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## From the Editors

Welcome to the 19th 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](mailto:ian.meredith@klgates.com) or [peter.morton@klgates.com](mailto:peter.morton@klgates.com)).

## News from around the World

Sean Kelsey (London)

### Asia

#### China

In a judgment dated 10 May 2012, the Hong Kong Court of Appeal (the “Court of Appeal”) has overturned a judgment of the Hong Kong High Court which had, on grounds of procedural irregularity, set aside an ICC award. The Court of Appeal has reaffirmed that, under the UNCITRAL model law, an award may only be set aside in very limited circumstances.

Pacific China Holdings Ltd (“PCH”) and Grand Pacific Holdings Ltd (“GPH”) entered into a loan agreement which provided for ICC arbitration in Hong Kong. An award was rendered in favour of GPH in August 2009. PCH applied to the Hong Kong High Court to set aside the award, pursuant to section 34C(4) of the Hong Kong Arbitration Ordinance which is essentially Article 34(2)(a) of the UNCITRAL Model Law. Under Article 34, a national court may set aside an arbitral award on grounds that the applicant was denied the opportunity to present its case to the tribunal.

PCH had raised new issues shortly before, and after the hearing. PCH complained that the tribunal had given it insufficient time or opportunity to make replies to submissions GPH had made in response to those issues. The tribunal had required that the scope of a joint experts’ report should be confined to what had been stated in the original reports. PCH complained that the tribunal had refused permission for production of three new authorities in the joint legal expert report. The High Court found procedural unfairness on all three arguments and set aside the award.

The Court of Appeal set aside the High Court decision, re-instating the award, and confirmed that the court is concerned only with the structural integrity of the arbitral proceedings and will not address itself to the substantive merits of the dispute. The High Court had not had jurisdiction to question the merits of the tribunal’s decisions, including its case management decisions, and ought to have deferred to the discretion that the tribunal had to use procedures that are appropriate to the particular case so as to provide a fair means for resolving the dispute. The Court of Appeal went on to express the view that, under Article 34, the conduct complained of must be

sufficiently serious or egregious to be regarded as a denial of due process; and that a court has discretion to refuse to set aside an award if satisfied that, despite an error, the tribunal could not have reached a different conclusion, and the burden is on the party making the application to show that it had or might have been prejudiced.

### India

In a judgment being hailed as a step forward for international arbitration in India, the Calcutta High Court (the “Court”) has held that a foreign award could only be annulled at the juridical seat of the arbitration.

In 1989 Canadian Commercial Corporation (“CCC”) entered into an Indian law agreement to set up a coal extracting facility for Coal India Limited (“Coal India”) in the state of Jharkhand. An arbitration clause provided for ICC arbitration in Geneva. A dispute arose and was referred to arbitration. The tribunal conducted proceedings in London, but recognized that the seat of the arbitration was Switzerland. CCC was awarded damages, plus costs. Coal India brought proceedings before the Court to have the award set aside.

In a judgment dated 20 March 2012, the Court held that it had no jurisdiction to determine Coal India’s application. Notably, the Court considered, and distinguished a number of judgments of the Supreme Court of India and various Indian High Courts widely regarded as inimical to key principles in international arbitration. These include the judgment in *Bhatia International v. Bulk Trading*, which the Supreme Court has itself recently revisited (see the [article](#) in the March 2012 issue of *Arbitration World*), as well as the Court’s own notorious *White Industries* judgment, whereby Coal India thwarted enforcement of an ICC award rendered in 2002.

In a separate development, the government of India has given notice that, for the purposes of the Indian Arbitration and Conciliation Act 1996 (the “Act”), China, Hong Kong and Macau have been placed on India’s list of countries to which the New York Convention is recognised to apply. This means that, with effect from 19 March 2012, awards rendered in those jurisdictions are now enforceable in India. Of 146 signatories to the New York Convention, fewer than 50 are included on India’s list, other absentees

including arbitral centres such as Australia and Mauritius ([click here](#) for our report in this edition on recent developments in international arbitration in Mauritius).

Domestic arbitration in India has also enjoyed a recent fillip, with the 18 April 2012 decision of the Delhi High Court to reject an application to set aside a €1.5 million award rendered under the auspices of the Indian Council of Arbitration. The Steel Authority of India (known universally as “SAIL”) had argued, under section 34(2) of the Act, that it had been deprived of the opportunity to argue its case in defence to a claim by German machinery maker Salzgitter Mannesmann. Muralidhar J rejected the petition, and ordered SAIL to pay the costs of the proceedings, finding that the particular jurisdiction under the Act invoked by SAIL was not an appellate jurisdiction, and declining to interfere in the reasonable decisions of the tribunal.

### Singapore

On 9 April 2012, legislation was passed for reform of Singapore arbitration law, by enactment of amendments to the International Arbitration Act to which we referred in our [last edition](#), and parallel amendments to domestic arbitration law. A third measure (the Foreign Limitation Periods Act—the “Act”) clarifies the limitation law applicable to disputes, including arbitrations seated in Singapore, which are governed by the laws of a jurisdiction other than Singapore. The Act provides that, subject to exceptions (including public policy), limitation issues will be determined in accordance with the laws that govern the substantive dispute.

### Europe

#### Portugal

On 14 March 2012, a new arbitration law came into effect, updating legislation passed in 1987. A bill was first introduced as long ago as 2009. The Portuguese government came under pressure to expedite the passage of the bill last year following the country’s €78 billion bail-out by the European Commission, European Central Bank and International Monetary Fund. The memorandum of understanding Portugal signed with those creditors contained a deadline for the law to be passed by the end of 2011.

The new law broadens the scope of arbitrability of disputes (permitting the parties to arbitrate any dispute involving economic interests), provides that the country's Civil Procedure Code does not apply to arbitration, creates greater scope for multi-party, multi-contract arbitration, and confers more power on tribunals to grant preliminary orders and interim measures.

### Switzerland

In a German-language ruling dated 27 March 2012, the Federal Supreme Court has set aside an award rendered by the Court of Arbitration for Sport ("CAS") which had threatened Brazilian football player Francelino da Silva Matuzalem with a playing ban. Matuzalem had transferred unlawfully to Spanish club Real Zaragoza from the Ukrainian team Shakhtar Donetsk. CAS imposed a financial penalty which neither Matuzalem nor Real Zaragoza were able to pay, in default of which FIFA's disciplinary committee set a deadline for payment, enforceable by way of either an open-ended playing ban on Matuzalem or a points deduction on the club, at the election of the aggrieved Ukrainian team. CAS issued an award upholding the committee's ruling (the "Award"). Matuzalem appealed to the Federal Supreme Court under Article 190(2)(e) of the Swiss Private International Law Act ("PILA") which provides that an arbitral award may be set aside if it is incompatible with either substantive or procedural components of public policy. The Federal Supreme Court found that restriction on economic freedom of the kind envisaged under the Award was excessive, inappropriate, unnecessary and disproportionate, and thus contrary to public policy.

Public policy grounds are among the most frequently chosen grounds for challenging international arbitral awards before the Swiss Federal Supreme Court, but this is understood to be the first case in which an award has been set aside for violation of substantive public policy under the PILA, and only the second case in which a petition based on Article 190(2)(e) of the PILA has been successful since the provisions on international arbitration were introduced in 1989.

### Middle East

#### Dubai

A recent decision has raised a potential question mark over the international arbitration credentials of the Dubai International Finance Centre (the

"DIFC"). Passage of the DIFC Arbitration Law in 2008 (the "Law") came into force after the UAE ratified the New York Convention, and was greeted as a major step forward for dispute resolution in the region, and arbitration in particular. Article 13 of the Law sets out the duty of the DIFC Courts to dismiss or stay proceedings brought in breach of a valid arbitration agreement. It does not in terms state that Article 13 applies to arbitrations seated elsewhere than the DIFC. Giving judgment in *Injazat Capital Limited and Injazat Technology Fund BSC* ("Injazat") v. *Denton Wilde Sapte* ("DWS") (6 March 2012), Sir David Steel J has held that, on the clear wording of the Law, Article 13 only applies where the seat of the arbitration is the DIFC.

Injazat claimed against DWS in negligence. The retainer provided for the exclusive jurisdiction of the "Dubai Courts", with a discretionary opt-out providing for LCIA arbitration in London. Steel J held that "Dubai Courts" referred to both the (English language, common law) DIFC Courts and the (Arabic language, civil law) Dubai Courts; and that DWS had failed to show that the terms of the retainer excluded the jurisdiction of the DIFC Courts. More troublingly, Injazat had contended, and DWS conceded in oral submissions, that Article 13 did not apply where the seat of the arbitration was outside the DIFC, so that there would be no mandatory stay in support of the arbitration agreement in this case as a London seat was specified. In his judgment Steel J remarks that: "*It is fair to say that this constitutes on the face of it a failure to implement the terms of the New York Convention to which the Emirates are a party*". It remains to be seen what knock-on effects this comment on the Law may have.

#### Israel

In March, Israel's Ministry of Justice proposed legislation to introduce mandatory arbitration of certain disputes. Commentators suggest the proposal is a means of relieving the burden of pending cases before the country's courts. Under the proposal, Chief Judges of the Magistrate Courts would be authorised to refer, without the consent of the parties (albeit subject to appeal), low value monetary claims, excluding personal injury claims, to arbitration. Arbitrators would be selected from a panel either by the parties, or by the relevant Court.

Awards would be subject to appeal to the Court that transferred the case to arbitration. It is reported that the Israeli Bar Association has said it will oppose measures introduced in the form proposed. There is as yet no legislation before the Knesset.

## South America

### Brazil

Amendment of provisions relating to arbitration in Brazil's 1973 Civil Procedure Code (the "CPC") is expected when a new CPC is introduced. Legislation currently before the Congress includes provisions whereby foreign arbitral awards can be recognised even where the same issues are before a Brazilian court; measures for protection of confidential arbitral proceedings are tightened up; and it is made clear (where previously it was not) that a judge may not, of his own motion, stay proceedings on the grounds that a dispute is subject to a valid arbitration agreement. The new rules currently under debate would mean that where requests for assistance of the courts pursuant to their ancillary jurisdiction are compliant with formal requirements, they may only be refused where the judge to whom the request is addressed does not have the competence to deal with it (in which case he or she must pass the request to a judge believed to have such competence).

But not all the amendments appear entirely benign. There appear to be contradictory provisions which may serve to blur the distinction between foreign and domestic awards in relation to their enforcement. More significantly, the new CPC changes rules which govern the effects of appeals such that, where a court determines that an allegedly defective arbitral agreement should be performed, any appeal from that determination will suspend the effect of the court's Order (where, before, it would not have done). As a consequence, a dispute in the Brazilian courts over the validity of an arbitration clause could entail years of litigation before an arbitration finally starts.

