October 2009

Editors:

Ian Meredith
ian.meredith@klgates.com
+44.(0)20.7360.8171

Peter R. Morton
peter.morton@klgates.com
+44.(0)20.7360.8199

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From the Editors

Welcome to the 10th edition of Arbitration World, a publication from K&L Gates' Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution.

We hope you find this edition of Arbitration World of interest, and we welcome any feedback (email: ian.meredith@klgates.com or peter.morton@klgates.com).

News from around the World

Institutions

AAA / ICDR

The American Arbitration Association (AAA) is conducting a review of its commercial arbitration rules (click here). The review is expected to be complete in the first half of 2010.

The international wing of the AAA, the ICDR, has announced the opening in January 2010 of the Bahrain Center for Dispute Resolution. The facility will mainly administer arbitrations under ICDR rules, but will also deal with arbitrations under the UNCITRAL rules or the soon to be created BCDR-AAA rules. The center is expected to develop into an important hub for Middle Eastern disputes.

CPR

The International Institute for Conflict Prevention & Resolution (CPR) has released its new Global Rules For Accelerated Commercial Arbitration. Significant provisions of the new Accelerated Rules include a provision requiring arbitrators to make an award as soon as feasible and in any event within six months of constitution of the tribunal. The default position is a sole arbitrator.

ICC

The ICC Court has announced that all arbitrators must disclose details about their availability for the next 18 months when being considered for appointment in an ICC arbitration. The new "ICC Arbitrator Statement of Acceptance, Availability and Independence," introduced from 17 August 2009, requires arbitrators to list how many cases they are already handling and any foreseeable commitments for the next 12 to 18 months. Arbitrators found not abiding by time limits in the future will have their fees cut or, in the worst-case scenario, will be removed from a case. The change comes following concerns some arbitrators take on too many cases, causing unreasonable delays.

JAMS
The Joint Arbitration and Mediation Service (JAMS) has announced the opening of its first international ADR centre, providing a venue for mediation and arbitration for cross-border disputes. The first two centres are located in Rome and New York, and the intention is to build a network of hearing locations around the world.

JCAA
The Japan Commercial Arbitration Association (JCAA) has amended its Administrative and Procedural Rules for Arbitration, effective from 1 July 2009. The changes include a change to Rule 11 on the language of an arbitration, and changes to administrative and filing fees.

SIAC
The Singapore International Arbitration Centre has announced a general review of its 2007 Arbitration Rules. The review is expected to be complete by early 2010. For further information on recent developments in Singapore, see the article below.

Asia

Cambodia
On 10 August 2009, the Cambodian Ministry of Commerce signed a Memorandum of Understanding with an agency of the World Bank relating to the establishment of a National Arbitration Center to resolve business disputes. The centre will be established over the next three years and will be the first commercial arbitration body in Cambodia offering an alternative to the courts.

Caribbean

Cayman Islands
The Cayman Islands Law Reform Commission is undertaking a review of its arbitration law. In May 2009, the Commission issued a draft Discussion Paper, proposing repeal of the current legislative regime and a new law based on the UNCITRAL Model Law to apply to both domestic and international arbitrations.

Europe

England and Wales
The High Court has held that the reference in an arbitration agreement to an award being "final, conclusive and binding" did not exclude rights of appeal to the court on a point of law. The *Shell Egypt West v. Dana Gas* decision emphasises the importance of clear and unequivocal drafting when seeking to exclude default statutory rights of appeal.

Republic of Kosovo
On 29 June 2009, the Republic of Kosovo signed the ICSID Convention. Its membership became effective on 29 July 2009. The new state has also become a member of the IMF, the International Bank for Reconstruction and Development, and the Multilateral Investment Guarantee Agency.

Latin America

Ecuador
On 6 July 2009, the World Bank received a written notice of denunciation of the ICSID Convention from the Republic of Ecuador. Under ICSID rules, the notice takes effect on 7 January 2010. Ecuador has also cancelled nine bilateral investment treaties, many of which contained ICSID arbitration clauses. Bolivia is the only other country to have previously withdrawn from ICSID.

North America

U.S.
The National Arbitration Forum has announced that it is ceasing to administer consumer arbitrations. The decision follows analysis of decisions reached in NAF cases revealing, as previously reported in the July 2008 edition of *Arbitration World*, that over 99% of cases were resolved in favor of the credit institution, and the suit filed by the Minnesota Attorney General alleging fraud and deceptive trade practices based, among other matters, on the NAF's concealment of cross-ownership ties with a major consumer debt collection group. The undertaking not to administer consumer arbitrations forms part of the settlement of the Minnesota claim.

The Arbitration Fairness Act: A Fundamental Shift in U.S. Arbitration Policy?

Beth W. Bivans (Dallas)

When the United States Federal Arbitration Act ("FAA") was originally enacted by Congress in 1925, it "declared a national policy favoring arbitration." Thereafter, a significant body of law developed emphasizing arbitration's favored status. Despite that, critics of this method of alternative dispute resolution have become significantly more vocal in the past decade. The criticism has largely focused on consumer and employment arbitrations, where mandatory, pre-dispute arbitration clauses are widely used. Critics suggest that pre-dispute arbitration agreements in these contexts are akin to adhesion contracts – forced upon consumers and employees with unequal bargaining power and little comprehension of the consequences.

Against this backdrop, legislation was first introduced in Congress in 2007, seeking to limit pre-dispute arbitration clauses. That bill never made it out of committee. By 2009, however, the political winds have changed, and there now appears to be strong support for a revised 2009 version of the bill – the Arbitration Fairness Act ("AFA").

