From the Editors

Welcome to the 7th edition of Arbitration World, a publication from K&L Gates' Arbitration Group which highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution.

After six editions in hard copy and pdf, this is the first edition of Arbitration World to be produced solely in electronic format. This change is intended to make the journal more accessible to readers, and easier to read online. It will also enable us to produce the journal more frequently than in the past, and so keep readers more up to date. We hope you like the new format and would welcome any feedback (email: ian.meredith@klgates.com or peter.morton@klgates.com).

News from around the World

Asia

Bahrain
The ICDR (the international arm of the AAA) and the Ministry of Justice of the Kingdom of Bahrain have agreed to establish the Bahrain Chamber for Dispute Resolution. The new body will be dedicated to the resolution of domestic and international disputes. The ICDR will provide technical advice, administrative and know-how systems and training for the new centre. The ICDR will also establish an office of its own in Bahrain.

India
The Permanent Court of Arbitration is to open a regional facility in New Delhi. The facility will provide a forum for PCA-administered international arbitrations in India for disputes arising in India and in the region, including inter-state disputes and investor-state disputes.

Hong Kong
The government of Hong Kong has published a draft Arbitration Bill. The government proposes to pass a new Arbitration Ordinance based on the UNCITRAL Model Law in 2009. The change, if enacted, would update Hong Kong's arbitration legislation (the current ordinance is based on the English Arbitration Act of 1950) and create a unified regime for domestic and international arbitrations.

Africa

Mauritius
Mauritius has passed a new International Arbitration Act. The Act is based on the UNCITRAL Model Law (2006 revision) and entered into force on 1 January 2009. The Act allocates all appointing functions and several administrative functions to the Permanent Court of Arbitration; to assist with this, Mauritius is in the process of
concluding a Host Country Agreement with the PCA. The new Act will apply both to normal commercial arbitrations and to investment arbitrations, and also contains specific provision for arbitrations under the constitution of offshore companies incorporated in Mauritius. There is no plan to set up a Mauritian arbitration centre, policymakers preferring to provide a legislative framework for ad hoc arbitrations and those administered by established institutions.

**Rwanda**
Rwanda has become the 143rd state to accede to the New York Convention. The move is part of a wider effort to attract international investment in the country: a Bilateral Investment Treaty with the U.S. is currently before the U.S. Senate for ratification.

**Americas**

**Canada**
The Supreme Court of Canada will hear the appeal in *Yugraneft v Rexx Management Corp* concerning the applicability of limitation periods to international awards. The Alberta Court of Appeal has held that an award was equivalent to a debt, and so the standard limitation period for enforcing a debt applies. The beneficiary of the award has appealed, arguing that a more flexible approach to limitation should be taken in international cases, where identifying and pursuing assets is more difficult. The case is considered a significant test of Canada's approach to enforcement of awards under the New York Convention.

**Europe**
The *West Tankers* case, concerning the availability of anti-suit injunctions in support of arbitrations in the European Union, has moved a step closer to resolution. Advocate-General Kokott has recommended that the European Court of Justice hold that anti-suit injunctions affecting litigation in EU member states are incompatible with the European jurisdiction and judgments regulation. The Court's judgment is expected in 2009. See further commentary below.

**England and Wales**
The English Court of Appeal has held that it does not have jurisdiction to order an injunction in support of an ICSID arbitration. In *ETi Euro Telecom v Bolivia*, the Claimant in the ICSID proceedings had obtained a freezing injunction against assets of the defendant held in London. The Court of Appeal set aside the injunction, holding that the relevant statute applied only to support for proceedings in other national jurisdictions and did not extend to disputes in an international forum that were not subject to any national law.

The English Court of Appeal has also held that a stay of English court proceedings can only be granted against someone who is either a party to an arbitration agreement or a person who is claiming through or under such a party. A legal or commercial connection with a party to an arbitration agreement is insufficient to justify a stay. In *City of London v Ashok Sancheti*, the Court of Appeal overruled the prior precedent, Roussel-Uclaf, which had taken a far broader approach to the concept of parties claiming rights through or under the signatories to arbitration agreements. The *Sancheti* case concerned an attempt to extend an agreement entered into by a national government to a local authority, but the stricter approach followed in the case was expressed to be applicable also in cases involving groups of companies and attempts to pierce the corporate veil.

**Germany**
A new Chinese European Arbitration Centre has opened in Hamburg. The centre, and its institutional rules for managing disputes, were designed and tailored specifically for the administration of Chinese-European trade disputes. The centre is based in Hamburg to capitalise on traditionally strong trade links with China and the importance of the port as an entry point to the EEA.

**Spain**
The Madrid Arbitration Court has unveiled its new arbitration rules. The new rules draw on the UNCITRAL, ICC and LCIA rules.

A unique feature of the rules is the possibility for a claimant that has been denied jurisdiction on grounds of the inexistence of an arbitral agreement nevertheless to request the tribunal set up a review of the decision and issue an award. Other noteworthy features include provision for the appearance of third parties in proceedings; a fast-track procedure for small claims; and the publication of awards on the court's webpage (if
both parties agree).

The rules came into force for new arbitrations on 1 January 2009.

Ukraine
The barriers to enforcement of international arbitration in Ukraine continue to be the focus of legal challenges. In a case brought by a Seychelles company, the European Court of Human Rights found that the failure adequately to enforce an arbitral award against a state-owned Ukrainian company constituted a breach of both the claimant’s right to a fair trial under Article 6 of the European Convention on Human Rights and its right to possessions in Protocol 1 of the Convention.

Meanwhile, a German company has also filed a claim with ICSID alleging that the Ukrainian courts’ failure to enforce its ICC award against the same company constitutes a breach of the Energy Charter Treaty.

Australasia
Australia
The Australian government has announced a review of its international arbitration legislation. The existing Act dates from 1974 and is considered in need of updating. A public consultation was open until 16 January 2009.

