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From the Editors

Welcome to the 14th edition of Arbitration World, a publication from K&L Gates' Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution. We hope you find this edition of Arbitration World of interest, and we welcome any feedback (email ian.meredith@klgates.com or peter.morton@klgates.com).

News from around the World

Marcus Birch, London

Americas

United States
In July 2010, Florida’s legislature passed arbitration legislation based on the UNCITRAL Model Law. The move forms part of efforts to establish Florida as a leading centre for international arbitration. In contrast to the approach taken in other States, Florida's enactment of the Model Law is virtually word-for-word: the only substantive variation is a provision ensuring immunity for arbitrators. The legislation adopts the variant of the Model Law wording that allows arbitration agreements to be oral as well as in writing.

Asia

Hong Kong
The Permanent Court of Arbitration (PCA) in The Hague and the Hong Kong International Arbitration Centre have signed a co-operation agreement providing for the sharing of facilities, services, information and expertise to facilitate arbitral hearings and meetings. The PCA has previously signed co-operation agreements with the China International Economic and Trade Arbitration Commission and the Australian Centre for International Commercial Arbitration.

Pakistan
Temporary laws giving effect to the New York and ICSID Conventions have expired, creating uncertainty over the enforceability of awards in Pakistan. An attempt to make the laws permanent was ruled unconstitutional in 2009, and the temporary laws have now expired. A bill to give permanent effect to the ICSID Convention is currently before the national assembly, but no bill to give permanent effect to the New York Convention has been proposed. Parties seeking to enforce awards in Pakistan are reported as relying on historic legal grounds under the Arbitration Act 1940 and the Code of Civil Procedure 1908.
Vietnam
New Vietnamese legislation on commercial arbitration has come into force. The Law on Commercial Arbitration, which came into force on 1 January 2011, replaces the 2003 Ordinance on Commercial Arbitration, and applies to both domestic and international commercial arbitration. One of the objectives of the new law is to make arbitration more accessible for commercial parties.

Europe
Greece
In December 2010, the Greek Parliament passed legislation enabling the parties to a dispute to submit to mediation at any stage of the dispute. The legislation was enacted in compliance with the EU Mediation Directive 2008/52/EC, and brings Greek law into line with other EU members. The new law covers all cross-border disputes, whether litigation or arbitration, and sets out certain basic rules as to mediation proceedings, including as to confidentiality and costs.

United Kingdom
The U.K. Supreme Court has granted leave to appeal the decision in Jivraj v Hashwani. The Court of Appeal held that the Equality (Religion and Belief) Regulations 2003 rendered void an arbitration agreement in a commercial contract which required the arbitrator to be from a particular religious community. The decision has raised concerns over potential side-effects on the validity of institutional rules which provide that a sole arbitrator or chair of a tribunal may not be of the same nationality as any party to the arbitration. The ICC and the LCIA, two institutions with such rules, are formally intervening in the appeal.

Institutions
Chartered Institute of Arbitrators (CIArb)
The CIArb has launched a major survey into the costs of international arbitration. The 'Costs of Arbitration' survey will gather data from internal and external counsel and arbitrators, with a view to obtaining findings on the overall costs of international commercial arbitration and how these are incurred at each stage. The survey is available at www.shape-the-future.com/costsurvey. The results will be presented at a conference in London on 27 and 28 September 2011.

ICSID
Qatar and Cape Verde have ratified the ICSID Convention. Both ratifications took place in late December 2010. The Convention will enter into force for Qatar on 20 January 2011 and for Cape Verde on 26 January 2011.

International Law Association (ILA)
The ILA has adopted The Hague Principles for Counsel Appearing before International Courts and Tribunals (which can be viewed at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1012). The Principles, intended as a first effort to identify minimum ethical standards for legal counsel across a range of international legal proceedings, were developed by a Study Group of the ILA co-chaired by Philippe Sands QC, Professor Laurence Boisson de Chazournes, and Campbell McLachlan QC.

World Investment Treaty Arbitration Update
Lisa Richman, Washington, D.C. and Dr. Sabine Konrad, Frankfurt

In each edition of Arbitration World, members of K&L Gates’ Investment Treaty practice provide an update on recent, significant investment treaty arbitration news items. This edition features a discussion of a decision on jurisdiction concerning the Slovak Republic and its implication on disputes involving intra-EU BITs; an analysis of the definition of investment in an award against Ukraine; summary of awards against Georgia and Kazakhstan; an examination of the recent award in claims by Franz Sedelmayer against Russia; a synopsis of conflicting interpretations of an award involving the Democratic Republic of Congo; a discussion of two recent decisions invoking Rule 41(5); a summary of the rejection of a challenge to an arbitrator appointed by Venezuela; and updates on claims against Argentina and Jordan.

Implications of Jurisdictional Ruling against Slovakia for Disputes Involving Intra-EU BITs
The Tribunal in Eureko v. Slovakia (PCA Case No. 2008-13) has upheld jurisdiction in an action brought under the Netherlands-Slovakia bilateral investment treaty (“BIT”) and will proceed to rule
on the merits of the dispute. The ruling may come as a source of relief to foreign investors seeking to rely on intra-EU BITs as a source of legal protection.

Eureko, one of Europe’s largest insurance companies, asserted that it suffered over a billion dollars in damages as a result of the Slovak government’s reversal of its health insurance market liberalization in 2006. Eureko identified a variety of government initiatives which adversely affected its investment, including a cap on insurer operating expenses and a ban on the distribution of profits to shareholders. Contending that the Tribunal did not have jurisdiction over the dispute, Slovakia argued that its accession to the European Union in May 2004 terminated the Netherlands-Slovakia BIT since the European Community Treaty governs the same subject matter as the BIT. In the alternative, it submitted that the overlap between the two treaties was itself sufficient for the Tribunal to find it lacked jurisdiction over the dispute.

The Tribunal invited the European Commission (“EC”) and the Dutch government to submit legal briefs to comment on this issue. The EC expressed doubts that the Tribunal had jurisdiction, noting that EU internal market provisions partially overlap with the substantive protections of the BIT, and an adverse decision by the Tribunal could potentially undermine EU law. Further, the EC observed that EU Member State reliance on a form of dispute settlement other than the EU judicial system is a breach of EU law, based on the “principle of loyalty” established in the ECJ’s Mox Plant case. The Dutch government, on the other hand, argued in favor of jurisdiction on the theory that the BIT continued in force, as confirmed in exchanges between government authorities of Slovakia and the Netherlands.

