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In this issue:

- News from around the World
- World Investment Treaty Arbitration Update
- Summer of Rule Changes
- *Rent-A-Center, West, Inc. v. Jackson*: Supreme Court Deals Blow to Preemptive Judicial Challenges to Arbitration Agreements
- Swiss Federal Supreme Court Sets Aside Award for Public Policy Violation
- English Court of Appeal Decision Re: Discriminatory Arbitration Agreements (*Jivraj v. Hashwani*)
- Indian Supreme Court Declines to Bind Non-signatory Third Party to Arbitration Agreement under India's Arbitration and Conciliation Act of 1996
- Facilitating the Resolution of Disputes: New ADR Rules of the German Institution of Arbitration
- Second Circuit Court of Appeals Holds that One Arbitrator's Resignation Does Not Require the Arbitration to Start Over Before a New Panel
- New Developments in Institutional Arbitration in Russia
- Interim Judicial Relief Gaining Traction in U.S. Courts
- The UAE's Proposed Federal Arbitration Law

From the Editors

Welcome to the 13th 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

Marcus Birch, London

Africa

Two recent developments in central African energy arbitrations suggest significant government involvement in such cases. In July 2010, an arbitral tribunal issued a ruling in the dispute between KenolKobil (KK) and Kenya Petroleum Refineries Ltd (KPRL), a company partly owned by the Kenyan government, relating to non-payment of crude oil processing fees. KPRL relied on the ruling to terminate processing of crude oil. However, amid concerns as to the effect of this step on the stability of petrol supplies across Kenya, the Government of Kenya ordered the refinery to release the cargo. KK has referred the dispute to arbitration in London, as per the processing agreement, but KPRL has not, as yet, responded to the notice of arbitration.

In Uganda, a dispute is developing between the Government and Heritage Oil and Gas Limited regarding unpaid capital gains tax on recently discovered crude oil deposits in the Lake Albert region. Heritage intends to sell the deposits to Tullow Oil for $1.5 billion, but the Government of Uganda is refusing to approve the sale until it is paid 30% capital gains tax on the proceeds of the deal. Heritage has sought arbitration of the matter, but Energy Minister Hilary Onek has recently stated that it should be resolved through the Ugandan courts.

These disputes, which are attracting considerable press attention, constitute important tests of the attitude to arbitration in African countries.

Americas

United States

Financial reform legislation currently being considered by the U.S. Congress contains proposals to limit arbitration in various sectors. Proposed bills would limit consumer arbitration of financial services contracts, and of broker-dealer and investment advisory claims. If passed, the legislation would authorise the Securities and Exchange Commission and the new Bureau of Consumer Financial Protection to prohibit pre-dispute arbitration agreements in these fields.

The proposed legislation is being considered at the same time as bills for an Arbitration Fairness Act of 2010, which would provide for a more wide-ranging regulation of arbitration in consumer, employment and other sectors involving a disparity of bargaining power. Both House and Senate drafts of the Arbitration Fairness Act have been in congressional committee for several months.

Asia

Malaysia

In August 2010, the Kuala Lumpur Regional Centre for Arbitration adopted the 2010 revised version of the UNCITRAL Arbitration Rules. The Centre is thought to be the first institution to adopt the new revision of the Rules. See the article below for a full review of this and other recent revisions of arbitration rules.

Singapore

The Singapore High Court has held that an agreement to refer insolvency disputes to arbitration was unenforceable as falling within the public policy exclusion. In *Petroprod v. Larsen*, the claimant brought a claim in the High Court seeking to avoid a number of payments made to the defendant, on the basis that they amounted to unfair preferences, transactions at an undervalue, or payments with the intent to defraud the claimant. The defendant applied for a stay pursuant to section 6 of the Arbitration Act, which governs domestic arbitration proceedings, relying on the arbitration agreement between the parties. The claimant argued that the issues that required determination were not arbitrable in that they related to a type of dispute that could only be resolved by the courts. The Court agreed and dismissed the application for a stay. It held that the avoidance provisions in the relevant legislation exist for the benefit of the general body of creditors and that the underlying policy would be compromised if they were subject to private arrangements, including arbitration.

Europe

The European Parliament's Committee on Legal Affairs has adopted its report on the proposed reform of the Brussels Regulation. The report, which rejects the proposal to abolish the arbitration exclusion in the Regulation, will now be submitted to the European Parliament for discussion in plenary session in early September 2010.

England and Wales

The English High Court has clarified the requirements for a connection with England to found jurisdiction for the Court to appoint a tribunal.

In *Chalbury McCouat International Ltd v. P.G. Foils Ltd*, a contract between Chalbury, an English company, and Foils, an Indian company, contained an arbitration clause which did not provide a procedure for the appointment of a tribunal. The parties failed to appoint a tribunal. Section 18 of the Arbitration Act 1996 gives the court powers to appoint tribunals in such circumstances, but only applies where the seat of the arbitration is in England. Since the arbitration clause did not designate a seat, the court assessed whether, by reason of a connection with England, it was appropriate to exercise the Section 18 power. That court found that it was: one party was English, the likely proper law of the dispute was English law, and payment under the contract was to be made in England. The only connection with India was that Foils was an Indian company operating in India. Accordingly, the court found that there was a sufficient connection with England for the court to exercise its Section 18 power. It directed that the tribunal be appointed by the London Court of International Arbitration.

This case demonstrates the importance of making provision for not only the proper law of the dispute, but also the seat of the arbitration and the procedure for the appointment of the tribunal.

Oceania

Australia

The amendments to the International Arbitration Act 1974 were passed through both Houses of Parliament in June and received Royal Assent on 6 July 2010. The amendments are a central element in efforts to increase Australia's attractiveness as a venue for international arbitration.

Institutions

IBA

The IBA Arbitration Committee's Task Force on Counsel Ethics in International Arbitration is conducting a survey of the experiences of users of international arbitration, members of arbitral institutions, counsel and arbitrators regarding ethical

conflicts and the need for international guidelines in counsel ethics in international arbitration proceedings. The survey is available at: http://www.surveygizmo.com/s3/331908/IBA-Arbitration-Committee-Counsel-Ethics-in-International-Arbitration-Survey.

UNCITRAL
The new UNCITRAL Arbitration Rules 2010 came into force on 15 August 2010. The 2010 Rules will apply to arbitrations pursuant to agreements concluded after 15 August 2010, unless the parties agree otherwise (*Article 1(2)*). The previous version of the rules, the 1976 Rules, will continue to apply to arbitrations pursuant to agreements pre-dating 15 August 2010, unless the parties agree that the 2010 Rules should apply. The new Rules contain a number of key changes, which are discussed in the article below.

World Investment Treaty Arbitration Update

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

In each edition of Arbitration World, members of K&L Gates' Investment Treaty practice provide updates concerning recent, significant investment treaty arbitration news items. This edition features summaries of a number of recent annulment decisions involving Argentina and Egypt; a discussion of the definition of investment in two awards in favor of Turkey and Costa Rica; a review of the Dutch Supreme Court's decision relating to four Russian arbitral awards in favor of Yukos Capital; and a synopsis of conflicting interpretations by the parties of an arbitral award involving the government of Jordan.

Recent Annulment Requests by Argentina and Egypt

Argentina – Mixed Results in Annulment Requests
To date, approximately ten awards have been issued against Argentina awarding damages in response to more than forty international arbitrations over measures it took in the wake of its financial crisis of 2001-02. Many claims are still pending and only a few have resulted in awards in Argentina's favor. Recently, two separate ICSID ad hoc committees annulled awards in favor of foreign energy companies. *See Sempra Energy Int'l v. Argentine Republic (ICSID Case No. ARB/02/16)* (June 29, 2010 decision on annulment) and *Enron Creditors Recovery Corp. and Ponderosa Assets, LP v. Argentine Republic (ICSID Case No. ARB/01/3)* (July 30, 2010 decision on annulment). In contrast, a U.S. federal court recently upheld two awards against Argentina. These decisions raise interesting questions, particularly for pending claims against Argentina.