International
 ICC
The ICC Court of International Arbitration has opened an office in Hong Kong. The office is the ICC’s first office outside Paris and responds to growing demands for ICC arbitration in the Asian region.

IBA
The International Bar Association has launched a review of its Rules on the Taking of Evidence in International Commercial Arbitration. The review is not expected to be complete until late 2009.

ICDR
The International Centre for Dispute Resolution has released guidelines for arbitrators in relation to the exchange of documents and information in international arbitration. These guidelines are intended to complement the IBA Rules and to assist arbitrators in resolving disputes about disclosure and costs of disclosure.

ICSID/Conflicts of Interest
An ICSID tribunal has ordered that one party cannot add to its legal team an English barrister belonging to the same chambers as a member of the tribunal. In HEP v Slovenia, the claimant objected to the respondent’s proposal, made at the pre-hearing conference, to add the barrister to its team for the hearing. The tribunal ruled that it had authority to order the claimant to remove the barrister from its team and that, in the circumstances, it was appropriate to do so.

UNCITRAL
The ongoing review of the UNCITRAL Rules is considering provision for the joinder of third parties. At the working group’s last meeting in September 2008, it was agreed that a rule providing for joinder should be included. The matter will be discussed further at the working group’s next meeting in January 2009. In the same process, an early proposal to reverse the presumption of the confidentiality of awards has received little support. The current draft provides for an award to be made public only by consent of the parties or in compliance with a legal obligation.

Prospects for Investment Treaty Claims Arising Out of the Financial Crisis
Ian Meredith and Marcus M. Birch
During 2008 governments on both sides of the Atlantic intervened in the affairs of banks and other financial institutions in a quite unprecedented manner.

The governmental (or at least government initiated) rescues have had an undoubted impact on private investors. Some announcements of planned action have been followed by sharp falls in share values; many shareholders have seen their holdings diluted by the creation of new preference shares in some cases held by the state; there has been an absence of shareholder consultation and instances of unequal treatment: the U.S. government stepped in to save
Merrill Lynch from bankruptcy, but allowed Lehman Brothers to fail.

Investors affected by government action may have recourse in the national courts. Investors in Northern Rock have brought a claim against the U.K. government claiming that the statutory scheme used to rescue that bank amounted to an expropriation of their shares without effective compensation. That case concerned domestic investors, who were able and prepared to use domestic judicial remedies.

Other recent events have a more international profile. The vast majority of depositors in Icelandic banks Kaupthing and Landsbanki, which went into administration in October 2008, were non-Icelandic companies and individuals. Some of the government-brokered mergers or asset sales involving failing banks relied on the assistance of foreign banks, such as Santander's acquisition of assets of Bradford & Bingley in the UK. International investors that suffer as a result of governmental action may not wish to proceed in the national courts, and may prefer to use international instruments and institutions to make their claims.

This raises the prospect of a wave of investor-state claims against governments based on the impact of the rescue packages. Many of the countries concerned have bilateral or multilateral investment treaties ("BITs" or "MITs") in place intended to protect foreign investors from discrimination, unfair expropriation, and other state action. Unlike most international treaties, these investment treaties typically create a direct right of action on the part of investors that are nationals of one country against the other state party to the treaty. Such claims are typically administered by the International Centre for the Settlement of Investment Disputes (ICSID).

This economic crisis is not without precedent, at least so far as the potential for investor-state claims is concerned. More than 40 out of the 140 cases currently pending before ICSID arise out of the Argentinean government's responses to the financial crisis of 2001-2002. Foreign investors claimed compensation from the Argentinean state arising out of a variety of measures including the devaluation of the peso, the pesification of debt and the freezing of bank accounts. Many claims remain ongoing.

The Argentinean cases provide helpful guidance on the issues and arguments at stake in investment treaty cases, which are likely to return in cases arising out of the present financial crisis. Argentina has relied on two principal defences. One was the presence in the relevant BIT of a non-precluded measures (NPM) clause that limited the applicability of investor protections in exceptional circumstances, including the protection of essential security and the maintenance of public order. The second was the customary international law defence of necessity. Although all the tribunals to date have accepted that both defences can apply to measures taken to avert financial crises, most tribunals (notably those in the CMS, Enron and Sempra Energy cases) have interpreted those defences strictly and have awarded compensation to the claimant investor. Other tribunals, notably in LG&E Energy Corp. and Continental Casualty, have recognised that the intent of the states parties to the treaties was to strike a bargain between increased investor protection and state policy flexibility, and accorded deference to a government's freedom of choice with regard to the methods used to avert a financial disaster.

It is of course too soon to assess precisely which states will face claims arising out of the current crisis and what kind of measures will generate claims. The scale of the economic crisis and the number of potential claims may cause governments to agree on a new structured process for the administration of claims, possibly including the establishment of a specialised tribunal or series of tribunals along similar lines as the U.S.-Iran Claims Tribunal. It is understood that intergovernmental discussions are already underway in this respect.

Explicitly or substantively discriminatory measures will provide the most obvious target. This would include measures such as the proposal by the Icelandic government to guarantee only those deposits in its banks held by Icelandic citizens or companies, which proposal was shelved following international diplomatic efforts. Yet as the Argentina cases show, macro-economic policy instruments may also give rise to significant claims where they can be proved to have harmed non-national investors. This could include the obtaining of ownership or control of financial institutions, the dilution of shareholdings, and the triggering of stock...
value falls. In such cases, the approach taken by ICSID tribunals to NPM clauses in the relevant BITs and to the defence of necessity will be of central importance. Since this economic crisis is global rather than local, but each government faces unique challenges in its own economy, it is to be expected that the deferential approach taken in *LG&E Energy Corp.* and *Continental Casualty* may gain ground.

