

Kirkpatrick & Lockhart Nicholson Graham LLP's Arbitration World

Welcome to the first edition of 'K&LNG's Arbitration World'

Welcome to the first edition of 'Arbitration World', a publication from Kirkpatrick & Lockhart Nicholson Graham LLP's Arbitration Group. 'Arbitration World' aims to highlight significant developments and issues in international arbitration that matter to in-house counsel and company executives with responsibility for dispute resolution.

In this issue we will be covering some recent decisions of the European Court of Justice which serve to highlight the benefits of agreements to arbitrate, and some English case law developments including a House of Lords decision re-affirming the English court's non-interventionist approach to arbitration. We look at the growing importance of Bilateral Investment Treaties (BITs) and how they might be used not only in claims by investors against governments of developing nations, but also in claims against Western States.

The issue also provides an up-date on developments in Dubai, Russia and China, all of which are evolving as

important arbitration centres. Insurance coverage disputes are commonly resolved through arbitration, and we look at some issues that may arise in arbitrations under 'Bermuda form' excess liability insurance. We also report on the new FIDIC Conditions of Contract which are of particular importance in the construction and engineering sector.

Details are provided of future Kirkpatrick & Lockhart Nicholson Graham LLP hosted arbitration events, including events in New York, San Francisco and London in February/March 2006.

If you would like to supply any feedback on anything featured in this publication, please email the editors, Ian Meredith (imeredith@klng.com) and Peter Morton (pmorton@klng.com) (partners at Kirkpatrick & Lockhart Nicholson Graham LLP).

To register for the forthcoming events please contact Kathie Lowe, Events Manager, London. (klowe@klng.com).

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One more reason to choose Arbitration - recent European cases on jurisdiction

by Peter Morton

One of the benefits of the inclusion of choice of jurisdiction clauses in international contracts has been the certainty such clauses provide as to which courts will deal with the case in the event of a dispute arising. Unfortunately, some recent decisions issued by the European Court of Justice (ECJ) mean that it is no longer possible to say with the same level of certainty that the parties' choice of court, freely made and expressed in a choice of jurisdiction clause, will be upheld.

To what extent, therefore, can it be said that the ECJ has dealt yet another blow to court proceedings in favour of agreeing to arbitrate?

Exclusive Jurisdiction Clauses

Parties who specifically provide in their contract that the national courts of country X shall have exclusive jurisdiction over any disputes between the parties could be forgiven for thinking that this agreement is binding.

Certainly that remains the general position in respect of proceedings brought outside Europe where, save in exceptional circumstances, the parties will be obliged to keep to the jurisdiction they have agreed.

The position in Europe is different due to the conventions governing jurisdiction to which the majority of

European countries have signed up, which provide a comprehensive code for determining where claims may be brought, namely:

- The Brussels Regulation (EC Regulation 44/2001) for all EU Member States (except Denmark)
- The 1968 Brussels Convention, as between Denmark and other EU States, and
- The 1988 Lugano Convention, between EU and the EFTA States (Iceland, Norway and Sweden).

Article 27 of the Brussels Regulation provides that a court second seised of essentially the same claim should decline jurisdiction until the court first seised has determined whether it has jurisdiction.

However, what is the position if the second seised court is named in an exclusive jurisdiction clause? This question arose before the ECJ in the case of *Erich Gasser GmbH v Misat Srl* [2003] Case C - 116/02. In that case, proceedings were commenced in Rome by Misat, for a declaration that Misat was not liable. Subsequently, Gasser commenced proceedings in Austria for payment of the relevant invoices which gave the Austrian courts exclusive jurisdiction.

The Austrian court referred the matter to the ECJ which held that the court second seised must defer to that first seised, even if the second seised was

named in an exclusive jurisdiction clause. The ECJ made clear there should be no exceptions to this principle in the interests of promoting trust between courts and legal certainty.

Unfortunately the decision is likely to have the opposite effect. The result is that, for contracting European states, exclusive jurisdiction clauses are hardly worth the paper they are written on, as they are now open to abuse by unscrupulous defendants who will forum shop in breach of the exclusive jurisdiction clause.