In annulling the awards against Argentina, *Sempra* and *Enron* reach essentially the same conclusion for seemingly different reasons. Both decisions concern claims under the US-Argentina bilateral investment treaty ("BIT") brought in response to a law Argentina enacted that allegedly interfered with the investors' entitlement to charge tariffs in US dollars under gas supply contracts and to adjust the tariffs semi-annually to a US inflation index. In *Sempra*, Argentina argued the measures it took were "necessary," to protect public order or in the face of an "essential security interest," consistent with Article 11 of the BIT. Weighing conflicting expert interpretations, and given the BIT fails to define the term "essential security interest," the tribunal looked to Article 25 of the International Law Commission's "Articles for Responsibility of States for Internationally Wrongful Acts" definition for a "state of necessity." The tribunal decided that Article 11 was "inseparable" from customary international law, and concluded that Argentina breached the BIT. Despite this detailed analysis, the committee determined that Article 11 "differs significantly" from customary law and concluded that the tribunal exceeded its powers by failing to identify and apply the relevant law (Article 11 of the BIT). It annulled the USD $128 million award, ordering Sempra to pay the costs of the annulment proceedings.

In *Enron*, the committee annulled a USD $106 million award because it determined that the tribunal failed to properly apply Article 11 of the BIT in rejecting Argentina's defense of "necessity." The committee held that the tribunal could have interpreted Article 11 as being similar to or informed by customary international law, but

disagreed with the tribunal's analysis of whether Argentina contributed to the state of necessity and whether the measures were the "only way" of addressing the crisis. In contrast to *Sempra*, the *Enron* committee appears to have concluded that the tribunal incorrectly applied the law instead of deciding that they failed to apply the relevant law. In September 2007, an ICSID committee refused to annul an award entered against Argentina under similar circumstances. The committee in *CMS Gas Transmission Co. v. Argentine Republic (ICSID Case No ARB/01/8)* strongly criticized the tribunal for erroneously interpreting Article 11 under customary international law, but ultimately determined it must uphold a large part of the award because it could not "act[] as a court of appeal," since an error of law is not a basis for annulment under the ICSID Convention. It remains to be seen whether the claimants in *Sempra* or *Enron* will resubmit any factual or legal issues to ICSID and whether Argentina will press for annulment of two other awards (involving wastewater treatment concessions) issued against it on the same day as the *Enron* annulment.

On June 7, 2010, Judge Walton of the U.S. District Court for the District of Columbia reached a different conclusion and denied two petitions to vacate or modify UNCITRAL awards rendered against Argentina. *See Republic of Argentina v. BG Group Plc*, No. 08-485 (D.D.C.); *Republic of Argentina v. Nat'l Grid Plc*, No. 09-248 (D.D.C.). Ostensibly agreeing with the *CMS* decision, Judge Walton held in *BG Group* that Argentina's attack on the validity of the award was premised on assertions of error by the arbitral panel. Because the court is not charged to review decisions like an "appellate court," it had "no choice but to deny the relief sought by Argentina." The Judge granted Argentina's request to file a supplemental memorandum in response to BG Group's motion to confirm the award. In *National Grid*, Judge Walton denied Argentina's petition for a different reason – its failure to file the motion to vacate within the three-month period prescribed under the Federal Arbitration Act, 9 U.S.C. §§ 1-14. The Judge granted National Grid's motion to confirm the award. Argentina has appealed the decisions.

Egypt – Government Succeeds in Having Award in its Favor Upheld

On June 14, 2010, an ad hoc committee upheld the award issued in an ICSID action brought by Helnan International S/A against the government of Egypt. The tribunal rejected Helnan's claims under the Denmark-Egypt BIT that Egypt had conspired to downgrade a Helnan-operated hotel from five to four stars as a prelude to privatizing the hotel, and using the downgrade as a pretext for ending Helnan's management contract. Helnan sought annulment of the award, raising a series of criticisms, including that the arbitrators had failed to state their reasons and had committed manifest excesses of power. Although the committee upheld the award, it took issue with a paragraph that it felt was a manifest excess of powers because it obligated Helnan to make use of local remedies before allowing it access to international arbitration. Nevertheless, it determined that because that section was not essential to the tribunal's decision to dismiss Helnan's claims, there were no grounds to set aside the award. The impact of the committee's decision is unclear – the ruling that it was inappropriate for the tribunal to require the claimant to seek redress in local courts before filing its ICSID claim seems to stand as a warning to future tribunals against issuing such requirements.

Definition of "Investment" in Awards Relating to Turkey and Costa Rica

Turkey Fends off $19 Billion Claim Concerning Alleged Telecoms Expropriation

On July 14, 2010, a tribunal declined jurisdiction over a USD $19 billion claim, reportedly the largest in ICSID's history. Dutch-Jordanian national, Saba Fakes, brought the claim over his investment in Turkey's mobile phone operator, Telsim Mobil Telekomunikayson Hizmetleri A.S., one of more than 200 companies owned by the Uzan family that were seized by authorities in 2003. Fakes claimed to have acquired a majority stake in Telsim in 2003 through a series of share transfer agreements under which he paid an advance of USD $3,800 for legal title of the shares while the Uzans retained beneficial ownership. Fakes demanded compensation under the Netherlands-Turkey BIT arguing that Telsim was "grossly mismanaged" by the government while in receivership and "vastly undervalued" when it was sold by auction to Vodafone in 2005. The tribunal rejected the case on

jurisdiction and ruled that Fakes did not have an "investment" under the ICSID Convention ("the Convention") or the BIT because it was clear from his testimony that he did not hold legal title to the shares and that no transfer of rights had ever been intended or effected. In an extensive discussion of what constitutes an investment, the tribunal observed that an "objective definition" of investment was contemplated in the Convention and that no "unanimous approach has emerged" from prior ICSID cases. After discussing a number of different approaches, the tribunal determined that three criteria are "necessary and sufficient" to define an "investment": (1) a contribution, (2) some element of risk, and (3) a certain duration. They concluded that neither the plain language nor the "object and purpose" of the Convention require consideration of any other criteria, and rejected the notion (as contained in the *Salini* test) that a contribution to the host State's economic development is necessary. The tribunal also determined that, consistent with the language of the Convention, the principles of good faith and legality are not prerequisites for an investment, nor must it be of a particular size, value or be successful. Although the BIT in this case did not, the tribunal acknowledged that a BIT may expressly set up additional requirements, for example, that the investment be lawful under the host State's laws. The tribunal ordered Fakes to pay Turkey over USD $1.5 million in legal fees and arbitration costs.

ICSID Tribunal Determines Deposits in Ponzi Scheme Are Not an "Investment"

On May 19, 2010, an ICSID tribunal rejected jurisdiction over claims brought by 137 Canadians against Costa Rica concluding money lost in a Ponzi scheme did not constitute an "investment" under the Canada-Costa Rica BIT. *See Alasdair Ross Anderson et al. v. Costa Rica (ICSID Case No. ARB(AF)/07/3).* The claimants, along with over 6,200 people, many of them foreigners, deposited approximately USD $405 million with two Costa Rican brothers, Luis Enrique and Osvaldo Villalobos Camacho, based on promises that they would earn 36 per cent annual interest. Rather than investing the money, the brothers used it to pay the interest owed to earlier depositors. Claimants alleged that Costa Rica failed to properly supervise the brothers' financial activities. The victims of the scheme could have filed a civil complaint for compensation in the Costa Rican courts, but only approximately 300 of them chose to do so, whereas the Canadian depositors sued Costa Rica under the Canada-Costa Rica BIT.