The Tribunal rejected both Slovakia’s and the EC’s positions, finding that no part of its jurisdiction or authority derived from EU law and, instead, was a product of the consent affirmed in the BIT and in Eureko’s subsequent claim. In response to the EC’s concerns, the Tribunal observed that a conflict between EU law and the BIT could only result in a finding that the Tribunal lacked jurisdiction if the dispute resolution clause of the BIT were itself superseded by EU law. It further noted that the Mox Plant decision is only relevant to disputes between EU Member States; a dispute between an investor and a Member State is therefore not subject to the exclusive jurisdiction of the ECJ.

**Tribunal Confirms Salini Test Does Not Apply**

An ICSID tribunal has found the Government of Ukraine in violation of the Austria-Ukraine BIT in its treatment of an Austrian property developer, Alpha Projektholding (“Alpha”), concerning a project to renovate and operate a hotel in Kiev. See Alpha Projektholding GmbH v. Ukraine (ICSID Case No. ARB/07/16). The award of 8 November 2010 determined that Alpha’s deal with the hotel qualified as an “investment” as required under Article 25 of the ICSID Convention, despite the fact that Article 25 does not define the term. The Tribunal’s analysis also accepts that joint-venture agreements are an acceptable form of investment which could prove important to future claims against Ukraine, in light of the fact that investors have relied on joint-activity agreements in order to invest in state property.

The question of what constitutes an investment has attracted a large and often conflicting body of jurisprudence and academic scholarship. One oft-referenced decision, Salini v. Morocco, held that an investment must meet four criteria in order to satisfy the Article 25 requirement: (1) contribution of money or assets, (2) a sufficient duration, (3) an element of risk, and (4) a contribution to the development of the host State.

The Tribunal rejected the Salini brand of jurisprudence on two grounds. First, the Tribunal concluded that it was appropriate in most cases to defer to the States’ definition of investment in a BIT or a contract because the drafters and signatories of the ICSID Convention decided not to include a universal definition of “investment.” Second, the Tribunal observed that the fourth Salini criterion—contribution to the development of the host State—“brings little independent content to the inquiry” of what constitutes an investment and invites a “post hoc evaluation of the business, economic, financial and/or policy assessments that prompted the claimant’s activities,” which effectively amounts to a form of “second-guessing.” The rejection of the Salini test is consistent with a trend in other awards,
including *Saba Fakes v. Turkey* (ICSID Case No. ARB/07/20) (Award, July 14, 2010) and *Malaysian Historical Salvors v. The Government of Malaysia* (ICSID Case No. ARB/05/10) (Decision on the Application for Annulment, April 16, 2009).

On the facts, the Tribunal held there was an investment, and that Ukraine both expropriated Alpha’s rights and failed to provide it fair and equitable treatment as required under the BIT. It observed that Alpha possessed a “legitimate expectation” that the government would not interfere with Alpha’s contracts relating to the renovation of the hotel, and the authorities undermined this expectation in converting the hotel to a mixed joint-stock company and suspending payments to Alpha.

The Tribunal did not, however, accept Alpha’s claim that Ukraine’s conduct placed it in violation of the umbrella clause in Article 8 of the BIT, which requires a contracting State to guarantee any obligation it has assumed with an investor of the other contracting State. It observed that Ukraine had no such obligation as the hotel was not acting as a State organ when it entered into its contracts with Alpha.

**Arrest of Claimant by Government Following $90 Million Award against Georgia**

In *Kardassopoulos and Fuchs v. Georgia* (ICSID Case Nos. ARB/05/18 and ARB/07/15), an ICSID Tribunal awarded two foreign investors each over US $45 million for damages caused by the deprivation of their rights in the Georgian energy sector.

In 1992, the Claimants and a Georgian state-owned company created GTI Ltd., a joint-venture vehicle which had rights to develop the East-West Samgori-Batumi pipeline in Georgia and exclusive control and possession of existing oil pipelines in Georgia. In the mid-1990s, Georgian authorities and other international energy companies entered into agreements which infringed GTI’s rights. Although Georgia initially accepted fault for the expropriation and instituted compensation proceedings, the State ultimately failed to reimburse either of the Claimants for their losses. After unsuccessfully working with Georgian authorities for eight years, the Claimants turned to ICSID arbitration.

The Tribunal determined that Georgia’s treatment of the Claimants violated the fair and equitable treatment protections of the Israel-Georgia BIT and the Energy Charter Treaty. Despite the fact that Mr. Fuchs’ contractual rights were terminated before the Israel-Georgia BIT came into effect, the Tribunal concluded that Georgian officials had created “legitimate expectations” in the compensation process, only to frustrate them and deny reimbursement. Georgia has since requested an annulment of the award.

In October 2010, Mr. Fuchs was arrested during a visit to Georgia on charges that he attempted to bribe Georgia’s Deputy Finance Minister into assisting him to increase the value of a potential settlement and influencing Georgia to drop the request for annulment.

**Mixed Ruling Relating to “Alleged Threatening Activity” by Kazakhstan**

Despite finding insufficient proof of threatening activity by Kazakhstan, the Tribunal in *Caratube International Oil Company v. Kazakhstan* (ICSID Case No. ARB/08/12) affirmed its power to protect the integrity of the proceedings by issuing a procedural order reminding the parties of the protections contained in Articles 21 and 22 of the ICSID Convention. These provisions of the Convention automatically grant immunity to all participants in international arbitration, including witnesses.

The order followed a request from Caratube for the Tribunal to confirm its powers under the Convention to reassure witnesses that Kazakh authorities “would at least think twice” before attempting to retaliate against them for their involvement in the proceedings. Kazakhstan’s President’s former son-in-law, Rakhat Aliyev, is scheduled to give evidence in February, supporting Caratube’s claims that its investments in Kazakhstan were unlawfully expropriated. Caratube is owned by US businessman Devinicci Hourani, and is seeking damages under the US-Kazakhstan BIT on the basis that Kazakh authorities mistreated Mr. Hourani’s investment in the Kazakh hydrocarbons industry.
Latest Order in the Dispute between Franz Sedelmayer and the Russian Federation

A Stockholm District Court has issued an order for the seizure of property in Sweden owned by the Russian Federation following a request by German national Franz Sedelmayer, who is seeking enforcement of a 1998 arbitral award in his favor against Russia for €2.3 million. Mr. Sedelmayer has sought to enforce the award in nearly 80 different legal proceedings in several countries.