Arbitration Cases in the U.S. Supreme Court’s 2008-2009 Term

Brian R. Davidson and Kari M. Horner

During its 2008-2009 term, the U.S. Supreme Court will decide three cases related to arbitration. Two of these cases will likely impact the scope or interpretation of the Federal Arbitration Act (“FAA”) in the American legal system. The third case will clarify the scope of an arbitration clause in a collective bargaining agreement with respect to statutory discrimination claims.

Compelling Arbitration under the FAA - *Vaden v. Discover Bank*

In this appeal from the United States Court of Appeals for the Fourth Circuit, the issues to be decided include: (1) whether 28 U.S.C. § 1331, the statute granting federal district courts original jurisdiction over civil actions arising under the Constitution, federal law, or treaties of the United States, commonly referred to as “federal question jurisdiction,” permits a federal district court to “look through” a petition to compel arbitration under Section 4 of the FAA to ground jurisdiction on the underlying dispute when the petition itself does not raise a federal question on which to ground jurisdiction; and, if so, (2) whether a state law counterclaim in the underlying dispute that is completely pre-empted by federal law can provide the basis for federal question jurisdiction. The Fourth Circuit answered both of these questions in the affirmative, thereby concuring with the “look through” approach of the First and Eleventh Circuits. The Second, Fifth, Sixth, and Seventh Circuits have adopted a more narrow approach and held that federal question jurisdiction under a Section 4 suit must be determined only by the allegations of the petition itself. The Supreme Court heard oral argument in this matter on October 6, 2008.

In the underlying dispute, Discover Bank (“Discover”) sued Vaden in Maryland state court for failure to pay a credit card balance. Vaden asserted counterclaims based on Maryland state law. Discover filed suit in federal district court under Section 4 of the FAA to compel arbitration of Vaden’s counterclaim pursuant to an arbitration clause in Vaden’s cardholder’s agreement. Section 4 of the FAA permits a federal district court to issue an order compelling arbitration if that court would have otherwise had jurisdiction of the subject matter of a suit arising out of the controversy between the parties. The Fourth Circuit determined that a federal district court would have subject matter jurisdiction under Section 4 of the FAA if the underlying dispute related to a federal question, within the purview of 28 U.S.C. § 1331. Moreover, the Fourth Circuit determined that Vaden’s state-law counterclaims with respect to finance charges, late fees, and compounding of interest on consumer credit account were completely pre-empted by the Federal Deposit Insurance Act, which was implicated because Discover is a state-chartered, federally insured bank. As such, the Fourth Circuit determined that it had federal question subject matter jurisdiction to hear Discover’s Section 4 petition.

An adoption by the Supreme Court of the “look through” approach could broaden the universe of disputes in which a party could compel arbitration in the federal district courts pursuant to Section 4 of the FAA. If, however, the Supreme Court finds that jurisdiction may not arise from a federal question in the underlying dispute, the use of federal courts to compel arbitration may be limited.

Enforcement of Arbitration Agreements by Non-Signatories - *Arthur Andersen, LLP v. Carlisle*

This appeal from the Sixth Circuit concerns two issues: (1) whether the FAA provides appellate jurisdiction over an interlocutory appeal from an order denying an application under Section 3 of the FAA to stay court proceedings pending arbitration when the applicant is not a signatory to the arbitration agreement; and (2) whether the FAA allows a district court under “equitable principles”
to stay litigation against non-signatories to an arbitration agreement if the non-signatories can otherwise enforce the arbitration agreement. The Sixth Circuit, in concurrence with the D.C. Circuit and Tenth Circuit, answered both of these questions in the negative. The Second Circuit has held to the contrary, ruling that equitable considerations can ground jurisdiction for an appeal under Section 16(a) of the FAA. The Supreme Court is likely to conduct oral arguments in this case during the February 23 through March 4 session.

In the underlying case, Carlisle had sought advice from Arthur Andersen, LLP (“Arthur Andersen”), Bricolage Capital LLC (“Bricolage”), and Curtis, Mallet-Prevost, Colt & Mosle, LLP (“Curtis Mallet”) on how to minimize taxes on the sale of its business. The investment management agreement with Bricolage contained an arbitration provision. Arthur Andersen and Curtis Mallet were not signatories to this agreement. After some of their investments as part of a tax shelter proved to be worthless, and Carlisle was forced to join an IRS settlement program with respect to its tax shelter, Carlisle sued Arthur Andersen, Bricolage and Curtis Mallet. Bricolage filed a motion to stay the proceedings pending arbitration. While that motion was pending, Bricolage filed a petition for bankruptcy, and an automatic stay as to Bricolage was entered. The remaining defendants then attempted to step into Bricolage’s shoes, relying on an equitable-estoppel argument that the arbitration agreement should bind Carlisle as to all defendants.

The Sixth Circuit affirmed the district court’s denial of the motion to stay and determined that it did not have jurisdiction to address the defendants’ interlocutory appeal from that denial. Section 16(a)(1) of the FAA provides jurisdiction over interlocutory appeals from the denial of a motion to stay pursuant to Section 3 of the FAA, which permits federal courts to stay “any issue referable to arbitration under an agreement in writing for such arbitration.” Focusing on the fact that neither Arthur Andersen nor Curtis Mallet was a signatory to the “agreement in writing,” the Sixth Circuit held that neither party had standing to appeal the order denying the motion to stay under Section 16(a)(1) of the FAA. This would not create jurisdiction for an appeal under the FAA.

The Supreme Court’s resolution of this issue may have a considerable impact on the rights of parties who are not signatories to an arbitration agreement.

Arbitration Clauses in Employment Contracts - 14 Penn Plaza LLC v. Pyett

This appeal from the Second Circuit concerns the issue of whether an arbitration clause in a collective bargaining agreement constitutes an effective waiver of an employee’s right to file statutory discrimination claims in a judicial forum. The Second Circuit held such a clause did not waive an employee’s right to file a statutory-discrimination claim. This holding is in direct conflict with the Fourth Circuit, which has held that such arbitration agreements are enforceable. Conflicts on this issue also exist between federal and state courts. The Court heard oral argument in this case on December 1, 2008.