House Version of the AFA - February 2009

The House version of the AFA (H.R. 1020) was introduced in the 111th Congress in February 2009, by Representative Hank Johnson, a Democrat from Georgia. The House version proposes the following amendment to Chapter 1, Section 2 of the FAA:

> "*(b) No pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of—*
>
> *(1) an employment, consumer or franchise dispute; or*
>
> *(2) a dispute arising under any statute intended to protect civil rights.*
>
> *(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitration shall be determined by the court, rather than the arbitrator, irrespective of whether a party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.*"

This amendment would be inserted in Section 2 of the FAA immediately following the well-known language otherwise favoring and enforcing all arbitration clauses. The amendment expressly does not apply to collective bargaining agreements and provides that it shall take effect upon enactment and "*apply with respect to any dispute or claim that arises on or after such date*."

Almost immediately after its introduction, opponents of House Bill 1020 began to point out a number of concerns regarding the scope, placement and possible consequences of the proposed amendment. First, and foremost, critics point out that the language, while intending to apply in only limited consumer, employment, franchise and civil rights cases, could be applied extremely broadly and have far-reaching, unintended consequences. Specifically, the use of the clause "*a dispute arising under any statute intended to protect civil rights*" is controversial. That language could easily be read to apply to a broad range of civil statutes that give rise to individual causes of action, including bankruptcy, antitrust, securities laws, intellectual property, maritime law, and the like.

Further, the mere fact that the amendment is incorporated into Section 2 of the FAA presents problems in many critics' minds. Because the law interpreting Section 2 is so well developed, a far-reaching amendment to that Section could call into question over 80 years of precedent that applies and interprets that Section. While some reinterpretation is certainly intended by the proposed amendment, other unintended consequences on the manner in which courts interpret Section 2 are feared.

In addition, House Bill 1020's proposed language in subparagraph (c) has also been the basis of significant criticism. Subparagraph (c) conflicts with long-standing precedent that gives arbitrators – not courts – the power to determine whether an arbitration agreement is valid and whether a specific dispute is, in fact, arbitrable. These concepts (referred to as "separability" and "competence-competence") limit court intervention into

arbitration and are widely viewed as cornerstones of arbitration in the United States and internationally. Nonetheless, the AFA turns this concept on its head, instead providing that the validity and enforceability of an arbitration clause is to be decided by a court, not by an arbitrator. There is also concern that the inclusion of this language as drafted in House Bill 1020 could be read to apply to *all* arbitrations. Such a drastic change could have extremely significant consequences on the cost, efficiency and viability of arbitration.

House Bill 1020 has also generated concern in the international community, as it could have far-reaching implications outside the United States. The mere fact that the AFA would render some types of pre-dispute arbitration clauses unenforceable creates concerns for parties engaged in international commerce who traditionally rely on arbitration clauses to reduce their litigation risks in the United States. Notably, the United States is one of over 140 nations that have signed the New York Convention, a treaty that recognizes and enforces commercial arbitration agreements and foreign arbitral awards. Whether and, if so, how the AFA may impact on the United States' obligations under the New York Convention is not yet clear. The international concern is particularly acute in connection with the prohibition against pre-dispute arbitration in franchise disputes. Not only is the term "*franchise*" in the AFA broad and not well defined, it makes no distinction between international or domestic franchises. As a result, it discourages international franchisors from doing business with domestic franchisees.

Finally, the "*effective date*" of the AFA has also drawn criticism, as it would essentially invalidate any existing pre-dispute arbitration clauses regardless of how long those contracts have been in effect.

Senate Version of the AFA - April 2009

These and other comments and criticisms of House Bill 1020 have not fallen on deaf ears. On April 29, 2009, Senator Russell Feingold, a Democrat from Wisconsin, introduced Senate Bill 931, the Arbitration Fairness Act of 2009. The Senate's version of the AFA addresses, in part, several of the issues identified in response to House Bill 1020's introduction.

While the two bills contain largely similar language, the Senate version proposes that the amendment be placed in a new, stand-alone Chapter 4 of the FAA. In addition, the Senate Bill clarifies that the concerning provisions of subparagraph (c) are limited to those types of arbitration matters covered by the newly drafted Chapter 4. The Senate version thereby attempts to limit the argument of critics that the new language has the possibility to alter long-standing precedent outside the consumer and employment contexts.

The Senate version of the AFA also clarifies that the term "franchise dispute" is limited to "a dispute between a franchisee with a principal place of business in the United States and a franchisor." This revised definition narrows the scope, but does not address the concerns of international franchisors doing business with U.S. franchisees. Nor does the Senate version otherwise resolve the concerns expressed regarding the potential impact of the AFA on the New York Convention or international transactions generally. Likewise, the Senate version still takes effect on the date of enactment, thereby rendering existing arbitration clauses in these contexts invalid.

Both the House and Senate versions of the AFA remain pending, but all expectations are that a version of the AFA will pass in this Congress and be signed into law. In late August, the American Bar Association's International Section passed a resolution denouncing the possible unintended, negative impact the AFAs might have on international arbitration. Meanwhile, in mid-September, supporters of the bill testified before the House Judiciary subcommittee, urging Congress to pass the AFA and emphasizing the consumer protection aspects of the bill.

Saipem v. Bangladesh: The Use of an Investment Treaty to Enforce an Arbitral Award

Marcus M. Birch (London)

Parties to international commercial arbitration expect that national courts at the seat of the arbitration will intervene only to the extent strictly necessary to support the arbitral process. National courts are expected to be particularly supportive in relation to the recognition and enforcement of arbitral awards. Parties may be dissuaded from proceeding with arbitrations in certain jurisdictions because of a fear of undue court interference in the process, or a concern that any arbitral award will be unenforceable in the local courts. Some comfort can be gained if the country in question is a signatory to the New York Convention, but in certain jurisdictions even that does not guarantee a swift procedure free of undue interference by the national courts.

The award of an ICSID tribunal in *Saipem v. Bangladesh*, released in June 2009, confirms that a contractual right to arbitrate and an arbitral award are capable of being expropriated, and that investors can benefit accordingly from protections contained in a bilateral investment treaty ("BIT") in respect of the actions of courts. The facts are a paradigm case of the problems that can occur, and, although its decision does not constitute binding precedent, the approach of the ICSID tribunal in *Saipem* provides a helpful model for assessing potential claims in similar fact situations.