Russia has argued that it should enjoy immunity from such orders on the basis of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, which has not yet come into effect because it has only 28 of the required 30 state signatories. Because the property attached in Sweden is used primarily for commercial purposes, it is not immune to attachment orders based on more generalized principles of sovereign immunity. Russia has indicated its intent to appeal the decision.

Both Parties Claim Victory in Dispute Involving the DRC

An ICC tribunal hearing a dispute between Canadian mining company, First Quantum Minerals, and the Democratic Republic of Congo (DRC) has issued an interim order, rejecting as “too large” and “unspecific” a request by First Quantum to block the DRC and state-mining company Gecamines from selling or transferring the contested assets until arbitration is concluded.

However, the order also extended a temporary order blocking the enforcement of a US $12 billion judgment by the Kinshasa Court of Appeal against First Quantum’s local subsidiary, prompting First Quantum to claim at least a partial victory. Nevertheless, following the hearing, DRC officials indicated that the Tribunal’s interim order did not impose a blanket ban on the sale of the contested assets.

Jurisdiction Declined under Rule 41(5) in Arbitrations against Ukraine and Grenada

Two recent ICSID decisions have declined jurisdiction in accordance with ICSID Rule 41(5), a rule that came into effect in April 2006 and permits dismissal of a claim that is “manifestly without legal merit” at an early stage of the proceedings. See Global Trading and Globex International v. Ukraine (ICSID Case No. ARB/09/11) and RSM v. Grenada (ICSID Case No. ARB/07/02). Globex marks the first time a tribunal dismissed a claim on the basis of Rule 41(5), and just the third instance in which a respondent relied on the rule as a basis for dismissal.

The two decisions use Rule 41(5) very differently. The tribunal in Globex relied on the rule to determine that the claim did not qualify as an investment in the context of an ICSID arbitration because the contract at issue was not with a Ukraine state entity but, instead, had been formed with an intermediary, private company. The tribunal held that, under ICSID’s travaux préparatoires, the claims did not qualify as an “investment” and instead were “pure commercial transactions.” The tribunal deliberately held the door open for a re-submission of the case as a non-ICSID treaty arbitration.

The tribunal in RSM, on the other hand, used Rule 41(5) to dismiss the treaty claim on the theory of collateral estoppel because a contract claim had been filed previously. The proceedings in RSM followed a prior arbitration in which an ICSID tribunal concluded that Grenada had not breached its petroleum exploration contract with RSM. RSM submitted the second, treaty arbitration on different facts, arguing that Grenada violated the US-Grenada BIT because its officials accepted bribes from a third-party competitor to RSM before rejecting RSM’s application for an exploration license.

The tribunal determined that RSM, having become aware of the corruption allegations while the first arbitration was still pending, should have submitted a request for revision of the first tribunal’s decision under ICSID Article 51. Article 51 permits the revision of an award following the discovery of a fact that “decisively … affects” an award if the fact was unknown to the Tribunal and the applicant at the time the award was rendered. Some consider that the RSM tribunal’s application of res judicata to dismiss the claim is incorrect on a number of levels—the tribunal not only failed to address directly the fact that RSM’s new corruption claims relied exclusively on a set of factual predicates that
were not resolved in the prior arbitration, but also
did not acknowledge that the revision procedure set
forth in Article 51 is not mandatory and therefore
could not serve as a basis to preclude litigation of
the new claims.

**Challenge to Arbitrator Appointed by**
**Venezuela Rejected**

A request to disqualify an arbitrator appointed in
multiple arbitrations by the Bolivarian Republic of
Venezuela has been rejected. *See Tidewater Inc. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/05).* The two other panel
members, Professor Campbell McLachlan and Dr.
Andres Rigo Sureda, rejected the challenge filed by
Tidewater, a US energy services company, seeking
to remove Professor Brigitte Stern from the tribunal.

The challenge was premised not only on the fact that
Professor Stern was appointed by Venezuela in
multiple arbitrations, but also her failure to disclose
some of the prior appointments. Tidewater also
argued that recurring legal issues in these actions
served as a further reason she should be excluded.

In rejecting the challenge, Professor Stern’s co-
arbitrators focused on the “many” ICSID cases in
which she has been appointed and her “extensive
practice as an arbitrator in investment cases.” These
factors caused them to conclude that Professor Stern
cannot be viewed as dependent on a particular party
and that appointment by Venezuela in multiple
arbitrations was immaterial under the circumstances.
Indeed, Professor Stern is one of the most frequently
appointed ICSID arbitrators and has been appointed
in more than thirty ICSID disputes. Despite noting
that disclosure is important, the other tribunal
members determined that Professor Stern’s non-
disclosure of appointments in a number of ICSID
matters could not serve as an independent grounds
for disqualification because the appointments were
a matter of the public record. Finally, they
determined that recurring issues should not serve as
a basis for disqualification because of the fact that
Professor Stern ruled against Venezuela on
preliminary matters in two prior cases. A challenge
to Professor Stern in another ICSID case involving
Venezuela remains pending. *See Universal
Compression International Holdings v Venezuela
(ICSID Case No. ARB/10/09).*

**Update Concerning Disputes Against**
**Argentina and Jordan**

In the October edition of Arbitration World, we
reported on three recent awards involving Argentina
and Jordan. By way of an update, following the
annulment by ad hoc committees in both *Enron v.
Argentina* and *Sempra v. Argentina* of awards of
over US$100 million earlier this year, both claims
recently were resubmitted to arbitration under
ICSID, essentially restarting the arbitral process.
Jordan has requested the annulment of the award
arising from the ICSID proceeding initiated by
Turkey-based ATA Construction, with which
Jordan allegedly has failed to comply. Jordan’s
reasons for requesting the annulment are not yet
known, and an ad hoc annulment committee has not
yet been constituted.

**The New Hong Kong**
**Arbitration Ordinance**

Chris Tung, Hong Kong

Thirteen years after the establishment of the
Committee on Hong Kong Arbitration Law on the
reform of Hong Kong’s arbitration law, the Hong
Kong Legislative Council passed the new
Arbitration Ordinance on 11 November 2010 (“New
Ordinance is expected to come into force in early
2011, when the Secretary for Justice issues a notice
in the Hong Kong Government Gazette.