## Institutions

### CAS

On 30 April 2012, the CAS ruled that the British Olympic Association's (the "BOA") lifetime ban for athletes who test positive for performance enhancing drugs should be lifted ahead of the 2012 Games in London. The decision is an extension of recent moves to prevent local 'bye-laws' extending the

World Anti-Doping Agency's standard two-year ban, and has been met with mixed reactions. It clears the way for previously banned athletes such as sprinter Dwain Chambers and cyclist David Millar (both of whom were prevented from competing in Beijing) to compete for qualification as members of Team GB.

### CIETAC

Implementation of CIETAC's new rules, which took effect on 1 May 2012, has been overshadowed by reports of a schism which has seen the Shanghai sub-commission declare independence. Reportedly in reaction to perceived centralising tendencies of the new rules, the sub-commission, which is a branch office of CIETAC, has announced plans to establish its own rules and panel of arbitrators. In a public statement, CIETAC has responded by declaring the Shanghai sub-commission's conduct to be null and void on grounds of violation of the Arbitration Law of China and the relevant regulations of the State Council, as well as CIETAC's Articles of Association. CIETAC has also published an open letter "*to all arbitrators*", appealing for them to continue to adhere strictly to the laws of the PRC and CIETAC's Arbitration Rules in their arbitration activities. The letter states that Shanghai is not the only sub-commission to seek to assert independence, lending credence to reports that the Shenzhen branch has also shown a desire for independence. In a response to CIETAC's public pronouncements, the Shanghai sub-commission has launched an attack on the institution's new rules, and in particular the requirement that parties expressly state if they want a dispute submitted to the Shanghai or Shenzhen sub-commission in their arbitration clause. Under the old rules, disputes could be allocated to sub-commissions based on party convenience, even if this was not stipulated in the arbitration clause. According to Shanghai, the retroactive amendment violates "*basic principles of party autonomy*". Last year CIETAC administered 1,282 cases, 417 of which were handled in Shanghai.

### CAM, DIS, ICC

Three leading international arbitral institutions have recently appointed new heads.

Andrea Carlevaris will take up the post of Secretary General of the ICC International Court of

Arbitration on 1 September 2012. Mr Carlevaris was appointed counsel at the ICC in 1999 and has been a member of the ICC Court, representing Italy, since 2008. He was also a partner at the Rome-based law firm Bonelli Erede Pappalardo Studio Legale. Mr Carlevaris will be replacing Jason Fry who is returning to private practice at the law firm Clifford Chance. Mr Fry will leave the post on 20 July 2012 at which point Jose Ricardo Feris, Deputy Secretary General of the Court, will assume the responsibilities of Secretary General until Mr Carlevaris officially takes up his position.

Klaus Peter Berger, a professor of law at the University of Cologne, has been elected the chairman of the German Arbitration Institution (DIS), which in April celebrated its 20th anniversary with a conference in Bonn. Mr Berger succeeds renowned arbitrator Karl-Heinz Böckstiegel, who has presided over the institution's board of directors for 16 years and will now become honorary president.

Miguel Ángel Fernández-Ballesteros has been appointed president of the Madrid Court of Arbitration (CAM), taking over from Miguel Temboury, who is to become Spain's deputy secretary of state for the economy.

#### **Swiss Chambers Arbitration Institution (SCAI)**

As previously reported, the recently renamed Swiss Chambers Arbitration Institution revised its Rules of Arbitration, which took effect on 1 June 2012 and apply to all arbitral proceedings commenced after that date. Some of the notable amendments include provisions introducing the emergency arbitrator, expedited procedures and *ex parte* interim relief. We will be reporting in more detail on the changes to the Rules in the next edition of *Arbitration World*.

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## **World Investment Treaty Arbitration Update**

Lisa M. Richman (Washington, D.C.),  
Dr. Wojciech Sadowski (Warsaw), and Dr. Sabine Konrad (Frankfurt)

In each edition of *Arbitration World*, members of K&L Gates' Investment Treaty Group provide

updates concerning recent, significant investment treaty arbitration news items. This edition features a discussion of the nationalization of Repsol by [Argentina](#), a summary of recent changes contained in the [2012 U.S. Model Bilateral Investment Treaty](#), certain developments regarding recent challenges to the independence and impartiality of some prominent investment treaty arbitrators including in claims involving [Venezuela, Argentina, Ecuador and the Republic of Guinea](#); a report concerning the possible resurrection of a claim against [Jordan](#); and an appeal rejected by Canada's Supreme Court of a NAFTA award against [Mexico](#).

### **Repsol's subsidiary taken by Argentina**

In mid-April Argentina's President first announced the plans to re-nationalize YPF, Argentina's largest oil company. The draft Act On Argentina's Hydrocarbon Sovereignty was sent to the national Congress on 16 April 2012 and was adopted with an overwhelming majority of votes by Argentina's Chamber of Deputies on 4 May 2012. The Act provides for nationalization of 51% of YPF's shares from the Spanish company Repsol (which holds a majority interest in YPF). It has also been reported that Repsol will not receive compensation in the amount of the market value of the nationalized shares. In fact, the amount of compensation may be reduced by the cost of alleged "environmental damage" attributed to Repsol.

The official justification for the re-nationalisation relates to YPF's alleged failure to satisfy the local demand for oil and natural gas production. However, Repsol contends the legislation was caused by a national energy shortage, coupled with the recent discovery of a substantial shale gas formation on Argentina's mainland.

On 15 May 2012 Repsol announced that it has served the notification letter upon Argentina's President, which starts the 6-months cooling-off period required under the bilateral investment treaty before arbitral proceedings can be commenced. The value of Repsol's claim is reported to exceed US\$10 billion.

### **U.S. Model BIT 2012 – No major changes**

On 20 April 2012 the U.S. Government published a new model bilateral investment treaty, which is a

revision of the 2004 model instrument prepared by the George W. Bush administration. The recent publication is the work product of a committee constituted in 2009 that attempted to respond to substantial—often conflicting—suggestions, concerns and proposals for changes voiced by supporters and opponents of international investment agreements.

At first blush, the new model treaty does not appear to be a major departure from the structure or wording of the core standards of investment treaty protection contained in the 2004 U.S. Model BIT. The most important standards, relating to national treatment, minimum standard of treatment, most-favored nation treatment and protection against expropriation, as well as the definitions of investor and investment, remain substantially identical as under the previous version of the model BIT.

Minor changes have been implemented relating to the protection of investors against performance requirements, which can be imposed by the host state. Under the 2012 Model BIT, the prohibition to apply such requirements extends also to the use by the investor of ‘local’ technology, *i.e.* technology owned by the host state or its nationals, and to the prohibition of use of a particular technology by the investor.

The new model BIT puts more emphasis on the transparency requirement. The goal is to require of Contracting States obligations relating to their legislative procedures, including the requirement to announce proposed regulations of general application (relating to matters covered by the Treaty), to include in the publication of any proposed regulations an explanation of the purpose of and rationale, and to submit proposed regulations to public discussion. All of these additions enhance the stability and predictability for investors.

The 2012 Model BIT also expands on the provisions of the 2004 version with respect to protection of environment and labour standards. Some modifications were also made with respect to the rules covering investment in the financial sector, including an express confirmation of the powers of the parties to adopt or enforce measures related, *inter alia*, to the prevention of deceptive and fraudulent

practices or that deal with the effects of a default on financial services contracts.

The United States continues to negotiate bilateral and multilateral investment protection treaties. Recent developments include resumption of negotiations with Pakistan and efforts to advance the adoption of the multilateral Trans-Pacific Partnership Agreement, which would include a chapter on the protection of investments. The parties negotiating the TPPA are Australia, Brunei Darussalam, Chile, Malaysia, Peru, Singapore, the United States, Vietnam and New Zealand. The final round of negotiations was supposed to close at the end of 2011, but was postponed until mid-2012. The most recent round of negotiations occurred between 8-18 May 2012.

### Round-up of recent arbitrator challenges

There has been an uptick in the number of challenges to the impartiality or independence of one or more arbitrators. This includes the publication of the decision of 27 February 2012, taken by the two arbitrators in *ConocoPhillips Company et al. v. Venezuela* (ICSID No. ARB/07/30) with respect to the request of the Respondent to disqualify Mr. L. Yves Fortier, QC as a co-arbitrator. Venezuela’s request was based on an alleged conflict resulting from the merger of the law firm in which Mr. Fortier was a partner, Norton Rose OR LLP, with Macleod Dixon LLP, co-counsel to ConocoPhillips Company and to other claimants with ICSID claims against Venezuela.

Although Mr. Fortier disclosed the fact of the merger immediately after it was approved by the two partnerships, and shortly thereafter decided to leave the partnership of the newly merged firm, because of the alleged conflict concerns, the Respondent maintained its request for disqualification on the ground that Mr. Fortier should have investigated and disclosed to the parties the fact of the merger discussions even before the merger was approved. The remaining arbitrators dismissed the request, principally on the ground that Mr. Fortier had no involvement nor information about the relevant matters handled by Macleod Dixon. They determined that a disclosure before approval of the merger was not necessary.

In another recently published decision, on 19 December 2011, the Secretary General of the PCA rejected Argentina's request in *Abaclat et al. v. Argentina* (ICSID No. ARB/07/05) to disqualify Professors Pierre Tercier and Albert van den Berg. (For further discussion of the *Abaclat* case, [click here](#).) Argentina sought to disqualify both arbitrators for alleged lack of independence and impartiality ostensibly because they rendered an unfavourable decision on Argentina's request for provisional measures, and decided against Argentina in the 4 August 2011 decision on jurisdiction and admissibility.

The Secretary-General of PCA dismissed all of the allegations, holding there was an absence of evidence that the majority of the Tribunal was influenced by anything other than its analysis of the arguments which the parties presented to it. It concluded that the request for disqualification resulted, in essence, from Respondent's dissatisfaction with the substance of the majority's rulings. Similarly, Respondent's assertions that the majority was prejudiced with respect to certain issues (determined in the decision on jurisdiction and liability), and failed to conduct a full deliberation of the case, were rejected in their entirety by the Secretary-General.

In another failed challenge, the Secretary-General of the PCA also recent refused to disqualify Judge Stephen Schwebel in *Merck v. Republic of Ecuador* (PCA AA 442) (full decision unpublished). Reportedly, Ecuador raised concerns about Judge Schwebel's public comments relating to an international litigation between Nicaragua and the United States in which he was a Judge (on the International Court of Justice) and in which Ecuador's outside legal counsel appeared as advocate for Nicaragua.