The case arose out of disputes between an Italian company, Saipem, and a Bangladeshi state entity, Petrobangla, under a pipeline construction contract which provided for ICC arbitration seated in Dhaka. A dispute arose and in 1993 an ICC arbitration was commenced. During the ICC arbitration, various of Petrobangla's procedural motions were dismissed by the ICC tribunal. In 1997 Petrobangla brought an application in the Bangladeshi courts for revocation of the ICC tribunal's authority, and obtained an injunction restraining Saipem from proceeding with the ICC arbitration. The Dhaka court revoked the authority of the ICC tribunal in 2000, on grounds that the ICC tribunal had conducted the ICC arbitration improperly by failing to deal adequately with Petrobangla's procedural motions. The ICC tribunal took the view that a challenge to arbitrators in an ICC arbitration falls within the exclusive jurisdiction of the ICC Court, and the Dhaka court's revocation order was to be disregarded. The ICC arbitration continued and in 2003 the ICC tribunal rendered an award in Saipem's favour for more than US$ 6 million plus interest. On Petrobangla's application to the Supreme Court of Bangladesh to set aside the ICC award, the Supreme Court held that the award was non-existent, a "nullity" due to the earlier revocation of the authority of the ICC tribunal.

Saipem, having lost faith in the Bangladeshi courts, chose not to appeal against either the revocation order or the "nullity" ruling. Instead, in 2004 it filed a request for arbitration with ICSID based on the 1990 Italy-Bangladesh BIT. The usual course in such a fact pattern would be an action for state responsibility for denial of justice: many investment treaties contain an obligation of "fair and equitable treatment" ("FET") and it is broadly recognised that a denial of justice constitutes a breach of this standard. The difficulty in this case was that the Italy-Bangladesh BIT contained no FET provision and so Saipem was obliged to rely on the prohibition on expropriation.

In a 2007 decision, the ICSID tribunal held that it had jurisdiction. In doing so, it rejected arguments by Bangladesh to the effect that Saipem's choice of Dhaka as the seat of arbitration implied its acceptance of the supervisory jurisdiction of the local courts over the ICC arbitration and the acceptance of the related litigation risk. The ICSID tribunal held that a contractual right to arbitrate has an economic value and is capable of being expropriated, and unlawful judicial acts can constitute expropriation. Commentators have noted parallels between the decision of the Saipem ICSID tribunal and established case law of the European Court of Human Rights to the effect that arbitral awards constitute property that can be the subject of a "taking" (*Stran Greek Refineries v. Greece* and *Regent Company v. Ukraine*) and that unlawful court decisions can amount to an expropriation (*Allard v. Sweden*).

The main issue dealt with in the ICSID tribunal's final award in *Saipem* was whether the actions of the Bangladeshi courts in fact amounted to an expropriation, namely whether the courts had abused their jurisdiction and improperly interfered with the arbitral process and enforcement. The ICSID tribunal held that the Bangladeshi courts' actions resulted in substantially depriving Saipem of the benefit of the ICC award, and in particular that the "nullity" ruling was tantamount to a "taking" of Saipem's residual contractual rights (arising from its investment in the pipeline contract) as crystallised in the ICC award.

The ICSID tribunal clarified that the setting aside of an award could not in itself found a claim of expropriation and that in order to be expropriatory the court action must also have been "illegal" according to international law standards. On the facts of the case, the ICSID tribunal held that the Bangladeshi courts' actions had been illegal because they constituted, first, an abuse of rights and, second, a breach of the New York Convention. As to the first, the revocation decision was grossly unfair because based on a manifestly unfounded finding of misconduct by the ICC arbitrators. There was no evidence that the ICC tribunal had committed any error, and thus no justification for the Dhaka court to revoke its authority. The Dhaka court had not consulted with or offered the members of the ICC tribunal an opportunity to be heard. As a result, and in the circumstances of the case, the ICSID tribunal held that while the Dhaka court had competence to revoke an arbitrator's authority, the Dhaka court had exercised that competence for an end different from that for which it was instituted. As to the second, the courts had acted in breach of Article II of the New York Convention in that their decisions had the effect of preventing or immobilising the arbitration. As compensation for the illegal expropriation, the ICSID tribunal awarded Saipem the same financial relief as the ICC tribunal.

The *Saipem* award is thought to be the first ICSID award to find that the actions of a state court have had an expropriatory effect, and it provides helpful clarification of the circumstances in which a BIT claim on that ground can succeed. The factual matrix will of course vary between cases, and it is likely to be only fairly extreme cases of interference that can ground a BIT claim. Nevertheless, from a practical perspective, the award is encouraging to investors and a welcome reinforcement to the arbitral process.

ReliaStar Life v. EMC National Life: Second Circuit Allows Award of Attorneys' Fees as a Sanction for "Bad Faith" in the Face of a Contrary Contract Term

Paul K. Stockman (Pittsburgh)

Most parties to an arbitration agreement providing that "[e]ach party shall bear the expense of its own…outside attorneys' fees" would feel comfortable that they would not be held liable to pay their opponent's lawyers. That may be a dangerously complacent view in light of a recent decision of the United States Court of Appeals for the Second Circuit. In *ReliaStar Life Insurance Company of New York v. EMC National Life Company*, 564 F.3d 81 (2d Cir. 2009), the court faced that very contract provision, and nonetheless confirmed an arbitration award that gave the successful party its attorneys' fees (ostensibly as a sanction for bad faith). Because the Second Circuit, sitting in New York, is a particularly well-respected appellate court, and hears many commercial arbitration disputes, this decision may come to have broad application. As such, it sounds a cautionary note, urging parties to document arbitration agreements carefully – especially with respect to the arbitrators' authority to award attorneys' fees and sanctions.