In the similar but more recent case of *Turner v Grovit* [2004], the ECJ reinforced its approach. In that case a prospective defendant issued proceedings in Spain in bad faith to frustrate proceedings in the English courts. The ECJ held that the English Court (which was second seised), was not entitled to issue an anti-suit injunction, even where the foreign proceedings were issued in bad faith. The ECJ held that the anti-suit injunction (previously a useful tool in circumstances such as these) was incompatible with the Brussels Convention as it represented an interference with the power of the Court first seised to determine its own jurisdiction.

Both these decisions have been met with dismay by many. The result is that in the case of contracts between parties in different EU countries there

is likely to be a race to their respective national courts the moment a dispute arises, notwithstanding the existence of a valid choice of jurisdiction clause.

The Arbitration Exception

The saving grace is that, according to the English Courts at least, this same analysis does not apply to arbitration clauses. This was confirmed in the case of *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598. The issue was whether the English Court was able to issue an anti-suit injunction in relation to court proceedings commenced in Finland, in breach of an arbitration clause providing for arbitration in London. The English Court of Appeal held that they were entitled to issue an anti-suit injunction in support of the arbitration clause, notwithstanding that the Finnish Court was first seised, and notwithstanding the ECJ's decision in *Turner*, because the Brussels Regulation does not apply to arbitration (Article 1(2)(d) provides that "The Regulation shall not apply to ... arbitration").

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Developments in Dubai

The Director of the Dubai International Arbitration Centre ("DIAC") has announced that the United Arab Emirates will sign up to the New York Convention, with signature expected later this year or early in 2006. Ratification of the New York Convention was approved by the UAE cabinet as long ago as 2003, although since then there has been little movement towards giving the Convention legal effect in the UAE. UAE signature to the Convention will be good news for two new Dubai arbitration centres hoping for recognition in the international arbitration market.

The DIAC, set up under the auspices of the Dubai Chamber of Commerce and Industry, will be especially eager to see UAE accession to the New York Convention, without which the Centre may struggle to achieve its place as a top

choice for international arbitration. The Centre has charged itself with raising the profile of arbitration in Dubai and the Arab world, publishing the quarterly DIAC Journal which informs readers of developments in arbitration in the Middle East.

The Court of the Dubai International Financial Centre ("DIFC"), established only in December last year, has made two high-profile appointments - Sir Anthony Evans PC and Michael Hwang SC were appointed to serve as Chief Justice and Deputy Chief Justice respectively in April 2005.

The DIFC has its own arbitration law which, broadly speaking, applies to disputes arising out of business conducted in or from the DIFC where there is an arbitration agreement between the parties. The system is overseen by the DIFC Court.



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Forum non conveniens

The ECJ has also recently issued a decision which is relevant in circumstances where there is no jurisdiction or arbitration clause and a defendant finds itself served with proceedings here in England and therefore subject to the jurisdiction of the English court.

In such cases the English common law principle of '*forum non conveniens*' can be of assistance to the defendant, pursuant to which the English Court has a discretion to stay the proceedings if (a) there is another forum which is clearly more appropriate for the claim and (b) the Claimant is unable to establish that it would be unjust for it to have to sue in that other jurisdiction.

It has been established for some time that *forum non conveniens* cannot be applied to disputes between parties in contracting states in Europe as the Conventions/Brussels Regulation provide the framework for allocating jurisdiction. However, can the English courts still apply *forum non conveniens* when dealing with a non-contracting state?

This issue was dealt with by the ECJ in the case of *Owusu v Jackson* [2002] EWCA Civ 877, a reference from the English Court of Appeal. The ECJ decided that where a party domiciled in England is sued in England, Article 2(1) of the Brussels Convention (which provides that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State) is mandatory and prevents the English

Court from declining jurisdiction on the basis of *forum non conveniens*.

The effect of the decision is that where defendants are domiciled in a Regulation/Convention state and are sued in their country of domicile, they are prevented from arguing that the Courts of some other jurisdiction are more appropriate.

The potential difficulties this ruling may cause are clear from the facts of the case where Mr Owusu was domiciled in England but the other four defendants were all Jamaican and the claim related to an incident on a holiday in Jamaica. However, the fact that Mr Owusu was domiciled in England was enough to strip the English court of any discretion to decline jurisdiction in favour of the Jamaican courts.

