ARBITRATION WORLD

35TH EDITION October 2017

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FROM THE EDITORS:

WELCOME TO THE 35TH EDITION OF *ARBITRATION WORLD*.

Welcome to this 35th edition of *Arbitration World,* a publication from K&L Gates' International Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution.

In this edition, we include two articles related to the growth of third party funding in arbitration: we report on the recent passing of a bill in Hong Kong to permit third-party funding of arbitration, and an English court case regarding security for costs against third-party funders, which may have relevance for international arbitration.

With respect to general developments in arbitration practice and procedure, we consider some of the recent initiatives to make information on arbitrators more widely available (including GAR's "Arbitrator Research Tool" and "Arbitrator Intelligence"), and we review the new Expedited Procedure under the ICC's Arbitration Rules.

In the energy and natural resources sectors, we report on the enacting of legislation regarding natural resources in Tanzania and potential consequences for investment treaty claims in Africa. We report on an award rendered earlier this year in favour of an investor against the Kingdom of Spain and its potential implications for investment treaty claims in the renewable energy sector. We review the current themes in gas price review disputes, with a focus on how developments in the market for gas and liquefied natural gas (LNG) are having an impact on price review arbitrations.

As to country/region-specific developments, we report on the proposed amendments to the International Arbitration Act 1974 in Australia, including provisions with significance for enforcement of foreign awards, the power to award costs and transparency in investor-state arbitration. We also review of some of the relevant considerations when selecting a seat for arbitration in the Middle East, with particular reference to Qatar and Dubai.

Additionally, we provide our usual update on developments from around the globe in international arbitration and investment treaty arbitration.

We hope you find this edition of Arbitration World of interest, and we welcome any feedback (e-mail ian.meredith@klgates.com or peter.morton@klgates.com).

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INTERNATIONAL ARBITRATION
K&L GATES' BENCH STRENGTH

US $26.7 BILLION IN DISPUTE

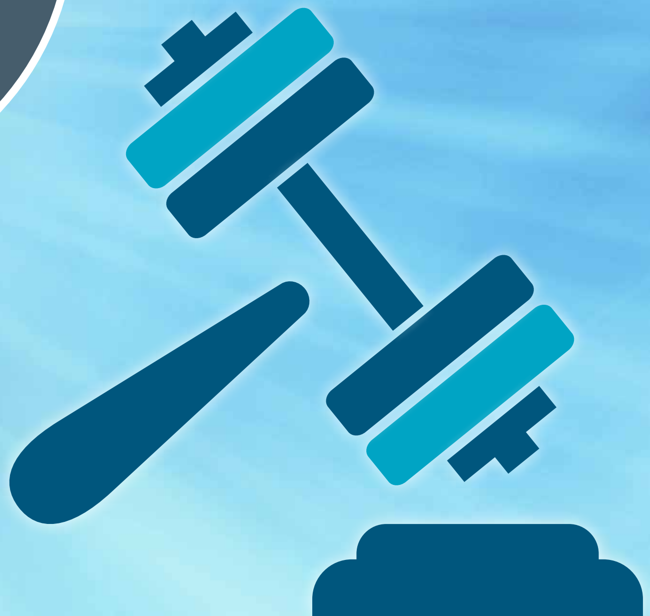
129 ARBITRATION LAWYERS ACROSS 36 OFFICES

Data valid as of September 2017

110
ARBITRATION DISPUTES CURRENTLY

38
MERITS HEARINGS IN THE PERIOD AUGUST 2015 - JULY 2017

24
CURRENT ARBITRATOR APPOINTMENTS
(8 AS SOLE ARBITRATOR OR CHAIR)



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Following an initial five-part series, we expect to release podcast episodes monthly, including interviews with K&L Gates clients and lawyers and leading members of the international arbitration community on hot topics in international arbitration.

Listen to podcast episodes directly from K&L Gates HUB or download via iTunes and Google Play.

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ARBITRATION NEWS FROM AROUND THE WORLD

Benjamin Mackinnon (London)

AFRICA

South Africa

South Africa is currently considering the adoption of a new International Arbitration Act. The bill would incorporate the United Nations Commission on International Trade Law ("UNCITRAL") Model Law and replace the Recognition and Enforcement of Foreign Arbitral Awards Act 1977. The bill will only govern international arbitrations with domestic arbitrations continuing to be governed by the Arbitration Act of 1965. The intention behind the new act is to promote South Africa as a regional hub for international arbitration.

ASIA

Hong Kong

On 14 June 2017, Hong Kong passed a bill amending the Arbitration Ordinance, the Arbitration (Amendment) Bill 2016. The bill confirms that intellectual property rights are arbitrable and is part of the policy to enhance Hong Kong as a leading centre for intellectual property trading. The amendments will become effective from 1 October 2017. On the same day, the Arbitration and Mediation Legislation (Third-Party Funding) (Amendment) Bill 2016 was also passed, and we provide a full report on this development later in this **edition.**

India

Further emphasising India's increased support for alternative dispute resolution, the Department of Justice of India has recently advised government departments to resolve their disputes through alternate methods such as mediation, arbitration and online dispute resolution. The stated aim is to reduce litigation. To encourage this, the Department of Justice has published a list of 12 institutions that departments may wish to use outside of the courts.

Singapore

The Singapore Court of Appeal has confirmed in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32 that an arbitration clause that gives one party a unilateral right to arbitrate or litigate (often known as an asymmetric dispute resolution clause) is enforceable. In the case, the respondent party applied to stay the litigation proceedings on the basis that the contract contained an arbitration clause. The Court of Appeal held that

although there was a valid arbitration clause, it did not place the parties under a present obligation to arbitrate but would give rise to an arbitration agreement only if and when the respondent elected to arbitrate a specific dispute in the future. The enforceability of asymmetric dispute resolution clauses is discussed in the webinar **"Is Your 'Asymmetric' Dispute Resolution Clause Enforceable Anymore?"**

AUSTRALASIA

Australia

In March 2017, the Civil Law and Justice Amendment Legislation Bill 2017 was introduced in the Australian Senate. The purpose of the bill is to clarify various elements of civil justice legislation, which includes minor and technical amendments to the International Arbitration Act 1974. We provide a full report on this development later in this **edition.**

New Zealand

The New Zealand Parliament has recently considered a new bill (the Arbitration Amendment Bill 2017) amending New Zealand's Arbitration Act 1996. The amendments would allow for arbitration of trust disputes, extend the presumption of confidentiality in respect of arbitrations to cover related court proceedings and more clearly define the grounds for setting aside arbitration awards. The bill was proposed by National MP Paul Foster-Bell and, although as a member's bill it is not sponsored by the government, it was passed by a vote of 107 to 12 on first reading. The bill has now gone to the Justice and Electoral Committee prior to being considered again by the full Parliament.

CARIBBEAN

Jamaica

A new arbitration law came into force in Jamaica on 7 July 2017. It is based upon the UNCITRAL Model Law and replaces the Arbitration Act 1900 (which was based upon the English Arbitration Act 1889). Jamaica thereby joins a number of other Caribbean countries to have adopted the model law, such as the British Virgin Islands, Barbados and the Bahamas.

EUROPE

England

The civil courts in England have recently been restructured to facilitate more flexible cross-deployment of judges with suitable expertise and experience. As a consequence, from July 2017, the courts that have jurisdiction to hear arbitration claims will fall within the "Business and Property Courts of England and Wales". The restructuring is intended to ensure that the English court continues to offer high-quality business court-based dispute resolution services.

The English High Court has recently held that misleading an arbitral tribunal can amount to a procedural irregularity under section 68(g) of the Arbitration Act 1996 *("the award being obtained*

Jamaica joins a number of other Caribbean countries to have adopted the model law, such as the British Virgin Islands, Barbados and the Bahamas.

by fraud or the award or the way in which it was procured being contrary to public policy"). In *Celtic Bioenergy Ltd v Knowles Ltd* [2017] EWHC 472 (TCC), it was held that the award was obtained by fraud *"in that matters that were completely inconsistent with key issues in [the Claimant's] case were deliberately withheld from the arbitrator".* Although not required to rule on whether recklessness could amount to dishonesty, Jefford J considered that *"cases in which recklessness as to whether a statement was true or false might amount to fraud within the meaning of s.68(2)(g) if there is some other element of unconscionable conduct."* The judgment serves as an important reminder of the importance of not misleading the arbitral tribunal.

France

The Paris Court of Appeal has set aside an award on the basis that its recognition or enforcement would be contrary to international public policy due to alleged money laundering *(Belokon v Kyrgyzstan, 21 February 2017, No. 15/01650).* Mr Belokon had obtained an arbitration award against Kyrgyzstan due to the indirect expropriation of a bank that Mr Belokon had acquired which Kyrgyzstan had subsequently placed into temporary administration. The Paris Court of Appeal held that preventing money laundering is part of international public policy and that French courts could not recognise or enforce an award that would work against this. The Paris Court of Appeal therefore proceeded to conduct a review of the evidence before holding that it disagreed with the tribunal's finding that there was insufficient evidence of money laundering.

Germany

In a recently published decision, albeit the judgment is dated 7 July 2016, the German Federal Court of Justice held that parties do not waive rights to arbitrate different disputes by submitting one dispute to a state court. The case involved a partnership agreement containing an arbitration agreement. Following the resignation of a member, a dispute arose which the parties submitted to the state court. When a further dispute arose with the same former member, the partnership commenced arbitration. The former member challenged the arbitration in court alleging that the right to arbitrate had been waived. The German Federal Court of Justice held that the waiver of the arbitration agreement only extended to the specific dispute that had been submitted to the state court, and therefore, the right to arbitrate had not been waived.