Against these developments, it remains to be seen how other challenges will be decided. This includes a challenge to the Spaniard Bernardo Cremades in *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), which was made on 16 April 2012, on the grounds that Mr. Cremades's brother sits on an arbitral panel in a parallel ICC arbitration concerned with the same facts as the ICSID arbitration.

The various challenges and their results suggest that while arbitrators remain obliged to comply with high standards with respect to both the duty to disclose circumstances that may affect their independence and impartiality, as well as their duty to exercise an independent judgment—challenging parties may be confronted with similarly high requirements in making a successful challenge.

### **“Parallel” ICSID claim may continue against Jordan**

A recent ICC award has raised questions relating to parallel ICSID and ICC proceedings. The ICC tribunal held that the Government of Jordan properly terminated a contract that was at issue in the dispute, despite an earlier finding by the ICC's Dispute Adjudication Board to the contrary. *See Government of the Hashemite Kingdom of Jordan and the Land Transport Regulatory Commission v. International Company for Railway Systems*, ICC Case No 16342/EC/ND, Final Award of 2 March 2012 (discussing DAB proceedings at paras. 91 and 92).

Following the ICC award, lawyers for a Kuwaiti investor (Privatization Holding Company) in the Respondent railway project reportedly suggested that it may resuscitate its discontinued ICSID claims against Jordan in which it argued that Jordan's actions violated the Kuwait-Jordan BIT.

Of interest, the tribunal in the ICC award labeled the ICSID proceedings as “duplicative,” notwithstanding the fact that claims under investment treaties typically constitute claims separate from those under contract or domestic law. What the Kuwaiti investor decides to do remains to be seen.

### **Canadian Court refuses to hear appeal**

On the other hand—and by way of an update to our report in the [December 2011 edition](#) of *Arbitration World*—by its decision of 10 May 2012, Canada's Supreme Court dismissed Mexico's application for leave to appeal a USD 77 million award based on the contention that an arbitral tribunal misinterpreted the NAFTA agreement. *See United Mexican States v. Cargill, Incorporated* (Ont.) (Civil) (By Leave) (34559), dated 10 May 2012.

The underlying September 2009 arbitral award against Mexico for NAFTA Chapter 11 violations was made under the ICSID Additional Facility Rules in favour of Cargill, an American supplier of high fructose corn syrup (HFCS). *See Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009. The arbitration related to losses suffered by Cargill's Mexican subsidiary and its U.S. operations that it contended were created or expanded specifically for production of HFCS to be sold in Mexico. Cargill succeeded in persuading the tribunal that these losses were caused by import and tax legislation enacted by Mexico, adopted by Mexico in violation of NAFTA Chapter 11 obligations, in order to protect its domestic sugar industry to the detriment of HFCS distributors such as Cargill. In turn, Mexico failed to convince the tribunal that its actions were a legitimate WTO counter-measure.

As explained in our prior report, because the arbitration was brought under the ICSID Additional Facility Rules (as Mexico is not a member of ICSID), it was not insulated from challenges to national courts, as an arbitration under the ICSID Convention would have been. Instead, it was subject to review by the Canadian courts, as the seat of the arbitration was Toronto. Accordingly Mexico has exhausted, without success, all possible avenues of legal recourse against the NAFTA award. The recent decision of the Supreme Court of Canada marks the third consecutive loss by Mexico before the Canadian Courts in this case, after it failed before both the Ontario Superior Court of Justice and the Ontario Court of Appeal. This has occurred notwithstanding the appeals by all three NAFTA states (Canada, Mexico and the United States) that the NAFTA tribunal did not interpret the treaty correctly and although Canada's Attorney General's office supported Mexico's application.

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## U.S. Supreme Court Takes Another Look at the Enforceability of Pre-Dispute Arbitration Clauses

Kristen L. Schneider and Kiran H. Mehta  
(Charlotte)

In January 2012, the Supreme Court of the United States' decision in *CompuCredit Corp. v. Greenwood* reversed the Ninth Circuit's ruling that agreements to arbitrate claims arising from the Credit Repair Organizations Act are unenforceable. The *CompuCredit* decision is part of a line of cases involving the enforceability of pre-dispute arbitration clauses that have come after the Supreme Court's seminal decision last year in *AT&T Mobility LLC v. Concepcion* (2011).

The issue before the Court in *CompuCredit* was whether the Credit Repair Organizations Act (the "CROA"), 15 U.S.C. § 1679 *et seq.*, prohibits the enforcement of an arbitration agreement in a lawsuit alleging violations of the CROA. In *CompuCredit*, the respondents filed a class action lawsuit against the petitioners, CompuCredit Corporation and Columbus Bank and Trust, alleging violations of the CROA. The respondents were individuals who received a credit card marketed by CompuCredit. A provision in the credit card application provided that "any claim, dispute or controversy" arising from the cardholder's account "will be resolved by binding arbitration." Based on this provision, the petitioners filed a motion to compel arbitration. The United States District Court for the Northern District of California denied the petitioners' motion, holding that "Congress intended claims under the CROA to be nonarbitrable." The United States Court of Appeals for the Ninth Circuit affirmed. The Supreme Court reversed, 8-1, in an opinion authored by Justice Scalia, with Justice Ginsburg dissenting.

First, the Court recognized that the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq.*, governed the issue in the case. The FAA provides that any contractual arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court acknowledged that the "liberal federal policy favoring arbitration agreements" applied even to federal statutory claims, "unless the FAA's mandate has been 'overridden by a contrary congressional command.'"

The respondents, relying on the CROA's disclosure and nonwaiver provisions, argued that the CROA overrides the enforceability under the FAA of the



arbitration clause in the credit card application. The CROA's disclosure provision states: "You have a right to sue a credit repair organization that violates the Credit Repair Organizations Act." 15 U.S.C. § 1679c(a). Furthermore, the nonwaiver provision of the CROA states: "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter – (1) shall be treated as void; and (2) may not be enforced." 15 U.S.C. § 1679f(a).

The Court rejected the respondent's argument, holding that the disclosure provision did not create a right to sue in court. Instead the Court concluded that the CROA simply preserves "the guarantee of the legal power to impose liability" through any competent judicial tribunal, including both courts and arbitral tribunals. The Court further dismissed any suggestion that the use of the terms "action," "class action," and "court" in the CROA provided consumers with a right to bring a lawsuit in court, finding that "[i]t is utterly commonplace for statutes that create civil causes of action to describe the detail of those causes of action, including the relief available, in the context of a court suit."

In reaching its conclusion that nothing in the CROA prevented enforcement of the arbitration clause, the Court also noted that at the time of the CROA's enactment in 1996, arbitration clauses in contracts like the credit card application at issue "were no rarity." The Court reasoned that if Congress had intended to prohibit arbitration in the CROA, it would have done so in a clear manner. The Court noted a number of examples where Congress has restricted the use of arbitration in other contexts. For example, the whistleblower provision of the Commodity Exchange Act, 7 U.S.C. § 26(n)(2) states: "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." The Court held that this type of language makes clear that arbitration is not an available means to resolve statutory claims. The Court concluded that "[b]ecause the CROA is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced."

For these reasons, the Court reversed the Ninth Circuit's decision and held that the CROA does not

prevent enforcement of arbitration agreements in cases alleging violations of the CROA.

The Supreme Court's decision in *CompuCredit* is consistent with its previous decisions involving the enforceability of pre-dispute arbitration clauses, including *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.* (2010) and *AT&T Mobility LLC v. Concepcion* (2011). In *Stolt-Nielsen*, the Court held that in order to permit class arbitration, the parties' arbitration agreement must authorize class relief. Building on that decision the following year in *Concepcion*, the Supreme Court held that the FAA preempted California's *Discover Bank* rule, which would render most class action waivers in consumer adhesion contracts unenforceable. Both of these decisions demonstrate the Court's strong support for individual arbitration agreements. In *CompuCredit*, the Court once again upheld an individual arbitration agreement against a class action attack, rejecting arguments that arbitration was precluded by statute and reaffirming that the FAA mandates enforcement of arbitration agreements according to their terms.

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## The "SCC Emergency Arbitrator": First Experiences with the Pre-Arbitral Interim Relief Procedure

Dr. Johann von Pachelbel (Frankfurt)

What can a party to an arbitration agreement do if it urgently needs to seek interim relief before the arbitral proceedings have been initiated or before the tribunal has been constituted? The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has developed an answer to this question which is introduced in Appendix II of its revised Arbitration Rules which were adopted on 1 January 2010 (SCC Rules), see [www.sccinstitute.com](http://www.sccinstitute.com).

In cases where the relevant contract provided for SCC Arbitration, during the time between the beginning of a dispute and the constitution of the arbitral tribunal the applicant for interim relief had no alternative in the past than to file its application to a state court. The SCC Rules now provide for an alternative by its Emergency Arbitrator Rules. The

topic is of practical relevance as it often takes weeks or months before a tribunal is constituted. Furthermore, effective interim relief is not available in all jurisdictions and in certain cases the parties wish to avoid a recourse to state courts for other reasons e.g. to ensure confidentiality. In view of the increasing number of requests for interim measures in international arbitration in the past and the apparent need for parties to secure assets or evidence or avoid irreparable harm etc. in the period before the case is referred to the arbitral tribunal, the question arises if the Swedish Emergency Arbitrator Rules provide an efficient tool for the parties to an arbitration agreement.

### Revised SCC Rules

Provided that the parties have agreed upon the SCC Arbitration Rules these rules shall ensure the availability of interim relief by an Emergency Arbitrator as long as the tribunal has not yet been constituted. However, this does not mean that a party is barred from taking recourse to state courts to apply for interim relief if the party prefers to do so.

A noteworthy feature of the “Swedish model” is the opt-out solution which means that the rules on the Emergency Arbitrator are applicable to all SCC proceedings commenced after 1 January 2010. This applies independently of whether the parties agreed on a SCC arbitration clause before or after said date. Consequently, the Emergency Arbitrator Rules apply unless the parties explicitly exclude them.

### First practical experiences

The SCC Institute has faced a noticeable demand for emergency arbitrations from users over the past two years. In 2010 four applications and in 2011 two applications were filed to the Institute. The proceedings all concerned cross-border agreements including shareholders’ agreements, transportation agreements, agency agreements, construction agreements etc. The parties involved had their origin in Cyprus, the Netherlands, Finland, Norway, Georgia, Sweden, Israel, Switzerland and other countries. The amounts in dispute ranged between 500,000 and 100 million Euros.

In all cases, the Institute appointed an Emergency Arbitrator within the 24 hours time frame stipulated in the Rules. In half of the cases, the Emergency Arbitrator made a decision within the five day

period determined by the SCC Rules. In the other cases, the time limit for the arbitral award was prolonged by a few days upon request of respondent.

