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## Welcome to the 8th Edition of K&L Gates' Arbitration World

### *From the Editors*

Welcome to the 8th 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 are pleased to announce the opening on March 2nd of our office in Singapore. This represents our 5th Asia office and 32nd location worldwide, including offices in 8 of what many view as the key venues for international arbitration: Paris, London, Hong Kong, Singapore, Beijing, New York, Washington, D.C. and Miami.

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

## News from around the World

### Asia Pacific

#### Japan

The Japan Commercial Arbitration Association published its new international commercial mediation rules in January. The rules are to apply to all mediations organised by the JCAA. Rules 8 and 11 of the new rules allow the parties to convert the mediation into an arbitration, and for the mediator to be appointed as arbitrator and to produce an award.

#### Cook Islands - New York Convention

The Cook Islands have acceded to the New York Convention. The accession on January 12, 2009 takes to 144 the number of states who have ratified the Convention.

### Americas

#### U.S.

Several bills have been proposed in the new session of Congress with the intention of restricting arbitration in defined non-commercial sectors. The bill proposing an Arbitration Fairness Act, if enacted, would limit the use of arbitration clauses in contracts involving consumers, employees and franchisees. A similar bill was introduced in the previous Congress, with broader wording intended to cover a range of situations involving parties of unequal bargaining power, but never became law. Three other bills in the new Congress (for a Consumer Fairness Act, Fairness in

Nursing Home Arbitration Act and Service Members Access to Justice Act) also propose restrictions on arbitration in their specific fields.

### **ABA**

The American Bar Association's Dispute Resolution Section has issued a revised version of its paper on disclosure by arbitrators of potential conflicts of interest. The revised draft follows a wide consultation and contains a checklist and commentary for arbitrators to consider when making disclosures of interests and relationships that might create an appearance of partiality. See the article below for further comment on this development.

### **Middle East**

#### **Israel**

The Israeli Parliament has adopted an amendment to the Arbitration Act which introduces the possibility of parties adopting appeal procedures for arbitral awards. The amendment permits parties to adopt as part of their agreement to arbitrate either a "private" appeal procedure (i.e., an appeal to an agreed arbitrator) or a "judicial" appeal procedure (i.e., an appeal with leave to a judge). The objective of the change is to increase confidence in arbitral awards and to streamline appeals.

### **Europe**

#### **Anti-suit injunctions**

The European Court of Justice has held that anti-suit injunctions affecting litigation in EU member states are incompatible with the European jurisdiction and judgments regulation. The result was widely expected but has drawn criticism from some quarters and has raised concerns over its impact on the attractiveness of London in particular as a seat of arbitration. See the article below for further comment on this development and its implications.

#### **France**

The Paris Court of Appeal has set aside an ICC arbitral award on the ground that the tribunal was improperly constituted. In the arbitration between J&P Avax and Tecnimont, J&P Avax had challenged an arbitrator on the basis of information indicating an undisclosed relationship between the arbitrator's law firm and Tecnimont. The ICC Court had rejected the challenge, but J&P Avax repeated it

in the context of a challenge to the final award on liability. The Court ruled that the arbitrator's failure to disclose certain relevant information to the parties in the arbitration should lead to the setting aside of the award. Although the arbitrator did not appear to know of the ties between his law firm and the Tecnimont company, the Paris Court of Appeal noted that it was his duty to investigate those links and disclose them to the parties, and his failure to do so tainted the award.

### **Scotland**

The Arbitration (Scotland) Bill 2009 was introduced into the Scottish Parliament in January. The bill aims to modernize and consolidate Scottish arbitration legislation. Drawing on best practice from the English Arbitration Act 1996, the UNCITRAL Model Law, and other sources, the bill if enacted will create a single regime for domestic and international arbitration and a full procedural code to be known as the Scottish Arbitration Rules.

### **International**

#### **Statistics on arbitration case filings**

Statistics on new cases filed in 2008 with most of the major international arbitration institutions show a marked upward trend. The ICC saw an 11 per cent increase in cases filed in 2008 against 2007 and the LCIA recorded a remarkable 61 per cent increase in cases across the same period. Figures from ICSID, however, show a decline in the numbers of new investment treaty claims. See the article below for further comment and analysis.

### **ICC**

The ICC will soon publish its survey of national rules on enforcement of arbitral awards under the New York Convention. This report will look at the rules in 60 different jurisdictions and will be the first systematic compilation of information on national rules of procedure governing the recognition and enforcement of foreign awards. It promises to be a valuable tool in assisting parties to contracts to assess the ease and speed with which their awards may be enforced.

### International Mediation Institute

The International Mediation Institute, a joint initiative of the AAA, the Singapore International Arbitration Centre and the Netherlands Mediation Institute, is developing an international standard for mediators - IMI Mediator Competency Certifications. Once implemented, the Certifications mechanism will assist parties and their advisers in identifying competent mediators. The intention is that any mediator may apply to become an IMI certified mediator if he/she can meet the relevant IMI requirements.

### ICSID

Meg Kinnear has been elected Secretary-General of ICSID. Ms Kinnear was formerly Senior General Counsel at the Trade Law Bureau of Canada, with responsibility for the conduct of all international investment and trade litigation involving Canada, and is a noted author and speaker on international investment law and procedure notably in the NAFTA context. She will replace the Acting Secretary-General, Nassib Ziade, effective June 2009.