This is a further example of the rigid approach of the ECJ and their hostility towards the flexible tools that the English Courts have used to reach what they see as the just result. The ECJ said its decision was based on:

- The need for consistency of jurisdictional rules in contracting states;
- The need for legal certainty on questions of jurisdiction; and
- The fundamental nature of Art 2 jurisdiction within the Convention framework.

The effect of the *Owusu* decision stretches further than Europe, as

illustrated by the position of the Jamaican defendants. Only one defendant has to be domiciled in a convention state for Article 2 to apply and prevent the European Court declining jurisdiction, even if there is another jurisdiction which is clearly a more appropriate forum.

Once again, however, agreements to arbitrate provide something of a silver lining. In the case of *Van Uden* [1999] All ER (EC) 258 the ECJ has made it clear that the existence of a valid agreement to arbitrate is one of the circumstances where a Court should decline jurisdiction even if the Court otherwise seems to have jurisdiction under the Regulation.

Conclusion

What these cases do is to point to the distinct advantages of agreements to arbitrate. Including an arbitration clause in a contract will offer parties greater confidence that their dispute will be heard in their chosen forum, and ought to minimise the risk of jurisdictional entanglements, and potentially having to litigate in the other party's national Courts.



All change in Russia

Professor Komorov, President of ICAC (the International Commercial Arbitration Court) of the Russian Federation has confirmed that new procedural rules are now in an advanced state of preparation and are expected to be brought into effect before the end of 2005.

ICAC has seen a dramatic increase in its caseload over the course of the last 5 years as Russian owned companies become increasingly active in international trade, and counterparties outside Russia become more willing to contract subject to ICAC. The rule changes are intended to further increase the confidence of non-Russian counterparties. Only time will tell whether the changes will achieve their desired objective.

It is thought unlikely that there will be any change in the current reluctance of Russian Courts to give effect to arbitral awards rendered by Tribunals seated outside Russia where parties to the arbitration are both Russian entities. It will also be interesting to see what, if any, changes are made to Tribunal composition, the role of the Tribunal "Reporters" who currently play a very influential role and the procedures for challenge and securing interim measures.

We hope to be joined by Professor Komorov at our London event in March 2006.

International Arbitrations to receive a New York welcome

by Kelly Talcott

With a recent amendment to its Civil Practice Laws and Rules (CPLR), New York state has become a friendlier forum for parties to international arbitrations. Formerly, New York state courts could only issue attachment orders and preliminary injunctions in the aid of purely domestic arbitrations, that is, those sited in New York state that did not involve any foreign parties. New York state courts would not issue attachment orders or preliminary injunctions in aid of arbitrations that were international in nature, even if located in New York, or where the site of the arbitration was outside of New York.

The recent amendment to CPLR 7502(c) now permits New York state courts to issue attachments and preliminary injunctions in all appropriate cases. The new law brings New York in line with many other jurisdictions, and applies in the case of arbitration "that is pending or that is to be commenced inside or outside" of New York state, "whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards."

By bringing its practice in line with that in many other jurisdictions, the amendment should make New York state a more attractive forum for international arbitrations.

Arbitration under 'Bermuda Form' Excess Liability Insurance

by Matthew Smith

The 'Bermuda form' excess liability insurance provides coverage for large corporate policyholders arising from, amongst other things, major catastrophes such as serious explosions or mass tort litigation against manufacturers arising from defective products.

The standard Bermuda form policy was developed in response to the collapse of the excess liability insurance market in the U.S. in the mid 1980's. A number of excess liability insurers (including Ace and XL) were subsequently established in Bermuda with capital from large US corporations to insure against catastrophic liabilities.

Arbitration under the Bermuda Form

A number of the Bermuda-based excess liability insurers now produce their own versions of the Bermuda form but the fundamental characteristics remain the same. In particular, almost all of the policies contain an arbitration clause which provides that disputes under the contract of insurance are to be determined in London, England, by a board of three arbitrators and in accordance with the provisions of the Arbitration Act 1996.