ReliaStar involved related coinsurance agreements between ReliaStar and EMC's predecessor. These agreements contained a broad arbitration clause, providing for the resolution of "any disputes or differences" before a three-member panel. As noted, Section 10.3 of the agreements also provided that "[e]ach party shall bear the expense of its own arbitrator…and related outside attorneys' fees…." After disputes arose, EMC commenced arbitration, asking the arbitrators to declare that the coinsurance agreements had been terminated, and seeking a final accounting. The tribunal rejected EMC's arguments

and ordered it to pay more than $21 million. But the tribunal did not stop there: a tribunal majority also awarded ReliaStar almost $4 million in attorneys' and arbitrators' fees and costs, without explanation, notwithstanding Section 10.3. On resubmission, the tribunal reiterated its award, purportedly because EMC's conduct in the arbitration "lack[ed] good faith."

The parties brought their dispute to the United States District Court for the Southern District of New York, which agreed with EMC that the arbitrators "exceeded their powers" in awarding attorneys' fees: "The arbitration article of the agreements is clear as a bell. Although it contains a broad arbitration clause, it unmistakably provides that the parties are to bear the fees of their respective…outside counsel." *ReliaStar Life Ins. Co. v. EMC Nat'l Life Co.*, 473 F. Supp. 2d 607, 609 (S.D.N.Y. 2007), *rev'd in part*, 564 F.3d 81 (2d Cir. 2009).

On appeal, the Second Circuit panel (in a 2-1 decision) reversed the district court, holding that the "broad arbitration clause" in the coinsurance agreements gave the arbitrators "the discretion to order such remedies as they deem appropriate," including "the inherent authority…to sanction a party that participates in the arbitration in bad faith" via "an award of attorney's or arbitrator's fees." *Id.* at 86. Section 10.3 was merely a restatement of the general "American Rule," and did not limit the panel's "comprehensive authority by precluding an award of attorney's or arbitrator's fees when a party's bad faith dealings create a recognized exception to the American Rule." *Id.* at 88. In short, the court concluded, "a more explicit statement would be necessary to manifest any intent to override the bad-faith exception to the American Rule and to preclude the arbitrators from awarding attorney's and arbitrator's fees as a sanction for bad faith conduct." *Id.* at 89. (Judge Rosemary Pooler dissented, arguing that the award "plainly contradict[ed] an express and unambiguous term of the contract." *Id.* at 90.)

The Second Circuit's decision appears to sap Section 10.3 of independent effect. (The court's argument that it was simply a "belt and suspenders" effort to remind non-lawyers or Englishmen of the "American Rule" for attorneys' fees, *see id.* at 88, is rather unpersuasive.) At the same time – assuming that arbitrators have the authority to levy sanctions for bad faith conduct – forbidding one measure of those sanctions (the quantum of litigation expense incurred by the innocent party) would seem to be an elevation of form over substance.

At any rate, the lesson from *ReliaStar* is a straightforward one: contractual stipulations as to how costs are to be treated may not always be binding. A party to an arbitration agreement looking to ***guarantee*** that it will not be required to pay its opponent's attorneys' fees should consider explicitly providing ***not only*** that the parties will bear their own costs and fees, ***but also*** that the arbitrators cannot shift those fees as a sanction or otherwise.

International Arbitration in Singapore: Recent Developments

Raja Bose (Singapore)

In recent years, Singapore has established itself as one of the leading venues for international arbitrations involving Asian businesses. Its attractiveness as a venue is often attributed to its convenient location, strong pool of arbitrators and counsel and supportive court system. Two recent developments - one infrastructural, one regulatory - should further improve the experience of parties arbitrating in Singapore. A recent court decision shows, on the one hand, the enthusiasm of the Singapore courts to support the arbitral process but, on the other, the complexity that can arise when more than one arbitral institution may have a role.

Maxwell Chambers

Maxwell Chambers has been established with the express goal of being the world's first integrated dispute resolution complex. Located in the heart of Singapore's business district and open for reservations since late July 2009, with a view to being fully operational by early 2010, it promises a "one-stop shop" experience by housing top international Alternative Dispute Resolution institutions, hearing facilities and support services under one roof.

Prominent tenants at Maxwell Chambers include the Singapore International Arbitration Centre (SIAC), Singapore Institute of Arbitration, the Singapore Chamber of Maritime Arbitration, the International Centre for Dispute Resolution (ICDR), the Court of Arbitration of the International Chamber of Commerce (ICC), and the Permanent Court of Arbitration (PCA). Other institutions and counsel offices are expected to follow.

International Arbitration (Amendment) Bill 2009

The Ministry of Law of Singapore is proposing amendments to the International Arbitration Act to empower local courts to grant interim orders in aid of arbitrations held outside Singapore. The proposed new provision is in line with legislation in other countries such as England and New Zealand, and the UNCITRAL Model Law. It would give the High Court power to grant disclosure orders and freezing injunctions.

Further it is proposed that, if the case is one of urgency, the High Court may make any order for the purpose of preserving evidence or assets upon an application by a party or proposed party to the arbitral proceedings. If the case is not one of urgency, the High Court shall make an order only if the application is made with the permission of the arbitral tribunal or the consent of the parties. The power is restricted to cases where the arbitral tribunal has no power or is unable for the time being to act effectively. The High Court may refuse to exercise its power under the proposed new section 12A if it considers it inappropriate to do so by virtue of the fact that the place of arbitration is outside Singapore. Under the proposals, the order of the High Court shall cease to have effect in whole or in part if the arbitral tribunal makes an order which expressly relates to the whole or part of it.