Article 1(g) of the BIT defines an investment as "any kind of asset owned or controlled either…by an investor of one contracting party **in accordance with the latter's laws….**" The tribunal interpreted this as a legality requirement and concluded the transactions were illegal "because [they] violated the Organic Law of the Central Bank" and that the deposits did not constitute "investments" under the BIT, despite the fact that the claimants "may not have committed a crime by entering into the transactions." Claimants reasonably argued that the tribunal should consider whether their ownership rights were "legal obligations" under Costa Rican law. Rejecting that approach as "too narrow," the tribunal emphasized that the claimants should have exercised "due diligence…to assure themselves that their investments compl[ied] with the law." The requirements that an investor know in detail the laws of the country in which he is investing and investigate whether the individual or entity with whom he is investing is acting in full compliance with those laws would seem to act counter to the purpose underlying BITs – promoting and protecting foreign investments.

Dutch Supreme Court Ends Yukos Appeals Process

On June 25, 2010, in a decision with potential implications for the future enforcement of arbitral awards in the Netherlands, the Dutch Supreme Court terminated a large part of the Yukos enforcement case. The Supreme Court determined that the judgment of the Amsterdam Court of Appeal granting Yukos leave to enforce four arbitral awards worth over USD $430 million against Russian state oil company, Rosneft, could stand despite prior decisions setting aside the awards. It further declared Rosneft's appeal of the Court of Appeal decision "inadmissible." The four arbitral awards were issued in September 2006 by a tribunal at the International Court of Arbitration of the Moscow Chamber of Commerce to compensate Yukos Capital for loans on which Yukos Oil subsidiary, Yuganskneftegaz, defaulted after it was auctioned off to Rosneft in 2004. Rosneft successfully petitioned the Moscow Arbitrazh Court

to set aside the awards in May 2007. Yukos appealed to the Amsterdam District court, arguing that the decisions to set aside should not interfere with enforcement of the awards. Rosneft countered that, under Article V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), enforcement *may* be refused upon proof that it has been set aside by a competent authority of the country in which the award was made. While the lower court agreed with Rosneft, the Amsterdam Court of Appeal granted Yukos leave to enforce the awards in April 2009 (despite the prior decisions vacating the awards) on the basis that the Netherlands should not recognize decisions of the Russian judiciary in cases related to Yukos, given it is not impartial and independent on matters concerning Russia's own interests.

Rosneft appealed to the Supreme Court, which declared the appeal inadmissible under a combination of Dutch law and the New York Convention. Without addressing the impartiality issue, it relied on a clause in the Dutch Code of Civil Procedure that prohibits appeals of decisions granting leave to enforce domestic arbitral awards. The Supreme Court accepted Yukos' argument that allowing Rosneft to appeal would violate Article III of the New York Convention, since it would make it easier to enforce a domestic award than a Russian one. The decision sets up an interesting dissonance between the rights of parties seeking to enforce or to vacate arbitral awards in the Netherlands. A decision granting enforcement of an award is not appealable; a decision vacating an award, on the other hand, may be appealed.

Both Parties Claim Victory in ICSID Arbitration Against the Government of Jordan

An ICSID tribunal has dismissed one part of a Turkish construction company's claim against Jordan but upheld another, leading both sides to claim victory. The original arbitration concerned a dike that ATA constructed in the Dead Sea. After the dike collapsed, the company that hired ATA, Arab Potash Company (APC), which was controlled by Jordan at the time, sought over USD $50 million in an ad hoc arbitration. In 2003, a tribunal exonerated ATA of liability for the collapse and awarded it nearly USD $6 million in damages under its counterclaims. The Jordanian Court of Appeal and the Court of Cassation ruled successively that the award should be annulled because the tribunal had erred in law by failing to attach strict liability to ATA for the collapse, and that the arbitration agreement should be cancelled. ATA filed an ICSID claim alleging that the annulment of the award and cancellation of the arbitration agreement amounted to an expropriation of ATA's investment, in violation of the Turkey-Jordan BIT. The tribunal upheld the annulment because the claims were filed before the BIT became effective in 2006. However, it ruled that the cancellation of the agreement breached the BIT, since ATA's right to arbitration was an investment that "crystallized when the Jordanian Court of Cassation rendered its decision" after the BIT entered into force, and determined that ATA is entitled to re-file a claim under the agreement. The tribunal was reconstituted on July 22, 2010 to address Egypt's application for interpretation of whether APC is entitled to the same relief.

Summer of Rule Changes

Raja Bose and Ashish Chugh, Singapore

Over the summer, both the United Nations Commission on International Trade Law ("UNCITRAL") and the Singapore International Arbitration Centre ("SIAC") have made substantial revisions of their respective arbitration rules with a view to making arbitration more efficient and expeditious.

UNCITRAL Arbitration Rules 2010

The UNCITRAL Arbitration Rules have been widely used since 1976 to resolve a wide variety of commercial, investment and inter-state disputes. The revised UNCITRAL Arbitration Rules 2010 (which came into effect on 15 August 2010) try to retain the flexibility and broad appeal of the 1976 Rules, while introducing some novel features.

The new Rules include provisions to deal with multi-party arbitrations, to empower the Tribunal to order interim measures, and to enable parties to object to Tribunal-appointed experts, and introduce procedural mechanisms for the replacement of an arbitrator and for the review of the costs of arbitration. The new Rules also remove the

stipulation that an arbitration agreement must be "in writing" (in line with the change reflected in the UNCITRAL Model Law on International Commercial Arbitration 2006). The Rules allow a Tribunal to make orders for "witnesses out of court" and direct witnesses to be heard and examined by videolink, and detail circumstances in which the award may be made public.

In perhaps a presage of its future use and popularity, the Kuala Lumpur Regional Centre for Arbitration has become the first institutional arbitration centre to comprehensively adopt the new rules on the same date that the rules came into effect.

SIAC Rules 2010

The SIAC Rules 2010 took effect on 1 July 2010 and will apply to all SIAC arbitrations commenced on or after that date. The stated objectives of the revision were to balance the hallmarks of institutional arbitration, such as the need for certainty and efficiency, with the greater degree of flexibility and autonomy that was perceived to be required. The key changes in the SIAC Rules 2010 broadly fall into four categories:

(a) Reduction of time and costs
Rule 5 provides for an expedited procedure, which a party can apply for if the amount in dispute does not exceed S$5million, or in case of exceptional urgency, or if all parties agree. If the expedited procedure is to be applied, then the SIAC Registrar may shorten the time limits under the rules and the case will ordinarily be referred to a sole arbitrator, who shall make an award within six months from the date the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time. Under such procedure, the Tribunal is obliged to only state the reasons for the award in summary form.

The removal of the requirement for a Memorandum of Issues should also reduce costs and shorten the timetable for arbitral proceedings.

(b) Emergency Arbitrator procedure
Rule 26 introduces the concept of an Emergency Arbitrator to assist parties who require emergency interim relief before the constitution of the Tribunal. The Emergency Arbitrator is to be appointed by the SIAC Chairman in appropriate cases within one business day of receipt of a party's application. The Emergency Arbitrator is empowered to award any interim relief considered necessary, which may be reconsidered only by the Tribunal. Absent agreement of the parties, the Emergency Arbitrator cannot subsequently act as an arbitrator in the dispute. The award of the Emergency Arbitrator ceases to be binding if the Tribunal is not constituted within 90 days of such award or where the Tribunal makes a final award.