Arbitration clauses are often used in contracts of insurance as an alternative to requiring coverage disputes to be determined by the Courts of a particular jurisdiction. Arbitration is often viewed as being less expensive and faster than litigation as well as offering more flexibility to the dispute resolution process. The arbitration clause will often be combined in contracts of insurance with a choice of law clause.

One of the features of the Bermuda form is that, while the arbitration clause provides for arbitration in London according to English law, the contract of insurance itself is governed by the law of

the state of New York (with certain modifications provided for in the policy). In other words, while the procedural law of the arbitration will be English law, the substantive law to be applied by the arbitrators in determining coverage disputes will be New York law.

The Choice of Law clause

The choice of law clause in the current version of the Bermuda form produced by XL (XL-004) provides:

"This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the laws of the State of New York, except insofar as such laws: (1) may prohibit payment in respect of punitive damages hereunder; (2) pertain to regulation under the New York Insurance Law or regulations issued by the Insurance Department of the State of New York pursuant thereto, applying to insurers doing business, or issuance, delivery or procurement of policies of insurance, within the State of New York or as respects risks or insureds situated in the

State of New York; or (3) are inconsistent with any provision of this Policy...'

The clause goes on to provide expressly that the laws of England and Wales shall apply to the arbitration procedure. It is interesting to note that the choice of law clause in the Bermuda form seeks to modify the application of New York law to the contract of insurance in a number of respects including:

- **Punitive damages:** The law of the State of New York (as well as a number of other US States) considers punitive damages to be uninsurable as a matter of public policy. The clause seeks to modify the application of New York substantive law to allow a policyholder to be indemnified in respect of his liability to a third party for punitive damages.
- **Regulation under New York Insurance Law:** The clause seeks to exclude New York law to the extent that it amounts to, amongst other things, regulation under New York insurance law.
- **Inconsistency:** Where New York law is inconsistent with any provision of the policy, the choice of law provision seeks to exclude the application of New York law.

The Bermuda form also modifies the application of the English Arbitration Act 1996. The policy provides that the parties waive their right under the 1996 Act to apply to the Court for the determination of any question of law arising in the proceedings (s. 45) and any right of appeal to the Court on a point of law (s. 69).

Potential Disputes over Appropriate Forum

The choice of English law for the conduct of the arbitration and New York law for the substance of the dispute can create a tension between the two legal cultures. The issue is also complicated by the fact that the Bermuda form does not state expressly whether the arbitration clause is to be interpreted in accordance with New York or English law. Because an arbitration clause is treated in many jurisdictions as 'an agreement within an agreement' and therefore separate in some respects from other contractual terms, it does not necessarily follow that the same system of substantive law applicable to the body of the contract will apply to the arbitration clause.

An illustration is provided by the case of *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep. 500. This concerned proceedings by the insurers XL for an 'anti-suit' injunction restraining the policyholder, Owens Corning, from pursuing an insurance coverage dispute under the Bermuda form through the Courts of the State of Delaware. Owens Corning argued that the apparent arbitration agreement in the Bermuda form was unenforceable because, on the facts of this case, the requirements for a valid arbitration agreement under New York law had not been met.

Owens Corning called expert evidence on the effect of chapter 2 of the United States Federal Arbitration Act, 9 U.S.C. section 1, which incorporated the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the Convention'). Article

II of the Convention set out the requirements for recognition of an arbitration agreement including a requirement that the agreement should be in writing, signed by the parties or contained in an exchange of letters or telegrams. On the facts of this case, Owens Corning submitted that if New York law applied to the interpretation of the arbitration clause it was strongly arguable that in accordance with the Convention there was no valid arbitration agreement. The formal requirements for the existence of a valid arbitration agreement under section 5 of the English Arbitration Act 1996, on the other hand, were understood to be 'less stringent' than those under the Convention.

The English court was asked to decide whether the arbitration agreement was to be interpreted by reference to English or New York law. His Honour Judge Toulson noted that it was not uncommon for the procedural law of the contract to differ from the substantive law as was the case with the Bermuda form. He also noted previous authority to the effect that in exceptional cases the law applicable to the interpretation of the arbitration agreement within the contract may differ from the substantive law applicable to the parties' other obligations under the contract. He concluded that the parties' choice of procedural law under the Bermuda form (i.e. English law) also applied to the interpretation of the arbitration agreement. Judge Toulson decided that under English law there was a valid arbitration agreement and on that basis he granted the injunction.