The New Ordinance is a significant reform of Hong
Kong arbitration law. It is intended to simplify
practice and enhance the user friendliness of the
arbitration process. Highlights include:

**A unified arbitration regime, in line with the**
**UNCITRAL Model Law**
The New Ordinance adopts the structure of the
UNCITRAL Model Law on International
Commercial Arbitration (“Model Law”) and
provides for a single arbitration regime for all
arbitrations. The definitions of “domestic
arbitration agreement” and “international arbitration
agreement” of the current ordinance have been
removed. Parts 2 to 9 of the New Ordinance
broadly reflect Chapters I to VII of the Model Law.
Part 10 of the New Ordinance departs from Chapter VIII of the Model Law in relation to the recognition and enforcement of arbitration awards, in continuing to provide separately for the recognition and enforcement of arbitration awards between Hong Kong and Mainland China.

Application
As indicated above, the New Ordinance will apply to all arbitrations whether international or domestic in nature.

In employment disputes falling within the jurisdiction of the Labour Tribunal, the court will continue to have the power to refer such disputes to arbitration if a party makes a request and the conditions under Section 20(2) of the New Ordinance are satisfied.

Arbitration-related proceedings to be heard otherwise than in open court
Under the New Ordinance, the starting point is that court proceedings relating to arbitration are to be heard otherwise than in open court unless, on the application of any party or on the court’s initiative in any particular case, it is satisfied that the proceedings ought to be heard in open court (Section 16).

Duty of confidentiality
Under Section 18(1) of the New Ordinance, unless otherwise agreed, no party may publish, disclose or communicate any information relating to arbitration proceedings under the arbitration agreement or to an award made in those proceedings, subject to certain exceptions (Section 18(2)).

Interim measures and preliminary orders
Sections 35 to 45 provide the arbitral tribunal with the power to order interim measures and preliminary orders. Section 45(3) empowers the courts to grant interim measures in relation to arbitration proceedings irrespective of whether similar powers may be exercised by an arbitral tribunal.

No “fast-track” procedure
No fast-track arbitration procedure is contained in the New Ordinance. Rather, Section 47 of the New Ordinance incorporates Article 19 of the Model Law, which provides that parties are free to agree on the procedures to be followed by the arbitral tribunal in conducting the proceedings. Accordingly, parties are free to adopt simplified and fast-track procedures such as the small claims and document only arbitration procedures of the Hong Kong International Arbitration Centre.

Opt-in provisions
Under Section 99 of the New Ordinance, the parties may select opt-in provisions (set out in Part 14, Schedule 2) which will enable them to continue to use certain provisions that only apply to domestic arbitrations under the existing ordinance. Under Section 100 of the New Ordinance, unless otherwise agreed, these opt-in provisions are to automatically apply if the arbitration agreement provides for domestic arbitration, where the arbitration agreement is entered into before or within a period of 6 years after the commencement of the New Ordinance. Under Section 101 of the New Ordinance, unless otherwise agreed, where opt-in provisions apply automatically to a construction contract, they are also to apply to construction subcontracts down the line unless there is a foreign element in the subcontract (Section 101).}

Taxation and review of arbitration costs
The arbitral tribunal determines the award of costs (Section 74). However, if the parties agree, the costs of the arbitration proceedings may be taxed by the court (Section 75). Court assistance may also be sought to determine the fees and expenses of the arbitral tribunal (Section 77).

Rules on Impartiality and Independence of Arbitrators
Marina Lebedeva, Moscow

The impartiality and independence of arbitrators is one of the fundamental principles of arbitral proceedings. Consistent with this, the Law of the Russian Federation “On International Commercial Arbitration” (Article 12) sets forth that an arbitrator must inform the parties about the circumstances that may undermine his independence and impartiality.

Rules on Impartiality and Independence of Arbitrators (hereinafter referred to as the “Rules”) were approved by the Order of the President of the Russian Chamber of Commerce and Industry on
August 27, 2010. They are based on the current international practice, the IBA Guidelines on Conflicts of Interest in International Arbitration and other texts issued by international and domestic organizations and arbitration centers.

The purpose of the Rules is to ensure that arbitrations proceed smoothly, by dealing with the ambiguous and complex situations when the impartiality and independence of arbitrators may be doubted, and clarifying what circumstances have to be disclosed and when. The Rules are not mandatory: they apply on the basis of the parties’ agreement. It is contemplated that the parties to arbitration seated in Russia might voluntarily agree on the adoption of the Rules to provide a framework governing issues of independence and impartiality, whether in ad hoc (non-institutional) proceedings, or in institutional arbitrations, alongside any applicable rules of the relevant institution.

According to Article 4 of the Rules, an arbitrator must be impartial and independent from the time of accepting an appointment to serve and must remain so during the entire arbitration proceeding. An arbitrator is considered impartial if he is not interested, directly or indirectly, in the outcome of the proceeding and does not have any preference or bias with respect to the party of the arbitration proceeding, its representative, expert, counsel or witness. An arbitrator is independent if no relationship exists between an arbitrator and any of the parties, their representatives, experts, counsel or witnesses that might affect the arbitrator’s position. A person must refuse an engagement as arbitrator if he does not consider himself independent and impartial.

Article 5 of the Rules sets out certain circumstances which undermine confidence in an arbitrator’s impartiality or independence and prevent a person from performing his powers as arbitrator:

- An arbitrator, his/her spouse or close family member is or has been a party, party’s representative, expert, counsel or witness in the current arbitration proceeding;
- An arbitrator, his/her spouse or close family member has a significant share in the capital or is a member of the board of directors, management board or other body of a legal entity that is a party to the current arbitration proceeding (a share exceeding 5% is considered significant);
- An arbitrator is a spouse or close family member of another arbitrator on the tribunal;
- An arbitrator is an employee of a party in the current arbitration proceeding or receives compensation from a party for services rendered or represents a party’s interest in another dispute; or
- An arbitrator has made a public statement with respect to the dispute.

Article 6 of the Rules provides that an arbitrator should disclose certain circumstances that may diminish confidence in the arbitrator’s impartiality or independence, even though the arbitrator considers himself independent and impartial. For example, an arbitrator must disclose if, within the past three years, he worked for a party, received from any party compensation for services rendered, or represented interests of any party of the arbitration proceeding in another dispute, or if close, friendly relationships exist between the arbitrator and the representative of one of the parties, etc.

The list of such circumstances is not exhaustive: any other facts which may give rise to reasonable doubts with respect to the arbitrator’s independence must be disclosed. An arbitrator must disclose such facts and circumstances to the relevant arbitration institution (where applicable), which, in turn, will inform the parties and other arbitrators. If a dispute is settled by ad hoc arbitration, the disclosure must be made in writing to the parties and other arbitrators.