MIDDLE EAST

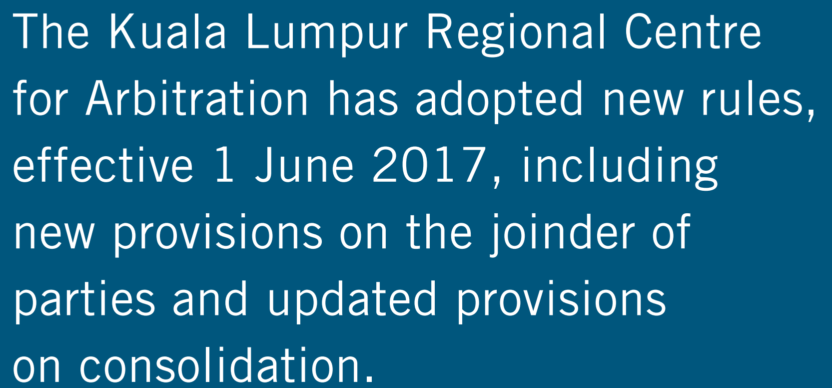
Abu Dhabi

The Abu Dhabi Global Market ("ADGM") has announced that an arbitration hearing centre on Al Maryah Island will be established in early 2018. The ADGM Arbitration Centre will be equipped with state-of-the-art technology and hearing facilities, which will be available to all parties seeking to resolve their disputes through arbitration or mediation. The announcement is in addition to the ADGM's recent agreement with the International Chamber of Commerce to launch its Middle East representative office in ADGM.

INSTITUTIONS

The Arbitration Centre at the Institute of Modern Arbitration and The Russian Union of Industrialists and Entrepreneurs

On 27 April 2017, the Russian Union of Industrialists and Entrepreneurs and the Arbitration Centre at the Institute of Modern Arbitration were both authorised by order of Prime Minister Dmitry Medvedev to administer arbitrations in Russia. Both are based in Moscow. The authorisations are in addition to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation and the Maritime Arbitration Commission,


The Kuala Lumpur Regional Centre for Arbitration has adopted new rules, effective 1 June 2017, including new provisions on the joinder of parties and updated provisions on consolidation.

both of which were exempted from having to seek authorisation. The requirement for authorisation was introduced in order to combat a perceived problem of arbitration institutions set up by corporations to administer disputes involving themselves.

The Kuala Lumpur Regional Centre for Arbitration

The Kuala Lumpur Regional Centre for Arbitration ("KLRCA") has adopted new rules, which are effective from 1 June 2017. The new rules contain provisions on the joinder of parties and updated provisions on consolidation. The KLRCA has also introduced a technical review of awards to allow the director of the KLRCA to "draw the arbitral tribunal's attention to any perceived irregularity as to the form of the award and any errors in the calculation of interest and costs".

London Chamber of Commerce and Industry

The London Chamber of Commerce and Industry ("LCCI") has launched a new arbitration service (the London Chamber of Arbitration). The LCCI has opted not to make the rules available on their website, although they are available upon request from the Interim Registrar. The London Chamber of Arbitration has also announced a panel of 19 arbitrators consisting of former members of the English judiciary and senior barristers.

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WORLD INVESTMENT TREATY ARBITRATION UPDATE

By Wojciech Sadowski and Patrycja Treder (Warsaw)

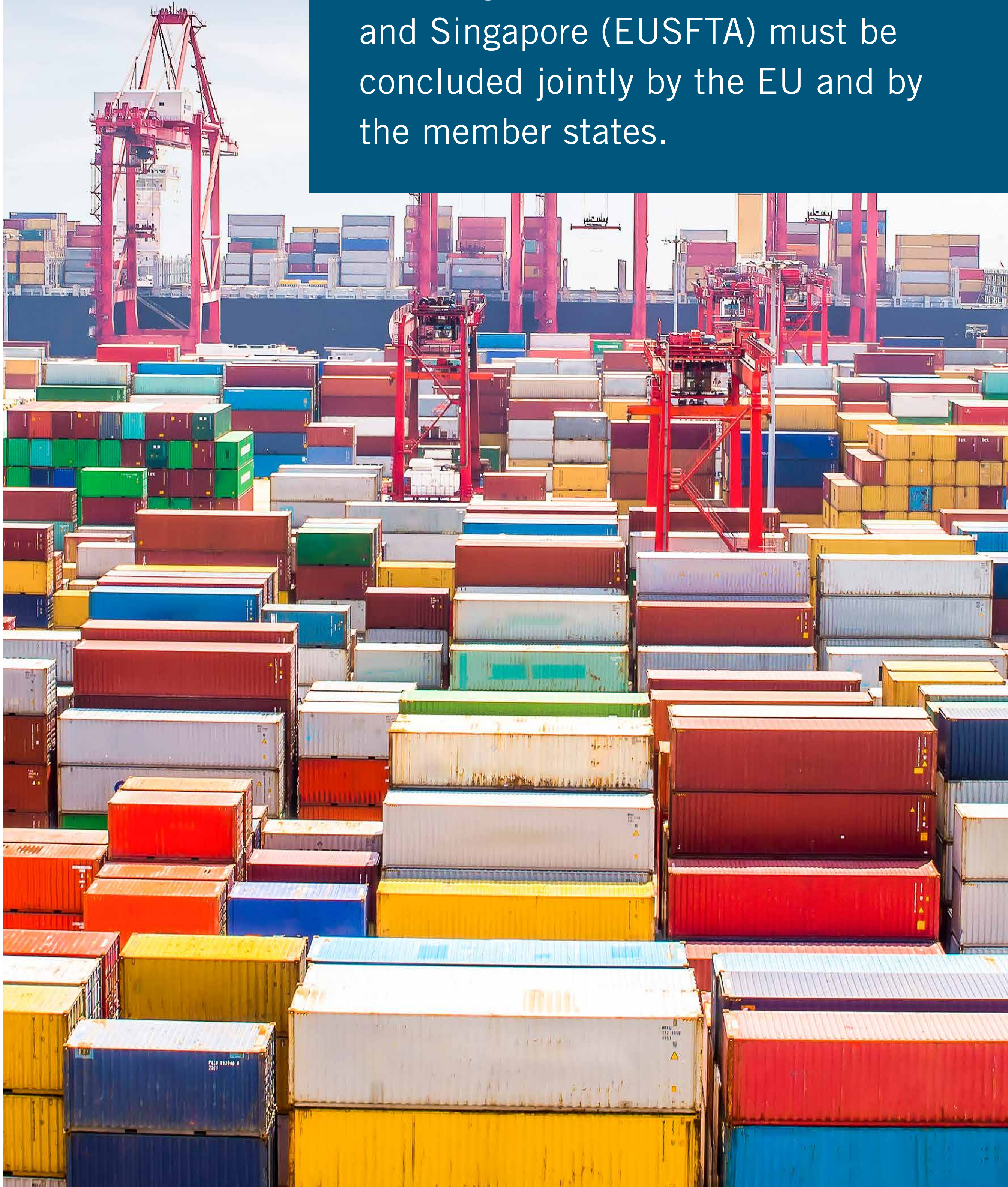
In each edition of *Arbitration World,* members of K&L Gates' Investment Treaty practice provide updates concerning recent, significant investment treaty arbitration news items. This edition features the judgment of the Court of Justice of the European Union on the EU-Singapore Free Trade Agreement, other recent developments with the potential to influence the future of investment disputes in Europe and the beginning of the process of termination of the intra-EU BITs by Poland amidst its political crisis over the reform of the judiciary. It also shortly discusses the US NAFTA Renegotiation Plan.

SHARED COMPETENCE OF THE EU AND MEMBER STATES TO CONCLUDE FTAs

On 16 May 2017, the Court of Justice of the European Union ("CJEU") rendered the Opinion 2/15 concerning the conclusion of a Free Trade Agreement between the European Union and Singapore (the "EUSFTA"). The proceedings were initiated by the European Commission in order to finally settle whether the EUSFTA may be signed alone by the EU or whether the signatures of the member states are also required (followed of course by the respective ratification procedures). We reported on the opinion of Advocate General Sharpston in this matter in the previous edition of **Arbitration World.**

The CJEU came to the conclusion that, as a rule, the EUSFTA falls within the exclusive competence of the EU, with the exception of certain provisions which fall within the competence shared between the EU and member states. Among the latter provisions, the CJEU listed (i) the provisions on investment protection so far as they relate to non-direct investment; (ii) the investor-state dispute resolution system; and (iii) the provisions of Chapters 1, 14, 15, 16 and 17 of the EUSFTA so far as they relate to Chapter 9 (Investment) and to the extent they fall within the competence shared between the EU and member states. Accordingly, in effect, the CJEU concluded that the EUSFTA must be concluded jointly by the EU and by the member states.

In effect, the Court of Justice of the EU concluded that the Free Trade Agreement between the EU and Singapore (EUSFTA) must be concluded jointly by the EU and by the member states.



With regard to the investment provisions, the CJEU maintained the division between the direct and non-direct investments and introduced a confusing division of competences between the EU and member states. The division between direct and non-direct investments is a well-established concept in both economics and law, including international investment law. However, the line between the two notions is rather thin and blurry, which is particularly visible in the awards rendered by the investment tribunals. Despite this, the CJEU decided that the provisions regarding the protection of investments fall within the exclusive competence of the EU only with regard to foreign direct investment. Yet, the provisions on investment protection were meant also to encompass non-direct investments which fall within the competence shared between the EU and the member states.