### Centre for Effective Dispute Resolution

The CEDR Commission on Settlement in International Arbitration has now published its draft report and rules for the facilitation of settlement in international arbitration and its final consultation phase is open until August 2009.

In its draft report, the Commission has found that arbitral tribunals are only occasionally proactive in facilitating settlement, and this is limited to certain specific jurisdictions. Research shows that settlement rates in arbitration are significantly lower than in many national courts, where judges systematically promote early settlement and the use of ADR techniques such as mediation.

The Commission's final report will be published later in the year, and is expected to include best practice tools and model rules for use by arbitrators and arbitral bodies.

## Global Recession – Trends in Arbitration

Ben Anstey

It has often been said that, during times of economic crisis, one can expect an increase in court and arbitration proceedings. The logic, put very simply, is that as the financial environment worsens, investments go bad, more deals go wrong, companies go bust, and generally people and companies have more cause to bring proceedings against one another.

As the financial crisis really began to take hold of the world's major economies during the course of 2008, did the expected upturn in arbitral proceedings across major arbitration institutions worldwide materialize?

### International Chamber of Commerce Court of Arbitration

The ICC received 663 Requests for Arbitration in 2008 – a healthy 11 per cent increase on the 599 Requests received in 2007. This increase does not stand out significantly when one looks at previous years, however, following a 14 per cent increase between 2005 and 2006, for example. The number of awards rendered was up 16 per cent – from 349 in 2007, to 407 in 2008.

### London Court of International Arbitration

2008 was certainly a busy year for the LCIA, which saw a significant increase of 61 per cent in filed requests for arbitration – 221 compared with 137 in 2007. This followed a modest increase from 133 in 2006. In his 2008 Report on Casework, Adrian Winstanley, Director General of the LCIA, attributed the increase “...at least in part, [to] the global turmoil that we are currently experiencing...”.

### Stockholm Chamber of Commerce

The Arbitration Chamber of the SCC in Stockholm, Sweden, also had an active year in 2008. Having already had the best year of its 90-year history in 2007, with 170 cases filed, it broke that record in 2008, with 176. The 2007 figure was a leap from figures of 100 and 141 in 2005 and 2006, respectively.

### Swiss Chambers' Court of Arbitration and Mediation

The Swiss Chambers was another institution that saw an increase in the number of cases filed in 2008

– 68, compared with 59 in 2007 – a 15 per cent increase. This was not as great an increase as between 2006 and 2007, however, when the number of cases rose by 18 per cent (50 to 59), following a slight dip from the 54 cases recorded in 2005.

### **China International Economic and Trade Arbitration Commission**

A large increase in international cases was also reported in China. CIETAC accepted a record 548 international cases in 2008, compared with 429 in 2007 – a 28 per cent increase. This followed a dip from 442 cases in 2006.

### **Singapore International Arbitration Centre**

The SIAC has seen a general increase in workload since its creation in 2000. Whilst the figures provided for international cases seem to simply continue this trend, the figures for all cases administered does show a spike in 2008. Following a slight fall in numbers in 2007 (86 in 2007, from 88 in 2006), the total number of cases jumped 15 per cent to 99 in 2008.

Mr. Minn Naing Oo, the SIAC Registrar, was not prepared to attribute this increase solely to the global crisis, commenting, *“While there was an increase in the number of cases filed at SIAC last year, we cannot be certain that the increase is due to the global financial crisis. Other factors, such as the new edition of the SIAC Rules, which came into force in July 2007, and the increasing popularity of arbitration in general and arbitration in Singapore may also have played a part”*.

### **U.S.-based Institutions**

One of the most striking increases was in the U.S., where, according to the Financial Industry Regulatory Authority (“FINRA”), securities arbitration claims filed by investors during the course of 2008 increased by 85 per cent. During 2008, investors filed a total of 3,677 cases against brokerage firms, compared to 1,985 during 2007. It is perhaps not surprising that this sector has seen such a large increase.