To reduce the risk of challenge of arbitrators on the ground of bias, Article 9 of the Rules provides that before an appointment of an arbitrator, the party may interview a candidate for such position to confirm the absence of facts that may undermine the arbitrator’s independence and impartiality. The Rules clearly provide that the interview should not be considered as a circumstance that may undermine an arbitrator’s independence and impartiality. The following issues may be discussed in the interview with a candidate: names of the parties to an arbitration proceeding, parent companies and subsidiaries with respect to the parties; names of the other arbitrators on the
tribunal, as well as of the experts, counsel and witnesses; general nature of the dispute; applicable law and arbitration rules; language and place of the hearing; duration of the proceeding; and the candidate’s qualification and experience. However, discussion of the merits of the case, parties’ legal arguments, evidence, and arbitration fees is strictly prohibited.

Article 13 of the Rules provides for the termination of an arbitrator’s powers. The powers of an arbitrator may be terminated by agreement of the parties, the arbitrator’s rejection of his powers, a decision by an authorized body to challenge the arbitrator, as well as on the other grounds provided by the applicable arbitration rules or law.

Recent English Decisions on Non-Parties to Arbitration Agreements

Sean Kelsey, London

We reported on Dallah Real Estate and Tourism Holding Company (“Dallah”) v The Ministry of Religious Affairs, Government of Pakistan (“Pakistan”) in the 10th edition of Arbitration World (October 2009). The case has recently been heard in the Supreme Court of England and Wales on appeal from the Court of Appeal. The English courts have decided three times (now conclusively) to deny enforcement of an ICC award against a non-signatory to the arbitration agreement, on the grounds that the tribunal lacked jurisdiction—even though the tribunal had itself found that it had jurisdiction.

The case turns on the application of s.103(2) of the Arbitration Act 1996 (the “Act”), which sets out the grounds on which an award may be challenged at the enforcement stage in accordance with Article V of the New York Convention. The Supreme Court decision has demonstrated the limits to the principle of kompetenz-kompetenz before the English courts.

We have previously reported the facts of the dispute. In brief, Dallah contracted with a trust entity created by Pakistan (the “Trust”). The contract provided for Paris-seated ICC arbitration. A dispute arose between Dallah and the Trust, by which time the Trust had ceased to exist. Dallah pursued its claim against Pakistan. An ICC tribunal found that Pakistan, a non-signatory to the arbitration agreement, was bound by it, because Dallah, the Trust and Pakistan (the tribunal found) had all intended that Pakistan be bound by it. A final award followed, in which Pakistan was ordered to pay substantial damages. Dallah obtained an order from the English High Court for enforcement of the award in England. Pakistan, which had not challenged the award before the French courts, applied to the English Court to set aside the order.

Pakistan relied on s.103(2)(b) of the Act, which provides that recognition or enforcement of the award may be refused if the person against whom the award is invoked proves that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made. The first instance judge, the Court of Appeal and now the Supreme Court, all heard expert evidence to the effect that under French law (i.e. the law of the seat) the extension of an arbitration agreement to a non-signatory requires evidence of the "common intention of the parties". All three courts heard the relevant facts, and found no such common intention.

In giving its judgment, the Supreme Court made three important points:

First, in circumstances where a party to an arbitration seeks to enforce a foreign New York Convention award in England, a challenge to enforcement before the English courts by the award debtor does not require that steps have been taken to resist the award before the courts of the arbitral seat.

Second, the Supreme Court rejected submissions that only the courts of the seat could undertake a full review of the tribunal's award on jurisdiction, and that the role of the enforcing court was limited. An award debtor which has consistently rejected the tribunal's jurisdiction and invokes s.103(2) of the Act is entitled to a full rehearing.

Third, in considering a claim that a tribunal lacked jurisdiction, the tribunal's own determination will be considered "carefully and with interest" but "has no legal or evidential value". A tribunal's competence
to decide its own jurisdiction is not licence to invent one—whatever the pre-eminence and experience of the individual arbitrators.

Superficially, the decision in Dallah seems to be in contrast with the recent Commercial Court case of Stellar Shipping Co LLC ("Stellar") v Hudson Shipping Lines ("Hudson") [2010] EWHC 2985 (Comm) (18 November 2010). Hudson and Stellar's subsidiary ("Phiniqia"), entered into a contract of affreightment ("COA") with an arbitration clause. Stellar endorsed the COA as guarantor of the performance by Phiniqia of its obligations. The terms of the guarantee had no arbitration clause. Disputes arose under the COA and the guarantee. A tribunal accepted jurisdiction in relation to both and (subject to authority issues remaining to be determined) made an award in favour of Hudson. Stellar challenged the award under s.67 of the Act.

The English courts apply restrictive rules to the incorporation into a contract of an arbitration clause in another, entirely separate contract. However, Hamblen J found that, on the facts, this was a "one contract" rather than a "two contract case": the two transactions effectively formed a commercial whole. He applied the principle in the leading House of Lords case, Fiona Trust v Primalov (see Arbitration World Spring 2008): the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal, in the absence of express wording to the contrary. In short, he agreed with the tribunal that it was the "commercially sensible" construction of the guarantee. By contrast, in Dallah (and on an application of French law), the courts have consistently held that Pakistan had deliberately structured the transaction between Dallah and the Trust in such a way as to avoid involvement in it.

Dallah and Stellar both provide a useful reminder of two things: a non-signatory to an arbitration agreement may find itself subject to a claim that it is bound by that agreement; and in certain cases the courts may be inclined to agree.

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Clearing the Hurdles of International Arbitration in Asia

Part 1

Raja Bose, Ian Fisher and Ashish Chugh, Singapore

Introduction

International arbitration in the coming years faces a number of challenges if it is to remain fit for purpose. Those challenges are especially acute in Asia. This article considers the ongoing efforts in the Courts, the legislatures and the arbitral centres in Singapore, Hong Kong, China, India, Vietnam and Thailand to deal with these challenges and provide a conducive environment to effectively arbitrate disputes.

Like most countries in Asia, the subject countries are all signatories to the New York Convention. However, experience has shown us that the mere ratification of the New York Convention by a country does not per se effectively secure its implementation. Whilst a variety of factors are necessary to provide an environment conducive to arbitration, in this article we focus on the following three factors:

1. Judicial rulings by the Courts;
2. Governmental and legislative initiatives to promote arbitration or rectify defective arbitral procedures; and
3. Initiatives by institutional arbitration centres.