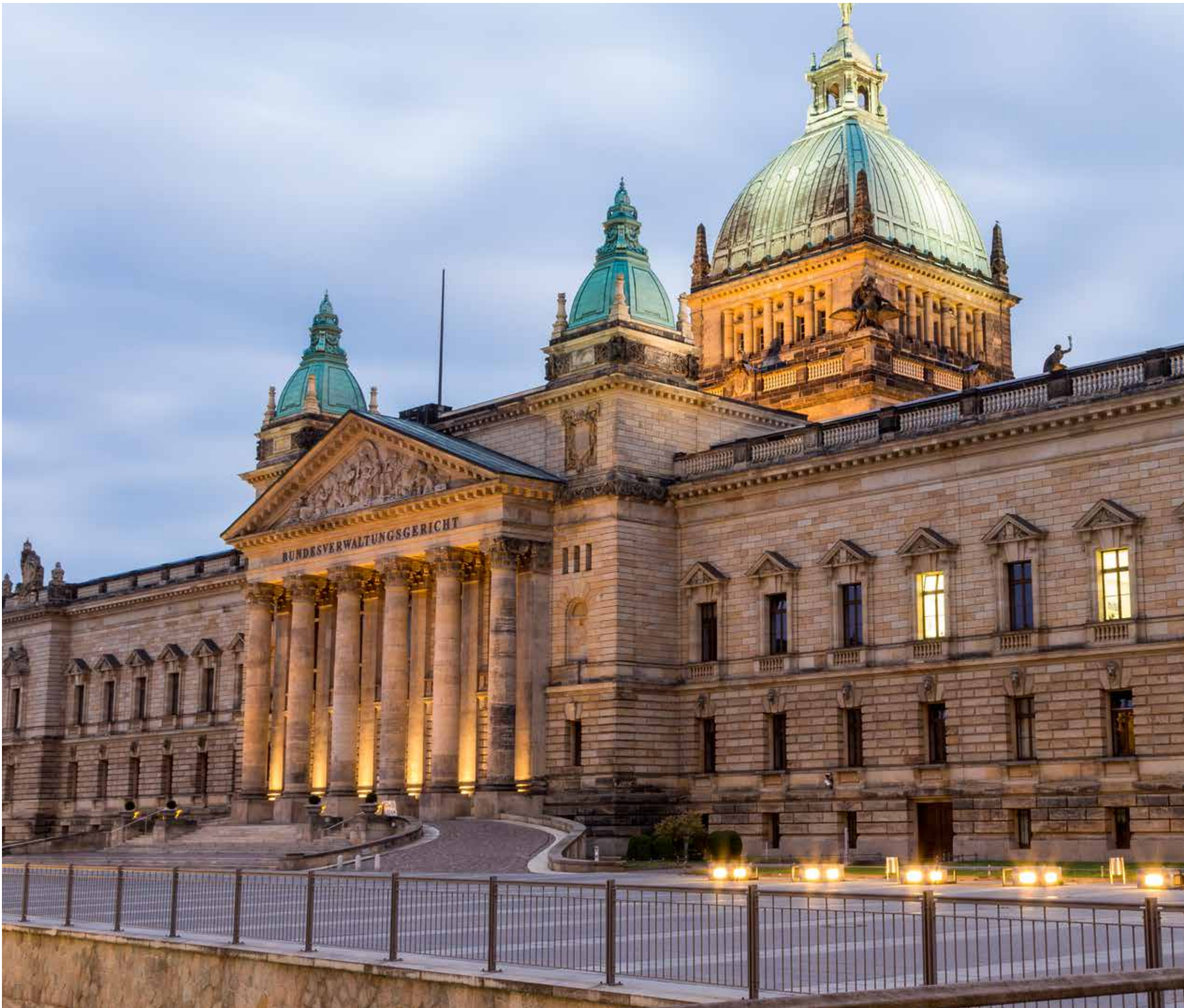
The CJEU also uses the aforementioned division (between direct and non-direct investments) in respect of the provision of the EUSFTA which stipulates that upon the entry into force of the EUSFTA, all the BITs concluded between the member states and Singapore will be automatically terminated. The effectiveness of this provision requires the signatures of the member states with respect to non-direct investments, but not with respect to direct investments. However, the possibility of the treaty being terminated by a non-party (e.g. the EU) is somewhat controversial.

Finally, the CJEU proceeded to the matter of the investor-state dispute resolution mechanism. It concluded that it falls within the competence shared between the EU and the member states. It pointed out that a member state may only be a party to arbitral proceedings consensually – the consent of the EU is not sufficient. Thus, the signatures of the member states under the EUSFTA are required.

IS ISDS DEAD IN EUROPE?

On 19 June 2017, i.e. literally on the heels of its Opinion in the EUSFTA case, the CJEU of the European Union held a hearing in the *Achmea* case (C-284/16) on referral from the German Supreme Court. The case, which arose from the jurisdictional award in the dispute between Achmea and Slovakia was heard by the Grand Chamber of the Court and attracted high attention from the member states. Eleven member states (Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Slovakia and Romania) supported by the European Commission argued against the jurisdiction of arbitral tribunals in intra-EU matters, while five other member states (Germany, France, Netherlands, Austria and Finland) took the opposite view.

The opinion of the Advocate-General (which is not binding on the CJEU) was rendered on 19 September 2017, whereas the judgment of the CJEU is expected in late 2017 or early 2018. The judgment may have far-reaching



consequences for enforcement of awards rendered in intra-EU arbitrations, which according to the UNCTAD data, represented 25% of all publicly known investment disputes commenced in 2016.

Less than two weeks later, on 1 July 2017, the European Commission announced that the EU and Japan reached agreement on the principles of their future free trade agreement. The mechanism for resolution of investor-state disputes in that agreement, however, remains one of the key areas of discord.

While Japan is taking the position that the traditional ISDS (Investor-State Dispute Settlement) model is sufficient and should be included also in this agreement, the European Commission announced in its press release on the agreement that the ISDS is dead in Europe and that it should be replaced with an international investment court. The latter concept, however, may be problematic in the light of the CJEU's opinion in case 2/15 regarding the competence of the EU and member states, as reported above.

POLAND SET TO TERMINATE THE FIRST INTRA-EU BIT

On 18 July 2017, a draft bill was submitted to the Polish Parliament with the intention to pass a law authorizing the President of the Republic of Poland to terminate the 1993 bilateral investment treaty with Portugal. In accordance with the Polish Constitution, adoption of this act by the Parliament is required before the termination notice can be served. On 28 September 2017, the Polish President signed the Act, which came into force on 18 October 2017. From thereafter, the termination notice may be served on the Republic of Portugal.

Although the proposal to terminate the intra-EU BITs by Poland is not new, as the plan had been announced by the current Polish administration at least twice, the development is interesting for two reasons.

First, the explanatory note attached to the Act suggests that the Polish government may have been making proposals to terminate all intra-EU investment treaties at once, such as by way of a multilateral treaty, as well as to terminate the treaty with Portugal by way of a mutual agreement. In both scenarios, the objective pursued by the Polish government was the derogation of

the so-called sunset clauses, extending in time the application of the treaty even after termination and which remain in force if the BIT is terminated unilaterally. The explanatory note further suggests that Portugal refused to concede to Poland's request that the treaty be terminated by consent.

The selection of the BIT with Portugal as the first intra-EU BIT to be terminated was explained by the Polish government by reference to the fact that this treaty renews automatically for five-year periods and that in order to prevent the renewal of the treaty beyond 2018, the termination must be effected by 8 October 2017.

Interestingly, the explanatory note refers to the process of public consultations with Polish business organizations, which reportedly all underlined the importance of treaties with ISDS clauses for Polish companies investing abroad. These views did not sway the government's initiative to terminate the Portuguese BIT.

The second interesting feature about the draft is the timing. The draft bill was submitted at the same time as the Polish Parliament was adopting a set of laws designed to subdue the Polish judiciary to the political will of the government and the Polish Parliament, spurring massive street protests across Poland in defence of the judiciary's independence. On 26 July 2017, the European Commission warned Poland to resolve the concerns over Polish judicial reform under the risk of the European Commission instituting formal proceedings under Article 7 of the Treaty on the European Union. The proceedings have not yet (at the time of writing) been initiated due to the further developments in Poland.

Seen from this perspective, the argument included in the explanatory note for the bill asserting that ISDS is no longer necessary in Poland as the rights of EU investors in Poland can be effectively protected by Polish courts is highly questionable.

If the NAFTA was altered in accordance with the US objectives, then the protection of foreign investors in the United States would be limited to national treatment.

US NAFTA RENEGOTIATION PLAN

On 17 July 2017, the Office of the U.S. Trade Representative published the Summary of Objectives for the NAFTA Renegotiation. The content of the summary corresponds with the "America First" policy of the Trump administration. In regard to the NAFTA investment chapter, it sets out two goals. The first is, to establish rules that reduce or eliminate barriers to US investment in all sectors in the NAFTA countries. The second goal is to secure for US investors in the NAFTA countries important rights consistent with US legal principles and practice, while ensuring that NAFTA country investors in the United States are not accorded greater substantive rights than domestic investors. Both aims may have a significant bearing on the content of the substantive protection standards guaranteed to foreign investors, especially on the international minimum standard of treatment, currently provided for in the NAFTA and some other international investment agreements entered into by the United States. This standard is independent from national law, and in fact, its underlying purpose was to protect investors from the vagaries of local laws by setting an objective yardstick. If the NAFTA was altered in accordance with the US objectives, then the protection of foreign investors in the United States would be limited to national treatment. This means that even if the US legislation in practice falls below an internationally accepted standard, investors would not be protected as long as the United States treats its domestic entities alike.