Insigma Technology Co Ltd v. Alstom Technology Ltd [2009] SGCA 24

A recent decision in the Singapore Court of Appeal, *Insigma Technology Co Ltd v. Alstom Technology Ltd* [2009] SGCA 24, concerned the interpretation of a highly atypical arbitration clause providing for arbitration in Singapore "before the SIAC" but under ICC Rules. Alstom filed a Request for Arbitration with the ICC in Paris but, following Insigma's objection, filed with the SIAC. The SIAC accepted jurisdiction and applied ICC Rules, accepting the difficulty of the position but taking a policy decision to uphold the parties' intentions as far as possible. The issue came before the Singapore Court of Appeal, which approved the SIAC's decision, holding that the principle of party autonomy would *prima facie* be upheld unless it was unjust or impracticable to do so. Singaporean public policy required SIAC to administer arbitrations under the rules chosen by the parties to the extent that they could reasonably do so. The Court highlighted that such hybrid clauses were not ideal and were not necessarily efficient. Following the decision, SIAC found officers to undertake the roles envisaged under the ICC Rules and administered the arbitration accordingly.

It is understood that the ICC is concerned at the decision and the possibility of ICC arbitrations being administered by other organisations. It remains to be seen whether such arbitrations will prove to be effective. The issue illustrates once again the importance of careful and informed drafting of arbitration provisions.

Proposed Changes in the Interface Between Courts and International Arbitration in the EU

Peter R. Morton (London)

Introduction

In April of this year, the European Commission published a Report on the application of what is commonly referred to as the "Brussels Regulation," which deals with jurisdiction and the recognition and enforcement of judgments of courts in civil and commercial matters in EU Member States. The Report was accompanied by a Green Paper launching a consultation on possible ways to improve the operation of the Regulation.

The Proposals

The Commission's Report and the Green Paper propose a "*(partial) deletion*" of the existing exclusion of arbitration from the Brussels

Regulation, replacing it with a new interface between courts and international arbitration. It is not proposed that the rules of the Brussels Regulation would apply to arbitration proceedings themselves. What is proposed is that court proceedings in support of arbitration would come within the scope of the Regulation and a special rule allocating jurisdiction in such proceedings would be created.

In particular, it is proposed to grant exclusive jurisdiction to the courts of the Member State of the place of arbitration "*in ancillary proceedings concerned with the support of arbitration.*" Such proceedings might include, for example, court proceedings regarding the appointment of arbitrators or for declaratory relief as to the existence and validity of the arbitration agreement. The Green Paper recognises that this would require uniform standards as to the place of the arbitration, and suggests that this be determined by reference to the "*agreement of the parties or the decision of the arbitral tribunal.*" The proposal to strengthen the role of the courts at the seat to the exclusion of courts in other member states would make careful choice of the seat of arbitration even more important.

The Commission also proposes a new Article 27A to the Brussels Regulation obliging courts in other Member States to stay any court proceedings where the court at the place of the arbitration is seised of a claim for "*declaratory relief in respect to the existence, validity, and / or scope of the arbitration agreement.*"

What the Commission appears to have in mind is that, in line with the ECJ's disapproval of anti-suit injunctions in the *West Tankers* decision (reported in a K&L Gates Newsstand Alert of 10 February 2009, and further discussed in the 8th Edition of *Arbitration World*), instead of applying for an anti-suit injunction the claimant should seek a declaration in the courts of the place of the arbitration, that the arbitration agreement is valid. From the moment of commencement of such proceedings, court proceedings on the substance of the matter pending in other Member States would be stayed; and if the court at the place of arbitration confirms the validity of the arbitration agreement in question, that judgment must be recognised in the other Member States – subject only to the public policy objection in the Brussels Regulation. It is suggested that such declaratory relief at the place of arbitration would therefore have an impact similar to that of an anti-suit injunction.

Concerns regarding the proposals

A number of concerns have been raised in the arbitration community regarding the proposals. These include:-

- The proposed changes may prompt respondents who wish to derail the arbitration process to commence proceedings in the courts of the seat of the arbitration disputing the validity of the arbitration clause, such that the courts at the seat of the arbitration routinely become an initial "gatekeeper." Such a process could take several months – and even years allowing for appeals, causing considerable delay in getting the arbitration process off the ground.
- The proposals appear to give rise to an erosion of the principle of *kompetenz - kompetenz* (the principle recognised in many national laws according to which the arbitral tribunal can rule on its own jurisdiction). The authors of the Green Paper say that it is not their intention to remove the principle of *kompetenz - kompetenz*; rather, that the question of whether it is appropriate for the tribunal or the court of the place of the arbitration to decide the validity of the clause depends on the arbitral law of the seat. However, that is not what the proposed new Article 27A currently provides, so at the very least some amendments to the drafting can be expected in any final proposal issued by the Commission.
- Does it not remain preferable to exclude arbitration from a Regulation concerned with judicial proceedings?
- Fundamentally, is there any real problem with the existing arrangements that needs to be cured? Do the few inconsistencies and unsatisfactory results (such as the decision referred to as *Putrabali* where a French court enforced an arbitral award that had been set aside in England) really mean sweeping change is necessary?

Future plans for the proposals

Given the complexity of some of the issues at stake, and the potentially far-reaching consequences of the proposed changes, the Green Paper has drawn comments from various quarters of the arbitration and wider legal community. The EU Commission's consultation process ran from 21 April 2009 to 30 June 2009. It is currently expected that the Commission's final proposal will appear early next year.

A Sea Change in 28 U.S.C. § 1782 Cases? U.S. Fifth Circuit and Two District Courts Refuse Discovery to Parties to Foreign Arbitrations

Abram I. Moore (Chicago)

In the May 2009 edition of *Arbitration World*, we noted that an increasing number of U.S. federal district courts were interpreting a 2004 U.S. Supreme Court decision to open the doors to discovery in the United States in aid of foreign arbitrations under 28 U.S.C. § 1782. We noted that a district court in Texas that recently denied such an application was the stark outlier. At the time, no circuit court of appeals had yet weighed in on the issue. However, on August 6, 2009, the Fifth Circuit Court of Appeals (governing Texas, Louisiana and Mississippi) affirmed the decision of the maverick Texas court, finding that parties to foreign arbitrations are not entitled to discovery in the United States under Section 1782. (*El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*.)