In the underlying case, respondents are former employees of Temco Services Industries. Respondents are covered by a collective bargaining agreement (“CBA”) between their union and the Realty Advisory Board on Labor Relations, the multi-employer bargaining associate of the New York City real estate industry. Respondents filed grievances with the union under the CBA, and arbitration commenced. During the arbitration, the union pursued respondents’ claims regarding denial of overtime and promotion, but chose not to pursue claims relating to age discrimination. After the union declined to pursue the age discrimination claims, respondents filed a claim with the Equal Employment Opportunity Commission alleging discrimination, and subsequently filed an action in federal district court, alleging violations of the Age Discrimination in Employment Act (“ADEA”).

Appellant moved to compel arbitration, but the district court denied the motion on the basis that a union’s waiver to litigate certain federal and state statutory claims in a judicial forum is unenforceable.

The Second Circuit noted that past Supreme Court decisions provide guidance addressing this specific question, but no decision was directly on point. In particular, in Alexander v. Gardner-Denver (1974),
the Supreme Court held that an arbitral resolution of an employee’s claims of racial discrimination did not prohibit the employee’s pursuit of statutory claims under Title VII, even though the employee’s CBA contained an agreement to arbitrate.

Subsequently, in Gilmer v. Interstate/Johnson Lane Corp. (1991), the Supreme Court held that statutory claims under the ADEA could be subject to compulsory arbitration if so provided in an individual employment agreement (however, in this case the contract was not a CBA). Finally, in Wright v. Universal Maritime Service Corp. (1998), the Supreme Court declined to reach the question of whether a CBA may validly require arbitration of claims under the Americans with Disabilities Act because the CBA in question did not clearly require arbitration of statutory claims.

The decision of the Supreme Court in 14 Penn Plaza will resolve important issues as to whether a union can effectively agree to arbitrate statutory discrimination claims with respect to its members. This decision will provide guidance to employers and union members with respect to the scope of their arbitration agreements. This decision may also have an impact on recent efforts in the United States Congress to prohibit the use of arbitration clauses in employment contracts.

### Anti-suit Injunctions in Support of Arbitration Agreements - Are They Lawful in Europe?

**Vanessa C. Edwards**

Courts in the UK have traditionally been willing to grant injunctions to prevent a party to an arbitration agreement from pursuing legal proceedings in breach of that agreement. The question whether such injunctions are compatible with European Union law is currently pending before the European Court of Justice in Case C-185/07 Allianz (formerly Riunione Adriatica di Sicurta Spa) and Others v West Tankers Inc. In most cases before the ECJ, an Advocate General delivers a written Opinion to the judges before they start their deliberation. AG Kokott delivered her Opinion on 4 September 2008, proposing that the Court should rule that anti-suit injunctions in support of arbitration agreements were contrary to EU law. The ECJ’s judgment is expected some time early next year. The ECJ usually, but not always, follows the Opinion of the Advocate General.

### The Brussels Regulation

The Brussels Regulation (Regulation (EC) No 44/2001) lays down rules for determining jurisdiction in civil and commercial matters involving more than one Member State of the EU. The Regulation states that it does not apply to arbitration. In its judgment in Case C-159/02 Turner v Grovitt the ECJ held that the Brussels Convention (the relevant provisions of which are essentially the same as those of the Regulation, which has superseded it) precludes anti-suit injunctions. Turner v Grovitt did not concern arbitration; the question before the ECJ in West Tankers is whether anti-suit injunctions are also impermissible when made in support of arbitral proceedings.

### The Facts

The West Tankers case arose out of the collision in Italy of a vessel owned by West Tankers and chartered to an Italian company, Erg Petroli SpA (Erg). The charterparty provided for arbitration in London. Erg claimed on its insurers, including Allianz, up to the limit of its cover and commenced arbitration proceedings against West Tankers in London for uninsured losses. The insurers brought proceedings against West Tankers in Italy to recover the amounts which they had paid Erg. The High Court in London granted West Tankers an injunction requiring the insurers to discontinue the proceedings in Italy. On appeal, the House of Lords referred to the ECJ the question whether it is consistent with the Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement. The House of Lords took the view that Turner v Grovitt could not apply to anti-suit injunctions made in support of an arbitration agreement because arbitration is excluded from the scope of the Regulation.

### The Opinion

AG Kokott disagrees. She deals with two principal issues in her Opinion.
First, what is the scope of the exclusion of arbitration from the Regulation? AG Kokott considers that the decisive question is not whether the application for an anti-suit injunction falls within the scope of the Regulation, but whether the proceedings against which the anti-suit injunction is directed – here, the proceedings before the court in Italy – do so. In those proceedings, the insurers are claiming damages for loss caused by the collision. The subject-matter is therefore a claim in tort (possibly also in contract) for damages, which falls within the scope of the Regulation, and not arbitration. The question whether there is an applicable arbitration clause is merely a preliminary issue which the court seised must address when examining whether it has jurisdiction. If that court were barred from ruling on that issue, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection.

Second, do factors relating to the practical reality of arbitration proceedings override that conclusion? AG Kokott considers that her interpretation respects individual autonomy and does not call into question the operation of arbitration. Judicial proceedings will result only if the parties disagree as to whether the arbitration clause is effective, in which case it is unclear whether the parties have genuinely agreed to submit a specific dispute to arbitration. If the national court concludes that the arbitration clause is effective, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. AG Kokott concedes that there is a risk of divergent decisions both as to the scope of the arbitration clause and, if both the arbitral body and the national court assume jurisdiction, as to the merits. She considers, however, that a unilateral anti-suit injunction is not a suitable response to that risk, which can be obviated only by the inclusion of arbitration in the Regulation. Until then, if necessary, divergent decisions must be accepted.