(c) Increased Tribunal authority
Rule 17 allows the Tribunal to decide the timetable for submission of written statements and other documents rather than the Rules themselves prescribing a definitive timeframe. Certain powers have also been transferred from the SIAC Registrar to the Tribunal, such as the power to determine the seat of the arbitration where the parties do not agree under Rule 18.

(d) Promotion of equality of treatment
Rule 24.1(h) gives the Tribunal the explicit power to issue an award for any unpaid arbitration costs. This remedies the situation under the previous regime where a claimant could be compelled to pay the initial costs of arbitration so as to continue with the arbitration, where the respondent refused to pay its share.

In respect of multi-party arbitration, Rule 9 gives each party an equal say in the appointment of arbitrators. The rule provides that if a single arbitrator is to be appointed, all parties have to agree on the arbitrator and if three arbitrators are to be appointed, the claimant will jointly nominate one arbitrator and the respondent will jointly nominate the other. In the absence of such a joint nomination within the stipulated period, the SIAC Chairman will appoint the arbitrator(s).

Finally, Rule 10.7 expressly prohibits any party from unilaterally communicating with an arbitrator or a candidate for appointment as arbitrator, save for communications with candidate party-nominated arbitrators in certain prescribed areas.

Rent-A-Center, West, Inc. v. Jackson: Supreme Court Deals Blow to Preemptive Judicial Challenges to Arbitration Agreements

Kiran Mehta and Matthew DeAntonio, Charlotte

A recent United States Supreme Court case limits the ability of parties to preemptively challenge the validity of an arbitration agreement in court. In *Rent-A-Center, West, Inc. v. Jackson*, the Court held that arbitrators—not courts—should decide claims that an arbitration agreement is unenforceable when the parties specifically delegate that issue to the arbitrator.

Prior to *Rent-A-Center*, courts—not arbitrators—usually decided the question of whether an arbitration agreement was valid. The rationale for this rule was that because arbitration is a matter of contract between the parties, the arbitrator only had authority to hear disputes that the parties specifically agreed to submit to arbitration. Thus, before an arbitrator had any power to hear the case, it was necessary for the court to make a gateway determination that the parties' agreement was valid.

Yet requiring the courts to make this gateway validity determination defeats some of the primary goals of arbitration: increasing efficiency, reducing costs, and ensuring a predictable dispute resolution mechanism. As a result, parties began to include provisions in their arbitration agreements expressly delegating the validity question to the arbitrator. The dispute in *Rent-A-Center* concerned such a "delegation clause." In that case, an employee, Jackson, sued his employer, Rent-A-Center, alleging race discrimination and retaliation. Rent-A-Center sought to compel arbitration pursuant to the parties' stand-alone arbitration agreement, which included a delegation clause stating, "The Arbitrator . . . shall have exclusive authority to resolve . . . any claim that all or any part of this Agreement is void or voidable."

Jackson opposed arbitration on the grounds that the entire stand-alone agreement agreement was unconscionable. Under state law, Jackson argued, the unconscionability rendered the entire agreement—including the delegation clause—invalid. Jackson's argument presented a difficult dilemma to the Court. By sending the validity question to the arbitrator, a court would have to enforce the delegation clause before the underlying agreement was determined to be valid. However, by addressing the validity question itself, a court would have to reject the delegation clause before that very clause was determined to be invalid.

In *Rent-A-Center*, the Supreme Court resolved this dilemma by applying a "severability" rule. According to that rule, the arbitration agreement and the accompanying delegation clause are two distinct contracts. Thus, even when a party challenges the validity of the agreement as a whole, the delegation clause remains valid and the arbitrator must hear the validity dispute. However, when a party challenges the delegation clause specifically, the court must make a gateway determination that the delegation clause is valid before allowing the arbitrator to decide whether the remainder of the agreement is valid.

The Court did not describe what would constitute a valid challenge to a delegation clause, but its reasoning suggests that successful challenges will be rare. Not only must a party nominally challenge the delegation clause, but the substance of the validity argument must attack the delegation clause rather than the agreement as a whole. This requirement increases the difficulty of mounting a successful challenge because many common bases for challenging the validity of arbitration agreements—such as the limitation of remedies or discovery procedures—usually have no bearing on whether a delegation clause is unconscionable. As a result, the presence of a delegation clause will usually result in an arbitrator, not a court, determining whether the arbitration agreement is valid.

Additional Requirement: Clear and Unmistakable Evidence

Rent-A-Center also clarifies another important requirement for the enforceability of delegation clauses. The Supreme Court has held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." In this section of the Court's opinion, the Court was

focused on the issue of which deciding body—judge or arbitrator—was empowered in the first instance to decide the question of whether a particular claim asserted in the arbitration was in fact arbitrable. In *Rent-A-Center*, Jackson argued that given his unconscionability claim, his agreement to the delegation clause was not clearly and unmistakably valid. The Court rejected that argument. The Court explained that this requirement pertains to the parties' manifestation of intent, not to the agreement's validity. This rule essentially requires the agreement's language to be clear and precise as to the parties' intent to arbitrate arbitrability. This aspect of the Court's decision also decreases the likelihood of a successful challenge to the agreement's validity because most carefully drafted arbitration clauses will contain such clear and unmistakable language.

The requirement that the delegation clause must contain clear and unmistakable language is especially relevant given the common practice of referring to institutional rules in arbitration agreements. For example, an arbitration agreement may incorporate the rules of a national arbitration organization, and those rules might delegate the arbitrability question to the arbitrator. Some commentators assert that the validity of these "incorporated" delegation clauses will be hotly contested after the Court's decision in *Rent-A-Center*. The validity of these incorporated delegations likely turns on the clear and unmistakable requirement.

What does the future hold?

Rent-A-Center solidifies the paramount importance of the parties' contract as the basis for arbitration, a holding fully in keeping with other cases decided by the Supreme Court during the 2009-10 term. For example, the Court held earlier in the term in *Stolt-Nielsen, N.A. v. AnimalFeeds International, Corp.* that class arbitration would not be allowed absent a specific provision in the parties' arbitration agreement explicitly or implicitly authorizing class relief. Additionally, in *Granite Rock Co. v. International Brotherhood of Teamsters*, a case decided a few days after *Rent-A-Center*, the Supreme Court rejected an argument from a labor union that arbitration of certain disputes, in particular labor disputes, was required based upon federal policy, even in circumstances where evidence of the parties' agreement to arbitrate the dispute is lacking.

A different issue will be argued before the Court in its next term, beginning October 4, 2010, in *AT&T Mobility, LLC v. Concepcion*. The question presented is "whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here class wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims." In this case, AT&T Mobility challenges the application of a California law precluding arbitration of consumer complaints unless class arbitration of those complaints was permitted. The outcome will be highly anticipated by consumer and industry groups eager to see if the Court's decisions this past term will foreshadow continued reliance by the Court upon the parties' arbitration agreements in shaping arbitration proceedings.

Swiss Federal Supreme Court Sets Aside Award for Public Policy Violation

Martin King, London

Earlier this year, in the case of *Atletico Madrid v Benfica & FIFA*, the Swiss Federal Supreme Court (the "Supreme Court") set aside an arbitral award of the Court of Arbitration for Sport ("CAS"). Whilst rare, the setting aside of a CAS Award is not unprecedented. This is, however, the first time that the Supreme Court has acceded to a challenge to an arbitral award on public policy grounds. The dispute has a complex factual history, but the resulting message from the Supreme Court is relatively clear: disregarding *res judicata* violates procedural public policy.