According to the SCC Rules, the Emergency Arbitrator may at a party’s request grant any interim measures it deems appropriate in relation to the parties (Art. 32 SCC Rules; Art. 1 Appendix II). The existing decisions made under the Emergency Arbitrator Rules show that the arbitrators have especially examined whether (i) they had jurisdiction (*prima facie*), (ii) it was likely enough that the applicant would succeed on the merits of the claim and (iii) whether the applicant had sufficiently established that the harm to be prevented by the interim measure was irreparable and of an urgent or imminent nature. In some cases, explicit reference was made to the provision of Art 17 A, added to the UNCITRAL Model Law on International Commercial Arbitration as amended in 2006, which states very similar requirements to those just mentioned.

### Procedural aspects

The procedure is started by the filing of an application for the appointment of an Emergency Arbitrator with the SCC Institute, including inter alia the contact details of the parties, a summary of the dispute, a statement of the relief sought and the reasons for this as well as proof of payment of the costs for the emergency proceedings (EUR 12,000 as arbitrator fee and 3,000 as application fee).

The rules are not designed as an ex-parte procedure. Thus, the SCC Institute will notify the other party as soon as it receives the application.

The Board of the Institute shall seek to appoint an Emergency Arbitrator within 24 hours which is a challenge taking into consideration the time it takes for arbitrators to check possible conflicts of interest. However, the Institute has succeeded in timely appointing Emergency Arbitrators in all cases so far. Once the appointment is made, the case is promptly referred to the arbitrator.

The arbitrator may conduct the proceedings in such a manner as he/she considers appropriate, provided that each party shall be given an equal and reasonable opportunity to present its case, taking

into account the urgency inherent in such proceedings (Art. 7 Appendix II). The Emergency Arbitrator may decide the case by an order or an award, and a decision may be taken even if the respondent has not replied to the application. In this way, the possibilities to obstruct or delay the proceedings are limited. Further, the Emergency Arbitrator may order the applicant to provide appropriate security in connection with the interim measure.

### **Binding effect of an emergency decision**

An emergency decision is as binding for the parties as interim decisions rendered by an arbitral tribunal. The emergency decision ceases to be binding when (i) the Emergency Arbitrator or an Arbitral Tribunal so decides, (ii) an Arbitral Tribunal renders a final award, (iii) arbitration is not commenced within 30 days from the date of the emergency decision; or (iv) the case is not referred to an Arbitral Tribunal within 90 days from the date of the emergency decision (Art. 9 Appendix II). Notwithstanding the aforesaid, the emergency decision may be amended or revoked upon a reasoned request by one party as long as the mandate of the Emergency Arbitrator continues to exist (Art. 9 Appendix II).

An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute unless otherwise agreed by the parties (Art. 4 Appendix II).

### **Summary**

The main question in evaluating the new SCC Emergency Arbitrator Rules is whether they provide an effective remedy for a party to an SCC arbitration agreement urgently seeking interim relief before the arbitral tribunal has been constituted. Based on the described experiences during the first six proceedings, this question can be answered in the affirmative.

One restraint results from the fact that an Emergency Arbitrator will rarely be in a position to render a decision fast enough in case a party really needs an immediate decision e.g. on the same day or the following day at the latest. In these cases, a party can only try to apply for an emergency decision at a suitable state court, if any. Furthermore, interim decisions rendered by an Emergency Arbitrator are not suitable where the element of surprise is of

utmost importance, because the respondent will always be heard before the case is decided. Also, a party may face difficulties in the enforcement stage as arbitral interim decisions are mainly regarded as not being internationally enforceable like, for example, an arbitral award under the New York Convention or, if they are, the enforcement proceedings will often take too long in view of their urgency. However, it must also be kept in mind that it is difficult, and to a certain extent impossible, to successfully apply for or even enforce interim measures ordered or awarded by state courts in many jurisdictions around the world. Moreover, it is generally assumed that a party will comply with the emergency decision of an arbitral tribunal in order to avoid a negative mindset of the arbitral tribunal in the subsequent main proceedings deciding on the merits of the dispute.

Summing up, the introduction of the SCC Rules on Emergency Arbitrators must be seen in context with other arbitral institutions which also have followed the new trend to introduce similar rules (eg. SIAC, ICDR, Swiss Rules 2012 and ICC). They can all be seen as a positive supplement provided to parties of an arbitration agreement, offering an alternative when interim measures cannot be applied for at state courts in certain jurisdictions and when the parties wish to maintain confidentiality also during this pre-stage of their dispute. Moreover, it can be assumed that in very complex disputes only an internationally experienced arbitrator with specific knowledge of a certain branch or business will be capable to make an interim decision within only a few days. Whilst some commentators point to the potential question mark over the enforceability of the Emergency Arbitrator's decision, some maintain that decisions of an Emergency Arbitrator should have a higher likelihood to be accepted by the parties, compared to a judge's decision of a court in one of the parties' jurisdictions due to fact that the arbitrator is appointed by the SCC Board and thereby likely to be regarded as impartial by the parties involved.

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## **Guidance from the U.S. Second Circuit on Application of the**

## Evident Partiality Standard of the Federal Arbitration Act

David S. Versfelt and Erica R. Iverson (New York)

On February 3, 2012 the Second Circuit decided *Scandinavian Reinsurance Company Ltd. v. St. Paul Fire and Marine Insurance Co.*, 10-0910-cv. The opinion addressed an issue of arbitrator disclosure and the degree of evidence required for vacatur of an arbitration award under the evident partiality standard of the Federal Arbitration Act. The basic facts were as follows:

Scandinavian and St. Paul entered into a reinsurance contract. The agreement provided that Scandinavian would assume some reinsurance obligations in exchange for premiums paid out by St. Paul, which were to be held in an “experience account.” The experience account would serve as the account from which St. Paul would debit any amount owed to it by Scandinavian. The dispute arose when both businesses entered run-off and were attempting to determine the amount of liability Scandinavian faced based on the terms of the agreement. While St. Paul asserted that there was no limitation of liability, Scandinavian argued that the intent of the parties proved that its liability was capped at approximately \$21 million. The parties entered arbitration in September 2007 (the “St. Paul Arbitration”).

Pursuant to the agreement, each party selected one arbitrator for the panel, and then the parties together selected the third. At the close of arbitration, a majority of the panel determined that the agreement was valid and should be enforced as written, thereby subjecting Scandinavian to approximately \$290 million in liability.

Concurrently with the St. Paul Arbitration, another arbitration—the “Platinum Arbitration”—commenced. The Platinum Arbitration was a reinsurance dispute between Platinum and its affiliates and PMA Capital Insurance Company and its affiliates. The Platinum Arbitration and the St. Paul Arbitration overlapped in time, shared similar issues, involved related parties, and included a common witness. Two of the arbitrators from the St. Paul Arbitration (St. Paul’s selected arbitrator, and the jointly selected arbitrator) were selected to serve on the Platinum arbitration. While the two arbitrators had made initial and ongoing disclosures

throughout the St. Paul arbitration, neither disclosed their service on the Platinum Arbitration panel. Ultimately, Scandinavian moved to vacate the award in the St. Paul Arbitration, alleging that it was the result of bias in favor of St. Paul, based on the material non-disclosures by the arbitrators.

In addressing Scandinavian’s motion to vacate, the District Court, per Judge Scheindlin, applied an evident partiality test to determine whether the arbitral award should be set aside, ultimately concluding that the two arbitrators’ non-disclosure was material to the St. Paul Arbitration. 732 F. Supp. 2d 292, 303 (S.D.N.Y. 2010). Judge Scheindlin used the analysis in *Applied Industrial Materials Corp. v. Ovalar Makine Ticaret Ve Sanayli A.S.*, 492 F.3d 132, 137 (2d Cir. 2007): “[A]n arbitrator who knows of a material relationship with a party and fails to disclose it meets *Morelite’s* ‘evident partiality’ standard: A reasonable person would have to conclude that an arbitrator who failed to disclose . . . was partial to one side.” Based on the similarities between the two arbitrations, the fact that St. Paul was Platinum’s predecessor as PMA’s insurer and the fact that the same witness—a former employee of both Scandinavian and Platinum—testified inconsistently in each of the arbitrations, the District Court found the evident partiality test satisfied.

The Second Circuit reversed. First, the Court iterated the high burden a party seeking to vacate an arbitration award faces, emphasizing that *Applied Industrial* requires that a reasonable person “would have to conclude” that bias existed as a result of the material non-disclosure. *See* Opinion at 22 (emphasis in original). The Court went on to find that evidence of overlapping witnesses and legal issues was not enough to definitively show bias absent some proof of actual bias, which Scandinavian failed to show. The Court noted that overlapping service was common and that while Scandinavian “appear[ed] to ask us to infer partiality from the arbitrators’ overlapping service because the Award in the St. Paul Arbitration was rendered in St. Paul’s favor . . . the fact that one party loses at arbitration does not, without more, tend to prove that an arbitrator’s failure to disclose some perhaps disclosable information should be interpreted as showing bias against the losing party.” Opinion at 28.

The Second Circuit did not consider it enough to show partiality that the arbitrators, because of their overlapping service, could have had an opportunity to share material information about the St. Paul Arbitration and influence each other's opinions regarding that arbitration. Nor was "actual bias" imputed from the fact that the overlapping witness gave inconsistent testimony at each arbitration regarding the same type of contract. Simply because Scandinavian might have strategized differently based on the overlapping service was not sufficient to show *bias* in favor of St. Paul, the crucial element underlying the evident partiality test.

Nor did the Court consider it relevant that the arbitrators in question made other continuing disclosures throughout the arbitration. The Court concluded that while "it would have been far better for them to have disclosed that fact, we do not think disclosure was required to avoid vacatur of the Award in light of the fact that the relationship did not significantly tend to establish partiality." Opinion at 35.

This case—coming as it does from the Second Circuit in New York, seat of many significant arbitrations—heightens the standard of proof for demonstrating evident partiality of arbitrators. The Court clearly intends that a party alleging partiality resulting from a failure to disclose be able to identify a basis for an arbitrator's partiality, not merely an allegation of a potential conflict of interest. This higher standard is likely to have ramifications for those who might want to seek vacatur based on material non-disclosures. This may be especially so in fields such as reinsurance, and construction, where arbitrator overlap can be common. The Second Circuit appears to reject any contention that partiality can be shown in the abstract. The key, in the Second Circuit's view, is the link between the non-disclosure and the resulting bias—the bias against the losing party must be shown through some concrete, ascertainable means in order for vacatur to occur.