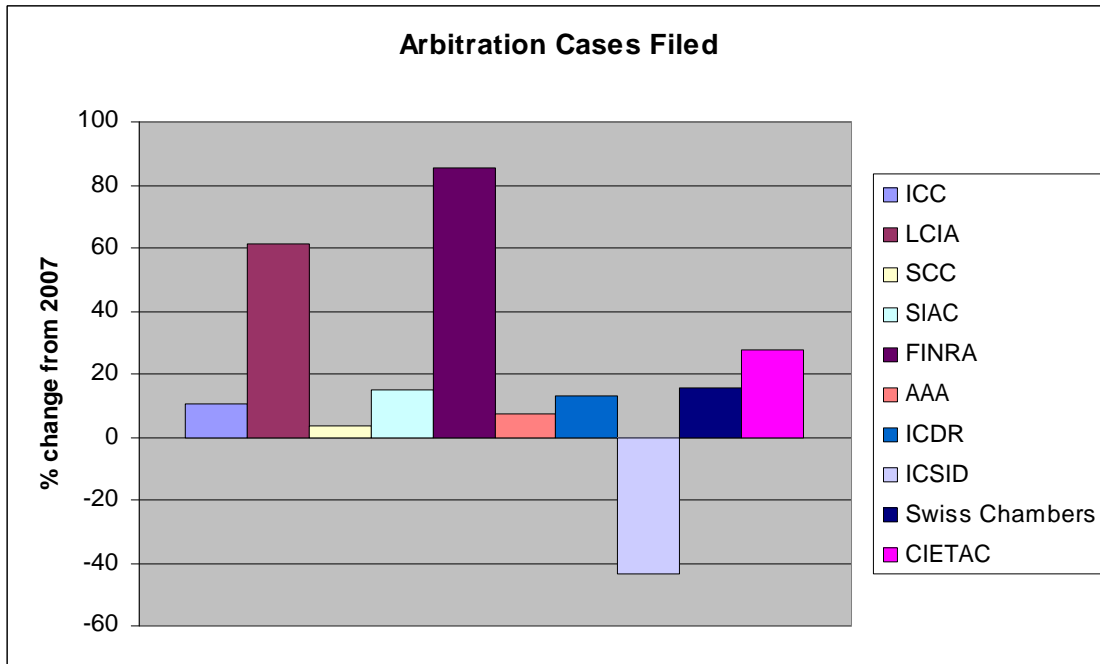
### **Economic Crisis = More Arbitration?**

Statistics are not as compelling everywhere. The AAA saw only a very modest increase in its 2008 figures for domestic class actions – to 45, from 42 in 2007. Further to this, it also bucks the trend by showing higher figures for class action arbitration in 2004 (58) and 2006 (56), a time when the current economic crisis was still the stuff of speculation by a minority of economists and other doomsayers. The AAA’s international arm, the ICDR saw an increase of 13 per cent in filings. This is a relatively significant increase, but does not approach the 61 per cent figure seen at the LCIA.

Perhaps even more significantly, ICSID saw a drop in its number of cases in 2008 – from 37 in 2007 to just 21 – a 43 per cent decrease.

### **Middle East**

Anticipation is building in the Gulf of an increase in arbitration arising from the current economic climate. The introduction, in June 2007, of a new set of rules for the Dubai International Arbitration Centre (“DIAC,” the centre itself having been established in 2003) and the clinching of a deal, in February 2008, between the Dubai International Financial Centre (“DIFC”) and the LCIA to form a new regional arbitration centre, have helped to cement the Middle East as a forum for international arbitration, supplementing the Abu Dhabi Commercial Conciliation and Arbitration Centre, the Qatar Centre for Reconciliation and the Qatar Financial Centre. It is still early days and meaningful statistics are hard to come by, but with the recent construction boom in the area, followed by the current period of financial uncertainty, it remains to be seen how many arbitration cases will be referred to these institutions, and how many can be attributed to the current crisis.



As described, and illustrated on the above chart, the figures available from the world’s major arbitration institutions are difficult to piece together into a clear picture of an upsurge in arbitration cases resulting from the global economic crisis. Whilst some institutions, such as the LCIA, FINRA and CIETAC, saw a significant increase in caseloads in 2008 as against 2007 and, in the case of the LCIA, attribute this increase partly to the crisis, the modest increases elsewhere (perhaps explained by the general increasing popularity of arbitration), and the large drop in ICSID cases, do not fit the hypothesis.

Perhaps then the conventional wisdom does not hold true. Whilst more disputes or potential disputes are likely to be arising during the current turmoil and may be taking time to filter through and manifest themselves in the institutions’ statistics, it may be that the severity of the downturn is such that companies are afraid of the cost of proceedings or, even more bleakly, wonder whether they or their proposed adversaries will be around long enough for it to be worth commencing proceedings.

## Do the IBA Rules on the Taking of Evidence in International Commercial Arbitration Need to Be Amended?

Ian Meredith

The IBA Rules of Evidence were adopted by a resolution of the IBA Council on June 1, 1999, and are often now said to reflect best practice in international arbitration. In the intervening 10 years since their formulation, the digital revolution has led to the creation and retention of vast amounts of "electronic documents" across the globe. Whether it is necessary for international arbitration practice to adapt to the challenges of dealing with electronic documents, and if so how, is a subject which polarises views and perhaps perfectly illustrates the difference of attitudes between the civil law and common law worlds.

The IBA Rules of Evidence were developed by a Working Party drawn from across the arbitration community and comprising practitioners from both common law and civil law jurisdictions. As we move towards the 10th anniversary of the adoption of the IBA Rules, the IBA has established a new Working Party to assess whether it is necessary to modify the IBA Rules of Evidence and if so, in what manner. The Working Party is due to report to the IBA Council ahead of the full IBA Conference in October 2009. This article represents a personal perspective on the dilemma facing the Working Party in relation to electronic documents.

The existing IBA Rules of Evidence deal with electronic documents in the definitions within Article 1.

“‘Document’ means a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information.”