Section 1782 allows parties to proceedings before foreign tribunals to obtain discovery from persons in the United States. Federal district courts have recently employed an expansive interpretation of the term "tribunal" in Section 1782, finding that it includes arbitral bodies. Those courts relied upon a 2004 U.S. Supreme Court case, *Intel Corp. v. Advanced Micro Devices, Inc.*, which found that the Commission of European Communities qualified as a "tribunal" and suggested, in dicta, that arbitral bodies may also be considered tribunals. As we noted in May, most district courts considering the issue after *Intel* have found that arbitral tribunals are indeed tribunals under the statute.

However, in the *El Paso* decision, the Fifth Circuit found that private arbitral bodies are not tribunals for the purposes of Section 1782. The court relied upon its pre-*Intel* holding in *Republic of Kazakhstan v. Beidermann International*, which is directly on point, and found that arbitral bodies cannot be considered "tribunals." Because the Supreme Court in *Intel* did not unequivocally overrule *Beidermann*, the Fifth Circuit held that it was bound by its earlier decision on the issue.

The Fifth Circuit is not alone in bucking the trend toward permitting Section 1782 discovery for foreign arbitrations. Since we last examined this issue in May, a district court in Florida found that an arbitral proceeding under the Rules of the ICC Court of International Arbitration was not a tribunal under Section 1782 (*In re: Application of Operadora DB Mexico, S.A.de C. V.*) and a district court in Illinois found that a private, non-state-sponsored, arbitral tribunal does not constitute such a tribunal (*In re An Arbitration in London, England*). Both decisions acknowledge the recent trend to the contrary and explain their reasoning at some length.

It remains to be seen whether these recent decisions will reverse the trend by district courts to consider arbitral bodies "tribunals" after *Intel*. At present, the only appellate court to consider the issue after *Intel* has come down against allowing discovery. However, the applicants in both *In re An Arbitration in London, England* and *In re: Application of Operadora DB Mexico, S.A.de C. V.* have filed notices of appeal. Therefore, assuming neither arbitration concludes in the meantime (thus mooting the issues), the Seventh and Eleventh Circuits may weigh in shortly.

Third Party Funding in Arbitration: A Perspective from England

Laura Atherton (London)

The cost of arbitrating disputes can impede those with genuine claims in bringing proceedings. Third Party Funding ("TPF") is an increasingly popular method of financing the conduct of a claim in England.

The basic principle of TPF is that the funder funds the legal fees for a claim and then takes a share of the damages won, typically 10 to 45%. The claimant only has to pay the funder if he wins; nothing is due to the funder if the claimant loses.

Is TPF right for your arbitration claim?

The Benefits of TPF for Arbitration Claims

TPF offers a number of advantages. The most obvious benefit is that the cost of bringing a claim is borne by the funder. At its most basic the facility allows claimants to bring claims that they could not otherwise afford to run, but the benefits go beyond this transfer of risk.

As part of the process of deciding whether to fund a claim a funder will carry out its own assessment of the chances of success and likely recovery. This has the corollary benefit to the claimant of having its claim independently assessed. Whilst a claimant will be advised by its lawyers as to the merits of the claim and the likely damages, if the funder agrees to fund the claim following assessment it can give the claimant further reassurance about its case. Alternatively, if the funder declines, this may give the claimant an additional "reality check" about the weaknesses in its claim, and provide valuable guidance as to whether to settle.

Putting your opponent on notice that your claim is funded by a third party may also assist in settlement negotiations. Not only does it inform the other side that you are fully funded on the costs of pursuing the claim, potentially an important factor in any settlement discussions, but it also advertises the fact that your case has been independently assessed as one worth investing in. This should cause a respondent to pause for thought about the strength of its own position.

TPF also enables companies to pursue claims through arbitration without the need to divert capital from other areas of the business to fund their case. This is particularly important in current market conditions where many businesses are experiencing liquidity problems.

Having a funder involved in your claim may also help in keeping the costs to a proportionate level as third party funders will often cap the funding of the claim at a level commensurate with the likely level of return. The funder will also generally require reports about the costs incurred and the progress achieved in a claim, thus adding a further layer of discipline on the conduct of the case.

The Difficulties of TPF

Despite the benefits, TPF may not be a possible or a desirable method of funding your arbitration claim. The claim that you wish to pursue may not satisfy the funder's criteria. Funders have differing requirements, but there are some general principles which will be applied in deciding whether they want to invest.

- Funders generally want to see an estimated chance of success of at least 60%. An "above evens" chance will rarely be enough.
- The value of the claim is also a determining factor. Funders vary on this issue and whilst some are prepared to fund claims for a value of £150,000, others will only invest when the estimate of recoverable damages is in excess of £2 million.
- A funder will expect to recover at least two and a half to four times its up-front investment or 10 to 45% of the damages awarded. The comparison of the costs estimate and the prospective return will therefore be carefully considered.

TPF may also, ultimately, be unattractive from the claimant's perspective. Are you prepared to give away the necessary percentage of damages to the funder? You may consider the amount the funder

requires is too high based on the cost of running the case, the likelihood of success and the sums at stake in the arbitration.

Issues to Consider When Looking at TPF for Arbitration

Each funder's terms will vary, but there are a number of issues which should be considered prior to entering into a TPF agreement. For example:

- Does the agreement cover all or just a proportion of your costs?
- To what extent would an adverse costs award (ie requiring you to pay your opponent's costs) be covered under the agreement and might it be appropriate to seek insurance (in England, referred to as "after the event" insurance) to cover the risk of an adverse costs award?
- Is the proposed funder a substantial organisation carrying out TPF as a business? Funding provided by, for example, private individuals could create more issues in the arbitration if their role is discovered. Such funding arrangements have, in the past, precipitated an application for security for costs.
- Is there a risk of the funder's insolvency leaving you liable for the respondent's costs should you lose? Is security provided?
- How are conflicts of interest between you and the funder to be dealt with?
- Where are the respondent's assets? Is there a risk that the TPF agreement may be invalid in that jurisdiction and what effect might that have on attempts to enforce the award?
- Do the arbitration rules and the applicable law allow you to recover costs in circumstances where it is the funder, rather than you, that has paid?
- How would a non-monetary settlement such as a promise of further business or the transfer of an asset be dealt with under the TPF agreement?
- Potential claimants should also be aware that, whilst a number of commercial funders have recently jointly submitted a draft code for consideration by Jackson LJ as part of his review of civil litigation costs, TPFs are currently unregulated. Vigilance is therefore required in considering both the terms of the agreement and compliance by both parties with those terms.