The Facts

In September 2000, the Portuguese football club, Benfica, signed the footballer "Dani" from the Dutch football club, Ajax. Within months of joining Benfica and having been disciplined for his conduct, Dani purported to terminate his playing contract with Benfica and subsequently signed for

Spanish club Atletico Madrid. A legal battle between Benfica and Dani ensued, which was ultimately settled by agreement in 2003. During the same period, Benfica were awarded training compensation of $2.5m from Atletico Madrid by a FIFA Special Committee pursuant to the FIFA Regulations on the Status and Transfer of Players. Training compensation is intended to compensate the clubs that have trained young players, and is applicable when a player signs his first contract as a professional and each time the player is transferred until the end of the season of his 23rd birthday. Atletico Madrid appealed to the Zurich Commercial Court (at that time, FIFA decisions were not referable to the CAS) which declared FIFA's decision null and void on the basis that it was in breach of European and Swiss competition laws. FIFA later rejected a further claim by Benfica for training compensation and Benfica appealed to the CAS (by this time an appellate procedure to the CAS had been included in FIFA's Regulations). A CAS Tribunal subsequently ordered Atletico Madrid to pay Benfica compensation of €400,000. Atletico Madrid appealed to the Supreme Court.

The Decision

The Supreme Court held that the issue before the CAS Tribunal as to the legality or otherwise of FIFA's decision on training compensation had already been decided by the Zurich Commercial Court. It was irrelevant that the FIFA Regulations had introduced an appellate procedure to the CAS between the decisions in Benfica's first and second claims for training compensation before FIFA; the fact that an arbitral tribunal was the appropriate appellate body rather than the Zurich Commercial Court was irrelevant to the application of the principle of *res judicata*. The Zurich Commercial Court had held as null and void the obligation to pay training compensation and CAS' award disregarding that decision was barred by *res judicata*. The CAS award was set aside.

Discussion

It was the introduction of the CAS appellate procedure to the FIFA Regulations in the intervening period between the two different decisions which created the slightly odd opportunity for the same issue to be determined differently by two separate appellate authorities in the same jurisdiction.

The Supreme Court distinguished between fundamental procedural public policy principles (e.g. an impartial tribunal and rules of natural justice), the violation of which contradicts justice, rendering a decision incompatible with the legal order of a state ruled by law, and substantive public policy principles (governing the recognition of rights and obligations with respect to the subject matter of a dispute). It made clear that *res judicata* was a part of procedural public policy.

The question facing the Supreme Court was therefore quite plain: whether the same issue(s) between the parties had already been validly determined. Since the answer was yes, the CAS award was in violation of a fundamental principle of procedural public policy and was set aside.

So, whilst the case is ground-breaking in the sense of being the first occasion on which an arbitral award has been set aside on public policy grounds in Switzerland, it is not earth-shattering in that it does not alter the traditional reluctance of the Swiss Courts to intervene in arbitration. Rather, the Supreme Court has cemented the place of *res judicata* within the category of procedural public policy principles.

English Court of Appeal Decision Re: Discriminatory Arbitration Agreements (*Jivraj v. Hashwani*)

Lauren Warner, London

The Court of Appeal in England has ruled in *Nurdin Jivraj* v. *Sadruddin Hashwani* [2010] EWCA Civ 712 that arbitrators are employees for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).

Background

In this case, the appellant, Mr. Hashwani, and the respondent, Mr. Jivraj, both of whom were members of the Ismaili community, had entered into a joint venture agreement to make investments in real estate. Eventually, Mr. Hashwani and Mr. Jivraj decided to terminate their agreement and disputes arose in relation to the division of the joint venture

assets. Article 8(1) of the joint venture agreement provided that the arbitrators were to "be respected members of the Ismaili community and holders of high office within the community". When attempts to resolve the disputes failed, Mr. Hashwani notified Mr. Jivraj of a claim for £1,412,494 and the appointment of Sir Anthony Colman as one of three arbitrators. Mr. Jivraj subsequently sought a declaration that the appointment of Sir Anthony was invalid, as Sir Anthony was not a member of the Ismaili community.

At the first instance, the High Court of England and Wales considered whether the requirement in an arbitration agreement for the arbitrators to be members of the Ismaili community was unlawful and a breach of either the Employment Equality (Religion or Belief) Regulations 2003 (the "Regulations"), the Human Rights Act 1998 (the "HRA") or public policy. The court also considered whether that part of the arbitration agreement could be severed.

The court held that the requirement to appoint an arbitrator who is a member of the Ismaili community was valid and enforceable. Steel J commented that if the requirement for an Ismaili arbitrator were invalid, the entire arbitration agreement would be void. Steel J held that the Regulations did not apply to the selection, engagement or appointment of arbitrators as arbitrators were not employees under the Regulations. Steel J concluded that the requirement did not breach the HRA and that it was inappropriate for the courts to circumvent parliamentary intention about this issue under the guise of there being a gap in public policy. Additionally, Steel J declared Sir Anthony's appointment as invalid, as it did not comply with the arbitration clause.

Court of Appeal decision

The Court of Appeal held that the arbitration agreement was void in its entirety and that arbitrators are employees for the purposes of the Regulations.

Arbitrators are "employees" under the Regulations

The Court of Appeal agreed with Mr. Hashwani's submission that the Regulations are intended to apply to all forms of employment in the broadest sense, including the provision of services under any form of contract. Moore-Bick LJ noted that arbitration rests fundamentally on agreement, both agreement between the parties themselves and agreement between the parties and the arbitrator. A person appoints an arbitrator under a contract according to which the arbitrator personally provides services to determine a dispute. The Court found that this arrangement is no different from one appointing a solicitor to deal with a piece of business.

Arbitration clause in breach of regulation 6(1)(a) and 6(1)(c)

The Court of Appeal held that the requirement to select an arbitrator from the Ismaili community under article 8(1) of the joint venture agreement was in breach of regulation 6(1)(a) and 6(1)(c) and therefore void, unless it could be brought within regulation 7. Under regulations 6(1)(a) and 6(1)(c), respectively, it is unlawful for an employer to discriminate when determining to whom he should offer employment or by refusing or deliberately not offering employment. Regulation 7 provides an exception where being of a particular religion or belief is a genuine and determining occupational requirement and it is proportionate to apply such requirement, whether or not the employer has an ethos based on religion or belief. In Moore-Bick LJ's judgment, the exception under regulation 7 did not apply, as article 8(1) called for the dispute to be determined according to English law, which does not require a particular religion or ethos.

Severance

The requirement for Ismaili arbitrators was viewed as an integral part of the arbitration agreement by both the High Court and the Court of Appeal. It was held by both that the requirement could not be severed without substantially altering the agreement from what the parties originally had intended. The Court of Appeal also affirmed that Sir Anthony's nomination was invalid albeit on different grounds, namely that the agreement to arbitrate no longer existed.

Comment

This decision by the Court of Appeal that arbitrators are employees for the purposes of the Regulations has implications for the drafting of arbitration clauses. Where arbitration clauses require

arbitrators to be from specific religious or ethnic groups or to be of a particular age, gender or sexual orientation, such clauses may be found to be invalid. Also, some commentators suggest that the decision may prevent the selection of arbitrators based on nationality, due to the prohibition against discrimination on the ground of nationality under the Race Relations Act 1975. It may be possible that a nationality requirement would fall under the regulation 7 exception if the parties were to argue that a neutral chair is paramount to ensuring the parties' trust that a non-biased award can be secured. However, there is a risk of the clause failing in such circumstances, given the narrow application of regulation 7. Finally, the Regulations are retroactive, so any clauses drafted prior to 2003 should be reviewed for compliance.

Initial indications are that the judgment is likely to be the subject of an appeal and we will report on any further developments in relation to this case in future editions.