[Emphasis added]

In Article 3, the IBA Rules of Evidence set in place a three-stage procedure under which document production should proceed. In stage one, each party produces the documents it relies on in support of its position (Article 3.1). In stage two, any party may request from the other party the production of further documents (Article 3.2) by submitting a

Request to Produce that describes each document or category of documents "in sufficient detail to identify it", and describes how the documents requested are "relevant and material to the outcome of the case" (Article 3.3). At this point one or other party may raise an objection to production. The grounds for withholding production (in Article 9.2) are:

- Lack of sufficient relevance or materiality;
- Legal impediment or privilege;
- Unreasonable burden to produce the requested evidence;
- Loss or destruction of the document;
- Commercial or technical confidentiality;
- Special political or institutional sensitivity; and
- Considerations of fairness or equality of the parties.

In stage three, if there is no agreement on which documents should be produced, the tribunal will assess the Request to Produce and any objections and order any party to produce documents (Article 3.6).

Why then do some members of the arbitration community advocate the need for a change to the IBA Rules of Evidence to deal specifically with electronic documents?

The case for change appears to turn upon the volume of "documents" now existing and the ability to search for relevant and material documents within electronically stored documents by the use of further technology. Historically physical hard copy document production has tended to be limited by an unwritten concept of proportionality. A party has been required to look in "appropriate places" and undertake "diligent efforts" to locate relevant and material documents. The sums in dispute and potential relevance of the documents have impacted the scale of the internal searching a party is required to undertake.

In the world of electronic documents, not only are far greater volumes of documents created (including not just in the form of email but also SMS and other forms of person-to-person messaging), but the ability now exists to access and search through such

records, albeit often with a very material cost implication.

It is said therefore by the champions of change that the IBA Rules of Evidence should be modified so as to lay down a greater level of specificity in terms of the way in which the parties (and by default the tribunal) should regulate the making available of electronically stored documents and/or the provision of access to electronically stored documents which may then enable the requesting party to have a say in the formulation of appropriate searches. Among those advocating change, at least three distinct camps can be said to be emerging. First, those who advocate a light touch, setting in place a relatively low level of prescription; secondly, those who take a middle ground, advocating some more prescriptive wording in relation to the formulation of a procedural order specifying matters such as the list of custodians, search criteria to be utilised, and time periods; finally, those who advocate the adoption of a detailed protocol to the IBA Rules of Evidence, drawing upon developing best (or some may say worst) practice in US litigation.

The author's view is that the IBA Rules of Evidence have attained such a high degree of acceptance across the international arbitration community (spanning both civil law and common law countries) precisely because of the light touch those involved in their formulation decided to utilise. Whilst there may be a superficial attraction to the development of more detailed wording to specifically address electronic documents, there is a strong argument for retention of the existing formulation such that if there is to be any modification, it should follow the light touch approach which leaves the parties, and in default the tribunal, in control of the extent to which it is appropriate in the specific circumstances of each individual case to embark upon extensive "E-production." The London-based Chartered Institute of Arbitrators has recently issued a suggested "Protocol for E-Disclosure in Arbitration" and there are other formulations in circulation should parties or tribunal require guidance.

The danger of the new Working Party embracing a more prescriptive approach is that the IBA Rules of Evidence will be seen as endorsing the much derided trend for international arbitration to resemble court practice, with US litigation practice operating as the benchmark.

At a time of such significant economic difficulty when many sophisticated users of international arbitration are decrying the perceived increasing cost and duration of international arbitration, the international arbitration community would be unwise to move in a direction which risks further alienating the client community.

*Note: The views expressed in this article are personal and not those of the firm.*

## The ABA's "Revised" Disclosure Checklist for Arbitrators: Lipstick on a Pig?

Michael Napoli

Seemingly in response to the criticism of its 2008 "Draft for Comment," the Dispute Resolution section of the American Bar Association released a revised version of its proposed best practices for meeting arbitrator disclosure requirements under U.S. law in January 2009. Unfortunately, little has changed. The Checklist continues to require investigation and disclosure of even apparently innocuous interconnections between arbitrators, their friends and family and participants in the arbitration.

The only significant change in the 2009 Draft is expansion of the introductory comments to address some of the criticisms of the 2008 Draft. First, the authors attempt to disclaim any attempt to set standards for disclosure. They note that no one should be "required to use the Checklist" and that it is not designed to be a "hammer" to force disclosures. Instead, to the authors, the Checklist is merely a "tool to assist arbitrators who wish help in deciding what to disclose." Protestations to the contrary notwithstanding, the nature of a checklist is to set standards. And, the stature of the ABA would give the Checklist significant weight in the eyes of courts and litigants.

Second, the authors changed the basis of the Commentary and Checklist from the Revised Uniform Arbitration Act to the ABA's Code of Ethics for Arbitrators in Commercial Disputes. The authors also claim to have considered the IBA Guidelines, disclosure guidelines from the various providers, state law and court rules in formulating

the Checklist. However, there are no substantive changes in the Draft Checklist in what should or should not be disclosed.

Despite being dressed up with new disclaimers and an expanded discussion of the law relating to disclosure, the 2009 Draft appears to do little to remedy the flaws in the 2008 Draft. The 2009 Draft continues to impose overly stringent investigation and disclosure obligations on arbitrators. The 2009 Draft of the Checklist continues to require disclosure in the following instance (specifically referred to in the Draft Checklist as an illustrative example):

James Jones is a witness for a party. Mr. Jones is president of the Cleveland Chamber of Commerce, of which the arbitrator is a member.