It should be pointed out that the influence and conduct of the parties, their lawyers and the tribunal are equally if not more important in any analysis of what can and should be done to make international arbitration do ‘what it says on the box’.

This article is published in two parts; the second part will be published in the next edition of Arbitration World.
Judicial Rulings by Enforcement/Reviewing Courts

If in recent years Singapore has been eulogised as an emerging global arbitration hub, it is at least partially because the Singapore Courts give primacy to the autonomy of arbitral proceedings and severely limit Court intervention to only a few prescribed situations. The Singapore Courts’ unwavering arbitration-friendly approach is manifested by the legendary difficulty of getting an arbitral award set aside or enforcement refused by the Singapore Courts. To date, out of all the reported Singapore Court decisions, there have been no instances of a foreign award not being enforced and only one case of an arbitral award being set aside under the International Arbitration Act.

The Singapore Courts have rejected a variety of ingenious arguments for setting aside awards, including that public policy would be violated either because of mere errors of law or fact made in an arbitral award or excessive costs were awarded by an arbitrator. The Courts have also striven to give effect to the parties’ intention to settle any dispute by arbitration “even if certain aspects of the agreement might be ambiguous, inconsistent, incomplete or lacking in certain particulars” such as a hybrid arbitration agreement, i.e., where an arbitral institution administers the arbitration in accordance with the rules of another institution.

Hong Kong is also a major arbitration hub and the Hong Kong Courts have historically maintained an arbitration-friendly approach, as a result of which applications to set aside arbitral awards rarely succeed.

Significantly, in line with its policy of limited judicial interference in arbitration matters, the Hong Kong Court of First Instance recently held that any application to set aside an arbitral award or to oppose the enforcement of a foreign award on the basis of the “public policy” exception had to meet the high threshold of being contrary to the “most basic notions of morality and justice”. A party failing to meet that threshold is liable to pay the costs of the application on an indemnity basis.

Hong Kong’s strong support for the autonomy of arbitral proceedings and limited Court intervention is also exemplified by:

1. Recent case law which suggests that the Courts will not hesitate to construe arbitration agreements between parties purposively and generously and will support the arbitral tribunal’s power to rule on its own jurisdiction.

2. The Courts’ sparing exercise of their power to grant relief in relation to arbitration proceedings.

However, not all of the subject countries’ Courts are as benevolent towards arbitration as Singapore and Hong Kong. In stark contrast, certain well-reported and controversial Indian decisions suggest that the Indian Courts are far more inclined to intervene in arbitration matters. These decisions have compounded concerns among parties and the larger international arbitration community in relation to arbitrations involving Indian parties or where the assets in dispute are situated in India.

Similarly, China also has seen a few troublesome decisions in recent years. The much-criticised Revpower case is a well-publicised example. In that case, the Shanghai Intermediate People’s Court took two years to register an arbitral award. Then, despite registration, the Court refused to enforce the award. Ultimately the Court dismissed Revpower’s application to enforce the award, on grounds that the judgment debtor had filed for bankruptcy and that there were therefore no assets against which the award could be enforced.

A spate of decisions have dealt with the issue of whether the Chinese Courts will enforce a Chinese-seated ICC arbitral award because of a restriction under Chinese law that arbitrations taking place within China must be conducted by explicit reference to a designated arbitration institution (CIETAC).

The Supreme People’s Court of China in Züblin International GmbH v Wuxi Woke General Engineering Rubber Co, Ltd held that the recognition and enforcement of an ICC arbitral award with a seat in Shanghai should be refused. However, recently in Dufserco SA v Ningbo Arts & Crafts Import & Export Co, the Ningbo Intermediate People’s Court of Zhejiang Province agreed to enforce an ICC award with a seat in
Beijing, albeit on a technical ground *viz* that the judgment debtor was procedurally barred from alleging that the arbitration agreement was void.

In Vietnam, the lack of legislative clarity has been a real cause of concern, particularly whilst dealing with commercial disputes. Although the Enforcement Ordinance of 1995 implemented the New York Convention into Vietnamese law, it did not expressly stipulate which arbitrations were considered “commercial”. The Vietnamese Courts have relied on the narrow definition of “commercial activities” under domestic commercial law to deny recognition and enforcement of arbitral awards. With the coming into force of the new Law on Commercial Arbitration on 1 January 2011, it is hoped that some of these problems have been resolved.

Finally, whilst the Thai judiciary has a reputation for being independent and effective in enforcing contractual rights, Thailand is still not considered to be as arbitration-friendly a jurisdiction as Singapore or Hong Kong. The Thai Arbitration Act 2002 has ironed out many of the historic problems with enforcing arbitration awards in Thailand. In the few years after the Act came into force, the Central Intellectual Property & International Trade Court enforced 16 foreign arbitration awards and rejected none. The applications were brought in respect of awards made in London, New York, Zurich, Stockholm, Hong Kong and Singapore.

There have also been instances in the past when the Thai Courts have enforced arbitral awards against Thai quasi-governmental authorities such as the arbitral award arising out of the Bang Na/Chon Buri Tollway arbitration. However, future arbitrations and enforcement of arbitral awards, particularly between Thai governmental entities and private companies, have been left in an uncertain state because of certain public pronouncements and cabinet resolutions made by the Thai government.

The second and final part of this article, looking at government legislation initiatives and steps taken by arbitration institutions relevant to the subject countries, will be published in the next edition of *Arbitration World*.

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**Arbitration Provisions with a Non-U.S. Forum and Non-U.S. Choice-of-Law May Be Struck Down as Against U.S. Public Policy**

Jeremy Mercer, Pittsburgh

In *Thomas v. Carnival Corporation*, the United States Court of Appeals for the Eleventh Circuit (covering Florida, Georgia and Alabama) took a U.S.-centric view to deciding whether claims by an injured seaman could be ordered to arbitration under an arbitration provision included in the seaman’s employment agreement. 573 F.3d 1113 (11th Cir. 2009). The Court of Appeals overturned a lower court order, which sent the claims to arbitration, on several bases—one of which could have lasting implications for enforcement of international agreements providing for arbitration outside the U.S. under non-U.S. law.

