Provinciales de Santa Fe S.A. of April 14, 2006

Decision on Jurisdiction of May 16, 2006

24. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic (Case No. ARB/03/19)

Subject Matter

Water services concession

Date Registered

July 17, 2003

Date of Constitution of Tribunal

February 17, 2004

Composition of Tribunal

President: Jeswald W. Salacuse (U.S.)
Arbitrators: Gabrielle Kaufmann-Kohler (Swiss)
Pedro Nikken (Venezuelan)

Status of Proceeding

Pending (the Claimants file a reply on the merits on March 30, 2007)

Published Decisions

Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* of May 19, 2005

Procedural Order No. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A. of April 14, 2006

Decision on Jurisdiction of August 3, 2006

Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *Amicus Curiae* Submission of February 12, 2007

25. Telefónica S.A. v. Argentine Republic (Case No. ARB/03/20)

Subject Matter

Telecommunications enterprise

Date Registered

July 21, 2003

Date of Constitution of Tribunal

April 12, 2004

Composition of Tribunal

President: Giorgio Sacerdoti (Italian)
Arbitrators: Charles N. Brower (U.S.)
Eduardo Siqueiros (Mexican)

Status of Proceeding

Pending (following a request by the parties, the Tribunal suspends the proceedings on October 6, 2006)

26. Enersis S.A. and others v. Argentine Republic (Case No. ARB/03/21)

Subject Matter

Electricity distribution enterprise

Date Registered

July 22, 2003

Date of Constitution of Tribunal

January 21, 2004

Composition of Tribunal

President: Roberto MacLean (Peruvian)
Arbitrators: Luis Herrera Marcano (Venezuelan)
Robert Volterra (Canadian)

Status of Proceeding

Pending (following a request by the parties, the Tribunal suspends the proceedings on March 28, 2006)

27. Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic (Case No. ARB/03/22)

Subject Matter

Electricity distribution enterprise

Date Registered

August 12, 2003

Date of Constitution of Tribunal

June 2, 2004

Composition of Tribunal

President: William W. Park (U.S.)
Arbitrators: Gabrielle Kaufmann-Kohler (Swiss)
Fernando de Trazegnies Granda (Peruvian)

Status of Proceeding

Pending (following the resignation of Fernando de Trazegnies Granda, the proceeding is suspended pursuant to Arbitration Rule 10(2) on July 7, 2006)

28. EDF International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. v. Argentine Republic (Case No. ARB/03/23)

Subject Matter

Electricity distribution enterprise

Date Registered

August 12, 2003

Date of Constitution of Tribunal

June 2, 2004

October 17, 2006 (reconstituted)

Composition of Tribunal

President: William W. Park (U.S.)

Arbitrators: Gabrielle Kaufmann-Kohler (Swiss)

Jesús Remón (Spanish)*

* (appointed following the resignation of Fernando de Trazegnies Granda (Peruvian))

Status of Proceeding

Pending (the Tribunal is reconstituted and the proceeding is resumed pursuant to ICSID Arbitration Rule 12 on October 17, 2006)

29. Plama Consortium Limited v. Republic of Bulgaria (Case No. ARB/03/24)**Subject Matter**

Oil refinery

Date Registered

August 19, 2003

Date of Constitution of Tribunal

February 10, 2004

Composition of Tribunal

President: Carl F. Salans (U.S.)

Arbitrators: Albert Jan van den Berg (Dutch)

V.V. Veeder (British)

Status of Proceeding

Pending (the Tribunal issues Procedural Order No. 10 concerning the production of documents on March 10, 2007)

Published Decisions

Decision on Jurisdiction of February 8, 2005, 20 *ICSID Rev.—FILJ* 262 (2005); 44 *ILM* 721 (2005);

Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures of September 6, 2005.

30. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (Case No. ARB/03/25)**Subject Matter**

Construction of an airport terminal

Date Registered

October 9, 2003

Date of Constitution of Tribunal

February 11, 2004

Composition of Tribunal

President: L. Yves Fortier (Canadian)
Arbitrators: Bernardo Cremades (Spanish)
W. Michael Reisman (U.S.)

Status of Proceeding

Pending (the Respondent files further documents, at the request of the Tribunal, on March 30, 2007)

31. Unisys Corporation v. Argentine Republic (Case No. ARB/03/27)

Subject Matter

Information storage and management project

Date Registered

October 15, 2003

Date of Constitution of Tribunal

September 3, 2004

Composition of Tribunal

President: Juan Fernández-Armesto (Spanish)
Arbitrators: Piero Bernardini (Italian)
Jean Paul Chabaneix (Peruvian)

Status of Proceeding

Pending (following a request by the parties, the Tribunal further postpones the first session on April 10, 2006)

32. Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru (Case No. ARB/03/28)

Subject Matter

Power generation project

Date Registered

October 24, 2003

Date of Constitution of Tribunal

June 3, 2004

Composition of Tribunal

President: L. Yves Fortier (Canadian)
Arbitrators: Guido Tawil (Argentine)
Pedro Nikken (Venezuelan)

Status of Proceeding

Pending (the Claimant files a reply on the merits on December 26, 2006)

33. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (Case No. ARB/03/29)

Subject Matter

Highway construction contract

Date Registered

December 1, 2003

Date of Constitution of Tribunal

June 15, 2004

Composition of Tribunal

President: Gabrielle Kaufmann-Kohler (Swiss)
Arbitrators: Franklin Berman (British)
Karl-Heinz Böckstiegel (German)

Status of Proceeding

Pending (the Claimant files a reply on the merits on February 21, 2007)

Published Decisions

Decision on Jurisdiction of November 14, 2005

34. Azurix Corp. v. Argentine Republic (Case No. ARB/03/30)

Subject Matter

Water and sewer services concession agreement

Date Registered

December 8, 2003

Status of Proceeding

Pending (Tribunal not yet constituted)

35. Corn Products International, Inc. v. United Mexican States (Case No. ARB (AF)/04/1)

Subject Matter

Soft drink sweetener production enterprise

(a) Original Arbitration Proceeding

Date Registered

January 26, 2004

Date of Constitution of Tribunal

April 28, 2004
July 13, 2004 (reconstituted)

Composition of Tribunal

President: Christopher J. Greenwood (British)
Arbitrators: Andreas F. Lowenfeld (U.S.)
Jesus Serrano de la Vega (Mexican)*

* (appointed following the resignation of Manuel E. Tron (Mexican))

Status of Proceeding

Pending (the Tribunal holds a hearing on issues of State responsibility in Washington, D.C. on July 10-13, 2006)

(b) Consolidation Proceeding Pursuant to NAFTA Article 1126

Date of Request for Consolidation

September 8, 2004

Date of Establishment of Consolidation Tribunal

January 7, 2005

Composition of Consolidation Tribunal

President: Bernardo M. Cremades (Spanish)

Members: Arthur W. Rovine (U.S.)

Eduardo Siqueiros T. (Mexican)

Outcome of Consolidation Proceeding

Order of the Consolidation Tribunal rendered on May 20, 2005.

Published Decisions

Order of the Consolidation Tribunal of May 20, 2005.

36. Total S.A. v. Argentine Republic (Case No. ARB/04/1)

Subject Matter

Gas production and distribution/power generation project

Date Registered

January 22, 2004

Date of Constitution of Tribunal

August 24, 2004

Composition of Tribunal

President: Giorgio Sacerdoti (Italian)

Arbitrators: Henri C. Alvarez (Canadian)

Luis Herrera Marcano (Venezuelan)

Status of Proceeding

Pending (the Tribunal issues a Decision on Jurisdiction on August 25, 2006)

37. SAUR International v. Argentine Republic (Case No. ARB/04/4)

Subject Matter

Water and sewer services concession agreement

Date Registered

January 27, 2004

Date of Constitution of Tribunal

September 3, 2004

Composition of Tribunal

President: Juan Fernández Armesto (Spanish)

Arbitrators: Bernard Hanotiau (Belgian)

Christian Tomuschat (German)

Status of Proceeding

Pending (following a request by the parties, the Tribunal further suspends the proceedings on October 27, 2006)

38. Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic (Case No. ARB/04/5)

Subject Matter

Railway concession agreement

Date Registered

February 10, 2004

Date of Constitution of Tribunal

December 10, 2004

Composition of Tribunal

President: Ibrahim Fadlallah (Lebanese)

Arbitrators: Charles Jarrosson (French)

Michel Gentot (French)

Status of Proceeding

Pending (the Claimant files a reply on the merits on December 4, 2006)

39. OKO Pankki Oyj and others v. Republic of Estonia (Case No. ARB/04/6)

Subject Matter

Debt Instruments

Date Registered

February 20, 2004

Date of Constitution of Tribunal

March 8, 2004

Composition of Tribunal

President: Otto L.O. de Witt Wijnen (Dutch)

Arbitrators: V.V. Veeder (British)

L. Yves Fortier (Canadian)

Status of Proceeding

Pending (the Claimants file a reply statement on costs on March 17, 2006)

40. Sociedad Anónima Eduardo Vieira v. Republic of Chile (Case No. ARB/04/7)

Subject Matter

Fisheries company

Date Registered

February 27, 2004

Date of Constitution of Tribunal

September 24, 2004

Composition of Tribunal

President: Claus von Wobeser (Mexican)
Arbitrators: Susana B. Czar de Zalduendo (Argentine)
W. Michael Reisman (U.S.)