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## Early Case Assessment: A Litigation Arrow in an Arbitration Quiver

Julie Anne Halter and William C. Zoellner  
(Seattle)

There is no question that dispute resolution procedures that are designed to be more efficient and less costly than traditional litigation, such as arbitration, can still be prohibitively expensive in some cases. To deal with this issue there are a number of highly effective processes and tools, many developed in the context of large scale litigation, that can provide significant strategic advantage and cost savings to clients in arbitration, mediation and other dispute resolution procedures.

One of these processes is referred to as Early Case Assessment (ECA). While every dispute begins with some level of informal or formal risk assessment and analysis, ECA has been used by litigators involved in document discovery as a way to identify relevant sources of evidentiary material, the types and weight of relevant document evidence and the projected costs of obtaining such evidence.

The ECA approach is a collaborative effort often involving in-house counsel, the arbitration team and, in many cases, the client's IT representatives and employees to build a thoughtful and strategic document discovery plan, including a plan for dealing with voluminous electronic documents and email, along with a corresponding budget. While the format, content and scope of any document discovery ECA are tailored to the specific project, the following features are key elements for consideration as part of the document discovery ECA approach:

- Examination of key facts, claims, issues at stake and amounts of damages in the case;
- Examination of key custodians (their number, position, role in case) and, in some cases, sampling of their Electronically Stored Information (ESI);
- Volume of ESI collected from each custodian, relevant non-custodial sources, targeted collections;
- Analysis of file types and number within collected ESI;
- Knowledge of the privacy, privilege and work product issues specific to the dispute;
- Knowledge of the rules affecting the disclosure of ESI, including any need to log privilege

- documents and any requirements for the redaction of appropriate information;
- Knowledge of rules regarding privacy, privilege and work product issues and any appropriate protective measures;
  - Examination of deadlines, tribunal orders, opposing counsel agreements and other case-specific requirements.

The initial document discovery ECA should be prepared as soon in the dispute resolution process as possible—typically, as soon as information regarding the appropriate custodians, volumes and key issues is available or as soon as reasonable assumptions about that information can be formulated. The ECA is a dynamic tool, which can and should be updated as the dispute resolution process evolves, and there are a number of ways a formal ECA process can assist you in the arbitration including when it comes to the formal disclosure process, whether for a limited or vast quantity of documents:

**Budget** – The document discovery ECA forms the basis for a budget and for defining realistic and proportional document discovery strategies to match the dispute resolution goals. It allows you to predict and balance the cost of a particular approach to document discovery against the amounts at stake in the dispute, both to inform and forearm you with arguments to maintain reasonable and proportionate expectations.

**Preserving and collecting** – The ECA will identify the ESI sources that require preservation and collection, often allowing you to cast a smaller, less intrusive and less costly net when gathering ESI. It will also serve to highlight often non-obvious repositories of potentially relevant content such as dynamic databases, internal websites and social media, so that information can be quickly preserved and retrieved as appropriate, without costly downstream evidentiary disputes.

**Scope of disclosure of electronic documents** – Information learned about your ESI sources, including the likely volumes of ESI, during the ECA allows for more well-informed discussions with the opposing party and arguments to the tribunal regarding the scope of disclosure that should be required, which in turn leads to more efficient and

cost-effective document discovery. Even if you are unable to reach an agreement regarding the scope of ESI discovery, you will have the information to quickly, specifically and effectively describe the burdens associated with responding to the requests.

**Requesting disclosure of electronic documents** – The information gathered during the ECA will also provide you with a better understanding of the specific documentary evidence you can expect from the opposing party. Such information often allows for more targeted and meaningful requests for ESI, allowing you to quickly isolate material which would support a case.

**Identifying sensitive documents** – An effective ECA will help you identify the likely sources of sensitive ESI. The sheer increase in volume of electronic documents and information has resulted in a corresponding increase in the risk of inadvertently producing documents that should be shielded for privilege or privacy reasons. In addition, ESI introduces a certain depth or layering of information not previously encountered in the traditional world of paper documents. While a relatively superficial examination of a paper document may quickly reveal the presence of privileged information, ESI allows more “hiding places” for information, which an ECA can help uncover at the beginning of the effort.

**Providing a road map for any subsequent document requests and review** – The ECA will provide an overview of the core issues that will be encountered when more fully responding to requests for disclosure of ESI. This overview should make the review conducted by the case attorneys more efficient, allowing them to more carefully prioritize and target certain categories of key information.

**Communication between client and counsel** – Given the exchange of information that is necessary to implement an effective ECA, significant and close communication between client and counsel is a critical factor in its overall success. The ECA is an excellent way to ensure that client and counsel are communicating effectively at an early stage in the matter. It will serve to highlight strengths and weaknesses in the parties' positions and help frame the key issues for resolution.

In the end, ECA helps counsel assist their clients in taking control of the disclosure of ESI in arbitration, or in any dispute resolution, in a very proactive and strategic way. ECA also highlights opportunities for cost savings and efficiencies throughout the ESI collection, review and production process while maintaining sufficient flexibility to scale to the needs of the case.

The e-Discovery Analysis (“e-DAT”) Group at K&L Gates uses a combination of people, processes, and technology in their ECA methodology that can be successfully leveraged for any dispute. We have a breadth and depth of experience working with parties to proceedings to evaluate, plan and implement cost-conscious yet highly effective document discovery strategies. Further details of the e-DAT Group's ECA approach can be found at <http://www.klgates.com/e-discovery-analysis-and-technology-e-dat-group-practices/>.

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## English Court Decides that Arbitration Agreement is Governed by Law of Seat of Arbitration and Prevails over Exclusive Jurisdiction Clause

Hussain S. Khan and Sarah Turpin (London)

A recent case in the English Court has highlighted the need for clear and precise drafting of arbitration clauses. While the case in question involved a construction all risks insurance policy, the decision is of general application and the same principles apply to arbitration agreements in other commercial contracts and other types of insurance policy.

In *Sulamerica CIA Nacional de Seguros SA & others v. Enesa Engenharia SA & others* [2012] EWHC 42 (Comm), the Court of Appeal held that the arbitration agreement was governed by English law, being the law of the seat of arbitration, which took priority over the exclusive jurisdiction clause.

Both of the parties in the matter are Brazilian. The claimant, Sulamerica (an insurer), had insured the defendant, Enesa (a construction group), under two all-risk policies for the construction of one of the

world's largest hydro-electric facilities located in Jirau, Brazil. A dispute arose between the parties after Enesa made claims under the insurance policies for physical damage to the facility. On 29 November 2011, Sulamerica commenced arbitration proceedings in London for a declaration of non-liability under the policy. Enesa commenced proceedings in Brazil and consequently Sulamerica sought an interim anti-suit injunction in England, which was granted on 13 December 2011. The Brazilian court on 16 December 2011 granted an order restraining Sulamerica proceeding against Enesa in arbitration until the Brazilian court had determined whether the parties were bound to arbitrate their dispute. In the matter before Mr Justice Cooke, Sulamerica sought the continuation of the interim anti-suit injunction which restrained Enesa from pursuing the proceedings commenced in Brazil.

Condition 7 of the insurance policy in question stated that any disputes arising under, out of or in connection with the policy shall be subject to the exclusive jurisdiction of the courts of Brazil. In contrast, Condition 11 stated that if any dispute arose in connection with the policy, then the parties undertake that, prior to a reference to arbitration, they will seek to have the dispute resolved amicably by mediation. Condition 12 of the policy stated that in case the insured and insurer(s) fail to agree to the amount to be paid under the policy through mediation, then such dispute shall then be referred to arbitration and the seat of arbitration shall be London, England.

Enesa argued that as the governing law of the contract was expressly stated as Brazilian law, and that as the insured facility was in Brazil, it followed that the law of arbitration should also be the law of Brazil. Enesa further put forward the argument that the dispute could only be referred to arbitration if the requirement to mediate in Condition 11 had been satisfied. Sulamerica argued that the law with which the arbitration agreement had its closest and most real connection was English law, as the seat had been stipulated as being London.

Mr Justice Cooke, following the reasoning in *C v. D* [2007] EWHC 1541 (Comm) and *Sashoua v. Sharma* [2009] EWHC 957, held that:

1. The law governing an arbitration agreement can differ from the law governing the rest of the contract and the arbitration clause is treated as separable. In the absence of an express or implied choice of law for the governing law of the arbitration clause, the law with which the clause has the closest and most real connection will be the governing law of the clause. As the seat of arbitration was London, by virtue of the Arbitration Act 1996, the English courts have supervisory jurisdiction over the arbitration process, which establishes a strong connection between the arbitration agreement and the law of England.
2. The agreement to mediate was not a legally binding obligation as the clause did not provide an unequivocal commitment to engage in mediation. The mediation process was not specified and there was no procedure for the appointment of a mediator, so there was no condition precedent to mediate prior to commencing arbitration.
3. The arbitration agreement provided for arbitration where the parties failed to agree to the amount to be paid. A declaration by the insurers for non-liability under the policy fell into this category of dispute.
4. In the present case, where there is a conflict between the mandatory arbitration and exclusive jurisdiction clauses, the arbitration provision prevails and the jurisdiction clause is confined to enable the Brazilian courts to be able to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of the award and to enforce the award or where the parties agree to waive the arbitration clause.

Accordingly, the English Court granted the continuation of Sulamerica's anti-suit injunction, and endorsed the continuation of the arbitration in London.

On 16 May 2012 the Court of Appeal upheld Cooke J's decision that the arbitration agreement was governed by English law and dismissed an appeal against the anti-suit injunction. With Moore-Bick LJ giving the leading judgment, the Lord Justices of Appeal stated that the law of the arbitration agreement will not necessarily follow the law of the contract. They stated that in order to determine the

law of the arbitration agreement a "three-stage enquiry" was required into: i) express choice, ii) implied choice, and iii) closest and most real connection.

In the matter in hand, there was no express choice of law in the arbitration agreement. With regard to the implied choice of law, the Lord Justices were persuaded by the fact that the choice of seat of arbitration was London, which suggested that the parties agreed that the arbitration agreement would be conducted under the Arbitration Act 1996. Furthermore, under Brazilian law the agreement to arbitrate would only be enforceable with the appellant's (Enesa's) consent, which would seriously undermine the arbitration agreement. Moore-Bick LJ, Hallett LJ and the Master of the Rolls determined that the arbitration agreement had its closest and most real connection with English law and was therefore governed by English law.