To put this in context, the Cleveland Chamber of Commerce (actually called the “Greater Cleveland Partnership”) has more than 17,000 members. The arbitrator’s membership in the chamber of commerce is barely a connection with the witness much less a relationship that would cause any reasonable person to question the arbitrator’s impartiality.

Other examples of connections that the 2009 Draft requires to be disclosed (or inquiry made) include: where a child of an arbitrator and a child of counsel for a party attend the same school and have had contact at school functions; where a brother of the arbitrator practices law in the same city as counsel for a party and the arbitrator is aware that his brother is friends with counsel, following an introduction at a party; and where a relative of the arbitrator practices in a law firm that is active in the same industry as one of the parties even though that law firm has not appeared in the arbitration (for example, where the arbitrator’s sister is a partner in a major law firm, which the arbitrator knows represents several large insurance companies, and one of the parties is an insurance company). As with the chamber of commerce example, there is nothing inherent in these connections that suggests any lack of impartiality by the arbitrator. This is not to say that if the connection between the arbitrator and a party or counsel goes beyond these circumstances (e.g., if as a result of their children going to school together, the arbitrator and counsel become friends) that disclosure would not be warranted, but requiring

disclosure based on these limited connections in themselves seems heavy handed.

The Draft Checklist continues to make no distinction between real conflicts of interest and trivial connections between arbitrator and participant. According to the Checklist, there is an equal obligation to disclose a long-standing business (or attorney-client) relationship between the arbitrator and a party as to disclose a joint membership by arbitrator and witness in a chamber of commerce. The two situations are not the same. To equate them is to run the risk of trivializing the former.

There are real dangers in requiring the level of investigation and disclosure mandated by the Draft Checklist. It sets standards which are exceedingly difficult to meet in the real world. The inevitable failure to meet these standards would almost certainly lead to further arguments to vacate arbitration awards, increasing the cost and complexity of arbitrations.

And, there is a very real question as to whether a regime of “if in doubt, disclose” is really helpful. By making arbitrators abide by such stringent duties of disclosure, persons with significant real world business experience are likely to be discouraged from acting as arbitrators. Moreover, there would be a tendency for the few significant disclosures to be overshadowed by the mass of trivial disclosures mandated by the Checklist.

Like the 2008 Draft, the 2009 Draft Checklist is for discussion only and does not represent the policy of the ABA or the ABA’s Section on Dispute Resolution.

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## The Anti-Suit Injunction after West Tankers

Ian Meredith

As we reported in our February 10, 2009 [Alert](#), in the case of *Allianz and Others v. West Tankers Inc* (Case C-185/07) the European Court of Justice recently endorsed the earlier opinion of Advocate General Kokott in effect outlawing the practice of the court of one Member State at the seat of an arbitration issuing an anti-suit injunction to restrain a party from ventilating a dispute before the court of

another Member State in purported breach of an agreement to arbitrate.

#### **What then are the likely wider implications?**

The English Commercial Court has historically been the court within the 27 states forming the EU which has shown the greatest willingness to support parties' agreement to arbitrate by issuing anti-suit injunctions. The *West Tankers* decision has no bearing upon the ability of any court within a Member State to issue an anti-suit injunction to restrain a party from pursuing court proceedings before a court outside the EU in purported breach of an agreement to arbitrate. It is likely therefore that the English Commercial Court (and others) will continue to issue anti-suit injunctions to restrain parties from litigating before U.S. and other courts outside the states of the EU.

In the House of Lords' referral to the ECJ, it was specifically noted that one reason why the referring court considered that the "Arbitration Exception" should be upheld facilitating the continued availability of anti-suit injunctions within the Member States was the potential adverse impact upon the business of arbitration within the EU. It was argued that the lack of availability of anti-suit injunctions to restrain parties from litigating within the courts of other Member States in breach of an arbitration agreement would adversely affect the willingness of parties to subject their prospective disputes to arbitration within Member States with the consequence that London, Paris and Stockholm in particular would see a future reduction in arbitration business in favour of seats outside the EU including, in particular, those in Switzerland, the U.S., Singapore and Hong Kong. Whilst sophisticated parties may be dissuaded from prescribing a seat within the EU when contracting with counterparties from other EU countries, it should be remembered that in a very large number of instances dispute resolution clauses are still drafted without the same level of in-depth analysis as other clauses and the "cut and paste" culture still persists in many organisations. The writer therefore believes that the risk to the leading EU seats may have been overplayed.

#### **What, if any, other implications potentially flow?**

Whilst a party can no longer seek injunctive relief from the court at the seat in circumstances where its counterparty threatens to litigate elsewhere at a court

in another Member State in breach of an agreement to arbitrate, nothing prevents that party from seeking interim measures from the Arbitral Tribunal (once constituted) or perhaps more pertinently, seeking damages for breach of the agreement to arbitrate in the context of the arbitration. As a deterrent, some parties may look to expressly provide in their arbitration agreements that damages are payable for any breach of the arbitration agreement. We may well see an increase in the number of applications to Arbitral Tribunals to award damages for breach of an agreement to arbitrate at an early stage in arbitral proceedings. If the Arbitral Tribunal then delivers a Partial Final Award, the party in whose favour the Award is issued will have the option to seek to enforce that Award in parallel with the continuation of the arbitral proceedings.