Indian Supreme Court Declines to Bind Non-signatory Third Party to Arbitration Agreement under India's Arbitration and Conciliation Act of 1996

Bradley Bowen, Seattle

In *Indowind Energy Ltd. v. Wescare (India) Ltd*. (April 27, 2010), the Indian Supreme Court held that a non-signatory third party could not be bound by an arbitration agreement it had not signed and where the agreement had not subsequently been ratified, approved, adopted, or confirmed by the third party. The case demonstrates the Indian Supreme Court's conservative approach in determining whether to bind non-signatory third parties to arbitration agreements. In light of the decision, if a third party is likely to benefit from a contract containing an arbitration agreement governed by Indian law, contracting parties should consider whether it is appropriate to include the third party as an express signatory to the agreement.

The decision involved Subuthi Finance Ltd ("Subuthi"), which acted as a promoter for Indowind Energy Ltd. ("Indowind"). In 2006, Wescare India Ltd. ("Wescare") entered into an agreement of sale with Subuthi that described Subuthi as the buyer and also as the promoter of Indowind. The agreement of sale contained an arbitration clause. Disputes eventually arose out of the agreement.

The Court relied on Section 7 of India's Arbitration and Conciliation Act of 1996 (the "Act") to determine whether there was a valid arbitration agreement. Under Section 7 of the Act, an arbitration agreement must be in writing. The Court noted that there had been no communications that provided a written record of an arbitration agreement between Wescare and Indowind. The Court noted that Wescare did not expressly enter into an agreement with Indowind with the intention of making an arbitration agreement: "In the absence of an arbitration agreement between Wescare and Indowind, no claim against Indowind or no dispute with Indowind can be the subject-matter of reference to an arbitrator. This is evident from a plain, simple and normal reading of [S]ection 7 of the Act."

The Court also found that although Subuthi described itself as Indowind's promoter, that fact did not make Indowind a party to the arbitration agreement in the absence of ratification, approval, adoption or confirmation of the underlying agreement. Wescare argued the Court should infer that Indowind was party to the agreement because Indowind's conduct demonstrated it acted in accordance with the agreement. The Court rejected this argument. The Court noted that a contract can be entered into orally or created from correspondence or conduct, but an arbitration agreement can only come into existence in the manner contemplated by Section 7 of the Act. The Court stated: "If [S]ection 7 says that an arbitration agreement should be in writing, it will not be sufficient for the petitioner in an application under [S]ection 11 to show that there existed an oral contract between the parties, or that Indowind had transacted with Wescare, or Wescare had performed certain acts with reference to Indowind, as proof of arbitration agreement." The Court also indicated that it may have deemed Wescare a party to the arbitration agreement had Wescare acknowledged or confirmed in any subsequent correspondence or documentation that it was party to the arbitration agreement. However, those facts were not before the Court.

Additionally, a clause in the underlying agreement indicated that the agreement would be null and void unless expressly approved by the Board of Directors and shareholders of Wescare, Subuthi and Indowind. While Wescare and Subuthi approved the agreement, Indowind did not. The Court reasoned that in the

absence of such approval by Indowind, Indowind could not be deemed a party to the arbitration agreement.

Facilitating the Resolution of Disputes: New ADR Rules of the German Institution of Arbitration

Dr. Eberhardt Kühne and Ishak Jonas Isik, L.L.M., Berlin

In most cases it is difficult to determine in advance in a contract which of the various forms of alternative dispute resolution (ADR) will best serve the purpose of resolving future disputes. On the initiative of academics, practitioners and in-house lawyers, the German Institution of Arbitration (DIS) has recently addressed this issue, and introduced the DIS Conflict Management Rules (CMR) as well as new supplementary ADR procedures.

DIS Conflict Management Rules: Main characteristics

Initiation of CMR procedure and appointment of the conflict manager

The procedure is initiated either, based on a contractual arrangement providing for such preliminary proceeding, by one party to the dispute (Sec. 1(1) CMR), or, lacking such agreement, the CMR procedure may also be unilaterally initiated if a party submits a request to the DIS Secretariat that then seeks a written consent from the other party (Sec. 1(2), 3(1) CMR). If the other party does not respond within two weeks after the receipt of the request, then there is no consent (Sec. 3(3) CMR). The procedure commences upon receipt of the request (in case of agreement) or in case of unilateral initiation upon the written consent, and payment of the provisional advance on the conflict manager's remuneration (Sec. 3(6) CMR). Immediately thereafter, the Secretary General of the DIS appoints, after having heard the parties and while considering their mutual wishes, an impartial and independent conflict manager (Sec. 4(1) CMR).

Joint hearing and conflict management plan

The conflict manager shall contact the parties without undue delay and no later than one week after his appointment, prepare the joint hearing and make procedural proposals (Sec. 5 CMR). In the joint hearing, the parties discuss the necessary features of the dispute resolution instrument pursuant to which their dispute shall be resolved and whether they envisage mediation, third party determination, arbitration or litigation (Sec. 6(2) CMR). The conflict manager's task is to advise and support the parties in their choice of the appropriate ADR instrument (Sec. 6(1) CMR). He/she also discusses the time frame and possible costs of the dispute resolution process with the parties (Sec. 6(4) and (5) CMR). The parties clarify whether any decision by a third party shall only be a recommendation, preliminarily binding until it is replaced by a court decision or arbitral award, and whether a review by a state court or arbitral tribunal shall be permitted in case of manifest error or severe procedural error. The parties may also decide whether non-legal criteria may or shall be relevant.

The aim of the joint hearing is to develop and agree on a conflict management plan (Sec. 7(1) to (3) CMR). Should the parties not agree on a conflict management plan, they decide if, and how, the procedure will be continued (*e.g.*, in another meeting or via telephone or video conference) (Sec. 7(4) CMR).

Effects and termination of CMR procedure

Concurrently with the commencement of the CMR procedure, the limitation period for claims indicated in the statement of claims is suspended. Such suspension ends at the earliest three months after the termination of the CMR procedure (Sec. 9(1) and (2) CMR). Except for interim measures, no party is entitled to resort to courts or arbitral tribunals concerning issues in dispute during the CMR procedure (Sec. 9.3 CMR).

The parties, the conflict manager and the DIS Secretariat are subject to confidentiality obligations (Sec. 10(1) CMR), without prejudice to contractually agreed non-disclosure obligations which shall remain unaffected (Sec. 10(3) CMR). Absent agreement, the parties are forbidden to designate the conflict manager as a witness in any proceeding (Sec. 10(2) CMR). Further, a party may only appoint the conflict manager as arbitrator, expert, proxy and/or advisor in any proceeding concerning the dispute with the consent of the other party (Sec. 10(4) CMR).

The CMR procedure ends (i) when the parties agree on a conflict management plan, (ii) if a party declares in writing to the DIS the CMR procedure to be terminated as neither a joint hearing has taken place within a month since the conflict manager's appointment nor a conflict management plan has been agreed on, or (iii) upon written termination declaration by the conflict manager to the DIS and the parties because, within three months as of the commencement of the CMR procedure, neither a joint hearing has taken place nor the parties agreed on a conflict management plan (Sec. 8(1) CMR). Should the parties not agree on a conflict management plan, there are no default or fall-back provisions under the CMR. To avoid this, the parties may agree on a fall-back in their dispute resolution clause when providing for the CMR procedure.

Advantages of the procedure

The use of a clause incorporating the CMR procedure reduces pressure in contract negotiations. The parties do not have to predict during contract negotiations what a future dispute will involve. The CMR procedure has a short and predictable time frame, with means to avoid delaying tactics. The costs are reasonable (proceeding costs: EUR 500.-; conflict manager's remuneration: EUR 2,500.- plus expenses). Further, the procedure provides for confidentiality without affecting any (stricter) contractual non-disclosure obligations. The distinction between the CMR as a preliminary proceeding and the (then chosen) further ADR procedures and the fact that the conflict manager may only be involved in late proceedings by consent ensures that the conflict manager will provide the necessary unbiased advice without vested interest.