The reasoning behind Judge Toulson's decision in *XL v Owens Corning* has been questioned by some commentators. It has been suggested that the substantive law applicable to the contract of insurance is more likely to apply to the interpretation and validity of the arbitration clause. It is therefore likely that disputes of this nature will continue to arise, particularly where, as in *XL v Owens Corning*, there is uncertainty as to the validity and effect of the arbitration clause. It is understood that a similar issue over the appropriate forum arose early on in the dispute with Ace and XL over coverage of the World Trade Centre.



Investor Protection - do Western governments understand what they have signed up to?

by Ian Meredith and Clare Tanner

Since the early 1960's Western governments (including both the United States and the United Kingdom) have sought to promote the development of investment opportunities for their nationals in countries right across the globe, through the establishment of Bilateral Investment Treaties ("BITs") and Multilateral Investment Treaties ("MITs"). The governments have sought to enshrine through BITs and MITs minimum levels of investor protection which operate as a safety net encouraging their nationals to invest in regions of the world they might otherwise have felt to have an unacceptably high political risk profile. There are now something in the order of 2,200 BITs in force under which Contracting States typically afford the nationals of another Contracting State the following broad protections:

- protection against expropriation or measures equivalent to expropriation without prompt, adequate and effective compensation;
- a commitment not to take arbitrary or discriminatory measures adversely affecting the underlying investment;
- a right to fair and equitable treatment;
- a right to treatment no less favourable than that accorded to the nationals of the Contracting State;
- 'most favoured nation' treatment (i.e. the Contracting State may not treat investors from one country less favourably than those from another);
- the right to the free transfer of investments and returns; and
- full protection and security accorded by the Contracting State to investments.

The route through which investors obtain the ability to pursue claims against Contracting States is The Convention on the Settlement of Investment Disputes between the States and Nationals of other States. A list of the circa 130 Convention States appears at: www.worldbank.org/icsid/constate/constate.htm

The Convention established the International Centre for Settlement of Investment Disputes ("ICSID") which provides facilities for the arbitration of investment disputes between Contracting States and the nationals of other Contracting States. The ICSID jurisdiction extends to any legal dispute arising directly out of an investment between a Contracting State (or sometimes a component part of a Contracting State such as a province or a body performing a governmental function) and a national of another Contracting State.

As can be seen from the list of disputes which have been referred to ICSID through the 1990's and the early years of the 21st century (available at <http://www.worldbank.org/icsid/cases/awards.htm>), Investor Protection has traditionally been seen as the protection of the interests of the Western investor primarily against expropriation without due compensation or unfair/inequitable/discriminatory treatment by an emerging state. This is best illustrated by the large number of claims brought against Argentina following the economic collapse in the 1990's. There is however a materially different area of

Investor Protection which is fast developing as exemplified by a case involving the Canadian corporation, the Loewen Group, and several other cases filed against the United States government under NAFTA (North American Free Trade Agreement). Investor Protection can and is increasingly being used by investors against Western governments.

The Loewen case concerned a funeral business and arose out of a Louisiana Court finding which was adverse to the Canadian investor. The sums in dispute were relatively modest (circa \$10m) but the Court imposed a substantial additional exemplary damages element (circa \$400m) against the Canadian investor and required, as a condition of any appeal, the payment of a bond representing 125% of the judgment. The Canadian investor sought to challenge various aspects through ICSID. Whilst the claim ultimately failed on technical grounds, it is suggested that the observations made by ICSID about the way Loewen had been treated can only encourage other investors who believe they have been adversely affected by Western states to look towards possible claims.

It can only be a matter of time before the United Kingdom government faces its first challenge based under a BIT or MIT. It is perhaps not surprising that a number of Western governments are looking to renegotiate their commitments under BITs as they become increasingly conscious that the Investor Protection regime can be used against them.