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THIRD PARTY FUNDING OF ARBITRATION IN HONG KONG IS GIVEN THE GREEN LIGHT

By Christopher Tung, Sacha Cheong and Dominic Lau (Hong Kong)

On 14 June 2017, the Legislative Council of Hong Kong passed the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 (the "Bill").

The Bill comes on the heels of the consultation paper issued in October 2015 by the "Third Party Funding for Arbitration" Sub-committee of the Law Reform Commission ("LRC") and closely follows the recommendations made by the LRC in its report dated 12 October 2016 to clarify the law concerning third-party funding of arbitration and associated proceedings under the Arbitration Ordinance (for more information about the report and the LRC's recommendations, see our article in the May 2017 issue of **Arbitration World**).

The Bill clarifies that the law concerning maintenance and champerty, which prohibits third-party funding of litigation and is still punishable as a criminal offence, does not apply to the funding of arbitration and mediation.

It is expected that the legislative amendments to the Arbitration Ordinance and Mediation Ordinance will come into effect later this year.

Key features of the Bill include the following:

- The definition of "arbitration" includes arbitration proceedings covered by the Arbitration Ordinance, as well as any related court proceedings or proceedings before an emergency arbitrator or mediator.
- It does not permit the funding of arbitration (whether directly or indirectly) by lawyers or providers of legal services in order to avoid any conflict of interest.
- It does not have retrospective effect, so funding agreements made before the commencement of the legislative amendments are not covered.

- It applies to non-Hong Kong arbitrations (i.e. where the place of arbitration is outside Hong Kong or there is no place of arbitration) to the extent that costs and expenses are incurred in respect of services provided in Hong Kong in relation to the arbitration.
- An advisory body and authorized body will be established to monitor and review the operation of the legislative amendments and issue a code of practice.
- There will be a code of practice setting out the expected standards and practices of third-party funders with regard to their funding agreements, minimum capital requirements, and ensuring that there are proper internal procedures in place for addressing conflicts of interest and complaints. There will be a public consultation process before the code is issued. Failure to comply with the code will not create any judicial or other liability; however, the code is admissible in evidence and may be taken into account where there is an issue of non-compliance.
- The communication of confidential information to an existing or potential party funder and its professional adviser is permitted, but any recipient is subject to confidentiality requirements.
- There are similar amendments to the Mediation Ordinance.

While Hong Kong will soon join the (growing) list of jurisdictions that permit third-party funding, there are many other jurisdictions around the world where such arrangements are not allowed. One point of concern that has garnered discussion among arbitration practitioners is whether it would be

possible for a party to challenge the recognition and enforcement of an arbitral award obtained through the involvement of a third-party funder on the basis that the arrangement is unlawful and therefore contrary to public policy. The risk of this happening in Hong Kong is low, following the Court of Final Appeal decision in *Unruh v Seeberger* (FACV Nos. 9 &10 of 2006; 9 February 2007). The court held that even if an agreement might be regarded as champertous according to the laws of Hong Kong, it would not be contrary to public policy to enforce such an agreement where it involves an arbitration taking place in a jurisdiction (in this case, the Netherlands) where maintenance and champerty are not contrary to public policy. The authors consider that, by extension, the same outcome would likely be reached if it were in relation to an arbitral award obtained in a jurisdiction which permits third-party funding for arbitration. That said, it is possible that the courts in other jurisdictions may take a different approach to the issue so it would be prudent to consult with legal counsel in the relevant jurisdiction if there is any doubt.

Third-party funding of arbitration has become increasingly common over the last decade in numerous jurisdictions, including England and Wales, Australia, the United States and Singapore. The implementation of this Bill ought to assist Hong Kong in consolidating its position as an important regional centre in Asia for legal services and dispute resolution, as well as a place of choice for business parties to conduct arbitration and mediation proceedings.

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SECURITY FOR COSTS IN INTERNATIONAL ARBITRATION: ARE ALL THIRD PARTY FUNDERS THE SAME?

By John Magnin and Jonathan Graham (London)*

In recent years, the growth of third-party funding in international arbitration has accelerated. Third-party funders are not subject to the tribunal's jurisdiction, and this has led to concerns whether a funded party will comply with a costs award made against it. To address this issue, tribunals appear more willing to take account of the fact that a claimant has obtained third-party funding in determining whether to grant security for costs. However, third-party funders may differ in their motivation for providing funding, their relationship to the funded party and the return they make on their investment. In a recent decision, the English High Court took the approach that there is a "spectrum" of funders and that the funder's place on the spectrum may determine its liability to provide security for a defendant's costs in English court proceedings. This raises the question of whether arbitral tribunals might take into account not only the involvement of a third-party funder but also a funder's position on the "spectrum" when deciding to grant security for costs.

SECURITY FOR COSTS IN ARBITRATION

Security for costs is an interim measure by which a party is ordered to provide security for the counter-party's costs of the arbitration. The aim is to protect a party against the risk that it will succeed at the hearing or trial and be awarded its costs, but that ultimately the costs order will not be satisfied by the losing party. It is normally only available to defendants not claimants, including defendants to a counterclaim.

Whilst security for costs is available in both litigation and arbitration, the test for obtaining security differs between the two, at least in England. Under the English civil procedure rules ("CPR"), applicable to court proceedings, security for costs may be granted if one of the conditions set out in CPR 25.13(2) is

satisfied (the most common being that there is reason to believe a corporate claimant will be unable to pay the defendant's costs if ordered to do so) and the court is satisfied, having regard to all the circumstances of the case, that it is just to make such an order. By contrast, section 38 Arbitration Act 1996, which provides the power for English-seated tribunals to order security, does not specify the grounds upon which an order for security can be made, and the rules of most arbitral institutions do not prescribe the conditions or circumstances which need to exist. Guidelines published by the Chartered Institute of Arbitrators make it clear that arbitrators should take into account *"any other additional circumstances they may consider relevant to the particular situation of the parties and the circumstances of the arbitration",* and tribunals are usually left with considerable latitude in deciding applications for security for costs.

Historically, there has been a reluctance on the part of many tribunals to grant security save in the clearest of cases.

THIRD PARTY FUNDING AS A FACTOR IN SECURITY FOR COSTS APPLICATIONS

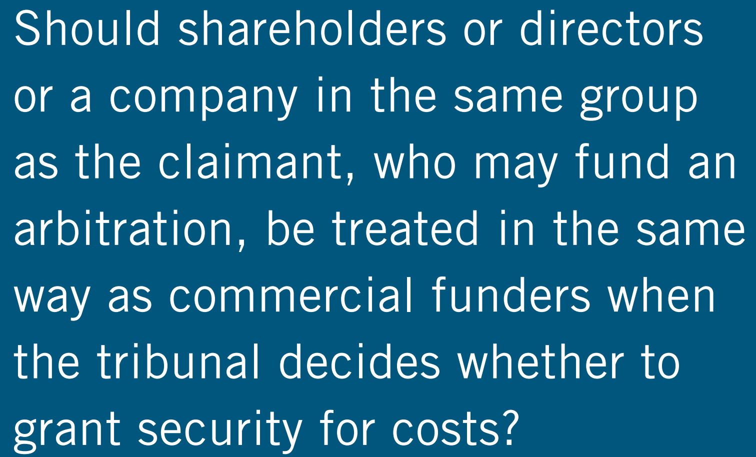
The arbitral tribunal has no power to make an order for security (or costs) against anyone who is not a party to the arbitration, in contrast to the English court's powers to order security against a non-party. Commentators have noted that the tribunal's lack of jurisdiction over a third party funder creates the potential for what has been described as a "hit and run arbitration", i.e. a situation in which an impecunious claimant advances what may be a weak claim, supported by a funder, and when the claim fails both the claimant is unable to satisfy and the funder avoids any liability for a costs award made in favour of the

respondent. Whilst the tribunal does not have jurisdiction to order security direct against a funder, the tribunal may consider it appropriate to order security against a claimant in receipt of third party funding. Such an order is likely to have a similar effect to an order made direct against a funder because if the claimant refuses to provide security, the claim will be stayed, and in practice, it seems likely that the funder would advance the requisite funds for the claimant to provide security, as otherwise their "sunk" investment would effectively be written off.

The case of *RSM v St Lucia* was an ICSID arbitration in which the existence of third-party funding was specifically recognised as being relevant in the decision to award security for costs. St Lucia successfully applied for an order that RSM post security for costs by way of bank guarantee for US$ 750,000. In his assenting reasons, one member of the tribunal, Dr Gavan Griffith QC, stated, *"once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made".* Although the tribunal as a whole did not adopt Dr Griffith's reasoning and emphasised that *"exceptional circumstances"* were required for security to be ordered against a claimant in investment treaty arbitration, his approach signified a willingness on the part of arbitrators to take account of third party funding when determining whether to order security for costs.

In commercial arbitration too, third-party funding is relevant when the tribunal hears applications for security for costs. The ICC Report on Decisions on Costs in International Arbitration notes that: *"If there is evidence of a funding arrangement that is likely to impact on the non-funded party's ability to recover costs, that non-funded party might decide to pursue…security for those costs…. Such measures may be appropriate to protect the non-funded party and put both parties on equal footing in respect of any recovery of costs".* Evidence of third-party funding alone is not likely to be sufficient on its own for security to be ordered. As the ICCA-Queen Mary Report on Security for Costs has emphasised, a tribunal will usually need to consider whether the financial situation of the claimant has materially and unforeseeably changed since the conclusion of the arbitration agreement, given that the parties had agreed at some point to submit disputes arising between them to arbitration and the risks could be assessed at the time of contracting.