In this respect, the CMR appear preferable to the ICC ADR Rules. Under the ICC ADR Rules, failing agreement on the settlement technique, the fallback shall be mediation while the 'Neutral' continues to conduct the procedure (Art. 5(2) and (3) ICC ADR Rules). The prohibition in Art. 7(3) ICC ADR Rules only relates to proceedings other than the current ADR proceeding. Unfair or obstructive behaviour of a party will most likely be identified during a CMR procedure enabling the other party to consider this in its choice of the ADR instrument (e.g., in such case mediation would be inappropriate). In essence, the CMR procedure can be expected to provide an efficient, time and cost saving institutional tool for the parties to find with professional support the appropriate method for resolving their disputes when they arise. In this manner, it strengthens the platform provided by the DIS for ADR and arbitration in Germany.

Supplementary new ADR proceedings of the DIS

Concurrently with the CMR, the DIS Mediation Rules, the DIS Expert Determination Rules and the DIS Expert Opinion Rules entered into force in May 2010. Thereafter, Rules for an Adjudication Proceeding were introduced. All these rules supplement the preliminary CMR proceeding and may be chosen as an ADR instrument. However, the parties are free to choose any other set of rules of any arbitration institution or to revert to state courts if they prefer.

Second Circuit Court of Appeals Holds that One Arbitrator's Resignation Does Not Require the Arbitration to Start Over Before a New Panel

Paul Stockman, Pittsburgh

Occasionally, a member of an arbitral panel will no longer be able to participate in the proceedings, due to resignation, illness or death. What happens in that event is not always clear. Applicable law, and the rules of arbitration organizations, empower the appointment of replacement arbitrators and define the method of selection, but do not always make it clear whether the arbitration proceeding may continue where it left off, or whether it must begin anew. A June 23, 2010 decision of the United States Court of Appeals for the Second Circuit, sitting in New York, has clarified the issue for matters within its jurisdiction (federal courts for New York, Connecticut and Vermont). In *Insurance Company of North America v. Public Service Mutual Insurance Company*, the court held that the ***resignation*** of one panel member does ***not*** require that the arbitration start over, while retaining its prior "general rule" that the ***death*** of a panel

member will, absent "special circumstances," require that the arbitration return to square one.

The *INA v. PSMIC* case arose on somewhat unusual facts. PSMIC initiated the *ad hoc* arbitration, seeking to recover on reinsurance contracts for payments it made to its insured for environmental claims. After discovery and oral argument, the three-member arbitration panel issued a summary award rejecting INA's defense. INA moved for reconsideration, but while its motion was pending, its own arbitrator became ill and resigned from the panel. The parties disagreed on how to proceed. Not surprisingly, PSMIC wanted the arbitration to continue, with the benefit of the ruling in its favor, while INA wanted a fresh start, obviously in the hope that it would fare better a second time around. At the remaining arbitrators' suggestion, the parties took the matter to court, with INA petitioning for an order staying the arbitration, disqualifying the panel, and ordering the arbitration to start anew.

The district court at first sided with INA, citing the Second Circuit's "general rule" that an arbitral vacancy requires that the arbitration commence afresh absent "special circumstances." As it turns out, however, INA's arbitrator had recovered fully, and at the time the court entered its order was actively seeking arbitral retentions. Accordingly, on PSMIC's motion, the court reconsidered its position, and held that the arbitrator's renewed availability was a "special circumstance." The court thus reappointed INA's arbitrator pursuant to the Federal Arbitration Act, 9 U.S.C. § 5, or, alternatively, directed INA to designate a new arbitrator.

The Court of Appeals upheld the district court's order, holding that its prior rule "did not apply to vacancies resulting from resignations," because of the "potential for manipulation." After all, a party that "perceive[s] itself to be losing . . . could disrupt the arbitration and obtain a new proceeding by pressuring its appointed arbitrator to resign." In so ruling, the court aligned itself with other rulings from the Seventh and Eighth Circuits.

Even so, the court retained the rule requiring the arbitration to commence anew when a panel member dies before an award is rendered. In that case, the court viewed it unfair to the party appointing the arbitrator, because the replacement would join the remaining panel members "after they had worked together and been exposed to each other's influences and after the deceased arbitrator has had some subtle and unknowable effect on them." The court also reaffirmed an existing exception to that rule: when an arbitrator dies after a partial final award (for example, in a bifurcated or phased arbitration), the prior (albeit partial) award remains valid, and need not be revisited.

As is often the case, the principal lesson from the *INA v. PSMIC* case is that "forewarned is forearmed." An arbitrating party is always well-advised to consider all eventualities in advance. In so doing, parties to arbitration can select an arbitration organization whose rules reach a desired result. (For example, the American Arbitration Association's commercial arbitration rules permit the remaining members of a panel of neutral arbitrators to continue the hearing and decide the controversy. The AAA rules also empower the arbitral panel to decide, if a substitute arbitrator is appointed, whether to repeat all or some part of the proceedings.) Better still, as with many of the procedural aspects of an arbitration, the parties can agree in advance on the procedures that will govern in the event an arbitrator resigns or dies.

New Developments in Institutional Arbitration in Russia

Dr. Rafal Morek, Warsaw and Marina Lebedeva, Moscow

The International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the "ICAC") in Moscow has recently undergone important changes. They include the adoption of amendments to the ICAC Arbitration Rules, the election of a new President and board of the ICAC, as well as the announcement of a new list of arbitrators.

Russia is one of only a few European countries with a central permanent court of arbitration established by statute. The legal status of ICAC is determined by the Law of the Russian Federation on International Commercial Arbitration of July 7, 1993, which is based on the UNCITRAL Model

Law. The Statute of the ICAC is appended to the Law as Annex 1.

Although many arbitration cases involving Russian parties are still referred to foreign arbitral institutions, such as the London Court of International Arbitration or the International Court of Arbitration of the ICC, institutional arbitration in Russia is developing rapidly. In 2009, the ICAC registered 250 new cases with parties from 43 countries. 86 cases involved companies from Western and Eastern European countries while participants from CIS countries took part in 77 cases. As regards individual countries, except for Russia, most parties came from Ukraine (36); Germany (17); Kazakhstan (14); the United Kingdom (13); Cyprus (13); Italy (12); Belarus (10); and Turkey (7). In 18 disputes, both parties were non-Russian companies.

In terms of the subject matter of disputes registered in 2009, the majority related to the international sale of goods – 149 disputes (60%). The remainder involved the following business sectors: 30 disputes (12.1%) work and services contracts; 20 disputes (8%) building and construction; 15 disputes (6.1%) carriage and transportation; 14 disputes (5.6%) loan and credit agreements; 6 disputes (2.5%) commercial representation. Other disputes (5.7%) related to lease, insurance, bank guarantees, etc.

In June 2010 the Russian Chamber of Commerce and Industry introduced several amendments to the ICAC Arbitration Rules (the "ICAC Rules"). One of the characteristic procedural features of ICAC arbitration relates to the involvement of a Rapporteur. A Rapporteur is a knowledgeable person appointed by the Executive Secretary of the ICAC (subject to a proposal of the Chairman of the arbitral tribunal or the sole arbitrator) to help the arbitral tribunal or the sole arbitrator with the file in question. The institution's list of Rapporteurs must be approved by the ICAC Board. However, the parties are free to select as Rapporteur a person who is not included in the list, provided that this person meets the requirements and subject to approval of the ICAC President. The other procedural amendments of the ICAC Rules involve, *inter alia*, admission of the use of video-conferencing in the course of a hearing.

The amendments that related to administrative matters, *inter alia*, increased the number of board members of the ICAC from five to seven. The amended Rules explicitly state that a person can hold the position of ICAC President for two terms only, i.e. not more than 10 years (the former ICAC President, Prof. Aleksandr S. Komarov, held that position for 17 years). Furthermore, the new position of the First Vice-President of the ICAC, who may replace the President of the ICAC if so required, has been created.