Status of Proceeding

Pending (the Tribunal holds a hearing on jurisdiction in Washington, D.C. on July 20, 2006)

41. BP America Production Company and others v. Argentine Republic (Case No. ARB/04/8)

Subject Matter

Hydrocarbon concession and electricity generation project

Date Registered

February 27, 2004

Date of Constitution of Tribunal

March 25, 2004

Composition of Tribunal

President: Lucius Caflisch (Swiss)
Arbitrators: Brigitte Stern (French)
Albert Jan van den Berg (Dutch)

Status of Proceeding

Pending (the Tribunal issues Procedural Order No. 1 concerning the proceeding on the merits on July 31, 2006)

42. CIT Group Inc. v. Argentine Republic (Case No. ARB/04/9)

Subject Matter

Leasing enterprise

Date Registered

February 27, 2004

Date of Constitution of Tribunal

November 11, 2004

Composition of Tribunal

President: Pierre-Marie Dupuy (French)
Arbitrators: Claus von Wobeser (Mexican)
Christian Tomuschat (German)

Status of Proceeding

Pending (the Tribunal holds a hearing on jurisdiction in Washington, D.C. on August 29, 2006)

43. Russell Resources International Limited and others v. Democratic Republic of the Congo (Case No. ARB/04/11)

Subject Matter

Mining concession

Date Registered

April 6, 2004

Date of Constitution of Tribunal

March 17, 2005

Composition of Tribunal

President: Horacio Grigera Naón (Argentine)

Arbitrators: Franklin Berman (British)

Yawovi Agboyibo (Togolese)

Status of Proceeding

Pending (the proceeding is stayed in accordance with Administrative and Financial Regulation 14(3)(d) on August 17, 2006)

44. ABCI Investments N.V. v. Republic of Tunisia (Case No. ARB/04/12)

Subject Matter

Acquisition of shares

Date Registered

April 6, 2004

Status of Proceeding

Pending (Tribunal not yet constituted)

45. Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt (Case No. ARB/04/13)

Subject Matter

Dredging project

Date Registered

May 27, 2004

Date of Constitution of Tribunal

September 14, 2004

Composition of Tribunal

President: Gabrielle Kaufmann-Kohler (Swiss)

Arbitrators: Pierre Mayer (French)

Brigitte Stern (French)

Status of Proceeding

Pending (the Respondent files a counter-memorial on the merits on February 15, 2007)

46. Wintershall Aktiengesellschaft v. Argentine Republic (Case No. ARB/04/14)

Subject Matter

Gas and oil production

Date Registered

July 15, 2004

Date of Constitution of Tribunal

September 7, 2005

Composition of Tribunal

President: Fali S. Nariman (Indian)
Arbitrators: Santiago Torres Bernárdez (Spanish)
Piero Bernardini (Italian)

Status of Proceeding

Pending (the Claimant files a counter-memorial on jurisdiction on September 15, 2006)

47. Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (Case No. ARB/04/16)

Subject Matter

Gas production concessions

Date Registered

August 5, 2004

Status of Proceeding

Pending (Tribunal not yet constituted; the Claimants file an ancillary claim on February 14, 2006)

48. Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States (Case No. ARB(AF)/04/3)

Subject Matter

Concession agreement to operate the National Registry of Motor Vehicles

Date Registered

September 29, 2004

Date of Constitution of Tribunal

March 9, 2005

Composition of Tribunal

President: V.V. Veeder (British)
Arbitrators: L. Yves Fortier (Canadian)
Eduardo Magallón Gómez (Mexican)

Status of Proceeding

Pending (the Claimants file a reply on the merits on October 12, 2006)

49. Talsud, S.A. v. United Mexican States (Case No. ARB(AF)/04/4)

Subject Matter

Concession agreement to operate the National Registry of Motor Vehicles

Date Registered

September 29, 2004

Date of Constitution of Tribunal

March 9, 2005

Composition of Tribunal

President: V.V. Veeder (British)
Arbitrators: L. Yves Fortier (Canadian)
Eduardo Magallón Gómez (Mexican)

Status of Proceeding

Pending (the Claimants file a reply on the merits on October 12, 2006)

50. Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (Case No. ARB(AF)/04/5)

Subject Matter

Soft drink sweetener production enterprise

(a) Original Arbitration Proceeding

Date Registered

September 29, 2004

Date of Constitution of Tribunal

August 11, 2005

Composition of Tribunal

President: Bernardo M. Cremades (Spanish)
Arbitrators: Arthur W. Rovine (U.S.)
Eduardo Siqueiros (Mexican)

Status of Proceeding

Pending (following a request by the parties, the hearing on the merits is postponed on October 8, 2006)

(b) Consolidation Proceeding Pursuant to NAFTA Article 1126

Date of Request for Consolidation

September 8, 2004

Date of Establishment of Consolidation Tribunal

January 7, 2005

Composition of Consolidation Tribunal

President: Bernardo M. Cremades (Spanish)
Members: Arthur W. Rovine (U.S.)
Eduardo Siqueiros (Mexican)

Outcome of Consolidation Proceeding

Order of the Consolidation Tribunal rendered on May 20, 2005.

Published Decisions

Order of the Consolidation Tribunal of May 20, 2005.

51. Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador (Case No. ARB/04/19)

Subject Matter

Power generation facilities

Date Registered

October 7, 2004

Date of Constitution of Tribunal

May 18, 2005

Composition of Tribunal

President: Gabrielle Kaufmann-Kohler (Swiss)
Arbitrators: Enrique Gómez Pinzón (Colombian)
Albert Jan van den Berg (Dutch)

Status of Proceeding

Pending (the parties file rebuttal post-hearing briefs on July 21, 2006)

52. Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela (Case No. ARB (AF)/04/6)

Subject Matter

Gold and copper mining project

Date Registered

October 28, 2004

Date of Constitution of Tribunal

June 7, 2005

Composition of Tribunal

President: V.V. Veeder (British)
Arbitrators: Charles N. Brower (U.S.)
Jan Paulsson (French)

Status of Proceeding

Pending (the Respondent files a reply on jurisdiction on February 16, 2007)

53. DaimlerChrysler Services AG v. Argentine Republic (Case No. ARB/05/1)

Subject Matter

Leasing and financial services

Date Registered

January 14, 2005

Date of Constitution of Tribunal

September 21, 2006

Composition of Tribunal

President: Pierre-Marie Dupuy (French)
Arbitrators: Charles N. Brower (U.S.)
Domingo Bello Janeiro (Spanish)

Status of Proceeding

Pending (the Tribunal holds a first session in Paris on January 27, 2007)

54. Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic (Case No. ARB/05/2)

Subject Matter

Electricity distribution concessions

Date Registered

February 4, 2005

Date of Constitution of Tribunal

June 5, 2006

Composition of Tribunal

President: Pierre Tercier (Swiss)

Arbitrators: Henri C. Alvarez (Canadian)

Georges Abi-Saab (Egyptian)

Status of Proceeding

Pending (the Tribunal holds a first session in Paris on August 24, 2006)

55. LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria (Case No. ARB/05/3)

Subject Matter

Construction of a dam

Date Registered

March 18, 2005

Date of Constitution of Tribunal

April 26, 2005

Composition of Tribunal

President: Pierre Tercier (Swiss)