Mr. Thomas was employed as a head waiter on a Carnival cruise ship. His employment agreement did not include an arbitration provision. In 2004, Mr Thomas was injured at work. Those injuries caused Thomas to “sign off” the ship, the Imagination. While he “signed on” again about a month later, continued treatment of his injuries on-board again caused him to “sign off.”

Thomas then “signed on” to the ship again in October 2005. This time, his employment agreement, for the first time, contained an arbitration provision that specified that “any and all disputes arising out of or in connection with this Agreement” shall be referred to arbitration, to take place in the Philippines under Panamanian law.

Two months later, the on-board physician determined that Thomas’ injuries rendered him unfit for duty and Thomas was “signed off” the ship for a final time.

Thomas brought suit against Carnival in a Florida state court for negligence, unseaworthiness of the ship, failure to provide prompt and adequate maintenance and cure (an ancient common-law remedy for injury to seaman), and failure to pay...
wages under the Seaman’s Wage Act, a U.S. statute. Carnival removed the case to federal court and sought to compel arbitration on all claims. The district court granted the motion to compel arbitration, and Thomas appealed. On appeal, the Court of Appeals reversed.

As to all but the Seaman’s Wage Act claim, the Court of Appeals ruled that the claims were not subject to arbitration because those claims did not arise under an agreement that contained a written arbitration provision, as required under the New York Convention. The Court reviewed the employment agreements under which Thomas served, and determined that the only claim that arose under the agreement with the arbitration provision was a claim under the Seaman’s Wage Act for wages after October of 2005.

However, the Court did not stop there and refer that claim to arbitration. Thomas argued that an affirmative defense under the New York Convention precluded arbitration of his statutory wage claim. According to Thomas, referring this claim to arbitration would be contrary to U.S. public policy because the mandatory application of Panamanian law to the proceedings would effectuate a waiver of this U.S. statutory claim. Under the New York Convention, “[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that … [t]he recognition or enforcement of the award would be contrary to the public policy of that country.” Article V(2)(b).

In deciding against referring the claim to arbitration, the Court of Appeals relied on two U.S. Supreme Court cases that are considered among the vanguard of pro-arbitration decisions out of that Court: *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), and *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995). Instead of citing and relying on the holdings in those cases, however, the Court of Appeals cited *dicta* in a footnote and used those few lines as the sole support to disregard the arbitration provision and permit the litigation to proceed in the U.S. courts. The Court of Appeals relied on the following *dicta*: “‘if the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies …. we would have little hesitation in condemning the agreement as against public policy.’”

The arbitration provision at issue in *Thomas* contained a Panamanian choice-of-law provision and a Philippines choice-of-forum provision. According to the Court of Appeals, those two provisions operated as a prospective waiver of Thomas’ rights to pursue his statutory Seaman’s Wage Act claim, thereby violating U.S. public policy and rendering any arbitral award unenforceable.

This conclusion, though, was reached without any analysis by the Court as to how Panamanian law would treat the wage claim if it were brought by Thomas in arbitration. There was no analysis as to whether Panamanian law would recognize and permit pursuit of such a claim or any similar claim in place of the Seaman’s Wage Act. Beyond that, the Court of Appeals did not engage in any analysis to see whether U.S. law permitted a person to waive the statutory protections of the Seaman’s Wage Act claim.

The result is that the Court of Appeals for the Eleventh Circuit has concluded based on *dicta* from two pro-arbitration U.S. Supreme Court decisions that an arbitration provision providing for arbitration under non-U.S. law in a non-U.S. forum may be disregarded as against U.S. public policy if adherence to that provision may result in a party not being able to pursue a U.S. statutory claim.

Whether or not this parochial view of arbitration provisions will spread beyond the U.S. courts within the Eleventh Circuit is difficult to predict. However, such a view does seem to be directly at odds with the U.S. federal policy favoring arbitration. Until this issue is resolved by the U.S. Supreme Court, in this era of ever increasing international trade and use of arbitration as a dispute resolution mechanism, advocates of arbitration provisions would be wise to take this view into consideration when drafting arbitration provisions, especially if their business takes them into the Eleventh Circuit.
New International Arbitration Decree Strengthens the Attractiveness of Paris as a Place of Arbitration

Louis Degos, Paris

It has been thirty years since the last change to the French arbitration legislation. The long-awaited reform has come, with the publication on 13 January 2011 of Decree No. 2011-48 on reform of arbitration (the “Decree”).

The provisions relating to international arbitration introduced into the French Code of Civil Procedure (“CPC”) by the Decree of 12 May 1981 had never been modified to take into account numerous case-law developments. Whereas some thought that this state of affairs attested to the excellence of that decree, others found it outdated; almost everyone agreed on the need for reform.

The new Decree was needed for two reasons. Firstly, to codify the case law, to take into account the foreign law influences such as estoppel (now provided for in article 1466 CPC), and secondly, to introduce innovative changes. The goal was thus to make the French law of international arbitration more accessible, more flexible and more efficient.

French law provides for separate treatment of domestic and international arbitrations. The new Decree clarifies that distinction and the provisions of French domestic arbitration law which also apply to international arbitration.

In regard to international arbitration, the following innovations are introduced:

- **Codification of the principles of the autonomy of the arbitration agreement and of competence-competence:** Article 1447 CPC codifies the principle of the autonomy of the arbitration agreement, pursuant to which the arbitration clause stands even if the underlying contract is held void. In the same way, the Decree reaffirms more explicitly the competence-competence principle, both in its negative (article 1448 CPC) and positive aspects (article 1465 CPC).

- **Increase in flexibility:** The Decree provides increased scope for the wishes and the agreements of the parties to be given effect. From now on, a party to an arbitration agreement may serve the other party in the way they wish (article 1484 CPC). The death of an arbitrator no longer causes the end of the arbitration, but only suspends the proceeding (article 1473 CPC).

- **Arbitration agreement, no requirement of form:** In domestic arbitrations, as in international arbitrations, there is no requirement as to the form of an arbitration agreement: a valid arbitration agreement can be contained in correspondence or exchanged emails. It can also be formalized ex post, for example in terms of reference (article 1507 CPC).

- **Arbitrator’s powers in relation to evidence and the assistance of the state court:** The Decree places on a statutory footing the power of an arbitrator to oblige a party to produce documents. This power has been recognised in case law for some time. Further, article 1469 CPC allows the parties to arbitration to require the assistance of the judge to obtain a document from a third party. This provision puts French international arbitration law on an equal footing with Swiss law, which provides for the assistance of state Courts in the taking of evidence.