English House of Lords re-emphasises the non-interventionist approach of the English Courts

In only the second case involving the Arbitration Act 1996 to reach the House of Lords, their Lordships in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UK HL43 took the opportunity to confirm that the English Courts should take a non-interventionist approach. The *Lesotho* case concerned an agreement entered into on 15 February 1991 under which an international consortium was to construct a major dam, the Katse Dam in Lesotho. The agreement was to be governed by the law of Lesotho with any disputes referred in the first instance to the engineer, with a right of appeal to arbitrators under the ICC Rules with the arbitration's seat in London. The ICC Rules exclude any appeal on a point of law.

A dispute developed and following an arbitration involving a distinguished panel of international arbitrators, an award was rendered. The Highlands Development Authority challenged the award seeking to have it set aside on the basis the arbitrators had exceeded their substantive jurisdiction under Section 67 of the 1996 Act or alternatively that they had exceeded their powers and were thus guilty of serious irregularity under Section 68(2)(b) of the 1996 Act. At first instance, Mr Justice Morison rejected the jurisdictional challenge but upheld the challenge on the basis of serious irregularity (excess of power) as a result of the Tribunal's approach to the computation of interest and the application of specific currencies for calculation of damages.

The case proceeded to the Court of Appeal where the Section 67 (jurisdictional) challenge was abandoned. The Court of Appeal upheld Mr Justice Morison's judgment on excess of power. In the House of Lords, whilst there was a majority view that the Tribunal had erred in relation to interest, the Lords found that the error amounted to an error of law, only challengeable under Section 69 (where not expressly excluded by contract, as it was in the case of the ICC Rules).

This is an extremely important decision emphasising as it does that the English Courts will not take a permissive approach to challenges and will not allow Section 68 to be utilised flexibly.

Arbitration clauses prevent shareholders from seeking section 459 relief

The English Court has recently affirmed, in the case of *Exeter City AFC v Football Conference Limited* [2004] EWHC 831, that where a shareholders' agreement includes an arbitration clause, the shareholder is precluded from seeking to invoke shareholder protection under Section 459 of the Companies Act.



New Edition of FIDIC Conditions of Contract for Construction Published

by Linda Kent

The Multilateral Development Banks (MDBs) have for a number of years adopted FIDIC Conditions of Contract for Construction as part of the Standard Bidding Document which they require their borrowers to follow. The MDBs introduce additional clauses in the Conditions of Particular Application ("Particular Conditions") to amend the FIDIC General Conditions in their favour but all MDBs do not make the

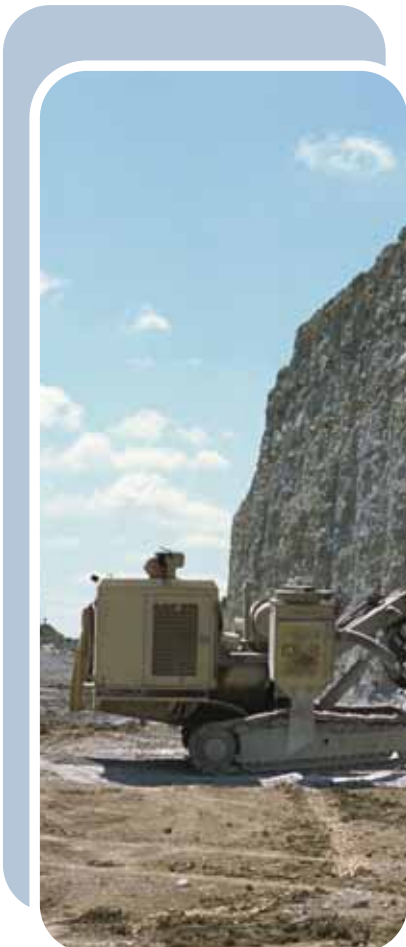
same amendments. Lengthy discussions have therefore taken place between the MDB's, other international funding institutions and the authors of the FIDIC Conditions of Contract. As a result a new MDB Harmonised Edition of the FIDIC Conditions of Contract for use on projects financed by Participating MDBs has been published.