Comment

AG Kokott's response to the argument that precluding anti-suit injunctions undermines the parties' autonomous decision to refer disputes to arbitration is disappointing. To state that judicial proceedings in breach of the arbitration agreement "will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question" ignores the very real risk of bad faith. The fact that that court should ultimately refer the matter to arbitration if it finds that the arbitration clause is indeed valid and applicable does not cure the harm done by the intervening lapse of time.

Moreover, it is regrettable that the AG did not deal with two other arguments cogently made by the House of Lords in its order for reference. First, the House of Lords explicitly accepted that, under the Regulation, the Italian court had jurisdiction to try the claim in tort, but stressed that the arbitration clause was an agreement not to invoke that jurisdiction, and it is that agreement that the anti-suit injunction requires to be performed. Second, the House of Lords, while explicitly accepting that in proceedings falling under the Regulation it is right that courts of Member States should trust each other to apply it, expressed the view that in cases concerning arbitration it is equally necessary that Member States should trust the arbitrators or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and if so to enforce it by orders requiring the parties to arbitrate and not litigate.

If AG Kokott's Opinion is followed by the ECJ in its judgment, a material boost may be given to a number of seats of arbitration outside (i) the Member States of the EU, and (ii) the countries party to the Lugano Convention, which mirrors the Brussels Regulation (Switzerland, Iceland and Norway), such as New York and Singapore, where anti-suit injunctions are available. Clearly, however, the English courts will retain the ability to issue anti-suit injunctions restraining parties from pursuing conflicting proceedings in courts outside the EU/Lugano countries (e.g., in U.S. courts).

It will also be interesting to see the extent to which AG Kokott's approach, if ultimately followed by the ECJ, will impact on the drafting of arbitration clauses. In particular, parties may seek to give the arbitration tribunal power to grant anti-suit injunctions. The full implications in terms of the effect upon arbitration across Member States will, however, take some time to emerge.
Is International Arbitration Delivering?

Peter R. Morton and Ben J. Anstey

The School of International Arbitration, Queen Mary, University of London recently released their updated survey of Corporate Counsel attitudes to International Arbitration, building on their original 2006 study (both sponsored by PricewaterhouseCoopers LLP). The eye-catching finding from the 2008 study was that, of 100 Corporate Counsel drawn from a range of businesses across the world, 86% expressed themselves to be “…satisfied with International Arbitration.”

This may seem to be a surprising finding, especially to those who attend corporate counsel fora, at which the merits of international arbitration, including its cost-effectiveness, are debated. If one digs beneath the surface, what does the 2008 study reveal about the state of consumer satisfaction with international arbitration?

Best of a Bad Lot?

One theme to emerge from the 2008 survey is that arbitration is increasingly selected as the ‘least worst’ option in international contracts. The enforceability of arbitral awards, the flexibility of the procedure and the ability to select experienced arbitrators came through as factors pushing corporate counsel towards arbitration, as opposed to international litigation or alternative dispute resolution mechanisms. The survey further revealed a clear perception amongst corporate counsel of arbitration as a private and independent system, largely free from external interference.

44% of the participating corporations indicated they mostly selected arbitration as their primary means of resolving international disputes. This was higher than the 41% that expressed a preference for litigation, the second most popular choice (although the proportion preferring litigation had increased since the original survey in 2006). There was a particular inclination towards international arbitration amongst those in the shipping, energy, oil and gas and insurance industries.

Enforcement

Whilst the survey revealed that only 11% of cases resulted in recognition and enforcement proceedings, and 49% ended in voluntary compliance (with 25% settling without an award, and the remaining 15% either settling following an award or resulting in litigation), enforceability of the ultimate finding of the tribunal comes through as a lead driver for its usage by corporate counsel.

In cases where enforcement is necessary, most corporations are able to enforce arbitral awards within one year and usually recover more than 75% of the value of the award, although 44% of the corporations reported that they had succeeded in recovering the full value of an award from enforcement and execution proceedings.

The majority of the corporations that took part in the survey reported no major difficulties in the recognition and enforcement of awards. Where difficulties were encountered, these tended to relate to: local procedures; identifying the assets (or lack thereof) of the non-prevailing party; the attitude of local bureaucrats and courts; and court corruption. Whilst these are all difficult practical issues to address, the boon for international arbitration as a tool lies in a glaring absence from the survey - deficiencies in the arbitral proceedings themselves were not mentioned as posing problems (although such problems can and, inevitably in some cases, do occur).

Cost Concerns

Only 5% of the survey respondents indicated that they were “rather” or “very disappointed” with international arbitration. The increased cost of arbitration in relation to other alternatives was cited as a particular concern.

The sometimes very high costs associated with international arbitration may well be due, at least in part, to the fact that issues which impact the cost-effectiveness of the resulting procedure, such as choosing an appropriate seat, applicable law and institution to conduct the arbitration, for example, are not always properly addressed at the contract drafting stage. Even within sophisticated businesses with established legal functions, key decisions in drawing up contracts may be left to
commercial/sales team members with less awareness of the dynamics of arbitration.

Time spent at the front end in establishing the right framework, and enlisting the help of those who are more familiar with arbitration and arbitration procedure, and thus best placed to help make these decisions, can repay ten times over if and when a dispute develops, and help reduce cost concerns.

Despite the high levels of satisfaction with international arbitration recorded in the survey, many corporate counsel do harbour real concerns about the costs and possible delays in international arbitration. Certainly, international arbitration will not be resting on its laurels in recording an 86% satisfaction rating, and will continue to strive to make the process swifter and cheaper for the benefit of its users.

Arbitration in Dubai: New Structures and Legal Instruments
Neal R. Brendel, James S. Malloy, and Lubna El-Gendi

The DIFC Arbitration Centre
The Dubai International Financial Centre (“DIFC”) opened in September 2004 with aspirations to turn Dubai into a global financial hub on a par with New York, Hong Kong and London. Since its opening, the DIFC has become the world’s fastest growing international financial center. The DIFC operates as a fully autonomous common law jurisdiction within the United Arab Emirates (“UAE”). Dubai courts have no jurisdiction over the DIFC or entities operating in the DIFC. Thus, the DIFC has its own judicial system with jurisdiction over civil and commercial cases relating to disputes arising out of or in connection with the DIFC and its members.