At the same time, a new list of arbitrators of the ICAC was approved by the Chamber of Commerce and Industry. The list now includes 179 arbitrators from Russia and abroad, including 30 new arbitrators. The list is not mandatory, i.e. parties are free to appoint non-listed arbitrators. However, the Chairman of an arbitral tribunal (in case there are three arbitrators) must be appointed by the ICAC Board only from that list. Likewise, if the ICAC Board decides that a dispute should not be resolved by a panel, the sole arbitrator must be appointed by the ICAC Board from the list.

Interim Judicial Relief Gaining Traction in U.S. Courts

Jeremy Mercer, Pittsburgh

Earlier this year, the United States Court of Appeals for the Ninth Circuit (covering the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Northern Mariana Islands) joined a large majority of federal Courts of Appeal and held that interim injunctive relief is available from the courts on arbitral claims. *Toyo Tire Holdings of Americas Inc. v. Continental Tire North America, Inc.*, CITE (9th Cir. 2010).

Toyo Tire had filed an arbitration demand with the International Chamber of Commerce, demanding, among other things, injunctive relief, arising out of an agreement with two other tire manufacturers. The other tire manufacturers had taken the position that Toyo Tire's association with a different tire manufacturer terminated a partnership agreement and, as such, Toyo Tire was precluded from buying certain tires manufactured by the partnership and

from competing in a segment of the U.S. tire market for five years.

In addition to filing its arbitration demand with the ICC, where the arbitration was to be heard by a panel of three arbitrators, Toyo Tire also filed a complaint in court seeking injunctive relief. In the court litigation, the defendants countered that Toyo Tire could not maintain the court action as the agreement provided for arbitration, which had been initiated, and they argued that under Ninth Circuit precedent, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), interim relief was not available. The trial court agreed and denied the requested injunctive relief.

Toyo Tire appealed to the Ninth Circuit which reviewed its decision in *Simula* and disagreed with the trial court, stating:

> "The Appellant argues that the district court abused its discretion by erroneously reading our decision in [*Simula*] to deprive it of the authority to grant injunctive relief to maintain the status quo pending arbitration. We agree."

In addition to disagreeing with the trial court's application of *Simula* to the case, the Court went further and expressly allowed interim injunctive measures in aid of arbitration.

The Court began its analysis by focusing on the fact that the ICC rules expressly permitted judicially imposed interim relief, both prior to tribunal formation and "in appropriate circumstances thereafter" (quoting ICC Rules, Art. 23). The Court then noted that the *Simula* case did not foreclose interim relief in all cases; instead, it merely upheld the denial of injunctive relief where the plaintiff did not demonstrate the imminent need for injunctive relief prior to the arbitration panel's ability to evaluate the claim.

Turning to the case before it, the Court emphasized that allowing a court to grant interim injunctive relief "is not contrary to the 'emphatic federal policy in favor of arbitration dispute resolution.'" Moreover, the Court recognized that while arbitration often promises increased speed and reduced costs, as compared with traditional litigation, those promises do not always materialize, especially during the panel selection and constitution process, which takes time, and during which a party could be harmed if interim injunctive relief were not permitted. Finally, the Court reiterated that the very rules applicable to the arbitration allowed the parties to request the interim injunctive relief actually requested of the court by Toyo Tire (citing ICC Rules, Art. 23).

Accordingly, the Ninth Circuit held that it was joining seven of its sister Courts of Appeal in affirmatively holding that district courts may issue interim injunctive relief when the standards for that injunctive relief are met.

> "Accordingly, we conclude that a district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process – provided, of course, that the requirements for granting injunctive relief are otherwise satisfied. This holding is consistent with our rulings in *PMS* and *Simula*, as well as the holdings of a majority of our sister circuits."

The UAE's Proposed Federal Arbitration Law

Adib Eghterafi and Neal Brendel, Dubai and Roberta Anderson, Pittsburgh

The UAE is finalising legislation to establish a uniform Federal Arbitration Law that will replace the existing provisions governing arbitration in the UAE Civil Procedure Code with a complete and distinct statutory scheme for arbitration. The anticipated Federal Arbitration Law is expected to improve the legal environment for commercial dispute resolution and thus boost the investment and business environment in the UAE. This article summarizes certain key components of the current draft arbitration law and the potential impact it may have on arbitration in the UAE.

Commercial Arbitration

Commercial arbitrations are defined in Article 3 of

the draft law in relation to disputes that arise of a "legal nature whether … contractual or otherwise." Article 3 proceeds to provide a non-exhaustive list of disputes subject to commercial arbitration, which includes the supply of goods or services, commercial powers of attorney, construction contracts, engineering or technical expertise, industrial or tourist licenses, transfer of technology, investment, development contracts, bank operations, insurance, transfer, excavations, exploration of natural resources, generation or supply of energy or power, gas or oil pipes installation, road and tunnel construction, land reclamations, environmental protection and establishing nuclear reactors. Any transaction of a commercial nature arguably is arbitrable.

International Arbitration

International arbitrations are defined in Article 4 of the draft law. The definition includes, for example, where the parties have their "[h]ead office … located in two different countries at the time when arbitration agreement is made," (Article 4.1.), or where the subject matter of the arbitration "is connected to more than one country." (Article 4.3).

Court Of Jurisdiction And Powers

The draft law expressly addresses the jurisdiction and powers of the courts with respect to arbitration. According to the wording of the law, any commercial arbitration dispute as defined in Article 3 "shall be the concern of the court that is basically responsible for resolving such dispute." In contrast, any international arbitration as defined in Article 4 is presumptively subject to the jurisdiction of the Abu Dhabi federal court of appeal, "unless the two parties agree on jurisdiction of another court of appeal abroad." (Article 5).

The draft law also contains detail regarding the role and powers of the competent court. By way of example, the competent court has the power, among other things, to assist in the selection of arbitrators in circumstances in which "either party violates procedures of selecting arbitrators they agreed upon," (Article 18(2)), and to "[p]ass a judgment in accordance with legally approved penalties on any witness failing to attend, or abstaining from swearing or answering without any legal justification." (Article 37).

Challenges To Awards

The circumstances in which the competent court can overturn an arbitration award are set forth in Article 53 of the draft law. These circumstances include but are not limited to circumstances in which "either arbitration party lacks legal capacity," Article 53.A.1, an "arbitration ruling eliminates implementation of law enforcement on which parties agree to apply to subject of dispute," Article 53.A.4., the "arbitrators are appointed contrary to law or agreement of the two parties," Article 53.A.4, and the "arbitration ruling … includes anything that is contrary to public order in the UAE." Article 53.B. The draft law thus leaves the door open for a party to challenge enforcement of an award. An application to set aside an award must be "filed within (60) days following date of announcement or receipt of arbitration ruling." Article 54.

Enforcement

Ratification and enforcement of the award is through the competent court. In order to enforce an award, a request to enforce must meet the criteria set forth in Article 56, including the requirements that the request for enforcement attach the "[o]riginal ruling or signed copy of the same," a [c]opy of [the] arbitration agreement," and an "[e]ndorsed translation of arbitration ruling into Arabic."

The long-anticipated Federal Arbitration Law is expected to be passed within the next year and probably will not vary materially from the draft law. It remains to be seen how the international community will respond. Some may argue that the UAE should have made more sweeping changes to the law, by more fully adopting the UNCITRAL Model Law for example. In addition, the ability for a party to challenge an award may raise concern if not addressed prior to the final law being enacted. It is clear, however, that the long-anticipated new law is welcome and necessary for the progress of arbitration in the UAE.