It is believed that the Participating MDBs which include The World Bank, The European Bank for Reconstruction and The Inter-American Development Bank will adopt this Edition in their Standard Bidding Documents, although there is some belief that the MDB's may publish their own form of contract for use in conjunction with the new Harmonised Edition. This new Edition should reduce the number of additions and amendments to be included in Particular Conditions and thereby remove uncertainty and misunderstanding. Most projects are, however, likely to continue to have special requirements which will need

some specific alterations. Most of the amendments made in the new Edition are those which favour the banks and the employers except the improvements which have been made to the wording of the dispute provisions. The amendments include:

- The enlargement of the Employer's powers to make claims under the performance security provisions by the removal of previous restrictions;
- The strengthening of the right of the Employer to replace the Engineer by removing the Contractor's power of reasonable veto and replacing it by a non-binding right of objection; and
- Increasing the advance payment threshold triggering repayments by the Contractor.

If you require further information regarding the MDB Harmonised Edition, please contact James Hudson (jhudson@klng.com) or Linda Kent (lkent@klng.com)



Ratification of the New York Convention by Pakistan

On 14 July 2005, Pakistan ratified the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) subject to the reciprocity reservation. As a result, arbitration awards made in other Convention States may be enforced in the same way as a judgment or order of a court in Pakistan. A list of Convention States can be found on the UNCITRAL website, <http://www.uncitral.org>.

Further Changes in China

by Ian Meredith

China continues to be a hot spot for arbitration. In May of this year, CIETAC revised its rules with the aim of addressing a series of issues which had formed the basis for foreign criticism. The main changes are:

- Parties can now nominate qualified arbitrators outside of the CIETAC panel. Provided the nominees are qualified arbitrators then they can be of any nationality. The nominees are still however subject to CIETAC's approval.
- CIETAC rules can now "travel". Parties can select both the venue of the oral hearing and the seat of the arbitration and they can both be outside mainland China. This means that, in the same way as the ICC rules, CIETAC rules can be used around the world and the final award may be enforced under the New York Convention in China as a foreign award.
- The winning party used to be restricted to recovering costs of not more than 10% of the total amount awarded to them. This restriction has been removed.
- Arbitrators appointed under CIETAC rules are now under more stringent obligations to disclose potential conflicts of interest than they were previously.
- The time limits within which the arbitrators must render their award have been reduced - they are now 6 months for cases involving a foreign element, 4 months for domestic cases and 3 months for summary cases.
- The parties are free to choose

whether they want the tribunal to adopt an adversarial-style procedure, or a more inquisitorial approach.

We also understand that the National Supreme Court is currently reviewing its level of recognition of arbitrations conducted in China administered by foreign institutions.

Whilst we understand that the restriction under Chinese Law preventing 'ad hoc' arbitrations taking place in China remains (all arbitrations in China must be administered by an institution), the number of arbitrations

in mainland China administered by non-Chinese institutions (such as the ICC) does seem to be slowly on the rise.

We will be further exploring these issues at forthcoming international arbitration events in New York and San Francisco during February and March 2006 when we expect to be joined by Mr Chen Min, the Deputy Secretary General of CIETAC, together with a number of leading international arbitrators to review developments in China in greater detail.



Forthcoming K&LNG hosted events

In 2006 we will be continuing our programme of interactive symposia at which we bring together in-house counsel, practitioners and arbitrators to discuss the key issues that matter to in-house counsel and executives who hold responsibility for managing arbitral disputes.

- In February and March 2006 we will be holding one day events in New York and San Francisco at which there will be special focus on the fast evolving situation in China and South East Asia generally. We will be joined by leading arbitrators with experience of arbitrating across the region together with a representative of CIETAC.
- On 23 March 2006 we will be hosting a one day event at Claridges Hotel, London. Panel sessions will address issues specific to Russia and Kazakhstan, the evolving situation in China as well as looking in detail at new and innovative ways to control cost and secure early resolution.

For further information on forthcoming events please contact Kathie Lowe, Events Manager (klowe@klng.com).

K&LNG web site

The arbitration section of our website www.klng.com has recently been re-formatted and now includes not only information about the firm's arbitration practice but also general information about arbitration and its potential benefits and information on some of the leading arbitration institutions in the world.

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