Arbitrators: Emmanuel Gaillard (French)

Bernard Hanotiau (Belgian)*

* (appointed following the passing away of André Faurès (Belgian))

Status of Proceeding

Pending (the Tribunal is reconstituted and the proceeding is resumed pursuant to ICSID Arbitration Rule 12 on December 13, 2006)

Published Documents

Decision on Jurisdiction of July 12, 2006

56. I&I Beheer B.V. v. Bolivarian Republic of Venezuela (Case No. ARB/05/4)

Subject Matter

Debt instruments

Date Registered

April 6, 2005

Date of Constitution of Tribunal

September 30, 2005

Composition of Tribunal

President: Karl-Heinz Böckstiegel (German)
Arbitrators: Charles N. Brower (U.S.)
Perre-Marie Dupuy (French)

Status of Proceeding

Pending (the Tribunal issues Procedural Order No. 5 concerning the production of documents on December 18, 2006)

57. TSA Spectrum de Argentina, S.A. v. Argentine Republic (Case No. ARB/05/5)

Subject Matter

Telecommunications concession

Date Registered

April 8, 2005

Date of Constitution of Tribunal

June 12, 2006

Composition of Tribunal

President: Hans Danelius (Swedish)
Arbitrators: Georges Abi-Saab (Egyptian)
Grant D. Aldonas (U.S.)

Status of Proceeding

Pending (the Tribunal holds its first session in Washington, D.C. on August 31, 2006)

58. Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe (Case No. ARB/05/6)

Subject Matter

Commercial farms

Date Registered

April 15, 2005

Date of Constitution of Tribunal

November 1, 2006

Composition of Tribunal

President: Gilbert Guillaume (French)
Arbitrators: Ronald A. Cass (U.S.)
Mohammad Wasi Zafar (Pakistani)

Status of Proceeding

Pending (the Claimants file a memorial on jurisdiction and the merits on March 16, 2007)

59. Saipem S.p.A. v. People's Republic of Bangladesh (Case No. ARB/05/7)

Subject Matter

Gas pipeline project

Date Registered

April 25, 2005

Date of Constitution of Tribunal

August 22, 2005

Composition of Tribunal

President: Gabrielle Kaufmann-Kohler (Swiss)
Arbitrators: Christoph H. Schreuer (Austrian)
Philip Otton (British)

Status of Proceeding

Pending (the Tribunal issues a decision on jurisdiction and recommendation on provisional measures on March 21, 2007)

Published Documents

Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007

60. Parkerings-Compagniet AS v. Republic of Lithuania (Case No. ARB/05/8)**Subject Matter**

Public parking concession

Date Registered

May 16, 2005

Date of Constitution of Tribunal

October 12, 2005

Composition of Tribunal

President: Laurent Lévy (Swiss)
Arbitrators: Marc Lalonde (Canadian)
Julian D.M. Lew (British)

Status of Proceeding

Pending (the parties file statements on costs on December 22, 2006)

61. Empresa Eléctrica del Ecuador, Inc. (EMELEC) v. Republic of Ecuador (Case No. ARB/05/9)**Subject Matter**

Electricity enterprise

Date Registered

May 26, 2005

Date of Constitution of Tribunal

February 28, 2006

Composition of Tribunal

President: Bernardo Sepúlveda Amor (Mexican)
Members: John H. Rooney (U.S.)
W. Michael Reisman (U.S.)

Status of Proceeding

Pending (the Claimant files a memorial on the merits on November 2, 2006)

62. Malaysian Historical Salvors, SDN, BHD v. Malaysia (Case No. ARB/05/10)

Subject Matter

Salvage contract

Date Registered

June 14, 2005

Date of Constitution of Tribunal

November 1, 2005

Composition of Tribunal

Sole Arbitrator: Michael Hwang (Singaporean)

Status of Proceeding

Pending (the parties file post-hearing briefs on March 22, 2007)

Published Documents

Pleadings

63. Asset Recovery Trust S.A. v. Argentine Republic (Case No. ARB/05/11)

Subject Matter

Collection contract

Date Registered

June 23, 2005

Date of Constitution of Tribunal

March 24, 2006

Composition of Tribunal

President: Jaime Irarrázabal Covarrubias (Chilean)

Members: Ernesto Canales Santos (Mexican)

A. A. Cançado Trindade (Brazilian)

Status of Proceeding

Pending (the proposal for disqualification of an arbitrator is declined and the proceeding is resumed in accordance with ICSID Arbitration Rule 9(6) on November 27, 2006)

64. Bayview Irrigation District and others v. United Mexican States (Case No. ARB (AF)/05/1)

Subject Matter

Agricultural enterprises

Date Registered

July 1, 2005

Date of Constitution of Tribunal

December 12, 2005

Composition of Tribunal

President: Vaughan Lowe (British)
Members: Edwin Meese III (U.S.)
Ignacio Gómez Palacio (Mexican)

Status of Proceeding

Pending (the Respondent files a rejoinder on provisional measures on December 30, 2006)

65. Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad (Case No. ARB/05/12)

Subject Matter

Electricity enterprise

Date Registered

July 29, 2005

Date of Constitution of Tribunal

January 4, 2006

Composition of Tribunal

President: Gabrielle Kaufmann-Kohler (Swiss)
Members: Henri C. Alvarez (Canadian)
Bernardo M. Cremades (Spanish)

Status of Proceeding

Pending (the Claimants file a counter-memorial on jurisdiction on November 21, 2006)

66. EDF (Services) Limited v. Romania (Case No. ARB/05/13)

Subject Matter

Duty free services

Date Registered

July 29, 2005

Date of Constitution of Tribunal

December 20, 2005

Composition of Tribunal

President: Piero Bernardini (Italian)
Members: Arthur W. Rovine (U.S.)
Yves Derains (French)

Status of Proceeding

Pending (the Respondent files a counter-memorial on the merits on October 11, 2006)

67. RSM Production Corporation v. Grenada (Case No. ARB/05/14)

Subject Matter

Oil exploration contract

Date Registered

August 5, 2005

Date of Constitution of Tribunal

December 7, 2005

Composition of Tribunal

Arbitrators: V.V. Veeder (British)
Members: Bernard Audit (French)
David Berry (U.S./Canadian)

Status of Proceeding

Pending (the Respondent files a counter-memorial on the merits on December 8, 2006)

68. *Waguïh Elie George Siag and Clorinda Vecci v. Arab Republic of Egypt (Case No. ARB/05/15)*

Subject Matter

Resort development

Date Registered

August 5, 2005

Date of Constitution of Tribunal

January 10, 2006

Composition of Tribunal

President: David A.R. Williams (New Zealand)
Arbitrators: Francisco Orrego Vicuña (Chilean)
Michael C. Pryles (Australian)

Status of Proceeding

Pending (the Tribunal holds a hearing on jurisdiction in Paris on August 8-9, 2006)

69. *Cargill, Incorporated v. United Mexican States (Case No. ARB(AF)/05/2)*

Subject Matter

Soft drink sweetener production enterprise

Date Registered

August 30, 2005

Date of Constitution of Tribunal

June 21, 2006

Composition of Tribunal

President: Michael C. Pryles (Australian)
Arbitrators: David D. Caron (U.S.)
Donald M. McRae (Canadian)

Status of Proceeding

Pending (the Tribunal issues Procedural Order No. 2 concerning the procedural calendar on January 25, 2007)

70. *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (Case No. ARB/05/16)*

Subject Matter

Telecommunications enterprise

Date Registered

August 30, 2005

Date of Constitution of Tribunal

December 9, 2005

Composition of Tribunal

President: Bernard Hanotiau (Belgian)

Members: Stewart Boyd (British)

Marc Lalonde (Canadian)

Status of Proceeding

Pending (the Claimant files a reply on the merits on February 27, 2007)

71. Desert Line Projects LLC v. Republic of Yemen (Case No. ARB/05/17)

Subject Matter

Road construction contract

Date Registered

September 30, 2005

Date of Constitution of Tribunal

January 6, 2006

Composition of Tribunal

President: Pierre Tercier (Swiss)

Members: Ahmed S. El-Kosheri (Egyptian)

Jan Paulsson (French)

Status of Proceeding

Pending (the Respondent files a counter-memorial on the merits on January 15, 2007)