TPF may be a good way to finance your arbitration but, prior to signing up, you should always consider the terms of the agreement, how such an agreement would sit with the applicable rules and law in the arbitration, and what effect it might have on your recovery at the end of the case.

It should also be noted that, whilst this article considers TPF based on practice in England, TPF is less popular and the market for such funding is less mature in some other jurisdictions, such as the U.S., where contingency fee agreements are widely available and the involvement of third party funders can give rise to issues of professional ethics for U.S. attorneys.

Protocol of Enforcement Affords Reassurance on Enforcement of DIFC-LCIA Arbitral Awards and DIFC Judgments Beyond DIFC Boundaries

Neal R. Brendel (Dubai and Pittsburgh) and Roberta D. Anderson (Pittsburgh)

The Dubai International Financial Centre's ("DIFC") Courts and the Dubai Courts have signed a Protocol of Enforcement, effective May 1st, 2009, pursuant to which both the DIFC Courts and the Dubai Courts assign one of their own Executive Judges to enforce the judgments and arbitral awards issued by the other respective Courts.

The DIFC Courts and the Dubai Courts both are mainstays of the United Arab Emirates ("UAE") legal system. Separate and distinct from the Dubai Courts, which were established in 1970, the DIFC Courts comprise the DIFC's independent judicial system, which has jurisdiction over matters arising from and within the DIFC, a center for global finance. The creation of the DIFC stemmed from a 2003 amendment to the UAE Constitution, which allowed for the creation of free trade zones throughout the UAE. It is the domain of each free trade zone to establish its own regulatory and legal systems.

The laws establishing the DIFC Courts were enacted in September 2004 to provide for the independent administration of justice in the DIFC, to address the sophisticated transactions conducted within the DIFC, and to provide comprehensive and world-class standards in dispute resolution and legal redress regarding civil and commercial matters based on international best practices. The DIFC Courts are based on a common law judicial system and offer an internationally recognized bench of judges experienced in commercial disputes. The intent of the DIFC Courts is to create an environment and legal system that is both familiar and attractive to international business, which can now take advantage of the DIFC as a forum for dispute resolution without any requirement of a nexus or connection with the DIFC.

With regard to dispute resolution, in February 2008, the DIFC and the London Court of International Arbitration ("LCIA") formed a new regional international arbitration centre, the DIFC-LCIA Arbitration Centre, which establishes the Middle East as a leading forum for sophisticated international dispute resolution, supplementing the Abu Dhabi Commercial Conciliation and Arbitration Centre, the Qatar Centre for Reconciliation, the Qatar Financial Centre and the Dubai International Arbitration Centre ("DIAC"). Subsequent to the creation of the DIFC-LCIA Arbitration Centre, the DIFC Arbitration Law 2008, which is based on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, removed the requirement that parties to DIFC-LCIA arbitration must have a nexus or connection with the DIFC. Accordingly, following the passage of the DIFC Arbitration Law 2008 any company or individual can now specify the DIFC as the seat of their arbitration.

The quality of the DIFC-LCIA Arbitration Centre notwithstanding, it remains less popular than the DIAC as a forum for dispute resolution. One potential reason for the relative popularity of the DIAC is simply that the DIAC (first created in 1994 as the "Centre for Commercial Conciliation and Arbitration") has been around for a significantly longer period of time, and has thereby gained general acceptance and has been included in contract arbitration provisions.

Another potential reason is a lingering, although likely unfounded, concern regarding the scope of jurisdiction of the DIFC Courts, and the enforcement of judgments and arbitral awards beyond the boundaries of the DIFC. The concern stems from the law establishing the connection between the DIFC Courts and the Dubai Courts, Judicial Authority Law No. 12 of 2004, which states that DIFC judgments and awards are enforceable by the Dubai Courts if the judgment or award is "final and appropriate for enforcement," and if it has been translated into Arabic. Article 7(2)(a).

The concern regarding enforceability of DIFC-LCIA arbitral awards, to the extent valid considering that the applicable laws were drafted to avoid obstacles to enforcement of judgments and awards outside of the DIFC, may be appreciably negated by the new Protocol of Enforcement. In addition to reinforcing the close ties between the DIFC Courts and the Dubai Courts, the Protocol of Enforcement assists companies and individuals that require their judgments or awards to be enforced beyond the boundaries of the DIFC. Among other things, the Protocol of Enforcement provides for "[p]rocedures where a judgment, award or order of the DIFC Courts (including arbitral awards ratified by the DIFC Courts) falls for enforcement outside the Dubai International Financial Centre Court's Jurisdiction." The Protocol of Enforcement likewise provides for "[p]rocedures where a judgment, award or order of the Dubai Courts (including arbitral awards ratified by the Dubai Courts) falls for enforcement within the Dubai International Financial Centre Court's Jurisdiction."

Although the respective judgments or awards must still be "final and appropriate for enforcement," the intent of the Protocol of Enforcement is that judgments and orders entered by the DIFC Courts, and DIFC-LCIA arbitral awards ratified by the DIFC Courts, will not be challenged legally or factually by the Dubai Courts, but rather essentially will be "rubber-stamped." The Protocol of Enforcement achieves this result among other ways by requiring the Dubai Courts to appoint a single "Execution Judge" charged with executing the order, judgment or award, and expressly stating that such "Execution Judge will apply the Civil Procedures Law and has no jurisdiction to review

the merits of a judgment, award or order of the DIFC Courts." Protocol of Enforcement Para. 1.d.