The case highlights the importance for clear and precise drafting of arbitration agreements in any form of contract. As arbitration clauses are separable, care must be taken if the parties wish to have differing laws governing the arbitration and the rest of the contract. When hybrid or stepped dispute resolution clauses are included in a contract, for example requiring parties to mediate prior to commencing arbitration, the mediation process must be precisely defined and in sufficient detail to impose an enforceable legal obligation on the parties, if that is what is intended. Careful drafting will help to reduce the risk of having time consuming and costly preliminary jurisdictional battles.

This case illustrates that, under English law, the seat of arbitration will generally correspond to and determine the governing law of the arbitration agreement, which can take precedence over an exclusive jurisdiction clause in determining the law of the arbitration agreement. This is important because it is not uncommon (particularly in the insurance context) to find exclusive jurisdiction clauses which are in direct conflict with arbitration clauses. However, in other jurisdictions the approach of the English Courts will not necessarily be followed, which could result in the exclusive jurisdiction clause trumping the arbitration clause, resulting in disputes which the parties intended to



arbitrate being heard in local courts. Care and attention in the drafting of arbitration provisions is essential.

## International Arbitration: Developments from Singapore

Martin S. King (Singapore)

International arbitration in Singapore continues to develop consistent with the exponential growth it has experienced in recent years. The variety, size and complexity of the disputes administered by SIAC continue to increase, with banking and financial derivative arbitrations making an appearance.

Perhaps most significantly for 2011, the changes to the SIAC Rules which came into force on 1 July 2010 have been put to the test. There was a large uptake from the international arbitration community of the new procedures that were introduced—namely the Expedited Procedures provided by Rule 5.1 and the Emergency Arbitrator provisions in Rule 26.2 and Schedule 1. Expedited arbitrations accounted for 8% of the SIAC administered filings in 2011 and since the introduction of the Emergency Arbitrator procedure there have already been six instances of its operation with parties coming from diverse locations such as the USA, Europe and Asia. Three of these six cases have involved representation by K&L Gates' Singapore office.

Alongside the developments associated with SIAC arbitrations there have been several cases requiring the Singapore courts to interpret laws affecting the conduct of international arbitration, namely the International Arbitration Act (IAA), and certain provisions of the Legal Profession Act. The following decisions have provided important additions to and clarification of the law governing arbitration in Singapore.

*Larsen Oil and Gas Pte Ltd v. Petroprod* [2011] 3 SLR 414 has become an important and well discussed case regarding the arbitrability of insolvency-related claims. Petroprod's liquidators were attempting to avoid payments coming under a Management Agreement (MA) on the grounds that

there were unfair preferences or undervalue transactions within the meaning of the Singapore Bankruptcy Act and the Companies Act. The issue in question was whether disputes involving insolvency, a subject usually reserved for judicial examination due to issues of public policy, could be determined in arbitration. The Singapore Court of Appeal held that the avoidance claims were not arbitrable under the arbitration clause of the MA. Furthermore, the court found that where an arbitration agreement affects the substantive rights of creditors or other third parties it must not be enforced. Despite refusing arbitral jurisdiction in this instance VK Rajah JA was intent on ensuring a positive view of arbitration in the courts when he stated at para 44:

*"...we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute."*

In *Doshion Ltd v. Sembawang* [2011] 3 SLR 118 the Singapore High Court sought to further define the limits of the Courts' jurisdiction in favour of arbitration. The dispute arose over two contracts governing a contractor and sub-contractor relationship, both of which included an arbitration clause. Doshion sought an injunction in the High Court in an attempt to stop the arbitration proceeding on the grounds that a settlement between the parties had been reached. Sembawang argued that an Arbitral Tribunal was suitably empowered under the arbitration clauses to determine the matter. The High Court refused the injunction application deciding that once a dispute arises between parties covered by a valid arbitration agreement, even in circumstances where the existence of a dispute is contested, the matter is appropriately put in the hands of the arbitrators.

Whilst inherent support for the arbitration process in Singapore is indicated in the above cases, *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (CA) shows that

Singapore courts will not hesitate to intervene in the arbitration process where it can be shown that the arbitral tribunal failed to conduct the proceedings in accordance with natural justice. Under a construction contract adopting the 1999 FIDIC Conditions of Contract a dispute arose between the parties, which was submitted to a Dispute Adjudication Board. An award in favour of the appellant was delivered. However, satisfaction of the award proved problematic for the parties and CRW applied to the ICC for arbitration to give effect to the original award. An ICC Arbitral Tribunal issued a Final Award requiring prompt payment without first hearing the Respondent's defence, nor assessing the DAB award. The Final Award was set aside by the Singapore Court of Appeal, emphasizing that basic legal entitlements provided by natural justice (in particular, in this case, affording each party an opportunity to be heard) cannot be ignored.

On the 9<sup>th</sup> of April 2012 the Singapore Parliament introduced the latest changes to the International Arbitration Act (IAA) which have been summarised by the Singapore International Arbitration Centre as follows:

- (i) Relaxing of the current requirement in the IAA that the arbitration agreement must be in writing;
  - The feedback in the consultation process concluded that the proposed Bill should extend the IAA's application to arbitration agreements concluded by any means, as long as their content is recorded in any form. The commercial reality of arbitration practice is that arbitration agreements are often concluded orally, and put into writing later.
- (ii) Allowing the Singapore courts to review rulings by arbitral tribunals that these tribunals do not have jurisdiction to hear the dispute (negative jurisdictional rulings);
  - The IAA currently does not permit a Singapore court to review negative jurisdictional rulings made by arbitral tribunals or rulings by the tribunals that it has no jurisdiction to hear the dispute. However, Singapore courts are able to review positive jurisdictional rulings made by arbitral tribunals, or rulings by tribunals that they have jurisdiction to hear the

dispute. The inconsistent treatment of negative and positive jurisdictional rulings received heavy criticism in the amendment consultation process.

- (iii) Defining the scope of arbitral tribunals' powers to award interest in arbitral proceedings;
  - The IAA currently does not clearly define the scope of arbitral tribunals' powers to award interest. The Bill proposed changes to clarify the scope of these powers, such as granting simple or compound interest on monies claimed and orders to pay legal costs.
- (iv) According emergency arbitrators with the same legal status and powers as that of any other arbitral tribunal, to ensure that orders made by such emergency arbitrators (whether appointed under the SIAC rules or the rules of any other arbitral institution, in both foreign and local arbitrations) are enforceable under the IAA regime;
  - The Bill proposes amending the definitions of an "arbitral tribunal" and an "arbitral award" to clarify the status of orders made by such "emergency arbitrators".

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## Unsolved Mystery: Colombia's International Arbitration Law

Richard F. Paciaroni and Denise N. Yasinow (Pittsburgh)

It is suggested by some that Colombia is an arbitration-friendly forum. Law 315 of 1996 and Decree 1818 of 1998 govern the enforcement of international commercial arbitration awards and agreements. Article 116 of Colombia's Constitution even includes mention of arbitration as a legitimate dispute settlement mechanism. In practice, however, Colombia's law on the recognition and enforcement of foreign and domestic arbitration awards is not yet up to international standards.

Colombia approved the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in 1979 (Law 37) and again in 1990 (Law 39). Despite this, enforcement of arbitral awards in the courts of

Colombia can be problematic. It can take up to two years for Colombian courts to recognize a foreign arbitral award, since it must first be confirmed before the Colombian Supreme Court in an “exequatur” proceeding. Furthermore, Colombia does not have a good record in enforcing arbitral awards between private parties and State entities. Relying on the argument of public ownership, the Attorney General’s Office has actually ordered that State entities refuse to voluntarily comply with foreign awards arising out of international commercial arbitration.

Recognizing that its arbitration law needs to be improved, the Colombian legislature has made multiple attempts to introduce new legislation, all of which have proven to be fruitless. The most recent draft legislation is the fourth attempt in eight years. Last year, a Working Group on International Arbitration submitted a final draft law for Congressional approval. The draft law has the potential to make Colombia a more desirable venue for foreign investors and international arbitrations, but it stalled and appears to be going nowhere.

### The Proposed Legislation

The Working Group proposed legislation that would modernize Colombian arbitration law. In some provisions, the draft law closely follows the New York Convention. According to the proposed legislation:

- Any international arbitral award granted by a tribunal in Colombia is treated as a national award and does not require recognition for enforcement. (Article 111).
- An international arbitral award granted by a tribunal seated outside of Colombia would need to be recognized by the Supreme Court of Justice’s Civil Appeals Division, but grounds for opposition are limited to the grounds listed in Article V of the New York Convention, which include, for instance, invalidity of the underlying agreement and improper notice of arbitration or arbitrator appointment. (Articles 111-114).
- Recognition of a foreign arbitral award will take a maximum of 30 days—ten for the opposing party to challenge the recognition and twenty for the Court to decide. There is no appeal process

for the Court’s recognition decision. (Article 115).

Furthermore, the proposed legislation includes some provisions from domestic legislation and from the 1985 UNCITRAL Model Law, which makes it especially arbitration-friendly. For example:

- The proposed legislation adopts Article 1492 of the French New Code of Civil Procedure’s definition of “internationality,” meaning that an arbitration will be considered “international” whenever international commercial interests are involved. This is a more expansive definition than that found in the 1985 UNCITRAL Model Law.
- It provides that no state or state-controlled company can argue that its internal law renders the party or the dispute immune from arbitration.
- It includes a provision on multi-party disputes and the appointment of arbitrators in such situations. The provision is similar to the ICC and UNCITRAL Rules.
- It describes how parties can challenge the arbitral tribunal’s ruling on jurisdiction.
- It allows parties, as long as they are all foreign parties, to agree to waive their ability to challenge arbitral awards. This is the ability to contract out of judicial review or limit grounds for judicial review.
- It states that there are no nationality requirements for counsel acting in international arbitrations. Counsel does not need to be licensed to practice law in the jurisdiction in which the arbitral tribunal sits.
- It provides that in the event the parties to an arbitration have not agreed on the procedural law to be followed, the tribunal is not required to apply the procedure of the jurisdiction in which it sits.

### The Status of the Proposed Legislation

Unfortunately, a number of months have passed and there is still no definitive word on the status of the draft law. It has not been approved by Congress, and there is no set date by which it is expected to be approved. Furthermore, since there are some elements of the draft law which implicate broader

legal reforms outside of arbitration, there has been a sizeable amount of opposition. Time will tell if any or all of the proposed legislation will pass.

In the meantime, Colombia is still not as friendly to international arbitration as some would like others to believe.

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## Who Qualifies as an Investor? A Primer on Protecting Foreign Investments (Part 1)

Lisa M. Richman (Washington, D.C.),  
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Political risk in cross-border investments is unavoidable, but there are some strategies that protect and provide avenues of relief against these risks. For example, over 2,500 bilateral investment treaties (BITs) can help manage these risks because they allow an investor of one country to seek money damages directly against a government of another country in a neutral, international arbitration forum.