In a further attempt to attract commercial business, the DIFC recently entered into a joint venture with the London Court of International Arbitration (“LCIA”) to establish the DIFC-LCIA Arbitration Centre (“Arbitration Centre”). The Arbitration Centre represents the first time that the LCIA, one of the longest-established international institutions for commercial dispute resolution, has ventured outside of the United Kingdom in its 125-year history.

The partnership with the LCIA offers the Arbitration Centre some immediate benefits. For example, the Arbitration Centre rules are closely modeled on the LCIA rules, which are well known throughout the international arbitration community. Likewise, the Arbitration Centre will have access to the LCIA’s extensive international network of arbitrators with a wide range of qualifications and expertise in international arbitrations. As noted by Adrian Winstanley, Director General of the LCIA, the initiative between the DIFC and the LCIA allows the DIFC to offer the “efficient, neutral, dependable and cost-effective [alternative dispute resolution] services for which the LCIA is widely known. . . . This cooperative venture underlines the LCIA’s recognition of the important and burgeoning economies of Dubai and the wider Middle East.”

DIFC’s Amended Arbitration Law
The DIFC has recently amended its arbitration law to make the Arbitration Centre more accessible and attractive to parties outside of the DIFC. The Amended Arbitration Law, in effect since September 1, 2008, is modeled on the UNCITRAL Model Law.

Several of the amendments are likely to increase use of the Arbitration Centre. First and perhaps most significantly, the new law allows parties to designate the DIFC as their seat of arbitration, regardless of whether they are connected to the DIFC. The previous law required a party to have some connection to the DIFC in order to access the Arbitration Centre.

Other noteworthy changes include the insertion of a confidentiality provision, the setting of a default number of arbitrators at one, a power for the DIFC Court of First Instance to appoint the arbitral tribunal in multiparty disputes absent agreement of the parties, a provision authorizing the DIFC courts to issue interim measures of protection (even in instances where the seat of arbitration is not the DIFC), and a provision giving the DIFC courts authority to enforce any prohibitive and mandatory injunctions issued by arbitrators.
The Amended Arbitration Law also contains provisions relating to the enforcement in the DIFC of arbitral awards rendered outside of the DIFC. Previously, the difficulty in enforcing arbitral awards created a significant roadblock to efficient and reliable arbitration in the Middle East.

The amended Arbitration Law stipulates that the DIFC courts will comply with any treaties entered into by the UAE for the mutual enforcement of judgments and awards. The UAE is a party to several such treaties, including the New York Convention, the Riyadh Convention (on the enforcement of judgments and awards rendered in Arab countries), the 1996 Agreement on Enforcement of Court Judgments, Delegations and Judicial Notices in the GCC States, and bilateral agreements with countries including France, India, Egypt, Tunisia, Jordan, Syria, Morocco, Algeria, and Somalia.

The UAE Federal Arbitration Law

The UAE is in the process of passing a new federal arbitration law to apply to all domestic and international arbitrations in the UAE, except for arbitrations in the DIFC. The new law is to be based on the UNCITRAL Model Law and promises to further pave the way for efficient and reliable international arbitrations in the Middle East. Once passed, the proposed law will be the first comprehensive arbitration law in the UAE. Currently, arbitration in the UAE is regulated by various provisions in the Civil Code, but no specific legislation.

Impact of Recent Changes

These recent changes are aimed at making the DIFC a desirable seat of arbitration for parties doing business in the Middle East, North Africa and South Asia region in particular. Whether this will occur remains to be seen. To date, there is little information in terms of the number or value of arbitrations the Arbitration Centre handles. Only time will tell whether commercial parties will begin to adopt the DIFC as the seat for international commercial disputes. While it may well be a convenient forum for parties in the DIFC and Middle East, it is less certain that parties doing business outside of those zones will decide to resolve their disputes there.

In seeking to meet its ambitious objective, the Arbitration Centre faces a degree of uncertainty and some real challenges. For instance, many parties will undoubtedly prefer to wait to see how the Amended Arbitration Law will be applied and enforced, and to observe what difficulties parties using the Arbitration Centre encounter in enforcing DIFC arbitral awards outside the UAE.

In sum, while the Amended Arbitration Law and the UAE Federal Arbitration Law promise familiar international arbitration rules and proceedings, as well as equally enforceable arbitral awards, it remains to be seen how all of this will develop over time.

Arbitration Clauses in Consumer Contracts – Recent English Decisions

Sean Kelsey

In Spring 2008 we reported on proposed legislation in the US restricting recourse to arbitration in consumer disputes (the Arbitration Fairness Act 2007), and, by contrast, on the recent ruling of the Supreme Court of Canada upholding the ability of companies to preclude consumer class actions by requiring that all disputes be referred to arbitration (Dell Computer Corp v Union des consommateurs). The judgment of the English High Court in the case of Mylcrist Builders Limited v Buck [2008] EWHC 2172 (TCC) comes as a timely reminder of the potential for arbitration clauses in consumer contracts to fall foul of the statutory protections afforded to consumers by English law.

The Facts

Mrs Buck employed Mylcrist Builders Limited to build an extension to her house. The parties entered into an agreement on the builders’ standard terms and conditions, which included an arbitration clause. A dispute arose and the builders purported to appoint an arbitrator who rendered an award. The builders applied to enforce the award. The application was refused. The court held that the arbitrator did not have jurisdiction. The arbitration agreement, in accordance with the Arbitration Act 1996 (the “Act”), required that the parties agree to the appointment of a single arbitrator, or else that an
application be made to the court for appointment of an arbitrator, and neither course had been followed. More significantly, the court also held that the arbitration agreement itself was unenforceable.