It can thus be seen that, although the existence of third-party funding alone is unlikely to be sufficient to persuade an arbitral tribunal to grant security for costs, third-party funding may be an important factor. But are all funders to be treated alike?


Should shareholders or directors or a company in the same group as the claimant, who may fund an arbitration, be treated in the same way as commercial funders when the tribunal decides whether to grant security for costs?

FUNDERS AND FUNDERS

It is not possible to review most international commercial arbitration decisions as they are confidential to the parties. As regards published awards in investment treaty arbitrations, we are not aware of any discussion as to the relevance of the nature and motivation of the third-party funder and whether that may have any significance to the issue of whether or not security for costs should be ordered. Whilst this may reflect the fact that the majority of third-party funders are commercial funders, parties may instead, for example, receive funding from their shareholders or directors, or a company in the same group, and those "funders" may or may not receive a return on the funds provided. Should they be treated in the same way as commercial funders when the tribunal decides whether to grant security?

A recent decision of the English High Court in the *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch) has introduced the concept in English litigation of a "spectrum" of third-party funders. Where a particular funder sits on the spectrum may affect the court's exercise of its discretion as to whether to order security for costs. This decision arose out of the long-running battle between Royal Bank of Scotland ("RBS") and its shareholders who brought an action against RBS claiming it had misled them over a £12 billion rescue fundraising at the height of the financial crisis in 2008. RBS brought two applications, heard simultaneously, for security for costs to be granted against two funders, the Respondents, who had provided funds to assist the remaining shareholder group (the "Action Group"), which had not settled with RBS. Mr Justice Hildyard noted that there was a broad spectrum of funders *"with the risk of exposure to a [costs] order and the provision of security for costs moving from minimal to considerable or even likely according to type and circumstances."* The English court will not usually exercise its discretion to order security for costs against what are termed "pure funders", described in *Hamilton v Al Fayed* [2003] QB 1175 (CA) as *"those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course".* On the other end of the spectrum are commercial funders whose business is litigation funding and who provide funding in return for what can be very high returns on any amount the funded party recovers. In *Arkin v Borchard Lines* [2005] EWCA Civ 655, the Court of Appeal held that such third party commercial funders are potentially liable for the costs of the opposing party to the extent of the funding they provide.

In the *RBS Rights Issue Litigation,* one of the Respondents was a professional litigation funder (the "Professional Funder") and the other a corporate in common ownership with a number of claimants in the Action Group (the "Related Funder"). The Related Funder's

evidence to the court was that it was not in the business of litigation funding and advanced funds to the Action Group solely because of the inclusion of a number of related companies in the Action Group. Although its funding was provided on commercial terms, Mr Justice Hildyard found that the Related Funder was positioned closer to the "pure funder" end of the spectrum and ordered security only from the Professional Funder. The judge stated that there were no hard and fast rules as to what characteristics would determine a funder's place on the spectrum, but that the reasons and motivation for the funder's involvement were important considerations.

Could the concept of a spectrum be applied in arbitration so that tribunals consider the position of the funder along the spectrum when determining an application for security for costs? The decision in *RBS Rights Issue Litigation* will not be helpful to funded parties, whose funding derives from commercial litigation funders. This decision will be of interest to parties funded by a related entity that provides funding only because of their corporate relationship. The decision in *RBS Rights Issue Litigation* would suggest that such funders may be classed as "pure funders" with the resulting potentially more limited prospect of being ordered to put up security for costs.

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THE RISE OF ARBITRATOR INTEL

By Ashish Chugh and Aloysius Chang (Singapore)

Selection of the party-nominated arbitrator is perhaps the single most important decision a party will make in an arbitration. One of the key attractions of arbitrations with a three-member tribunal is the comfort and confidence parties gain by having a person of their own choice hearing and contributing to the determination of their case and, in some cases, choosing the chairman of the tribunal. Of course, no equivalent opportunity exists in a court process. Similarly, when looking at candidates for acting as sole arbitrator, parties will want to conduct their own 'due diligence'. The quality of arbitration proceedings is largely dependent on the quality and skill of the arbitrator(s) appointed. Careless selection can result in not only additional time and cost being incurred, but prospects of success potentially being jeopardised. The fact that the grounds of appeal or challenge to an arbitral award are generally very limited makes the selection all the more important.

Against this background, it is unsurprising that many 'users' of arbitration (including certain prominent in-house counsel) have for some time now been calling for greater publicly available information on arbitrators, with suggestions ranging from a database of standard performance metrics maintained by institutions to even a TripAdvisor-style open access comparison/rating website. To date, many initiatives have failed to get off the ground by reason, for example, of reluctance on the part of arbitrators to participate and concerns that published feedback may be dominated by disgruntled parties, where the failing lay in their case rather than the appointed arbitrator. There are also concerns, for example, that for three-member tribunals, a delay on the tribunal's part might result in all three arbitrators being unfairly 'tarred with the same brush', when the delay may have been caused by one arbitrator alone.

The result has been that parties, in particular first-time users, have always been likely to encounter a dearth of resources for researching potential arbitrators, making a comparative exercise in the appointment of arbitrators a difficult one, at least without experienced arbitration counsel to advise on relevant candidates. That may no longer be the case. In recent months, two new initiatives have been set up to plug this informational gap: the Global Arbitration Review's Arbitrator Research Tool ("GAR-ART") and Arbitrator Intelligence ("AI"), both of which aim

to provide an informational network granting arbitration users a useful tool for researching and comparing potential arbitrators for their disputes.

The GAR-ART provides an online database of searchable profiles on individual arbitrators with several categories of relevant information, such as biographical information (including nationality, languages, qualifications, areas of expertise, etc.), information about his or her experience (including materials such as the arbitrator's CV, speeches, published awards, etc.), a list of the co-arbitrators and counsel with whom they have worked with during the last three years, a Q&A section on procedural and case management preferences, and links to any other relevant GAR published material. The GAR-ART will also provide parties with the ability to contact other users with recent experience of an arbitrator for further information. GAR has maintained that the GAR-ART is not a 'TripAdvisor' on arbitrators, as the information is mostly drawn from arbitrators and data collected by GAR rather than the parties. It currently provides about 80 profiles of international arbitrators, the details of more than 950 co-arbitrators and chairs they have worked alongside, and more than 1,700 counsel who have appeared before them. GAR charges a subscription for access to the GAR-ART service.

AI is an information network headed by its founder and executive director, Professor Catherine A. Rogers (Professor of Law at Pennsylvania State University and Queen Mary, University of London). It differs from GAR-ART in that it collects arbitrator information and quantitative feedback from parties and counsel on key features of arbitrator decision-making, for the purpose of sharing it with AI users via published reports. AI's information is obtained through published and unpublished arbitral awards as well as surveys called the "Arbitrator Intelligence Questionnaire" ("AIQ") that allow arbitration users to provide feedback on specific questions regarding the arbitrator, including those on case management, evidence taking, arbitrator questions during hearings, arbitral award rendering, reasoning in arbitral awards, and calculation of interest rates. The AIQ was launched on 1 June 2017 in Singapore and is currently a work-in-progress. Once sufficient information is collected, the information and feedback gathered will

be anonymised and made available through "AI Reports". AI also aims to work with arbitral institutions in order to encourage systematic participation in its AIQ and has thus far entered into a Cooperation Agreement with the Singapore International Arbitration Centre ("SIAC"), pursuant to which SIAC will assist AI in administering the AIQ in exchange for AI waiving its fees on the AI Reports for the SIAC.

The issues of arbitrator insight and transparency appear to have been at the forefront of users' minds for some time. For example, in a 2016 survey by Berwin Leighton Paisner on diversity on arbitral tribunals, 92% of respondents wanted more information about new and lesser-known arbitrators, while 81% wanted to give feedback about arbitrators at the end of their cases. Moreover, in a 2015 survey by Queen Mary, University of London and White & Case, the third-worst characteristic of international arbitration was listed as "lack of insight into arbitrators' efficiency". This is quite unlike the situation with litigation, where the performance of judges is open to public scrutiny.

However, there remain concerns with some of the consequences that initiatives such as GAR-ART and AI may have. From the arbitrators' perspectives, the busiest ones may view themselves as having the least to gain, as the extent of their practice may be viewed negatively as an unmanageable workload giving rise to potential delays and lack of appropriate attention to the case in hand. Some commentators consider such services are likely to give rise to more challenges to arbitrators, as parties would be armed with a lot more information to 'mine' to seek to question an arbitrator's independence or impartiality. Some suggest that any reticence of law firms to fully support such initiatives may be motivated by self-interest, as one of the valued skills of experienced arbitration counsel will be to advise the client party on candidate arbitrators.

Nonetheless, from the parties' perspective, when facing an opponent with significant previous experience of arbitration and arbitrators, the availability of such resources may be viewed alongside third-party funding as a significant tool to assist in levelling the playing field. Whilst it is currently unclear how useful these resources will be to users in the future, developments in this regard will undoubtedly be closely watched by the arbitration community.

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The arbitration rules of almost
all major international arbitration
institutions have been the subject
of review and amendment in the
last 10 years, with the guiding
principles almost invariably
including ensuring that the
procedure is swift and efficient.

ICC LAUNCHES NEW EXPEDITED PROCEDURE

By Peter Morton (London)

One of the traditionally stated potential advantages of international arbitration is that it can be a quick and informal alternative to court litigation. However, in recent times (certainly the last 5 to 10 years), international arbitration has been subject to some criticism, by some frequent 'users' of international arbitration for taking too long and costing too much.