## **Novation of Contracts and Agreements to Arbitrate**

Sean Kelsey

In the recent case of *CMA CGM v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm) the English High Court has tackled the interesting question of what happens if court proceedings are already on foot between two parties with no contractual relationship and part way through those proceedings a pre-existing contract containing an arbitration clause is novated, bringing those parties into a direct contractual relationship under which disputes are to be resolved by arbitration.

HMD built four ships pursuant to four contracts with shipowners ER Schiffart GmbH ("ERS") (the "contracts"). The contracts each contained an arbitration clause. ERS wanted to assign the contracts to container shipping group CMA CGM ("CMA"). Under the contracts, it was a requirement that HMD consent in writing to such an assignment, that consent not to be unreasonably withheld or delayed. HMD withheld its consent. CMA sued in the French courts, where the civil code permits fault-based tortious actions. CMA contended that HMD had breached the contracts with ERS by reason of the withholding of the requested consent, HMD's breach was a fault on which CMA could sue in tort, and CMA had suffered damage as a result. While the French proceedings were ongoing,

the three parties (CMA, ERS and HMD) concluded the novation of each of the four contracts, CMA effectively stepping into the shoes of ERS. Notwithstanding that, CMA persisted with the French proceedings and obtained judgment and an order for substantial damages, which HMD paid.

HMD commenced arbitrations in London under each of the contracts against CMA, seeking recovery of the sums it had paid pursuant to the French proceedings. HMD argued that CMA had breached the arbitration agreement to which it, CMA, had become a party on novation of the contracts. The tribunal held that continuing to pursue, and not discontinuing, the court proceedings after the dates on which the novations took effect was a breach of the arbitration agreement. Having suffered loss as a result of that breach, HMD was itself entitled to recover as damages the sums it had paid out pursuant to the French judgment. The tribunal also found that it was not bound by the French judgment, and indeed it came to the opposite conclusion from that reached by the French court, holding that HMD had not acted unreasonably in withholding its consent to the novation of the contracts. The tribunal granted a declaration accordingly.

CMA appealed to the English High Court under s.69 of the Arbitration Act 1996 (appeal on a point of law). The appeal raised two questions of law: first, whether the arbitration agreement applied to the pre-existing dispute between CMA and HMD which was already pending before the French court at the time of the novations; and second, whether the tribunal was bound by the French court's determination of the same issues between the same parties in a judgment which the English courts would be bound to recognise pursuant to the Council Regulation EC44/2001 on jurisdiction and the enforcement of judgments (the "Judgments Regulation").

On the second point of law the English court held that "*this is not a question of not recognising a judgment, but concluding that, as the parties were obliged to go to arbitration, it is only the outcome of arbitration which is of any relevance.*" The tribunal had concluded that the Judgments Regulation was inapplicable, because it does not require UK arbitrators to recognise foreign judgments and the English court did no more than state that it was not persuaded that the tribunal's conclusion was wrong.

More significantly, on the first point of law, the case is notable as an application of the principle in *Fiona Trust* (see page 19 of [Arbitration World, Spring 2008](#)) that, unless an arbitration agreement is shown to be invalid in itself, only express language will displace the presumption that parties to it intend that all disputes between them be decided by arbitration.

CMA argued that its dispute with HMD was not arbitrable, and that *Fiona Trust* did not apply because *Fiona Trust* only applies to the construction of arbitration agreements negotiated between the parties to the dispute. CMA was not a party to the arbitration agreement when it brought its claim against HMD in the French courts, and indeed the parties had no contractual relationship at that time. But the English court accepted the tribunal's handling of the relevant construction issues, rejecting an argument as to the subjective intent of CMA, that it could not have intended that it be required to discontinue the French proceedings after the novation of the arbitration agreement. The English court found that the arbitration agreement's referral to arbitration of future disputes arising under the contracts – which according to CMA kept its dispute with HMD outside the ambit of the arbitration agreement – was a reference to disputes arising after the date those contracts came into force, not the dates on which CMA became a party to the contracts. In the tribunal's reasoning, this was precisely the kind of argument *Fiona Trust* had tackled decisively.

Accordingly, when novating a contract with a party with whom you are already in dispute, careful consideration should be given to the dispute resolution provision in that novated contract and any impact it may have on any pre-existing proceedings.

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## Second Circuit Holds That the Federal Arbitration Act Does Not Authorize Pre-Hearing Document Discovery from Non Parties to an Arbitration

Richard Paciaroni and Emily Gomez

In a unanimous panel opinion that may signal a trend, the United States Court of Appeals for the

Second Circuit has held that Section 7 of the Federal Arbitration Act (“FAA”) does not authorize an arbitrator to compel pre-hearing document discovery from non-parties to the arbitration. *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, No. 07-1197-CV, slip op. at 11 (2d Cir. Nov. 25, 2008).