The Law
The Unfair Terms in Consumer Contracts Regulations 1999 (the “Regulations”) implement the EC Directive on unfair terms in consumer contracts, and stipulate that a “contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” An unfair contractual term is not binding on a consumer. (Under section 91 of the Act, an arbitration clause is automatically unfair for purposes of the Regulations in relation to any claim with a pecuniary value of £5,000 or less.)

Schedule 2 of the Regulations contains an indicative and non-exhaustive list of contractual terms which may be regarded as unfair. Paragraph 1(q) of Schedule 2 includes terms which have the effect of

“(q) excluding or hindering a consumer’s right to take legal action or exercise any other legal remedy particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions...”

The Decision
In assessing the impact of the arbitration clause on the parties’ rights and obligations, the court found that the right of a party to an arbitration agreement to obtain a stay of court proceedings (under section 9 of the Act) and the restrictions on an appeal against any arbitral award meant that the arbitration clause had the effect of excluding or hindering Mrs Buck’s right to take legal action in the courts. On the facts, it was also relevant that the arbitrator’s fees (£2,000) were a significant proportion of the value of the dispute (only a little over £5,000 inclusive of VAT). Had these aspects of the dispute settlement provision been pointed out to Mrs Buck it was likely that she would not have entered into a contract with the builders on their standard terms and conditions. For purposes of the Regulations and the case law on their application, the arbitration clause was unfair because it caused significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which was contrary to the good faith requirement of fair and open dealing.

Implications
The lesson of the case is that businesses contracting under English law with consumers on standard terms and conditions should only include an arbitration clause if it is specifically brought to consumers’ attention, and its effect is fully explained in advance of agreement. A further word of warning – even a corporate counter-party may be held to be a consumer for the purpose of the Regulations in circumstances where it contracts for purposes other than its business, trade or profession. In another recent case, Heifer International Inc v Christiansen, the English High Court found that a BVI company incorporated to acquire a property in England contracted as a consumer with Danish architects and the Regulations were engaged. The company argued that the arbitration clause in its contract with the architects was unfair because it mandated arbitration in Denmark (and in Danish). The court disagreed, but largely because the company had taken reputable Danish law advice at all times and would have been perfectly able to afford the expense of participating in any Danish arbitration, including the cost of interpreters and translations. This may not always be the case.

Ordre Public in Enforcement and Annulment of Arbitral Awards in Germany
Dr. Eberhardt Kühne and Ishak Isik, LL.M.

A recurring issue in the German Federal Court of Justice's jurisprudence is the compliance of foreign arbitral awards with the ordre public. Three recent Federal Court decisions have addressed this issue.

Principle of good faith
Good faith plays an eminent role under German law. The principle of venire contra factum proprium (undue exercise of legal rights because of contradictory behaviour) is an integral aspect of good faith. This principle (analogous to the common law doctrine of estoppel) is that a party’s behaviour contradictory to earlier behaviour may be considered an undue exercise of legal rights.
This principle was applied in the Federal Court's judgment of April 17, 2008.

The parties founded a joint venture for the exclusive and joint exploitation of oil fields in Lithuania and agreed upon ICC arbitration seated in Denmark. The tribunal awarded the claimant damages for breach of the joint venture agreement since the respondent exploited the oil fields without participation of the joint venture vehicle. The respondent did not challenge the award in Denmark. However, when the claimant applied to the German courts to enforce against the respondent's assets in Germany, the respondent raised objections. The Higher Regional Court refused to hear the respondent's objections, as it considered the respondent's behaviour contradictory and, hence, an improper exercise of legal rights.

The Federal Court held that in principle the objection of *venire contra factum proprium* may be relevant in an enforcement procedure of a foreign arbitral award. However, it held that a party could have legitimate reasons not to challenge the award in the country of origin. Not challenging the award in the country of origin does not constitute as such contradictory behaviour.

In the present case, in the absence of any further indications of contradictory behaviour, the Federal Court reversed the Regional Court's judgment.

**Procedural errors**

By contrast, in the Federal Court case of May 21, 2008 the arbitral award in question was annulled in the country of origin.

The applicant was granted an arbitral award by an international arbitral tribunal in Belarus. The Belarusian Supreme Commercial Court granted the respondent's application for annulment because of formal irregularities of the proceeding as the award was adjudicated by only two instead of the mandatory three arbitrators. Despite the annulment of the award in Belarus, the applicant applied to enforce the award in Germany. The German Regional Court rejected the application. The applicant contested the Regional Court's verdict and argued that, in relying only on the annulment of the award as such, the Regional Court violated its fundamental procedural right to be heard.

The Federal Court could not discern any violations of the applicant's fundamental procedural rights since the Regional Court not only relied on the fact that two arbitrators rendered the award but also scrutinized whether the award was annulled in Belarus in accordance with Art. V para. 1 (d) of the New York Convention.

**Compulsory insolvency provisions**

In its judgment of October 30, 2008 the Federal Court again highlighted that in enforcement and annulment procedures public policy rules have to be applied in a strict and restrictive manner.

The case concerned a contract for the purchase of corn which was subject to the General Terms for the Trade of Grain in Germany (GTTGG). After the buyer became insolvent, the insolvency administrator refused performance of the purchase contract. The seller resorted to arbitration and successfully claimed damages for breach of contract pursuant to the GTTGG. The insolvency administrator applied for the annulment of the arbitral award and argued that the specific rule of the GTTGG applied by the arbitral tribunal violated compulsory insolvency provisions and mandatory general regulations applicable to standard business terms.

The Federal Court upheld the Regional Court's refusal to annul the arbitral award and confirmed that not all conflicts with compulsory provisions can ground a public policy objection. The *ordre public* only comes into play if principles of fundamental concern, i.e. which are considered essential for the German legal system, are evidently disregarded. Such a violation was not discernible in the underlying case.