Navigating the available protections can be confusing. Who and what is covered and what protection is available? In this multi-part series, we will explain some of the basic principles and protections available to safeguard the interests of foreign investors. This first installment will look at the question: **Who qualifies as an investor?**

### Look to the Treaty Definition

While investment treaties contain different definitions, most define “investor” as a company or natural person that is a national of one of the countries that has signed the relevant treaty. The term “company” typically includes corporations, partnerships, associations or other organizations that are legally constituted. This can include government entities, including sovereign wealth funds, if such entities act in a commercial capacity.

Unincorporated entities and non-profit organizations may also qualify as “investors”.

### Determine the Home Country’s Definition of “National”

In order to be considered a “national”, the relevant country’s laws must be consulted, but typically the nationality of a person is determined by the individual’s citizenship and/or residence.

The nationality of a company is more complicated, but generally is determined by either the company’s country of incorporation or primary place of business. A company may also be required to demonstrate that it has economic activity in the country of its alleged nationality. Again, it all depends on the specific language of the particular treaty, as well as the rules and regulations of the home country.

### Some Representative Examples

The relevant investment treaty should be consulted to definitively determine what types of entities qualify as an “investor”. However, a non-exhaustive list of “investors” that may qualify for protection include:

**Investment funds.** How an investor company is structured may impact whether it qualifies under an investment treaty.

- **Managed investment funds** may qualify as investors if they meet the applicable requirements of their home State and the relevant investment treaty. For example, in *Renta 4 S.V.S.A. et al. v. Russian Federation*, SCC No. 24/2007, claims of four of the seven investment fund claimants that had invested in a Russian company were allowed. The tribunal determined two managed investment funds did not qualify as claimants because under Spanish law, they were not “corporate bodies” and a depository did not have standing because it was not itself the “investor”.
- **Hedge funds** may also qualify. For example, The Children’s Investment Fund, a UK hedge fund, recently issued a press release noting that it intends to commence an action against India under both the UK-India BIT and under the Cyprus-India BIT (arguing that the funds are domiciled in Cyprus). The reported investment losses concern the hedge fund’s minority ownership of an Indian company relating to domestic tax legislation.

**Holding companies.** By establishing a holding company in a particular country, the investment may obtain additional treaty protection. This can sometimes lead to multiple claims under different investment treaties by different entities at various ladders of the investment structure. For example, in *Lauder v. Czech Republic* and *CME Czech Republic B.V. v. Czech Republic*, two sets of arbitral proceedings were launched in parallel by the Dutch holding company and its ultimate U.S. shareholder, and led to a substantial damages award in one of them.

**Creditors who suffer investment losses from nations defaulting on their sovereign debts.** A recent decision on jurisdiction held that the claims of 60,000 individuals who invested in Argentinean sovereign bonds, asserting that Argentina's default and subsequent debt restructuring breached protections contained in the Argentine-Italian BIT, could continue. See *Abaclat et al. v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011.

**Subsidiaries of distressed asset investors.** In a case relating to an investment in Yukos, RosInvest, a subsidiary of the distressed asset investor Elliot Group, filed a claim against Russia under the UK-Russia Investment and Protection Agreement concerning RosInvest's US\$10 million speculative investment in shares of Yukos in late 2004, which was protected by an asset protection agreement that allocated the risk to Elliot Group's parent. *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005.

**Individual financial investors or shareholders.** Disputes against countries by individual investors who purchased financial instruments are not uncommon. One recent example includes the case of *Alasdair Ross Anderson and others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3. This case involves claims of dozens of individual investors who invested money with a high interest return rate in a project that turned out to be a Ponzi scheme. The illegal nature of the investment under the Costa Rican law ultimately deprived the claimants of treaty protection.

## Conclusion

To protect investments from future problems and to have all options available, potential "investors", either those that already have invested or that are in the pre-investment stage, should consider a number of important questions:

- Does a bilateral investment treaty exist between the home country and the host country? What level of protection does this treaty offer?
- If no bilateral investment treaty exists, does the possibility of restructuring the investment in order to achieve protection and an optimized tax structure through a third state exist?
- Should the investment also be protected by an insurance policy? If yes, what amount should the policy cover?
- Can the home state offer protection and possibly reduce the risk?
- Did other investors suffer damages due to the impact of political risks?

In the next edition of Arbitration World, we will consider another important question that must be addressed in determining what protection(s) are available: **what constitutes an "investment"?**

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## Developments in International Arbitration in Mauritius

Hussain S. Khan (London)

Several initiatives have gotten underway over the past few years in Mauritius as it competes to become the venue of choice for international arbitration, in particular for Africa. The Mauritian Prime Minister has backed schemes to drive Mauritius' appeal as a regional centre for international arbitrations on the basis that Mauritius has a geographical location that puts it as a centre of reference for disputes involving Africa, South-East Asia, India, China and Europe. Mauritius' location, together with its perceived neutrality, and infrastructure, particularly in communications and logistics, will support its attraction.

Other tempting aspects for Mauritius as an arbitral centre include its wide network of double taxation agreements which brings international investment. Mauritius was placed 1<sup>st</sup> in the Ibrahim Index of African Governance, which ranks 53 African countries according to delivery of public goods and services to citizens by the government and NGOs. The World Bank's Doing Business report listed Mauritius 20<sup>th</sup> worldwide and 1<sup>st</sup> in Africa and it was ranked 12<sup>th</sup> on the Wall Street Journal's Economic Freedom index.

Mauritius has an established legal system with influences from both common law and civil law jurisdictions. Court proceedings are conducted exclusively in English and there is a strong legal connection with the Bar of England & Wales. Two significant developments in the Mauritian legal framework have taken place to facilitate the country's progress as an arbitral hub. Firstly, accession in June 1996 to the New York Convention on the Recognition and Enforcement of Arbitral Awards; and, secondly, in November 2008 Mauritius passed a new international arbitration law, the International Arbitration Act 2008 (the "Act") which is based on the 2006 Amended UNCITRAL Model Law (Model Law).

The Act came into force on 1 January 2009 and is a modified version of the Model Law. The Act explicitly extends the definition of "arbitration agreement" to include bilateral and multilateral investment treaties; excludes confidentiality provisions to improve transparency; expressly permits foreign lawyers to act as both counsel and arbitrators and also includes specific provisions for disputes concerning offshore companies incorporated in Mauritius.

All appointments under the Act are handled by the Permanent Court of Arbitration (PCA) in The Hague. The Mauritian government has negotiated a host country agreement with the PCA pursuant to which the PCA appoints a permanent representative to Mauritius based in Port Louis. Furthermore the PCA participates in the training of local practitioners and members of the African judiciary on international arbitration issues and the New York Convention.

In July 2008 the Government of Mauritius, the London Court of International Arbitration (LCIA) and a new Mauritian company incorporated for the purpose, Mauritius International Arbitration Centre Limited (MIAC), entered into an agreement for the establishment and operation of a new arbitration centre in Mauritius, known as the LCIA-MIAC Arbitration Centre. Plans have been made to build a modern complex that will house both the PCA and LCIA-MIAC offices and hearing suites.

The PCA has stated that it has been approached to administer its first case, a maritime dispute involving Asian and European parties, under the Act. It has also received enquiries regarding *ad hoc* cases being heard there. Mauritian and international lawyers have started to name Mauritius as the seat of arbitration in their arbitration clauses, but it will inevitably take some time for disputes to materialise under these contracts and resulting arbitrations to be commenced.

The infrastructure for international arbitration is now in place in Mauritius, but it is likely to take some time for the initiatives to reach fruition. However, the future looks promising with Mauritius having been selected to host the ICCA Congress in 2016 and other events and highlights on the horizon.

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## The Chamber of Arbitration of Milan and the "Mediterranean Project"

Giampaolo Salsi and Andrea Campana (Milan)

The National and International Chamber of Arbitration of Milan (the "Chamber") is a special branch of the Chamber of Commerce of Milan, established in 1985. It is widely recognised as the most prominent arbitration institution in Italy. It specializes in commercial dispute resolution and offers arbitration services, as well as other minor ADR services, such as mediation and a soft on-line dispute resolution service known as 'Risolvionline'. These services allow for the resolution of disputes within set time-limits through alternative methods to judicial proceedings. The Chamber has also been accredited to resolve .IT domain name disputes at a national level.

Consistent with the Chamber's position as a well recognised and respected international authority in the field of arbitration, it participated in the drafting of the Model Law on International Commercial Arbitration advanced by UNCITRAL.

### **The Arbitration Rules of the Chamber**

The Chamber has its own arbitration rules (the "Rules"), a modern set of provisions characterised by clarity and a streamlined structure, while at the same time responding to the most advanced procedural standards.

The Rules, for example, allow the Chamber to act as an appointing authority for proceedings under the UNCITRAL Arbitration Rules. All arbitrators appointed under the Rules must be impartial and independent and, to this effect, are required to sign a Statement of Independence and accept the specific "Code of Ethics" adopted by the Chamber.

Appointed arbitrators have a tight term of six months from the constitution of the tribunal to issue the final award. This term can be extended, as it often happens; as a matter of practice, as based on the Chamber's statistics for the last seven years, proceedings last for an average of thirteen months.

The Rules also espouse the principle of party autonomy, by allowing parties conducting arbitrations before the Chamber to agree on certain aspects of the procedure, in place of the fall-back provisions contained in the Rules. For example, parties are free to determine the procedural and substantive law to be applied by the tribunal. They may also choose the language and the seat of the arbitration proceedings to be administered by the Chamber. Other notable features of the Rules are that they allow the tribunal to issue interim measures and the costs of the arbitration and fees of the arbitrators are transparent and predictable, thanks to the Chamber's public tariff.

### **The "Mediterranean Project"**

Considering Italy's geographical position, the Chamber has devoted special attention to the Mediterranean Region. This is with the aim of strengthening economic relations between Italy and various countries within this area, which is of strategic importance and in which Italy has always played a major role.

The Mediterranean basin is also regarded as a strategic area by the European Union. The EU has established a Euro-Mediterranean partnership involving EU countries and ten countries from the Mediterranean basin: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Palestine, Syria, Tunisia, and Turkey. This area is subject to a specific cooperation strategy aiming at creating a Euro-Mediterranean Free Trade Area.

Against this background, the Chamber recently launched the "Mediterranean Project", with the purpose of developing, in collaboration with institutional counterparties in the Mediterranean countries, standards and a common practice in a shared space for private commercial dispute resolution. This aims to provide companies operating in these countries with a tailor-made instrument of justice that responds to their particular needs and to the arbitration culture of such countries.