72. Ioannis Kardossopoulos v. Georgia (Case No. ARB/05/18)

Subject Matter

Oil and gas distribution enterprise

Date Registered

October 3, 2005

Date of Constitution of Tribunal

February 27, 2006

Composition of Tribunal

President: L. Yves Fortier (Canadian)

Members: Francisco Orrego Vicuña (Chilean)

Arthur Watts (British)

Status of Proceeding

Pending (the Tribunal holds a hearing on jurisdiction in London on January 15-16, 2007)

73. Helnan International Hotels A/S v. Arab Republic of Egypt (Case No. ARB/05/19)

Subject Matter

Hotel lease and development agreements

Date Registered

October 5, 2005

Date of Constitution of Tribunal

February 10, 2006

Composition of Tribunal

President: Yves Derains (French)

Members: Michael J.A. Lee (British)

Rudolf Dolzer (German)

Status of Proceeding

Pending (the Claimant files a memorial on the merits on February 2, 2007)

74. Ioan Micula, Viorel Micula and others v. Romania (Case No. ARB/05/20)

Subject Matter

Food products enterprise

Date Registered

October 13, 2005

Date of Constitution of Tribunal

September 12, 2006

Composition of Tribunal

President: Laurent Lévy (Swiss)

Members: Stanimir A. Alexandrov (Bulgarian)

Claus-Dieter Ehlermann (German)

Status of Proceeding

Pending (the Tribunal holds its first session in Paris on November 10, 2006)

75. African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. Democratic Republic of the Congo (Case No. ARB/05/21)

Subject Matter

Construction contracts

Date Registered

October 27, 2005

Date of Constitution of Tribunal

May 4, 2006

July 6, 2006 (reconstituted)

Composition of Tribunal

President: Ahmed S. El-Kosheri (Egyptian)

Arbitrators: Otto L.O. de Witt Wijnen (Dutch)

Dominique Grisay (Belgian)*

* (appointed following the resignation of Teresa Giovannini (Swiss))

Status of Proceeding

Pending (the Claimant files a memorial on October 18, 2006)

76. Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania (Case No. ARB/05/22)

Subject Matter

Water and sewer services concession agreement

Date Registered

November 2, 2005

Date of Constitution of Tribunal

February 9, 2006

Composition of Tribunal

President: Bernard Hanotiau (Belgian)

Arbitrators: Gary B. Born (U.S.)

Toby Landau (British)

Status of Proceeding

Pending (the Tribunal issues Procedural Order No. 5 concerning the petition for participation as *amicus curiae* of November 27, 2006 on February 2, 2007)

Published Decisions

Procedural Order No. 1 (March 31, 2006)

Procedural Order No. 3 (September 29, 2006)

Procedural Order No. 5 (February 2, 2007)

77. Ares International S.r.l. and MetalGeo S.r.l. v. Georgia (Case No. ARB/05/23)

Subject Matter

Steel industry project

Date Registered

November 9, 2005

Date of Constitution of Tribunal

April 10, 2006

Composition of Tribunal

President: J. William Rowley (Canadian)

Members: Emmanuel Gaillard (French)

John Beechey (British)

Status of Proceeding

Pending (the Respondent files a counter-memorial on the merits on February 14, 2007)

78. Hrvatska Elektroprivreda d.d. v. Republic of Slovenia (Case No. ARB/05/24)

Subject Matter

Nuclear power plant

Date Registered

December 28, 2005

Date of Constitution of Tribunal

April 20, 2006

Composition of Tribunal

President: David A. R. Williams (New Zealand)

Arbitrators: Charles N. Brower (U.S.)

Jan Paulsson (French)

Status of Proceeding

Pending (the Respondent files objections to jurisdiction on December 8, 2006)

79. Spyridon Roussalis v. Romania (Case No. ARB/06/1)

Subject Matter

Food trading company

Date Registered

January 10, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

80. Quimica e Industrial del Borax Ltda. and others v. Republic of Bolivia (Case No. ARB/06/2)

Subject Matter

Mining concession

Date Registered

February 6, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

81. The Rompetrol Group N.V. v. Romania (Case No. ARB/06/3)

Subject Matter

Oil refinery

Date Registered

February 14, 2006

Date of Constitution of Tribunal

December 20, 2006

Composition of Tribunal

President: Franklin Berman (British)
Arbitrators: Donald Donovan (U.S.)
Marc Lalonde (Canadian)

Status of Proceeding

Pending (the Tribunal holds a first session in Paris on February 28, 2007)

82. Vestey Group Ltd v. Bolivarian Republic of Venezuela (Case No. ARB/06/4)

Subject Matter

Farming enterprise

Date Registered

March 14, 2006

Status of Proceeding

Pending (Tribunal not yet constituted; the Claimant files a request for the suspension of the proceeding on March 20, 2007)

83. Phoenix Action Ltd v. Czech Republic (Case No. ARB/06/5)

Subject Matter

Metal industry project

Date Registered

March 23, 2006

Date of Constitution of Tribunal

January 8, 2007

Composition of Tribunal

President: Brigitte Stern (France)
Arbitrators: Andreas Bucher (Swiss)
Juan Fernández-Armesto (Spanish)

Status of Proceeding

Pending (the Tribunal holds a first session in Paris on February 23, 2007)

84. Togo Electricité v. Republic of Togo (Case No. ARB/06/7)

Subject Matter

Electricity concession

Date Registered

April 10, 2006

Date of Constitution of Tribunal

September 8, 2006

Composition of Tribunal

President: Ahmed S. El-Kosheri (Egyptian)
Arbitrators: Marc Grüninger (Swiss)
Marc Lalonde (Canadian)

Status of Proceeding

Pending (the Claimant files a reply on provisional measures on November 17, 2006)

85. Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic (Case No. ARB(AF)/06/1)

Subject Matter

Hotel operation project

Date Registered

April 12, 2006

Date of Constitution of Tribunal

October 26, 2006

Composition of Tribunal

President: Vaughan Lowe (British)
Arbitrators: Nabil Elaraby (Egyptian)
Paolo Michele Patocchi (Swiss)

Status of Proceeding

Pending (the Claimant files memorial on jurisdiction on January 17, 2007)

86. Libananco Holdings Co. Limited v. Republic of Turkey (Case No. ARB/06/8)

Subject Matter

Electricity generation and distribution concessions

Date Registered

April 19, 2006

Date of Constitution of Tribunal

December 18, 2006

Composition of Tribunal

President: Michael Hwang (Singaporean)
Arbitrators: Henri C. Alvarez (Canadian)
Franklin Berman (British)

Status of Proceeding

Pending (the Tribunal holds a first session in New York on February 12, 2007)

87. Branimir Mensik v. Slovak Republic (Case No. ARB/06/9)

Subject Matter

Mineral water spring project

Date Registered

May 10, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

88. Chevron Block Twelve & Chevron Blocks Thirteen and Fourteen v. People's Republic of Bangladesh (Case No. ARB/06/10)

Subject Matter

Exploration, development and production of natural gas

Date Registered

June 30, 2006

Date of Constitution of Tribunal

February 15, 2006

Composition of Tribunal

President: Thomas Buergenthal (U.S.)

Arbitrators: John Beechey (British)

Fali S. Nariman (Indian)

Status of Proceeding

Pending (Tribunal recently constituted)

89. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (Case No. ARB/06/11)

Subject Matter

Hydrocarbon concession

Date Registered

July 13, 2006

Date of Constitution of Tribunal

February 6, 2007

Composition of Tribunal

President: L. Yves Fortier (Canadian)

Arbitrators: Brigitte Stern (French)

David A.R. Williams (New Zealand)

Status of Proceeding

Pending (Tribunal recently constituted)

90. Scancem International ANS v. Republic of Congo (Case No. ARB/06/12)

Subject Matter

Cement production and distribution

Date Registered

July 17, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

91. Aguaytia Energy, LLC v. Republic of Peru (Case No. ARB/06/13)

Subject Matter

Electricity generation and transmission

Date Registered

July 18, 2006

Date of Constitution of Tribunal

March 27, 2007

Composition of Tribunal

President: Robert Briner (Swiss)
Arbitrators: J. William Rowley (Canadian)
Claus von Wobeser (Mexican)

Status of Proceeding

Pending (Tribunal recently constituted)

92. Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan (Case No. ARB/06/15)