Following the new Decree, the supporting Court can intervene not only in case of difficulties in constituting the arbitral tribunal, but also to extend the duration of the arbitration, as well as in case of disputes about the abstention, impediment, dismissal or challenge of an arbitrator.

The most innovative provisions of the new reform concern (i) the jurisdiction of the President of the First Instance Court of Paris as a supporting judge, (ii) challenges to awards and (iii) the stay of execution of an award.
(i) Article 1505 CPC adds two new grounds of competence of the President of the First Instance Court of Paris. That Court now has jurisdiction to act in support of arbitration not only when an international arbitration is seated in France or the parties have elected French procedural law, but also when the parties have given the French courts jurisdiction over any dispute arising from the arbitral proceedings or one of the parties is at risk of a denial of justice. This last possibility gives statutory force to the famous NIOC case.

(ii) Under article 1522 CPC, the parties may, by specific and express agreement, waive at any time their right to challenge the award. However, it remains possible for the parties to appeal any exequatur order in France, on the same grounds as those for challenge to an arbitral award. In those circumstances, the award will be assessed in the place where it is to be executed, which is a limited control as per application of the New York Convention, particularly since the award cannot at that stage be amended. This provision will be of considerable practical value when the arbitration proceeding takes place in France, but the award must be enforced elsewhere.

(iii) Article 1526 CPC provides that the action for annulment of an award rendered or recognized in France or any appeal against the exequatur order will not suspend the execution of the award. Article 1526 therefore increases considerably the effectiveness of the arbitration award. However, the judge can prevent the enforcement of the award if such enforcement could affect seriously the rights of one of the parties.

The reforms effected by the Decree have been welcomed by practitioners and academics alike. The new text has also been praised for its accessibility to non-French parties.

Note: As the Secretary General of the French Arbitration Committee (FAC), Louis Degos was a member of the Reform Commission which established a pre-draft of the new arbitration law in 2006. When the Ministry of Justice decided to reform the arbitration Law in France, it started with the pre-draft of the FAC and consulted a wide range of organisations and lawyers. And to pursue this task, the Ministry worked with a small group of selected people (including Degos) to draft the Decree.

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**English Court Refuses to Expand Scope of Review of Arbitral Awards**

Hugh Carlson, London

The English High Court has said that it is “very doubtful” that parties can confer jurisdiction on the court to hear an appeal of arbitral findings of fact. This holding, in Guangzhou Dockyards Co Ltd v. ENE Aegiali I (November 2010), is consistent with the English Courts’ tendency to preserve the finality of arbitral awards where possible.

**Facts**

Guangzhou Dockyards Co. Ltd. (Guangzhou), a Chinese dockyard owner, and ENE Aegiali I (ENE), a ship-owner, entered into a contract whereby Guangzhou would convert a crude oil carrier owned by ENE into an ore carrier. The dispute resolution clause selected English law as the applicable law and provided that the arbitration was to be conducted under the rules of the London Maritime Arbitrators Association. It provided that either party could appeal to the English High Court on any issue arising out of the arbitral award.

A dispute arose, and an arbitral tribunal made an award in favor of ENE for approximately US$59 million plus interest. Guangzhou filed two separate applications in the English Commercial Court seeking to challenge the award. The first application, still pending, was under section 69 of the English Arbitration Act 1996 (Act), and concerned an issue of law. The second application asserted that the arbitral tribunal had misapplied Chinese law—a question of fact under the English law arbitration proceedings. Therefore, the question posed to the High Court was whether it had jurisdiction to hear an appeal on an arbitral tribunal’s decision of fact in the event that the arbitration clause in question permitted an appeal “on any issue”.

**Decision**

The court dismissed the application, observing it “very doubtful that the court has jurisdiction to hear an appeal from arbitrators on an issue of fact, even
if the parties were to agree to such an appeal”. The question was not conclusively decided, however, as the court interpreted the aforementioned contractual clause as not extending so far as to confer jurisdiction over issues of fact. Nevertheless, the court observed that it probably could not be conferred such jurisdiction under any circumstance, irrespective of the wording of the contract in question.

Commentary

Guangzhou Dockyards suggests that English courts will remain unwilling to permit parties to expand their jurisdiction to allow review of issues of fact decided by arbitral tribunals.

The decision is consistent with the recent United States Supreme Court decision Hall Street Associates v. Mattel (2008), in which the Court held that the grounds for vacating and modifying an arbitral award specified under the Federal Arbitration Act could not be expanded by the parties’ agreement. Both Guangzhou Dockyards and Hall Street Associates reflect a disposition by courts to promote limited judicial review of arbitral awards.

Enforcement of Foreign Awards in India—The Latest Instalment

Marcus Birch, London

A recent judgment of the Delhi High Court has added to the jurisprudence in relation to challenges to enforcement of a foreign award in India.

In Penn Racquet v Mayor International, an Indian award debtor challenged an ICC award in a Swiss-seated arbitration on the basis of Section 34 of the Indian Arbitration and Conciliation Act 1996. Mayor relied on earlier judgments of the Supreme Court of India in Venture Global Engg. v Satyam Computer Services Ltd. and ONGC Ltd. v Saw Pipes Ltd., (reported on in the Summer 2008 edition of Arbitration World), arguing that the award was contrary to the terms of the contract and therefore illegal and contrary to public policy.

The Court rejected the challenge. It distinguished between the concept of a challenge to an award (the grounds for which are set out in Section 34 of the Act which applies to domestic awards only) and a challenge to enforcement of a foreign award (the grounds for which are set out in Section 48, which applies to foreign awards). Although public policy appeared as a ground in both provisions, the Court observed that the expression “public policy of India” carried a narrower meaning under Section 48 than under Section 34.

Since the award was a foreign award governed by Austrian law, Mayor had a very high threshold to meet to establish a breach of public policy. Mayor's arguments, essentially based on rearguing the merits of the arbitrator's ruling, had not met that threshold. The Court held that enforcement of a foreign award could not be denied merely because the award was in contravention of the law of India. It reiterated that for an Indian court to deny recognition and enforcement of an award, it would need to be shown that a foreign award was contrary to (i) the fundamental policy of India; or (ii) interests of India, or justice or morality.

The judgment demonstrates the continuing debate in Indian legal circles concerning the basis and proper scope of the review by a court called upon to enforce a foreign award. It has been welcomed by commentators as an example of a non-interventionist approach to arbitration in the Indian courts.
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