In this regard, the Chamber has pursued the goal of strengthening and consolidating the existing arbitral institutions and creating solid links between them. In order to achieve this goal, in 2009 it promoted the creation of a specific institute—"Ispramed" (The Institute for the Promotion of Arbitration and Mediation in the Mediterranean area)—which coordinates a network among the most representative arbitral institutions in the Mediterranean basin. In particular, the Chamber participates in the network together with the Chamber of Commerce of Istanbul, the Centre of Arbitration and Mediation of Tunis, the Cairo Regional Centre for International Arbitration, the Moroccan Court of Arbitration, and the Algerian Chamber of Commerce and Industry. The Mediterranean Project therefore serves as another initiative of the Chamber that aids in the fulfilment of its broader objective of encouraging the use of ADR, not only in Italy, but in the wider Mediterranean and to promote the Chamber of Arbitration of Milan as the premier institution for the resolution of Euro-Mediterranean disputes.

## Eurozone Exits: Possible Impact on Commercial Contracts

Frania C. Cooper and Alice N. Bell (London)

In the current economic climate the future of the Euro is uncertain. There is no legal provision enabling a state's departure from the Euro and whilst member states may unanimously amend EU law, this is a lengthy process. A more likely outcome in such a scenario is the "disorderly" exit by a country, such as Greece, and the possibility of a complete breakup of the Eurozone remains. Any change to the members of the Eurozone or the Euro as a currency would not only affect the banking and financial services sector but can be expected to impact long-term cross-border commercial agreements of various forms, many of which are subject to arbitration.

### Effect on commercial contracts and possible areas of dispute

#### Trading with a country following a disorderly exit

The exchange rates for an exiting country's new currency would be set by national law or the European Central Bank. The new currency would likely fall significantly in value against its original Euro exchange rate, meaning creditors of companies in the exiting country would receive less value in the new currency. Any debt remaining payable in Euros will be much more expensive in local currency and commercial counterparties obliged to pay in Euros may therefore have difficulties in making payments. Redenomination is unlikely to amount to contractual frustration, discharge or force majeure but illegality provisions could be relevant. For example, if a redenomination law prohibited payment in Euros from local banks of an exiting country, thereby making performance of the contract illegal, a contracting party could potentially claim illegality of contract.

#### Trading with countries likely to leave

Prior to an exit, a weak member state would be likely to suffer from factors including increased cost of sovereign borrowing, restructuring of outstanding sovereign debt or a run on its banks. In anticipation of an exit and redenomination, member states may introduce emergency measures including temporary

suspension of bank payments to prevent the withdrawal of Euros. This could lead to difficulties when dealing with counterparties in such countries, who may not be able to meet their payment obligations.

#### Trading with countries remaining in the Euro

If there are one or more disorderly exits from the Euro, the value of the Euro may fall in value due to uncertainty in the market. If a series of member states withdrew from the Euro, questions may arise of whether the remaining Euro currency would still be regarded as the same as the original Euro. Demand in the EU may weaken due to reduced borrowing and spending power.

#### Trading with countries following a complete breakup

There is the possibility that rather than legislating to introduce new national currencies, two tiers of Euro currency could be created: a "hard" Euro for the stronger Eurozone countries and a "soft" Euro for weaker countries. This would create uncertainty as to which Euro should be the relevant currency in a contract containing payment obligations in Euros, particularly when a contract involves counterparties in both "soft" and "hard" Euro countries.

If the Euro were to cease to exist entirely, all Eurozone countries would denominate into national currencies. In order to determine the relevant currency for a contract the principles described below are likely to be applied.

#### Which currency applies?

On an exit, payment obligations under commercial contracts may need to be redenominated and, because of the factors examined above, disputes may arise over which currency should apply. In an arbitration context, which currency applies to a contract would be relevant for determining the correct currency of a claim or an award.

On a controlled exit, the legal position for redenomination would be likely to be addressed by new European legislation whilst in the case of a disorderly exit, governing law, jurisdiction and conflict of law principles would be examined in order to determine the correct currency.



### Governing law and jurisdiction

If a contract is subject to the governing law and jurisdiction of the exiting state, that state's new redenomination law would likely apply to that contract. However, issues may arise in arbitration where the law of the contract and the law of the arbitration seat are not both the law of the exiting state. In this case, conflict of law principles may need to be applied to determine the correct currency.

### Lex Monetae - "the law of the money"

This principle provides that a state can determine its own currency and that if a contract points towards a certain currency, that country's law will apply to determine whether the obligation should be redenominated. The difficulty with the Euro is that it is not the currency of a single country, so a decision must be made as to which country's law will apply. In the absence of an express redenomination clause in the contract, the parties' contractual intention will be considered:

- Definition of currency – is "Euro" defined with reference to the single currency, or with reference to the currency of the exiting state? If the definition does not clearly point to the Euro, there will be more scope to argue for redenomination.
- Place of payment – under English law, there is a rebuttable presumption that the currency is that of the place of payment.
- Identity of the obliger – there is a presumption that if the obliger is resident or incorporated in an exiting member state, the currency will be redenominated under the new currency law.

Arbitrators should apply the *Lex Monetae* principle to determine if an arbitration claim should be redenominated into a new currency or remain in Euros. Similarly, arbitral awards may need to be redenominated into the correct currency.

### Key points to consider

If bringing an arbitration claim following a Eurozone exit, the terms of the relevant contract must be carefully considered, including in order to ascertain the currency of a claim and award.

## U.S. Ninth Circuit to Consider Who Decides Arbitrability When Arbitration Clause Incorporates UNCITRAL Rules But Includes Carve-Outs

Josh M. Leavitt (Chicago)

Many of our non-U.S. readers in particular will understand this power of the arbitral tribunal to decide its own authority as the subject of the internationally recognized "Kompetenz-Kompetenz" doctrine, pursuant to which the arbitral tribunal is considered competent to make the initial determination of its own competence. But, while the doctrine is acknowledged in a few U.S. appellate opinions, it carries no independent legal significance or presumption in the U.S. To the contrary, the United States Supreme Court has quite clearly stated that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); see *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). There is a presumption that arbitrability is "an issue for judicial determination unless the parties clearly and unmistakably provide otherwise."

As anticipated in the [October 2010 issue](#) of *Arbitration World*, the validity of the practice of delegating the arbitrability question to the arbitrator by merely referencing in arbitration clauses institutional rules that do so has been hotly contested recently in the U.S. Several U.S. Federal Circuits have upheld the practice with regard to the AAA Rules, the ICC Rules and UNCITRAL Rules. However, the Ninth Circuit may soon rule on a case, *Oracle America Inc. v. Myriad Group A.G.*, that has implications for the circumstances by which parties can meet the "clear and unmistakable" test by simply incorporating a set of arbitration rules (in this case the UNCITRAL rules) that purport to vest the arbitral tribunal with the power to rule on its own jurisdiction when the arbitration clause at issue carves out certain types of disputes that expressly must be decided in court and not arbitrated.

The Ninth Circuit case involves an international software licensing dispute over Java technology

developed by Sun Microsystems (which had merged with Oracle). Several licensing agreements are involved in the dispute, but Oracle's basic claim is that Myriad unlawfully continued to use the subject technology and trademarks after a master agreement lapsed. In a federal court lawsuit in California, Oracle alleged a variety of state and federal claims (Lanham Act trademark infringement, copyright infringement, breach of contract and violation of the California Unfair Competition Law). The characterization of the claims alleged is important to the arbitrability questions because the arbitration clause at issue calls generally for the arbitration of disputes relating to breach of the agreements but has a carve-out for intellectual property disputes which it provides are subject to court jurisdiction. After Oracle filed the California federal lawsuit, Myriad filed a motion to compel arbitration and also reportedly filed a demand for arbitration with the International Center for Dispute Resolution (ICDR) with respect to the same claims being litigated in the lawsuit.

The California federal district court found that it, not the arbitrator, decides arbitrability, that the IP claims were outside the scope of the arbitration clause and that only the contract claim could proceed in arbitration. The lower court's opinion stated that the UNCITRAL Rules' jurisdiction provision "merely provides that the arbitrator has the authority to decide his or her own jurisdiction; it does not state that he must or has the sole discretion to do so," and that the mere incorporation of the UNCITRAL rules does not meet the Supreme Court's "clear and unmistakable" test. The lower court held that the authority to decide arbitrability thus remains with the court even if under the UNCITRAL rules the arbitrator also has such authority. The court went on to hold that only some of the Oracle claims were subject to arbitration and that the carve-out provision shielded certain of the claims from arbitration. Myriad interpreted the ruling as finding that there was "concurrent jurisdiction" and shortly went on to reinitiate the arbitration which led to TRO and preliminary injunction motions by Oracle. In a second ruling, the lower court held that Myriad had misinterpreted its earlier ruling and held that it had "exclusive" not "concurrent" jurisdiction over the disputes over the IP rights and sole authority to determine arbitrability. The court observed that

Myriad's remedy was to appeal the earlier ruling on its motion to compel arbitration, which Myriad did.

On appeal, the parties' briefs review a number of significant top level issues including a) the relative policies, merits and efficiencies of courts versus arbitrators deciding arbitrability, b) the applicability of federal appellate cases holding on their facts that the "clear and unmistakable" test is met where an arbitration agreement specifies that arbitration rules vesting arbitrators with the power to decide arbitrability will apply, c) the intent and meaning of the AAA, ICC and UNCITRAL rules at issue in those prior cases, d) the propriety of the lower courts' emphasis on the need for a clause to vest the arbitrator with "exclusive" or "sole" authority to decide arbitrability, and e) whether the lower court had meant to hold that it had "concurrent" jurisdiction along with the court to resolve arbitrability.

Whether the Ninth Circuit will come to rule on those issues remains to be seen; Oracle argues that the prior case law discussed in the briefs is distinguishable because none of them involved an arbitration clause that carved out certain claims from arbitration and vested exclusive jurisdiction on the carved out claims with the courts. It argues that where an arbitration clause reserves some disputes to the court something more than mere incorporation of arbitration rules is required to demonstrate the "clear and unmistakable intent" to have an arbitrator decide questions of arbitrability. Myriad argues that the carve-out clause is irrelevant because it is preceded by a broad arbitration clause requiring arbitration of any dispute relating to the software license and the carve-out clause says nothing about which forum should decide arbitrability.

In the end, however, even if the Ninth Circuit fails to comment on the policy arguments advanced by the parties, the court could decide the case in a way that impacts the way arbitration clauses should be drafted and the degree to which in certain situations it may be advisable for the arbitration clause to specifically address whether the arbitrator is vested with authority to decide arbitrability, especially clauses with carve-outs for certain types of disputes.

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