INSTITUTIONAL INITIATIVES AIMED AT SAVING TIME AND COST

Stakeholders in the international arbitration community have sought to respond to this criticism in their own ways. As far as the arbitration institutions are concerned, various initiatives have been undertaken to seek to ensure that the institution provides the relevant framework of rules, procedures and processes to enable arbitrations to be suitably streamlined and expenditure of time and cost kept to a minimum. For example, in 2009, the ICC Commission on Arbitration published a Report on **"Techniques for Controlling Time and Costs in Arbitration"** including 86 recommendations for minimising the time and cost of conducting an arbitration. The arbitration rules of almost all major international arbitration institutions have been the subject of review and amendment in the last 10 years. The guiding principles of the review process have almost invariably included introducing means to ensure that the procedure is swift and efficient, whilst maintaining a party's fundamental right to have a reasonable opportunity to present its case.

New mechanisms are being introduced into rules of arbitration, including provisions for the appointment of an "emergency arbitrator" in cases of exceptional urgency (where formation of the tribunal by normal means cannot be awaited) and, more controversially, provisions for the early dismissal of claims / defences (which, as reported in our **May 2017 edition,** appear in both the new Singapore International Arbitration Centre's ("SIAC") Rules (2016 – Rule 29) and the new Stockholm Chamber of Commerce's ("SCC") Arbitration Rules (2017 – Article 39).

Additionally, many arbitration institutions have chosen to offer rules for expedited arbitration. We reviewed the relevant features of the expedited arbitration procedure offered by a number of

prominent arbitration institutions, in particular, the International Centre for Dispute Resolution (ICDR – the international arm of the American Arbitration Association (AAA)), the SCC and the SIAC in our **33rd Edition.** The procedures tend to (i) set threshold criteria (in terms of sums in dispute) for the application of the expedited procedure, (ii) involve the appointment of a sole arbitrator rather than a three-member tribunal and (iii) set shorter time limits than apply under the institution's main rules of arbitration.

THE ICC EXPEDITED PROCEDURE

On 1 March 2017, the ICC, one of the most prominent arbitration institutions in the world, adopted new Arbitration Rules (the "ICC Rules") which include a new Article 30 regarding an Expedited Arbitration Procedure ("Expedited Procedure") and a new Appendix VI to the ICC Rules in which the detail of the Expedited Procedure is set out.

In terms of application, the Expedited Procedure provisions apply to arbitration agreements concluded after 1 March 2017 where the amount in dispute does not exceed US$2 million and the parties have not opted out of the Expedited Procedure. Parties are also free to 'opt in' to the Expedited Procedure at any time, irrespective of the amount in dispute or the date of conclusion of the arbitration agreement.

The key features of the Expedited Procedure may be summarised as follows:

- Constitution of the Arbitral Tribunal: The ICC Court may appoint a sole arbitrator notwithstanding any contrary provision of the parties in the arbitration agreement. Whilst this has been referred to by some commentators as a potentially controversial aspect of the new Expedited Procedure (because it may be regarded as eroding party autonomy), the ICC Court may appoint three arbitrators if appropriate in the circumstances. In all cases, the ICC Court will invite comments from the parties before taking any decision on the number of arbitrators.
- Procedure: The arbitration procedure is simplified, including through the following measures:

o There are no "Terms of Reference" – a document prepared in arbitrations under the standard ICC Rules which provides a framework for the future conduct of the case, including details of the parties, their representatives, the tribunal, a summary of the parties' claims, a list of issues to be determined and a statement of the applicable procedural rules. Doing away with the preparation and finalisation of the Terms of Reference could result in significant time and costs savings.

o A case management conference is to take place within 15 days of the transmission of the case file to the arbitral tribunal. This

ought to ensure that directions for the future conduct of the arbitration are issued promptly following constitution of the arbitral tribunal.

- The arbitral tribunal may decide the case on documents alone. Whilst under the main ICC Rules, the procedure for establishing the facts of the case is in the discretion of the arbitral tribunal and there is express reference to the possibility of the arbitral tribunal deciding the case on documents alone (Article 25(6)), the norm in ICC arbitration is for there to be a final merits hearing. Under the new Expedited Procedure, the likelihood is that cases will be decided based on documents only except in instances where there is, for example, a clash of witness testimony on a key factual issue and so oral cross-examination is required.

- The Expedited Procedure contemplates that the tribunal may wish to direct that there shall be no document production requests and to limit the number, length and scope of written submissions and written witness evidence (both fact and expert).

- The final award is to be rendered with six months of the case management conference. Whilst the main ICC Rules include a similar provision, the six-month time limit under the main ICC Rules runs from signature of the Terms of Reference, and experience shows that the time period is infrequently adhered to and the deadline (which some consider to be largely an aspirational one) is routinely extended by the ICC Court. In contrast, one can hope that, in practice, arbitrations under the Expedited Procedure will routinely be concluded within the six months, and slippage beyond the stipulated time period will be the exception rather than the norm.

Some would raise the question as to whether it is appropriate to prescribe that an arbitration should be dropped into the expedited arbitration 'pigeon-hole' merely by reference to one factor, namely, the sum in dispute.

COMMENT

There remains a school of thought as to whether it is really necessary to have a separate set of rules for 'expedited arbitration'. For example, while the London Court of International Arbitration's (LCIA) Arbitration Rules provide a procedure for the expedited formation of the arbitral tribunal (and, more recently, for the appointment of an emergency arbitrator), the LCIA Rules do not include a general expedited procedure. Also, some would raise the question as to whether it is appropriate to prescribe that an arbitration should be dropped into the expedited arbitration 'pigeon-hole' merely by reference to one factor, namely, the sum in dispute.

Several years ago, I wrote an article for *Arbitration International* (Vol 26, Number 1, 2010) entitled *"Can a world exist where expedited arbitration becomes the default procedure?"* which raised the question of whether, in fact, all cases should properly be considered for expedition, rather than starting from the default mindset that a 'normal' commercial arbitration should proceed according to a procedural timetable lasting around 12–18 months.

Whilst some commentators consider an expedited procedure is unnecessary if the institution's rules are sufficiently flexible, others feel that the introduction of the Expedited Procedure by the ICC is overdue (from an institution held up by many as the market leader). Generally, the development is to be welcomed as a providing a new option in the toolkit available for use by parties seeking to bring about the fast and efficient resolution of their dispute. This is particularly so for lower-value claims where, in the past, a potential claimant may have been put off even pursuing its claim by the time and costs associated with concluding an arbitration under the main ICC Rules, especially for agreements specifying a three-member tribunal.

The new provisions in the ICC Rules provide another example of why it is important to consider carefully the arbitration clause at the contract drafting stage. Specifically for clauses referring disputes to arbitration under the ICC Rules, careful thought should be given as to whether the parties would like to 'opt out' of the potential application of the Expedited Procedure, including considering the implications the new Expedited Procedure may have for the number of arbitrators dealing with the case if the amount in dispute does not exceed US$2 million.

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MINING LAW REFORM IN AFRICA – ARE THE RECENT LEGISLATIVE CHANGES MADE BY TANZANIA PART OF A DEVELOPING TREND?

By Ian Meredith (London)

In June/July 2017, Tanzania brought forward important legislation giving the state significant new powers in relation to natural resources. In essence, Tanzania has amended its mining and tax laws:

- making it mandatory for Tanzania to own at least 16% of mining projects;
- raising export royalties on gold and silver by 2%; and
- empowering the state to:

o reject a company's valuation of its export royalties if it believes it is too low; and

o cancel and renegotiate contracts for natural resources

President Magufuli was reported as justifying the legislative steps on the basis that said the measures were necessary because of the "…large scale theft taking place in the mining sector".

Two international investors, Acacia owned by Barrick Gold of Canada and Ashati of the Republic of South Africa (RSA), have already indicated that they believe that these developments give rise to breaches of bilateral investment treaties ("BITs"), entitling them as adversely impacted foreign investors that are nationals of countries that have BITs in force with Tanzania to bring a claim before an international arbitral tribunal to seek compensation and/or other relief.

The extent to which adversely affected foreign investors are able to successfully rely upon BITs to seek compensation and/or other relief may affect the actions of other governments of mineral-rich states who might be tempted to follow Tanzania's lead.

Countries that have BITs in force with Tanzania include: Canada, China, Denmark, Finland, Germany, Italy, Mauritius, the Netherlands, Sweden, Switzerland and the United Kingdom.

The terms of individual BITs differ, and the precise terms can materially impact, amongst other things, the qualifying requirements for protected "investors" and "investments", the scope of the protections available and the notification and other requirements that operate as conditions precedent to the bringing of arbitral proceedings.

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GAS PRICE REVIEW ARBITRATIONS – CURRENT THEMES

By John Gilbert (London)

In a previous edition, issues that commonly arise in gas price review arbitrations were addressed. In this article, the focus is on the current themes in gas price reviews. In particular, it considers how developments in the market for gas and liquefied natural gas ("LNG") over recent years are having an impact on price review arbitrations.

By way of brief introduction, gas price review arbitrations arise in relation to long term supply contracts for pipeline gas and LNG, most commonly for supply into North West Europe. They occur where price provisions in the contract operate to fix the price for gas periodically by applying a formula so that the initial price, Po, is indexed to crude oil or other competing fuels. If certain trigger conditions are met or at regular intervals throughout the term of the contract, either of the parties may seek renegotiation of the price and, failing agreement, refer the matter to arbitration. As a result of the large volumes of gas involved and the long duration of the contracts (often 15 to 20 years), these price reviews can represent a significant opportunity and risk to the parties.