Subject Matter

Oil and gas distribution, trade, storage and transportation enterprise

Date Registered

August 30, 2006

Date of Constitution of Tribunal

January 18, 2007

Composition of Tribunal

President: Arthur Watts (British)
Arbitrators: Charles N. Brower (U.S.)
Christopher J. Greenwood (British)

Status of Proceeding

Pending (Tribunal recently constituted)

93. Barmek Holding A.S. v. Republic of Azerbaijan (Case No. ARB/06/16)

Subject Matter

Electricity concession

Date Registered

October 16, 2006

Date of Constitution of Tribunal

February 7, 2007

Composition of Tribunal

President: Vaughan Lowe (British)
Arbitrators: Peter W. Galbraith (U.S.)
Brigitte Stern (French)

Status of Proceeding

Pending (Tribunal recently constituted)

94. Técnicas Reunidas, S.A. and Eurocontrol, S.A. v. Republic of Ecuador (Case No. ARB/06/17)

Subject Matter

Oil refinery expansion

Date Registered

October 31, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

95. Cementownia "Nowa Huta" S.A. v. Republic of Turkey (Case No. ARB(AF)/06/2)

Subject Matter

Electricity concessions

Date Registered

November 16, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

96. Joseph C. Lemire v. Ukraine (Case No. ARB/06/18)

Subject Matter

Radio broadcasting enterprise

Date Registered

December 7, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

97. Nations Energy, Inc. and others v. Republic of Panama (Case No. ARB/06/19)

Subject Matter

Electricity power generation project

Date Registered

December 11, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

98. Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan (Case No. ARB/06/20)

Subject Matter

Gold extraction enterprise

Date Registered

December 12, 2006

Date of Constitution of Tribunal

February 7, 2007

Composition of Tribunal

President: V.V. Veeder (British)

Arbitrators: Christopher J. Greenwood (British)
Marc Lalonde (Canadian)

Status of Proceeding

Pending (Tribunal recently constituted)

99. City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) (Case No. ARB/06/21)

Subject Matter

Hydrocarbon concession

Date Registered

December 19, 2006

Status of Proceeding

Pending (Tribunal not yet constituted)

100. Piero Foresti, Laura De Carli and others v. Republic of South Africa (Case No. ARB(AF)/07/1)

Subject Matter

Quarrying and trading enterprise

Date Registered

January 8, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

101. Fondel Metal Participations B.V. v. Republic of Azerbaijan (Case No. ARB/07/1)

Subject Matter

Aluminium and alumina production company

Date Registered

January 9, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

102. RSM Production Corporation v. Central African Republic (Case No. ARB/07/2)

Subject Matter

Petroleum exploration and exploitation contract

Date Registered

January 18, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

103. Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others (Case No. ARB/07/3)

Subject Matter

Coal mining contract

Date Registered

January 18, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

104. Eni Dación B.V. v. Bolivarian Republic of Venezuela (Case No. ARB/07/4)

Subject Matter

Hydrocarbon rights

Date Registered

February 6, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

105. Giovanna A. Beccara and others v. Argentine Republic (Case No. ARB/07/5)

Subject Matter

Debt instruments

Date Registered

February 7, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

106. Tza Yap Shum v. Republic of Peru (Case No. ARB/07/6)

Subject Matter

Fish flour production enterprise

Date Registered

February 12, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

107. Global Gold Mining LLC v. Republic of Armenia (Case No. ARB/07/7)

Subject Matter

Mining enterprise

Date Registered

February 20, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

108. Europe Cement Investment and Trade S.A. v. Republic of Turkey (Case No. ARB (AF)/07/2)

Subject Matter

Electricity concessions

Date Registered

March 6, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

109. Alasdair Ross Anderson and others v. Republic of Costa Rica (Case No. ARB (AF)/07/3)

Subject Matter

Capital contributions in an enterprise

Date Registered

March 27, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)

110. Giovanni Alemanni and others v. Argentine Republic (Case No. ARB/07/8)

Subject Matter

Debt instruments

Date Registered

March 27, 2007

Status of Proceeding

Pending (Tribunal not yet constituted)



© 2006 International Centre for Settlement of Investment Disputes, All Rights Reserved



K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Commercial and other forms of political risk insurance

Jane Harte-Lovelace
Partner, London, K&L Gates

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Modern political risks

- Dysfunctional legal systems
- Decentralisation of power
- Issue based protectionism
- Democratic changes
- Terrorism
- Local competition
- Economic crises
- Legal and regulatory changes

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Insurable political risks

- Confiscation, expropriation, nationalisation
- Contractors plant and equipment
- Licence cancellation and export embargos
- Currency inconvertibility and non-transfer
- Political violence
- Kidnap and ransom
- Asset non-repossession

Multinational Investment Guarantee Agency “MIGA”

- Member of World Bank Group
- Owned by 168 member countries
- Created in 1988 with a mandate to promote investments into developing countries achieved through:
 - political risk guarantees
 - technical assistance to governments
 - investment dispute mediation

MIGA types of coverage

- Currency transfer restriction and convertibility
- Expropriation
- War and civil disturbance
- Breach of contract resulting in arbitral award

Combination of the above

MIGA Types of investment covered

- Eligibility – new investments
- Investment type covered:
 - equity
 - non-equity direct
 - share holders loans
 - loan guaranties
 - non-shareholder loans
- Duration – up to 15 years (sometimes 20)
- Amounts
 - up to \$210m directly
 - greater through co-insurance and syndication
- Coverage – equity covered up to 90% and debt up to 95%

MIGA Time scale

- Preliminary application by investor (one page)
- Definitive application (fees and detailed application)
- MIGA
 - project review committee
 - host country approval
 - underwriting
 - International Risk Management Committee
- Investor and MIGA board approval
- Signed contract of guarantee

} 8-12 weeks

Options in the commercial insurance market

- Expanding commercial market due to
 - globalisation
 - awareness of effect of various political risk issues
 - expansion and commercial underwriting
 - specialist brokers
 - "buyers market"
 - absence of BITs or MITs in certain jurisdictions

Scope of coverage

- Basic coverage mirrors MIGA
 - Confiscation and expropriation
 - Currency inconvertibility
 - Political violence
 - Contract frustration
- Potentially broader than MIGA
 - personal property of employees
 - kidnap and ransom, extortion
 - cancellation of export licences
- Can be built into global programme to fit with other insurances

Potential advantages of private sector insurance

- Wordings are negotiable
- Customisation
- Underwriters prepared to take novel risk
- Prices coming down in soft market
- No nationality requirement
- No socio-economic requirements
- New and existing investments
- No need to promote foreign investment - pure market and underwriting decisions
- Underwriting decisions are made quickly
- Payment of claims can be quick

Potential disadvantages of private sector insurance

- Level of available cover
- Cost
- Payment of claims usually slow with potential for coverage dispute – choice of law and jurisdiction and other terms are critical
- No “political” reasons to pay
- Policy terms may limit ability to do commercial deals with government

Conclusion

- Political risk must be ongoing part of corporate risk management programme
- Assess issues early e.g. jurisdiction of investor, timing of investment, socio-economic issues
- Consider relevant BITs and MITs
- Consider if MIGA guarantee available
- Assess value of diplomatic assistance in resolving dispute with host government
- Consider commercial PRI possibilities as part of overall insurance programme
- Whether relying on BIT or MIGA guarantee or insurance policy understand the terms

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

K&L GATES INTERNATIONAL ARBITRATION DAY

International Arbitration as a Tool in Effective Risk Management
19 April 2007

Clare Tanner, Associate, K&L Gates

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Components of Due Diligence

- What, if any, investment treaties is the host state a party to?
- What is the “nationality” of the “investor”?
- In what form are the relevant investment treaties and what protections are afforded?
- Does the “investment” qualify under the relevant investment treaty ?

K&L | GATES Kirkpatrick & Lockhart Preston Gates Ellis LLP

Components of Due Diligence

- Has the investor scope to secure additional direct protections by contract?
- Has the investor secured additional forms of quasi governmental or commercial political risk coverage?