## Background

*Life Receivables Trust* concerns an insurance coverage dispute between Life Receivables Trust (“LRT”), a life insurance investor, and Syndicate 102 at Lloyd’s of London (“Syndicate 102”), its contingent cost insurance (“CCI”) provider. LRT’s business involved purchasing life insurance policies from elderly insureds and collecting the death benefit when the insureds failed to reach their life expectancies. When an insured outlived his or her life expectancy by more than two years, LRT would collect the death benefit from Syndicate 102.

In 2005, Syndicate 102 refused to pay LRT the death benefit for an insured who outlived his life expectancy by more than two years, arguing that LRT’s purchasing agent, Peachtree Life Settlements (“Peachtree”), had fraudulently calculated the insured’s life expectancy. In accord with the CCI policy, LRT initiated an arbitration. Syndicate 102 thereafter made a number of discovery requests upon both LRT and Peachtree, to which Peachtree objected. After the arbitration panel issued a subpoena requiring Peachtree to provide its responsive documents, Peachtree filed suit in federal court. After unsuccessfully moving to quash, Peachtree appealed.

## The Second Circuit’s Decision

On appeal, the Second Circuit overturned the district court’s ruling. The court began by considering the language of Section 7 of the FAA, the only provision that addresses document production in arbitration. Section 7, *inter alia*, grants arbitrators the power to:

“...summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”

Next, the court examined the current circuit split over whether Section 7 may be used as authority to compel depositions and pre-hearing document discovery outside the presence of the arbitral tribunal. On the one hand, the Eighth Circuit has held that Section 7 implicitly grants an arbitration panel the power to subpoena relevant documents from non-parties prior to a hearing. The Eighth Circuit’s rationale is that without the power to produce these documents ahead of time, the parties would be unable to review and analyze relevant information prior to the hearing. On the other hand, the Third Circuit has held that the explicit language of Section 7 restricts an arbitrator’s subpoena power over non-parties to situations in which the non-party appears in the arbitrator’s physical presence. The Third Circuit’s rationale is that regardless of inconvenience or inefficiency, a court cannot grant powers to arbitrators that the legislature has not seen fit to convey. In the middle is the Fourth Circuit, which has found a special exception in Section 7 that permits pre-hearing document discovery of third parties upon a showing of special need.

The Second Circuit sided firmly with the Third Circuit, holding that documents are only discoverable from non-parties when brought before arbitrators by a testifying witness. The clear and unambiguous language of Section 7, combined with the fact that a previous, similarly-worded version of Federal Rule of Civil Procedure 45 did not permit federal courts to issue pre-hearing subpoenas on non-parties, persuaded the court that Section 7 of the FAA also does not authorize pre-hearing document discovery on non-parties to an arbitration. The court did not address whether Section 7 would authorize pre-hearing depositions of non-parties, but its strict interpretation seems to preclude *any* third party discovery outside of a hearing before the arbitral panel.

## Other Options for Document Discovery from Non-Parties

The Second Circuit took pains to note that its interpretation of Section 7 does not leave arbitrators completely unable to demand documents from third parties. Arbitrators remain empowered to order “any person” to produce documents as long as that person is called as a witness at a hearing. While this process is certainly less efficient, the inconvenience of having to appear may cause a testifying witness

to deliver the documents and waive his or her presence. Alternatively, an arbitrator also retains the power to compel a non-party witness to appear with documents and then adjourn the proceedings, giving the parties time to review the evidence.

Parties who want to further ensure that arbitrators will have the power to order third party discovery in their contract disputes can also take the step of expressing a preference for state arbitration law in all of their contracts. If an underlying contract specifically incorporates the arbitration law of a state that grants arbitrators the ability to order pre-hearing discovery from non-parties, the arbitrators' powers under state law will not be pre-empted by the more restrictive FAA. *See generally Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

### Conclusions

In conjunction with the Third Circuit's 2004 *Hay Group* decision, *Life Receivables Trust* seems to signal a trend towards greater limitations on an arbitrator's ability to order the production of documents from non-parties to an arbitration. Parties that require documents in the possession of non-parties would be well advised to cultivate amicable relations and ask them to produce documents voluntarily, in lieu of having the non-parties physically appear and produce documents at a hearing before the arbitral tribunal.

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## Arbitration and Wrongful Death Claims in Texas

David S. Coale

The Texas Supreme Court continues to clarify the bounds of arbitrability in one of the largest U.S. jurisdictions. The recent case of *In re Labatt Food Service, L.P.* involved a wrongful death suit brought by the parents and children of an employee who suffered a fatal asthma attack on the job. They argued that they were not bound by an arbitration clause in his occupational benefit plan, because they did not sign it, and because of public policy considerations. After prevailing in the trial court and the intermediate court of appeals, the Texas

Supreme Court ruled against them and ordered the matter to arbitration. No. 07-0419 (Feb. 13, 2009).

Because the plaintiffs had not signed the plan themselves, the first issue was whether they were bound by the arbitration clause that the deceased employee had signed. Recognizing a split in authority on this point around the United States, and even within Texas, the court concluded that the beneficiaries were bound because their claims were derivative of the deceased's. His contractual agreement to arbitrate applied to the plaintiffs because they could only succeed to rights that he had. The court noted the express requirement of the Federal Arbitration Act that "*place[s] arbitration contracts on equal footing with other contracts,*" in which other kinds of defenses against a deceased person were found to apply to wrongful death plaintiffs.