Once an execution order from the Dubai Courts is obtained, a DIFC-LCIA arbitral award can be enforced within the borders of the UAE pursuant to the UAE Constitution and Federal Law No 11 of 1973 and also should be enforceable in any country that has subscribed to the 1958 New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards (New York Convention). As the UAE became a signatory to the New York Convention in November 2006, DIFC-LCIA arbitral awards are subject to enforcement in New York Convention jurisdictions.

Recent English Decisions on Non-Parties to Arbitration Agreements

Sean Kelsey (London)

Rules of law and procedure under which a non-party to an arbitration agreement might be bound by it, or seek to enforce it, vary from jurisdiction to jurisdiction. Some are more liberal than others. In England, s.82(2) of the Arbitration Act 1996 (the "Act") expressly envisages that a third party might be bound by an arbitration agreement, stating that "*references…to a party to an arbitration agreement include any person claiming under or through a party to the agreement*." Two recent decisions of the English Court of Appeal have illustrated the relatively restrictive approach taken in England to the question of who is bound by an arbitration agreement.

Sancheti

In *The Mayor and Commonalty & Citizens of the City of London v. Ashok Sancheti*, [2008] EWCA Civ 1283, the English Court found that a UK local government authority, the Corporation of the City of London ("the Corporation of London"), was not bound to arbitrate a claim against a foreign national, Mr Sancheti, who had, separately, laid claim to the protections for inward investors pursuant to a bilateral investment treaty ("BIT") in pursuit of a claim against the UK government.

In 2001, Mr Sancheti – an English solicitor and an Indian national – took an assignment of a lease on a property in New Bond Street, London, where he set up in practice. The Corporation of London was the lessor. The lease provided for a rent review to take place in March 2002, with an increase in rent either to be agreed or determined. In July 2002, the Corporation of London proposed a rent increase, but nothing was agreed. The lease came to an end in 2004. In March 2005, the outstanding rent review pursuant to the lease and an increase in rent back-dated to 2002 was determined. The Corporation of London sought to recover the balance from Mr Sancheti.

In May 2005, Mr Sancheti gave notice of a claim for racial discrimination and harassment against the UK, and invoked the terms of the UK-India BIT. The UK-India BIT provides for the arbitration of disputes between investors and contracting parties. In January 2006, the Corporation of London demanded repayment of increased rent and other sums, and in August 2006 it issued proceedings in the Central London County Court. In September 2006, Mr Sancheti served a request for arbitration under the UK-India BIT. Mr Sancheti sought a stay of the Corporation of London's County Court proceedings under s.9 of the Act on the grounds that their subject matter was a dispute covered by the BIT, which was binding on the Corporation of London as an emanation of the UK state "*claiming under or through*" the UK state for purposes of s.82(2) of the Act.

The English Court of Appeal found that a stay under s.9 of the Act can only be granted against a party to the arbitration agreement itself, or someone claiming through or under such a party, and that the fact of some legal or commercial connection between a party to an arbitration agreement and a non-party is not sufficient to bring that non-party within the jurisdiction of an arbitral tribunal pursuant to s.82(2) of the Act. The Corporation of London was not a party to the BIT and hence had not agreed to arbitrate and was entitled to proceed with its County Court claim.

Dallah

In *Sancheti*, an emanation of a nation state (the Corporation of London) was held not to be bound by that nation state's (the UK's) arbitration

agreement pursuant to the BIT. In *Dallah Real Estate and Tourism Holding Company* ("Dallah") *v. The Ministry of Religious Affairs, Government of Pakistan* ("Pakistan") [2009] EWCA Civ 755, a nation state was held not to be bound by an arbitration agreement to which an emanation of that nation state was a party.

Dallah had reached agreement with Pakistan for Dallah to obtain land in Mecca and to construct accommodation for Hajj pilgrims. Pursuant to this agreement, Dallah entered a contract with a trust entity created by Pakistan (the "trust"). The contract contained an arbitration agreement providing for a Paris seat. A dispute arose between Dallah and the trust, by which time the trust had ceased to exist. Dallah pursued its claim against Pakistan before an ICC tribunal, which found that Pakistan, a non-signatory to the arbitration agreement, was bound by it, because Dallah, the trust and Pakistan (the tribunal found) had all intended that Pakistan be bound by it. A final award followed, in which Pakistan was ordered to pay substantial damages to Dallah. When Dallah obtained an order for enforcement of the award in England (the "order"), Pakistan, which had not challenged the award before the French courts, applied to the English Court to set aside the order. The first instance judge, having heard expert evidence as to French law governing the extension of an arbitration agreement to a third party which has not signed that agreement, set aside the order. In July, the English Court of Appeal upheld the judgment.

Differing Approaches to the Position of Non-Parties

ICC tribunal awards which have found that non-parties to arbitration agreements were nevertheless bound by them have received strikingly different treatment from courts supervising the relevant arbitrations. For example, in the *Dow Chemicals* case, the French courts upheld an award made by an ICC tribunal under what has become known as the "group of companies" doctrine. This holds that an arbitration agreement may be relied upon by a third party to it, which is a member of the same group of companies as one of the parties to that agreement, if that third party has played a part in the conclusion, performance or termination of the contract containing the arbitration agreement, and it was the common intention (express or implied) of the parties that the third party be bound by the contract and the arbitration agreement within it. By contrast, in the *Peterson Farms* case, the English court overturned an ICC tribunal decision extending an arbitration agreement to a non-signatory, and it was held that English law does not recognise the "group of companies" doctrine.

The *Dallah* case reprises this more restrictive approach taken by the English courts. *City v. Sancheti* is also significant because the Court overturned the 1977 case of *Roussel-Uclaf v. G. D. Searle & Co. Ltd* – a case (arguably the closest English law has come to an application of a "group of companies" doctrine) in which an English court had held that the wholly-owned subsidiary of a party to an arbitration agreement which was not itself a party to that agreement was nevertheless entitled to rely upon it.