K&L | GATES

Kirkpatrick & Lockhart Preston Gates Ellis LLP

K&L GATES INTERNATIONAL ARBITRATION DAY

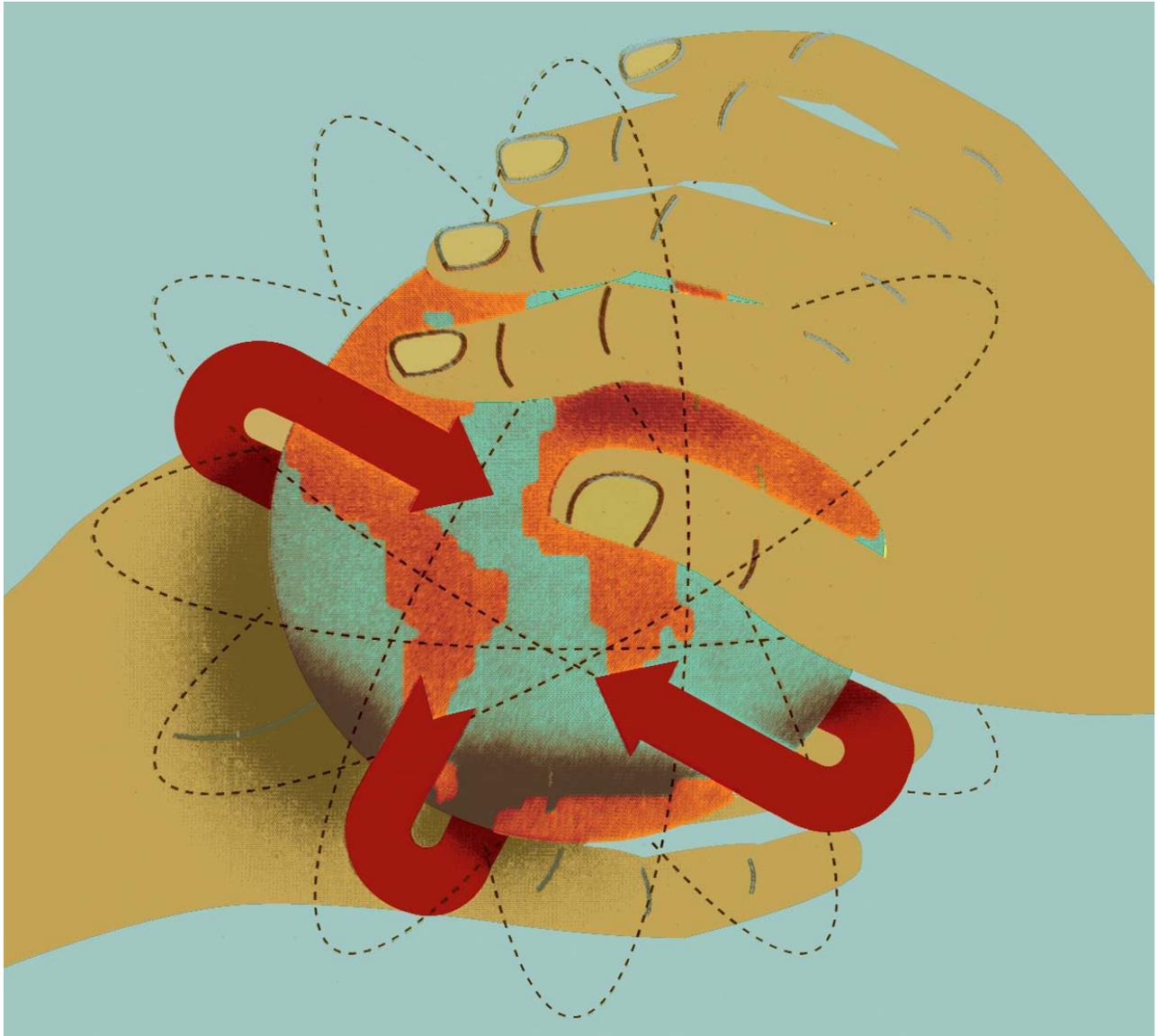
International Arbitration as a Tool in Effective Risk
Management
19 April 2007

Clare Tanner, Associate, K&L Gates



Investment treaties

Taking advantage of the protections on offer



Bilateral and multilateral investment treaties have flourished in recent years and can provide a means of reducing the risks involved in international investment.

Ian Meredith and Clare Tanner explain the typical protections such treaties can offer investors and outline recent developments in the area.

The risks associated with foreign investment are all too familiar to those in the international business community. Contractual obligations give investors some comfort that they will receive the expected returns on their investment, particularly if compliance with those obligations can be achieved by reference to international arbitration.

However, in developing or politically unstable countries in particular, direct or indirect actions by a host government can mean that these contractual promises are of limited or no value. These problems are compounded where the state is also a party to the contract and, for example, a change of government results in attempts to avoid obligations entered into by a previous regime.

Illustration: Andy Baker



Definition of investment: an example

The International Centre for the Settlement of Investment Disputes (ICSID) will only accept jurisdiction where the dispute relates to an “investment”. An ICSID tribunal often looks to the relevant bilateral or multilateral investment treaty (BIT or MIT) to assist it in determining whether the transaction in question qualifies as such. The China/UK BIT, for example, defines investment as follows:

- “Investment” means every kind of asset accepted as investment by a contracting party in its territory in accordance with its laws and regulations and, in particular, though not exclusively, includes:
 - moveable and immovable property and any other property rights such as mortgages, liens or pledges;
 - shares, stock and debentures of companies or interests in the property of such companies;
 - claim to money or to any performance under contract having a financial value;
 - copyrights, industrial property rights, know-how and goodwill; and
 - business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.
- The term “investment” includes investments existing at the date of entry into force of this agreement and the change in the form in which assets are invested does not affect their character as investments.

Historically, the risks associated with foreign investment meant that investment capital was slow to flow between countries. To address this, a network of extra-contractual protection for investors has developed. These protections are often found in bilateral and multilateral investment treaties (BITs and MITs) between states.

The earliest of these treaties were concluded in the 1950s but their number has proliferated since the 1980s. A recent development of particular interest has been the entry by the People’s Republic of China (China), a country with fast developing investment opportunities, into “new generation” BITs with Germany, The Netherlands and Finland (the latter is still awaiting ratification).

This article provides an overview of the issues surrounding investor protection and specifically:

- Outlines the protective features of extra-contractual investor protections such as BITs.
- Describes the interaction between contractual and treaty remedies.

- Explains the mechanisms available for obtaining a remedy for breach of extra-contractual protections, and the jurisdictional issues that may arise when seeking such a remedy.

- Sets out the advantages of China’s new generation BITs (*see box, China BITs: a new generation*).

The article also provides some general tips on structuring investment transactions to take advantage of the protections that may be available under BITs and MITs (*see box, Entering into an investment contract: some tips*).

Protective features

BITs between states are not in common form but tend to share certain features. They generally provide that the state that is hosting the investment will grant certain protections to an investor from the other contracting state. As illustrated by case law, these protections typically include:

- **Protection from expropriation without compensation.** A change in government or economic crisis can result in host

states trying to gain economic advantage by nationalising privately held economic interests. To prevent such arbitrary measures, a BIT may require host states to pay compensation in the event of expropriation.

In one recent example, a UK company, the Vestey Group Limited, owned around 350,000 acres of land in Venezuela. In 2001, the Venezuelan government introduced a new land law that led to the creation of a Land Institute to examine title to land holdings and to assess if the land had been used productively. Certain farms belonging to Vestey were found to lack title and to be unproductive. Vestey was concerned that the finding would result in locals squatting on the land. Vestey began a claim under the UK/Venezuela BIT relying, among other things, on its entitlement to be protected from expropriation without compensation. The claim was settled on terms.

The recent moves by President Morales’ government in Bolivia to seize foreign owned energy assets looks set to start a new round of BIT claims based on expropriation.

- **Protection from treatment less favourable than that offered to nationals.** The attractions to a national government of offering better terms to its own nationals than foreign investors are clear. Foreign investors do not vote or provide local support for unelected governments. The ability of local investors to, for example, obtain raw materials at a better price than foreign investors makes the foreign investment less competitive and less attractive. A requirement to treat nationals and non-nationals alike is therefore of significant value.

In one recent case, Occidental Exploration and Production Company (Occidental), a US company, entered into an agreement with a state owned company in Ecuador (*OEPC v Ecuador (LCIA Case No. UN 3467)*). The contract granted Occidental the right to carry out the exploration and exploitation of hydrocarbons in a certain area of the Amazon Basin. Occidental assumed virtually all of the costs and in return received a percentage of the oil produced and the right to export it. Occidental paid value added tax (VAT) on the costs and, as an exporter, sought reimbursement of that VAT from the Ecuadorian tax authority, the Internal Revenue Service (*Servicio de Rentas Internas*)

(SRI). A dispute arose between Occidental and the SRI as to whether Occidental was entitled to a refund of VAT.