The plaintiffs then argued that the plan, and thus its arbitration clause, was void as against public policy because it contained an indemnity provision that violated the Texas Labor Code. The court distinguished a challenge to an arbitration provision, which a court decides, from a challenge to the validity of an entire contract, which is for the arbitrator. Because the plaintiffs attacked the arbitration clause "*only in the sense that they also challenge all parts of the agreement because the parts comprise the whole,*" the court held that this argument was for the arbitrator only. As a result, the court did not reach a related issue of whether the Federal Arbitration Act preempted the relevant state law.

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## Arbitrating Antitrust and Competition Law Issues in Germany

Dr. Moritz Dietel and Ishak Isik, LL.M.

### Antitrust and arbitration

Antitrust law may come into play in arbitration procedures in three main contexts: (i) Where a planned merger does not obtain clearance by the competent competition authority, this may lead to damages claims that are subject to arbitration. Antitrust issues may be relevant to the question whether such claims are founded; (ii) Where

antitrust violations are relied on as a basis for a claim of breach of (contractual) duties and/or warranties; (iii) Where an approved merger is subject to "behavioural remedies" to be monitored by arbitration tribunals. It is common practice of the European Commission to oblige the companies involved in a merger to resort to arbitration if a third party is detrimentally affected by the merger clearance. In this case, the latter may seek remedies in resorting to arbitration tribunals.

### Antitrust laws as public policy rules

The German Federal Court of Justice held in *Schweißbolzen* (1966, KZR 7/65) that mandatory German antitrust provisions, and in *Fruchtsäfte* (1969, KZR 3/68) that EC antitrust law must be considered as a matter of public policy (*ordre public*) in procedures of annulment or enforcement of an arbitration award. In its landmark decision *Eco Swiss China Time Ltd. v. Benetton International NV* (1999, Case C-126/97), the European Court of Justice (ECJ) also identified EC antitrust law as public policy and held that a "national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 81 EC, where its domestic rules of procedure require it to grant application for annulment founded on failure to observe national rules of public policy." Accordingly, when a party chooses to invoke an EC member state jurisdiction to enforce an arbitration award, the member state court has to ensure that the award complies with mandatory EC antitrust law which forms part of the member state public policy rules.

German courts are obliged to verify *ex officio* whether arbitration tribunals have applied the antitrust and competition law as public policy rules (e.g., Sec. 1060, 1059 para. 2 no. 2b ZPO - German Act on Civil Procedure). Such verification occurs in the context of applications to annul or enforce arbitral awards.

Even if antitrust issues are not raised by any party, an arbitration tribunal must consider them if its award is to be enforceable. Unlike national courts, it is unclear what exactly constitutes public policy for an arbitration tribunal since it lacks its own legal system. Any relevant legal system could involve public policy rules or could have extraterritorial effects. The prevailing opinion is that arbitral

tribunals must have regard to the rules of *ordre public international* or international public policy, i.e., principles of fundamental concern mutually recognised on an international level in accordance with the principle of comity.

German tribunals apply a methodical approach in addressing public policy issues. The starting point is which provisions with extraterritorial effect are relevant in the specific case. The underlying facts of the case must meet the requirements of these relevant provisions. Secondly, there must be a close link between the facts of the case and the state having enacted the relevant provisions (that link may be, e.g., governing law, place of jurisdiction, place of performance, place of recognition or enforcement of the arbitration award). Finally, the extraterritorial effect must be accepted by other states in accordance with the principle of comity. In this respect, the arbitral tribunal should strike a balance between the different interests of the affected states in enforcing their provisions.

The crux is, however, to determine the uniform international substantive rules of public policy. For example, it is disputed whether EC antitrust law forms part of international public policy: although the ECJ has held that EC antitrust law has effect outside the EC, the Swiss Federal Court has refused to recognise it as a matter of public policy (cf. judgment 4P.278/2007 of 8 March 2006) and argued that EC antitrust law has no international status. In any case, disregarding EC antitrust law is dangerous as such an award could be contested in an EC member state in an annulment or enforcement procedure.

### Reducing risks of annulment of arbitration awards

In Germany, arbitration tribunals - unlike national courts (cf. Sec. 90 GWB - German Act on Restraints on Competition) - are not obliged to inform antitrust authorities of disputes concerning antitrust and competition issues. Indeed, parties in Germany are often advised to resort to arbitration because third parties detrimentally affected by any violations of antitrust and competition law will not get to know of the arbitration award and, hence, will not claim for damages. However, this tactic may fail in the long run, as any German court called upon to adjudicate on the enforcement or annulment of the award is obliged to inform antitrust authorities of

any relevant offences or issues. Even if the court does not do so, the court proceedings are public so affected third parties may find out.

Irrespective of the jurisdiction in which the arbitration tribunal is seated, any arbitral award violating or sanctioning a breach of EC antitrust and competition law may be annulled in the context of an application to enforce or annul in an EC member

state. Therefore, any company wishing to reduce the risk of such an annulment should make sure that the arbitration tribunal, whenever conceivably of relevance, considers antitrust issues.

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