As discussed below, the development of trading hubs, the increase in volumes of LNG available and the continuing liberalisation of energy markets have had an impact on gas price reviews and the arbitrations that may follow.

MOVE TO HUB PRICING

A number of trading hubs for gas have developed. They vary in the volumes and the nature of the products traded at the hub. As certain hubs have become well-established with large volumes traded and reliable liquidity, some parties have been prepared to move away from valuing gas by a formula indexed to oil or other competing fuels to calculating contract price by reference to the price at the hub. Currently, the hubs most frequently used are Henry Hub in the United States, NBP in the United Kingdom and TTF in the Netherlands.

This has led to the question of whether there will be a need for price reviews in contracts where price is calculated by reference to a hub. Although the move to hub pricing may lead to there being fewer price reviews in the future, there are circumstances where parties may still wish to have the opportunity for a price review in such a contract. For example, the price under a long term contract will be calculated by applying a discount or premium to the hub price, and parties

The development of trading hubs, the increase in volumes of LNG available and the continuing liberalisation of energy markets have had an impact on gas price reviews and the arbitrations that may follow.

may wish to argue that the value of that discount/premium should be adjusted based on a number of factors. In addition, many hubs are still developing – how they operate and the nature of the products traded on them may change over time. This may lead parties to wish to adjust the discount/premium to that hub or even to argue that the reference hub should be changed.

It is important to note that, although there has been a move towards hub pricing, there remain a significant number of contracts that are indexed to oil or other fuels in whole or in part. The parties to those contracts will wish to retain the ability to conduct price reviews and to refer those reviews to arbitration where agreement cannot be reached. There are also parts of the world (such as the Far East) where there are currently no well-established hubs, and so a move to hub pricing in those parts is less likely in the near future.

SHORTER-TERM CONTRACTS

With the development of hubs and capacity to supply exceeding demand into North West Europe over recent years, commentators have predicted a reduction in the term of gas supply contracts and in the number of long term supply contracts. If the prediction proves to be correct, it is likely to lead to a reduction in the number of price reviews. However, it seems unlikely that long term contracts will disappear altogether because of the important role that they play in the financing of the upstream projects that produce the gas.

CHANGE IN NATURE OF THE MARKETS

The liberalisation of markets and the development of trading hubs have led to the roles being fulfilled by some of the participants changing. In the past, the producers of gas who imported it into Europe would sell to companies whose role was to supply consumer and industrial customers or to aggregate gas and then sell it on to those companies. Now the gas may pass through many more hands as it is traded before it is used to meet customer demand for the supply of physical gas.

Over time, the impact of this change will be seen both in the terms of price provisions in long term gas supply contracts and in the positions adopted by the parties in price review arbitrations.

IMPACT OF (DE)REGULATION

In Europe, changes in regulations relating to energy markets have played a very significant role in relation to gas price reviews. In particular, the liberalisation of markets and the impact of subsidies introduced to support the growth of renewable energy have in many cases formed the basis for price reviews to be triggered. In some cases, the regulation has come from the European Union ("EU") and in others from individual states. This may continue as the European Commission is currently considering the condition of the energy market within the EU and whether further measures are needed to develop a consolidated market across the whole EU.

In Japan, South Korea and China, moves towards market liberalisation and other regulatory changes have caused there to be an increased focus on the region and for many to question whether price review arbitrations may increasingly be seen there. Large volumes of LNG supply scheduled to come on stream from Australia in the coming years, attempts to establish a gas trading hub in the region and the so-called "Asian premium" on LNG imported into the region with a reliance on oil indexation may also contribute to this. However, this has to be balanced with the fact that certain of the long term supply contracts in the region do not contain price review mechanisms which expressly provide for reviews to be referred to arbitration. In addition, there has to date been a desire on the part of many parties in the region to avoid resolving disputes through formal dispute resolution mechanisms.

REPEAT REVIEWS

For some long term supply contracts in Europe, parties are finding themselves in the second or third price review cycle. This has a number of consequences.

The first is the question of whether awards rendered in previous arbitrations bind the parties in subsequent proceedings. From a legal perspective, this is a complex question the answer to which will depend on a number of factors. In some circumstances, parties will be bound by the determination of the first tribunal as to the construction of the supply contract. In any event, a party may find it difficult credibly to adopt a different position in a subsequent arbitration. It is likely that these issues will be a factor in the parties' approach to appointing arbitrators for subsequent arbitrations.

The second is that, under some contracts, parties have found themselves going straight from the conclusion of one price review arbitration into the next price review process or even finding that the next price review can be triggered before the last has been concluded. This may be the result of extended negotiation periods or the length of time that it has taken for an arbitration to be conducted through to an award.

All of this – together with the risk associated with leaving the most commercial of contract terms in the hands of third parties to adjust – has caused some to question whether arbitration is the best approach to resolving disputed price reviews. Many alternatives have been considered, but none has yet succeeded in replacing arbitration as the leading mechanism of dispute resolution chosen for price reviews.

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THE FUTURE OF RENEWABLE ENERGY TREATY CLAIMS AFTER *EISER*

By Wojciech Sadowski (Warsaw)

The award rendered on 4 May 2017 in *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. against the Kingdom of Spain,* (ICSID Case No. ARB/13/36) is likely to be of considerable interest to parties to pending and future investment treaty claims in the renewable energy sector. It is not only the first win of an investor against Spain related to the state's reform of the renewable energy sector, but the determinations of the Eiser tribunal may also have an impact on non-Spanish cases.

Most treaty claims arising from renewable energy projects and related to the state's power to regulate are based on the same scheme. The development of renewable energy projects typically involves substantial capital expenditure in the initial phase. It also requires some form of state support during the first years of operation in order to finance that expenditure. Accordingly, investors in the renewable energy sector will often rely heavily on the stability of legal regimes existing at the time when they make investment decisions and arrange the financing for these projects. Subsequent regulatory changes leading to a substantial reduction of the state support or a substantive increase of fiscal charges may undermine the economic equilibrium of these projects, thus leading to treaty claims.

Many European states offer financial support to renewable energy producers, including the feed-in-tariffs, which are akin to a guaranteed price for 'green electricity' produced, regardless of its quantity. However, when the volume of green energy output increased exponentially in response to incentives offered to green energy producers, and after the global financial crisis began to take its toll across Europe, some states such as Spain had to revisit their approach. That, however, as the *Eiser* award demonstrates, risks leading to compensable violations of investors' rights and expectations.

Three elements appear to be salient in the tribunal's reasoning.

First, the tribunal paid significant attention to the due diligence of the investor in the decision-making process. Reliance on analyses of local law, financial predictions and business plans, as well as the track record of successful investment projects and Eiser's profile as a low-risk investor, were certainly

taken into account by the tribunal in order to assess the reasonableness of the expectations of the investor.

Second, confirmations given by the state that the investor's project would be covered by the favourable state support scheme proved to be important, in the eyes of the tribunal, in light of the subsequent decision of the state not to afford the benefits to the investor.

Third, the *Eiser* tribunal was not persuaded by the new Spanish model based on the model calculation of costs of an ideal (hypothetical) renewables project, which did not take into account the actual costs incurred by real investors, but instead was based on abstract calculations carried out in one of the ministries. Rather, the tribunal considered that the changes introduced by Spain took away all the expected profitability of the investor's project, leaving it unable to repay the financing costs.

This decision may have implications for many renewable energy disputes based on investment treaties, since different projects co-existing in the same market may differ significantly in terms of their profitability, either because of the natural conditions of their projects, the technology applied or the cost of financing. Benchmark values based on the assumption of a cost and benefit structure of a model investment may be found, in different sizes, shapes and colours, and in other jurisdictions. From the respondent state perspective, it may also be tempting to select the most efficient project in the market as the yardstick and reproach the claimant for its alleged business inefficiencies. The *Eiser* decision is likely, therefore, to be considered very carefully by both claimants and defendants to investment treaty claims in the renewable energy sector to see what may be taken from the decision in support of their position.

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SMALL BUT IMPORTANT – RECENT PROPOSED CHANGES TO THE AUSTRALIAN INTERNATIONAL ARBITRATION ACT 1974

By John Kelly and William KQ Ho (Melbourne)

Australia continues to redouble its efforts to promote international arbitration and Australia as an arbitration-friendly hub in the Asia-Pacific region. Recent proposed amendments to the *International Arbitration Act 1974* (Cth) ("IAA"), as contained in the *Civil Law and Justice Amendment Legislation Bill 2017* ("Bill"), now assist in clarifying a number of minor but important matters, including:

1. procedural requirements for the enforcement and recognition of foreign awards;
2. the arbitral tribunal's powers to award costs in international arbitration; and
3. the application of confidentiality provisions to arbitration subject to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Transparency Rules").

ENFORCEMENT AND RECOGNITION OF FOREIGN AWARDS

Section 8(1) of the IAA presently provides that a foreign award is binding between *"the parties to the arbitration agreement"*. This wording is *inconsistent* with the New York Convention, which provides that a foreign award is binding between parties to the *"arbitration award"*. This inconsistency has obviously not been ideal given that the New York Convention is also given force by the IAA.

The wording of s.8(1) has unfortunately led to conflicting views as to whether an award creditor has an onus to prove, at the enforcement stage, that an award debtor, who is not named in the arbitration agreement, was in any event a party to the arbitration agreement. Generally speaking, the international standard practice is that an award creditor merely has to furnish a copy of the arbitration award and the related arbitration agreement when seeking to enforce the award. There is no onus on the award creditor to prove that the award debtor is also a party to the arbitration agreement.