The arbitral tribunal that heard Occidental's treaty claim found that Occidental was entitled to a VAT refund and SRI's failure to make the refund meant that Ecuador was, among other things, in breach of its obligation, under its BIT with the US, to provide Occidental with treatment no less favourable than that offered to nationals.

Ecuador's Ministry of Energy has recently announced moves to wind up Occidental's activities in the country alongside new hydrocarbons legislation increasing the state take from oil revenues. Occidental has responded quickly, filing a request for arbitration alleging further breaches of the BIT between the US and Ecuador.

■ **Fair and equitable treatment.** This is a developing concept but some broad trends can be identified. They include a requirement that a host state maintains a stable investment environment (in contrast, for example, to the economic crisis in Argentina in the late 1990s). The reasonable expectations of the investor when making the investment may also form the basis of a fair and equitable treatment claim.

For example, in *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8), CMS Gas Transmission, a US company, acquired a shareholding in a local gas utility company, TGN, in Argentina. TGN was created following the privatisation of the gas industry. CMS's case was that the regulations establishing TGN and the terms of TGN's licence established a regime under which tariffs were to be calculated in US dollars and to be adjusted every six months by reference to a US price index. Following the Argentinean economic crisis disputes arose as to the calculation of the tariff. In 2002 an emergency law was introduced which terminated TGN's right to adjustment of the tariff and calculation of the tariff in US dollars.

The ICSID arbitral tribunal that heard the matter found that Argentina had breached its obligation to provide fair and equitable treatment, under its BIT with the US, because guarantees provided to CMS, which were key to the decision to invest, were withdrawn by the government and the investment environment changed dramatically.

■ **Provision of full protection and security.** A host state must take steps to protect the assets of foreign investors. For instance, in *Wena Hotels Limited v Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Wena, a UK company, entered into an agreement with a state owned Egyptian Company, EHC, to develop and run two hotels in Luxor and Cairo. EHC repossessed both hotels and evicted Wena. The Egyptian courts ruled that the eviction was illegal. The hotels were returned to Wena but all the fixtures and fittings were missing.

The arbitral tribunal found that Egypt had failed to provide Wena with full protection and security, in accordance with the requirements of the Egypt/UK BIT. It was unclear whether Egyptian officials, other than officials of EHC, participated in the repossession and eviction. However, Egypt was aware of EHC's intention to repossess the hotels and failed to stop it. In addition, once the seizures occurred, Egypt did not take prompt action to return the hotels to Wena.

■ **The right to the free transfer of investments and returns.** Foreign investors are likely to find their investments to be of limited value if there is no mechanism for them to transfer their returns to their home state or elsewhere. Under many BITs, currency control regulations or other actions freezing funds can be challenged.

The types of protections described above may also be available to an investor as a result of MITs such as the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty.

Interaction between contractual and treaty remedies

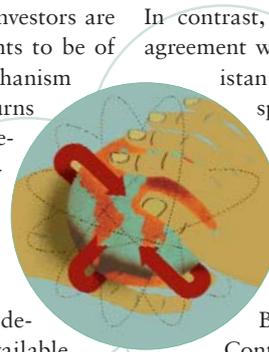
Whether investor protection measures appear in a BIT, an MIT or in a contract with a host state, there is an analytical distinction to be drawn between breaches of treaty type extra-contractual obligations and breaches of contractual obligations. Tribunals have found that whether there has been a breach of treaty type obligations and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law. As a matter of principle, the same set of facts can give

rise to different claims grounded on different, contractual and extra-contractual, bases.

In some cases an "umbrella clause" within a BIT or MIT may mean that failures to observe contractual commitments amount to breaches of that treaty. For instance, SGS, a Swiss company, entered into an agreement with the government of the Philippines to provide an import supervision service (*SGS Société Générale de Surveillance SA v Republic of the Philippines* (ICSID Case No. ARB/02/6)). SGS alleged that the Philippines had failed to make certain payments due under the contract and that this failure amounted to a breach of the Switzerland/Philippines BIT, which provides that: "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory of the other Contracting Party". In this case, the arbitral tribunal found that the BIT's umbrella clause meant that failures to observe contractual commitments were in effect breaches of the BIT.

In contrast, SGS also entered into an agreement with the government of Pakistan to provide pre-shipment inspection services of goods to be exported to Pakistan (*Société Générale de Surveillance SA v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13)). The Switzerland/Pakistan BIT provides that: "Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party".

SGS alleged that Pakistan was in breach of its contractual obligations and that this failure amounted to a breach of the Switzerland/Pakistan BIT. In this instance, the tribunal found that there was no clear and persuasive evidence that, in adopting the above clause, both Switzerland and Pakistan intended that all breaches of each state's contracts with investors of the other state were to be converted into breaches of the BIT. As a result, the tribunal found it had no jurisdiction over claims submitted by SGS that were based on alleged breaches of the agreement and which did not also constitute or amount to breaches of the substantive standards of the BIT.



Entering into an investment contract: some tips

When entering into an investment contract it is important to:

- Check the availability of investor protection, including umbrella clauses, before entering into the contract (and not after a dispute has arisen). When determining the appropriate structure for a transaction, consider the investor protections that are potentially available in addition to other factors such as the tax implications, corporate governance requirements and funding consequences of that structure.

- Consider the types of dispute that may arise given the circumstances of the investment. This may influence which of the potentially applicable treaties is most attractive to an investor.

- Identify which treaty is applicable. Some investment treaties were entered into a number of years ago. Changes in the political landscape, such as the fragmentation or change in the name of a state, may mean that it is not immediately apparent which treaty is applicable. For example, the UK has entered into a BIT with the People's Republic of the Congo but not with the Democratic Republic of the Congo (formerly Zaire).

- Consider the possibility of structuring the transaction so that the nationalities of the parties involved (including that of the investment vehicle) mean that they have rights under one or more BIT or MIT. This could involve:

- including an explicit statement in the contract as to the investor's nationality. The 1993 International Centre for the Settlement of Investment Disputes (ICSID) model clause 6 provides that: "It is hereby stipulated by the parties that the Investor is a national of [name of another Contracting State]";

- if the investment vehicle is a national of the host state, making explicit in the contract that the vehicle will be treated as a national of another contracting state because of foreign control. The 1993 ICSID model clause 7 provides that: "It is hereby agreed that, although the Investor is a national of the Host State, it is controlled by nationals of [name of other Contracting

State(s)] and shall be treated as a national of that/those State(s) for the purposes of the Convention".

Note that the developing concept of nationality may enable claims to be brought by majority or even minority shareholders and also enable the nationality of a corporate entity to be assessed by more than one test.

- Include an explicit statement in the contract that the transaction constitutes an investment. The 1993 ICSID model clause 3, for example, provides that: "It is hereby stipulated that the transaction to which this agreement relates is an investment".

- Structure the transaction to meet as many of the features of an investment as possible, which will make it easier to surmount the jurisdictional hurdle involved in seeking ICSID arbitration.

- Consider combining an ICSID clause with a clause referring to an arbitral institution that does not have the same jurisdictional requirements where the investment status of a transaction is uncertain.

- Incorporate investor protection measures into the contract when contracting directly with a host state. These measures should:

- commit the host state to providing investor protection;

- state that the transaction is an investment;

- state the nationality of the investor; and

- provide for a reference to ICSID arbitration.

- These measures may be vital if, for example, the investor is a national of a country with no BIT with the host state or the protections available under the particular BIT are limited. Provisions in contracts giving direct access to treaty type protections are most common in the natural resources sector, such as oil and gas concession agreements.

The interaction between contractual and treaty remedies is further illustrated in the case of Impreglio, an Italian investor, which was leader of a joint venture established to construct hydro-electric power facilities in Pakistan (*Impregilo SpA v Islamic Republic of Pakistan (ICSID Case No ARB/03/3)*). Impreglio concluded two contracts with the Pakistan Water & Power Development Authority (WAPDA) that were never fully performed due to alleged violations by Pakistani authorities.

The Italy/Pakistan BIT does not contain an umbrella clause and so Impreglio could not rely directly on such a clause. However, Impreglio alleged that:

- Pakistan was in breach of its obligation to provide fair and equitable treatment and to protect it against unjustified or discriminatory measures.