**Outer Bounds of Arbitrability in Texas**

David Coale

The Texas Supreme Court has strongly defended contractual arbitration clauses in recent years. During the most recent term, the court set some
outer boundaries on the enforcement of arbitration provisions, finding waiver of an arbitration right in one case, and in another case that a particular provision was unconscionable. These opinions from the highest court of a large U.S. state suggest what the law may be in other U.S. states that have not addressed these issues.

**Waiver**

Texas, like most other U.S. jurisdictions, requires a showing of “substantially invoking the judicial process to the other party’s detriment or prejudice” to find waiver of an arbitration right. In *Perry Homes v. Cull*, the Texas Supreme Court found a waiver for the first time in its many arbitration opinions. No. 05-0882 (Tex. May 2, 2008). Over several months in litigation, the movant took ten depositions and sought leave to take several more, accompanied by dozens of additional document requests. As trial drew near, the movant withdrew an earlier objection to arbitration, after obtaining extensive discovery that would not have been available under the applicable arbitration rules. The court held that this conduct was “manipulation of litigation . . . that is precisely the kind of unfairness that constitutes prejudice under federal and state law.”

By contrast, the next month, the court declined to find waiver when the movant took no depositions, filed no dispositive motions and did nothing to seek a trial setting except exchange informal correspondence with opposing counsel. *In re Fleetwood Homes of Texas*, No. 06-0943 (Tex. June 20, 2008) (per curiam).

**Unconscionability**

In the case of *In re Poly-America*, an employee claimed that he had been wrongly discharged in retaliation for making a workers’ compensation claim, and among other causes of action, sought reinstatement and punitive damages pursuant to the Texas Workers’ Compensation Act. No. 04-1049 (Tex. Aug. 29, 2008). Part of the relevant dispute resolution provision waived the employee’s claims for punitive damages and reinstatement. The Texas Supreme Court held that, while an arbitration agreement may encompass claims created by a Texas statute, these particular limits in the dispute resolution provision violated public policy because they “substantively limit [defendant’s] liability . . . and thereby undermine the deterrent regime the Legislature specifically designed to protect Texas workers . . . .”

The court went on to hold that those unconscionable provisions were severable from the rest of the arbitration clause, which contained a number of discovery limitations and a cost-splitting mechanism, and then agreed that arbitration should be compelled.

In the *Fleetwood* case discussed earlier, the Texas Supreme Court declined to find an arbitration agreement unconscionable that allowed the prevailing party to recover attorneys’ fees, noting that “allowing both parties to recover fees hardly makes an agreement ‘one-sided’; such agreements . . . surely make them less so.”

**Fraudulent Inducement**

While the Texas Supreme Court found both waiver and unconscionability during the term, it declined to find that an arbitration agreement was fraudulently induced in the case of *Forest Oil v. McAllen*, No. 06-0178 (Tex. Aug. 29, 2008). The plaintiff claimed that it agreed to an arbitration provision because of alleged fraudulent misrepresentations. The contract also contained a “waiver-of-reliance” provision which warranted that both parties had reviewed the agreement with counsel and that neither party is “relying upon any statement or representation of any agent of the parties . . . .” The Supreme Court held in *Forest Oil* that, as between “sophisticated parties represented by counsel in an arm’s-length transaction,” this waiver provision defeated the claim of fraudulent inducement.

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**Sports Arbitration Update:**

**Sheffield United v West Ham**

Martin J. King

The long-running legal battle between the English football clubs Sheffield United and West Ham may be approaching the final whistle.

Having failed in its arbitral challenge to the FA Premier League's ("FAPL") Disciplinary Commission’s decision to fine West Ham (rather than deduct points) for West Ham’s breaches of
FAPL Rules, Sheffield United continues to seek damages for breach of contract from West Ham. The manner of West Ham's employment of Carlos Tevez was in breach of FAPL Rules and Sheffield United consider that breach was an effective cause of its relegation from the Premier League in 2007. Sheffield United is reported to calculate its loss at £30m+ given the loss of television income amongst other indirect losses which greet clubs falling into the Championship.

Both football clubs are party to an arbitration agreement contained in "Rule K" of the Rules of the Football Association ("FA") and therefore Sheffield United's claim was referred to arbitration.

An independent arbitral tribunal constituted pursuant to Rule K rendered an Interim Award on liability on 18 September 2008; finding that Sheffield United are entitled to recover damages from West Ham for breach of contract. Quantum is due to be assessed in early 2009. West Ham subsequently lodged an appeal against that Interim Award to the Court of Arbitration for Sport ("CAS").

Sheffield United consider that: the arbitral tribunal's Interim Award is final and binding; CAS has no jurisdiction to hear West Ham's appeal: and the appeal is in breach of the arbitration agreement enshrined in Rule K. Sheffield United therefore applied for an interim injunction in the English Commercial Court to restrain West Ham from pursuing its appeal to CAS, pending the trial of Sheffield United's application for a permanent anti-suit injunction. CAS would consider its own jurisdiction but agreed to a moratorium in submissions on the point to enable Sheffield United's injunction application to be determined in the Commercial Court.

West Ham contended that the Interim Award was, in effect, "a decision passed by the FA" (which could be appealed to CAS under FIFA Statutes). However, the FA itself had stated that Sheffield United's claim for breach of contract was a dispute heard by a private independent tribunal and that the FA had not sat in judgment and had no influence over the tribunal's decision. The Court held that West Ham had failed to show that: the tribunal was, in effect, the FA; and it should not be held to its agreement to arbitrate (under Rule K). Further, the Court reinforced that damages are not an adequate remedy for breach of an arbitration agreement.

Ultimately, the Court granted Sheffield United an interim injunction restraining West Ham from proceeding with its appeal to CAS, putting Sheffield United perhaps one step closer to securing an award for damages against West Ham.

Amid press reports that West Ham may be appealing the interim injunction and/or may be sold by its financially troubled Icelandic backers and/or may be considering a settlement with Sheffield United, it remains to be seen whether this battle will be going into extra time in 2009.

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