- Pakistan's conduct was tantamount to expropriation.

Impreglio relied on, among other things, breaches of contract by WAPDA to make out these claims. The tribunal found that:

- The contracts in issue were concluded between Impreglio and WAPDA and not between Impreglio and Pakistan.

- Under Pakistani law, which governed both contracts and the status and capacity

of WAPDA for the purposes of the contract, WAPDA was a legal entity distinct from the state of Pakistan.

The tribunal found that the BIT did not extend to breaches of contracts concluded by such an entity and, as a result, the tribunal had no jurisdiction under the BIT to entertain Impreglio's claims based on alleged breaches of the contract.

The Impreglio tribunal went on to find that a breach of contract might constitute a violation of a BIT but to do so it must be the result of behaviour going beyond that of an ordinary contracting party. The state, in the exercise of its sovereign authority and not as a contracting party, may

breach the obligations assumed under the BIT. The threshold to establish that a breach of contract amounted to a treaty breach was a high one.

Obtaining a remedy

While obtaining the right to investor protection is important, unless there is a mechanism to obtain a remedy for a breach of this right, its value is minimal. Domestic courts are unlikely to provide a solution. In many parts of the world lack of neutrality and political pressure on the judiciary mean that courts are unlikely to award a foreign investor with a remedy against the state. International arbitration is the obvious answer and, with the specific needs of investor protection disputes in mind, the International Centre for the Settlement of Investment Disputes (ICSID) was established by the 1966 Washington Convention (the Convention) under the auspices of the World Bank.

ICSID is an established and internationally respected arbitral institution. ICSID tribunals only accept jurisdiction over disputes arising from investments between a contracting state and the nationals of another contracting state. Many, but not all, BITs provide that any dispute will be referred to ICSID arbitration. For example, the UK/China BIT provides for settlement of disputes by a single international arbitrator, an ad hoc arbitral tribunal or an ad hoc tribunal established under the UNCITRAL Arbitration Rules (this BIT differs in style to the new generation of China BITs (see box, *China BITs: a new generation*)).

The particular advantage of ICSID arbitration to an investor is that, unlike most international arbitrations, the arbitration is not wholly confidential. References to arbitration are reported on the ICSID section of the World Bank website (see www.worldbank.org/icsid). From a claimant's perspective, the publicity surrounding ICSID claims can provide useful leverage as there is a perception that where a country faces a number of investor protection claims this acts as a disincentive to investment. Decisions of ICSID tribunals are also generally published.

The trend towards more open ICSID arbitrations is illustrated by an arbitration,

China BITs: a new generation

The development of China as a capital exporting state, and pressure from other capital exporting states, has led to a change in the climate of opinion within the country. This has resulted in a new generation of Chinese bilateral investment treaties (BITs), which contain broader types of investor protection measures than the old-style BITs. To date, China has entered into new generation BITs with The Netherlands, Germany and Finland (the latter is still awaiting ratification).

Under old-style China BITs (such as that between the UK and China), the only issue capable of reference to international arbitration is the amount of compensation due if a foreign investor has suffered expropriation (see *main text*, *Protective features*). As a foreign investor may have poor prospects of establishing, for example in the domestic Chinese courts, that it has suffered expropriation, the real value of the protections available under these old-style BITs is limited.

In addition to containing substantive investor protections, the new generation of BITs provide for the submission of disputes to the International Centre for the Settlement of Investment Disputes (ICSID) for arbitration. For example, The Netherlands/China BIT provides that a dispute between an investor and the host state will be submitted to ICSID or an ad hoc tribunal under the UNCITRAL Rules.

Parties investing in China may wish to structure transactions to take advantage of the protections available under the German and Dutch BITs. This may be achieved by channelling investment through a Dutch or German vehicle.

An alternative course may be to rely on most favoured nation (MFN) clauses in old-style BITs between China and other states. MFN clauses provide that a host state cannot treat investors from one state less favourably than those from another. The effect of MFN clauses is an area of debate. However, potentially, investors from countries with old-style China BITs incorporating MFN clauses may be able to take advantage of the rights granted to German and Dutch investors under the new generation BITs. (The question of whether MFN clauses provide substantive or procedural protections is an unresolved but important issue.)

against Malaysia, where memorials on jurisdiction were filed in recent months and are the first pleadings to be made available by ICSID (*Malaysian Historical Salvors, SDN, BHD v Malaysia (Case No. ARB/05/10)*). Facilities are also available at ICSID in Washington for non-parties to watch hearings (if the parties agree). Tribunals operating under ICSID rules of procedure have also allowed non-parties to make written submissions (if they meet criteria laid down by the tribunal). This may, or may not, assist the investor depending on the position taken by bodies such as interest groups or unions that are likely to make submissions.

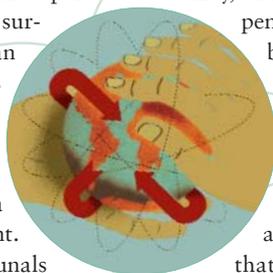
Jurisdictional issues

An ICSID tribunal will only accept jurisdiction over a claim that arises out of "an investment". The starting point for identifying whether ICSID has jurisdiction is the relevant BIT or MIT or definition in the contract.

The types of investment that appear in the definitions in BITs and MITs often include: property rights; interests in companies; money claims and rights to performance; intellectual property rights; and concessions. (For an example of a definition of investment in a BIT, see box, *Definition of investment: an example*.)

If a claim is to be brought before an ICSID tribunal, an investor may also have to establish that the transaction qualifies as an investment within the meaning of Article 25 of the Convention. There is no definition of an investment in the Convention but features that are suggestive of investment include:

- The duration of the project, including an expectation of a longer-term relationship.
- Regularity of profit and return.
- The assumption of risk by both sides.



PLC Cross-border	
Related information	
<p>This article can be found on PLC Cross-border at www.practicallaw.com/4-202-4484. Other relevant information can be found on the Commercial and dispute resolution topic page, which can be accessed from www.practicallaw.com/crossborder. This includes links to content such as the following:</p>	
Know-how topics - drawn from the index to all information on our website	
Cross border: dispute resolution	www.practicallaw.com/3-103-1202
Alternative dispute resolution	www.practicallaw.com/4-103-1188
PLC Cross-border Handbooks - comparative guides to the law and lawyers worldwide	
Dispute Resolution Handbook	www.practicallaw.com/disputehandbook
Articles - comparative features providing regulatory and transaction analysis	
US class action reform: one year on	www.practicallaw.com/4-202-2705
Chinese investment abroad	www.practicallaw.com/8-201-3879
Enforcing awards and judgments	www.practicallaw.com/3-201-2127
The choice of seat in international arbitration	www.practicallaw.com/9-200-8226
Document retention: the law and practice around the world	www.practicallaw.com/0-200-9107

- A substantial level of financial commitment.
- Whether the operation is significant for the host state's development.

Some tribunals, such as that in *SGS SA v Republic of Philippines* (see above, *Interaction between contractual and treaty remedies*), have taken a liberal approach to the question of jurisdiction, relying on the definition of investment contained in the relevant BIT without referring to Article 25 of the Convention.

If an investor is a non-natural person, usually a company, the investor must have the

nationality of a contracting state and not the nationality of the host state on the date on which the parties consent to submit the dispute to arbitration. However, companies that are host state nationals will not be excluded if they are foreign



controlled. ICSID tribunals have generally looked to the place of incorporation, registered office, central administration or effective seat when determining the nationality of companies.

If an investor is an individual, an ICSID tribunal will only accept jurisdiction over a claim if the investor can establish that he possesses the nationality of a contracting state and does not possess the nationality of the host state. The investor must have the nationality of the contracting state on the date on which the parties consent to submit the dispute to arbitration as well as on the date on which the request is registered. Subject to certain exceptions, the nationality of an individual is determined by the law of the state whose nationality is claimed.

A host state and an investor may agree that the investor is of a specified nationality. While this does not automatically mean that the investor has surmounted the jurisdictional hurdle, an agreement on nationality will create a strong presumption in favour of the stated nationality.

Ian Meredith is a partner and Clare Tanner is an associate in the Dispute Resolution and Litigation Department of Kirkpatrick & Lockhart Nicholson Graham LLP, based in London. Ian leads the firm's UK Arbitration Group.