However, some controversy arose when the Victorian Court of Appeal, in *Altain Khuder LLC v IMC Mining Inc & Anor* (2011) 282 ALR 717, found that s.8(1) required an award creditor seeking to enforce an award against a non-signatory to the arbitration agreement to do more than simply produce the award and arbitration agreement in an application to enforce a foreign award. That decision,

The proposed amendments speak volumes in terms of the continuing efforts to make Australia an attractive venue for arbitration and ensuring Australia maintains standards consistent with the global arbitration community.

which effectively reversed the onus onto the award creditor, attracted some criticism, especially when compared to the approaches taken in the United Kingdom, Singapore and Hong Kong. Subsequently, in *Dampskibsselskabet Norden AIS v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161, the Federal Court of Australia declined to follow the approach taken by the Victorian Court of Appeal in *Altain Khuder* and, instead, followed the international practice. The Explanatory Memorandum to the Bill commented that the Federal Court's decision *"represents the approach which should be adopted in all Australian jurisdictions."* The Explanatory Memorandum stated that *"requiring the award creditor to provide proof that the award does in fact bind the award debtor when initiating an enforcement application introduces an added and unnecessary procedural step, which creates an opportunity for the award debtor to improperly delay enforcement".*

In recognising the need to resolve the inconsistencies in case law, the Bill now proposes to amend s.8 so that the foreign award is binding between *"the parties to the award".* This clarifies that there is no need for an award creditor to have to jump through the legal hoops of having to establish that the award is binding on a non-signatory to an arbitration agreement. This is a welcomed and positive proposal in ensuring that Australia's standards are in line with international practice when it comes to the enforcing of foreign arbitral awards.

POWER TO AWARD COSTS

Section 27 of the IAA grants an arbitral tribunal the power to award costs at its discretion. However, some commentators have previously noted that the provision is outdated due to references to the notions of costs being *"taxed or settled as between party and party or as between solicitor and client".* Those are common law concepts which may be regarded as somewhat out of place and too restrictive in the arbitration context. The Explanatory Memorandum to the Bill noted that the *"references to taxing costs on a party and party or solicitor and client basis are outmoded and inflexible in contrast to current practice in international arbitration".*

The Bill now proposes to amend s.27 of the IAA by deleting the references to the various common law costs concepts and to, instead, empower an arbitral tribunal with wide flexibility to determine the question of costs. A new sub-section would provide:

"In settling the amount of costs to be paid in relation to an award, an arbitral tribunal is not required to use any scales or other rules used by a court when making orders in relation to costs."

TRANSPARENCY IN INVESTOR-STATE ARBITRATION

In 2015, the IAA was amended so that provisions relating to confidentiality (ss.23C to 23G) applied to arbitrations and the parties had to agree to opt out if they intended for the arbitration not to be confidential. However, the Bill now states that those provisions do not apply in arbitration proceedings to which the UNCITRAL Transparency Rules apply. The UNCITRAL Transparency Rules were drafted and adopted with the aim of making investor-state arbitrations initiated under an investment treaty more open to the public and allow for third-party submissions.

The Explanatory Memorandum to the Bill states that:

> *"Australia is not presently a party to the Transparency Convention. However, should the parties to an investment arbitration, which is to be conducted subject to the Transparency Convention, agree that the seat of the arbitration should be in Australia, this amendment would prevent any conflict between the IAA and the Transparency Convention. This broadens the scope of arbitration work which can be conducted in Australia under the IAA."*

In summary, whilst the recently proposed amendments may from first glance seem minor, they speak volumes in terms of the continuing efforts to make Australia an attractive venue for arbitration and ensuring Australia maintains standards consistent with the global arbitration community.

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"DEAR DISPUTE, PLEASE HAVE A SEAT" —SELECTING QATAR OR DUBAI AS YOUR SEAT OF ARBITRATION

By Matthew Walker and Leanie van de Merwe (Doha)

Selecting the most appropriate seat for arbitration in the Middle East has seldom been an easy task. The region has not been perceived as being particularly arbitration-friendly, not least because of uncertainty around the enforcement of arbitral awards within the member states of the Gulf Cooperation Council ("GCC"). However, this landscape has seen a substantial amount of change and positive developments over the last year or two, with Saudi Arabia and now Qatar adopting new arbitration legislation and with the ICC opening a regional centre in Abu Dhabi in an attempt to encourage parties to choose to resolve their disputes in the Middle East. Given the multiplicity of options available to parties in the region, this article focuses on some of the key considerations when deciding whether to select Dubai or Qatar as a seat of arbitration.

ARBITRATION IN QATAR

Arbitration law in Qatar had until recently been set out in two laws: Law No. 13 of 1990, The Civil and Commercial Procedure Law ("CCPC"), particularly Articles 190–210; and Emiri Decree 29/2003, which ratified the provisions of the New York Convention. On 16 February 2017, the Emir of Qatar issued Law No. 2 of 2017 ("New Arbitration Law"), which specifically repealed Articles 190–210 of the CCPC and has modernised the arbitration process in Qatar. The New Arbitration Law came into force on 12 April 2017 and applies to all new and existing arbitrations in Qatar. It is largely modelled on the 2012 UNCITRAL Model Law with a few minor exceptions. Below, we summarise some of the key provisions of the New Arbitration Law.

The New Arbitration Law officially recognises the status of the Civil and Commercial Court of the Qatar Financial Centre ("QFC Court") in the definition of the "Competent Court". This means

that the parties can now choose the QFC Court as having supervisory jurisdiction over their arbitration – an English-language, common-law based court located in the QFC, which is an "on-shore" financial free zone in Qatar. Unlike previously, the QFC Court now enjoys jurisdiction to rule on all matters relating to an arbitral dispute over which the parties have granted it such jurisdiction, including enforcement of the award. The New Arbitration Law also provides for a broad scope of application which essentially covers all domestic and international commercial arbitrations between private and public law persons.

Article 11(11) of the New Arbitration Law is another notable provision which confirms that arbitrators will enjoy immunity from suit in respect of the performance of their duties as arbitrators, unless they have exercised their duties in bad faith, in a grossly negligent manner or by colluding with another party. This contrasts with a recent development in Dubai (as described below) and may result in further debate amongst regional practitioners as to the desirability for further clarification of the law in the United Arab Emirates ("UAE").

Pursuant to Articles 16 and 17 of the New Arbitration Law, the Arbitral Tribunal can now also rule on its own jurisdiction and it is empowered to hear and decide applications related to requests for interim relief. This was not the case under the previous arbitration legislation. Although the New Arbitration Law has not completely removed the concept of court supervision from the arbitral process, it has removed the ability of the local courts to reassess the merits of the dispute, which was permitted under the old arbitration provisions contained in the

Dubai has two prominent arbitration centres that have their own rules and procedures: the Dubai International Arbitration Centre (DIAC) and the arbitration centre of the Dubai International Finance Centre (DIFC), which operates in conjunction with the London Court of International Arbitration (LCIA).

CCPC. Article 33 of the New Arbitration Law has also limited the scope for challenges to arbitration awards and for refusing enforcement of an arbitration award, in line with the provisions of the UNCITRAL Model Law and the New York Convention. The general feeling amongst legal practitioners is that the New Arbitration Law is a positive development which is likely to promote Qatar's efforts to become an arbitration-friendly jurisdiction.

ARBITRATION IN DUBAI

Dubai, as one of the seven Emirates of the UAE, has its own domestic arbitration legislation that is contained in Articles 203–218 of Federal Law No. 11 of 1992, as amended (the Civil Procedure Code). These provisions are not based on the UNCITRAL Model Law. As part of its commitment to become a prominent global economic player, the UAE ratified the New York Convention in 2006. Dubai also has two prominent arbitration centres that have their own rules and procedures: the Dubai International Arbitration Centre ("DIAC") and the arbitration centre of the Dubai International Finance Centre ("DIFC"), which operates in conjunction with the London Court of International Arbitration ("LCIA"). The DIFC is an offshore financial free zone that operates from within Dubai and administers arbitrations under the DIFC-LCIA Arbitration Rules 2008. Both these centres have dealt with a significant number of cases since their establishment and are made up of highly regarded members of the global legal community. In 2008, Dubai also published a draft arbitration law that is based on the UNCITRAL Model Law, although it is not yet clear when this law will come into force.

One recent development that has attracted comment from practitioners has been that in 2016, a Judicial Tribunal was created by Decree No.19/2016 for the purpose of reviewing and resolving jurisdictional conflicts between the domestic Dubai Courts and the DIFC Courts. The Judicial Tribunal's role has been to help judges and practitioners understand the dividing line between the domestic local courts and the DIFC Courts, particularly as to the competence of each to hear applications for enforcement in respect of arbitrations seated "on-shore" in Dubai. In Cassation Case No. 1 of 2017 (JT), the Judicial Tribunal clarified this distinction by ruling that the DIFC Courts should not hear a matter relating to the enforcement of a foreign arbitral award where Dubai was the seat of the arbitration. The losing party in the original arbitration matter had filed a case with the Centre for Amicable Settlement of Disputes, an entity that is affiliated to the domestic Dubai Courts. In its ruling, the Judicial Tribunal held that the centre is an "integral part" of the Dubai Courts and that the domestic Dubai Courts are therefore the only competent courts to decide upon matters filed before that centre.

This decision was consistent with the Judicial Tribunal's ruling in the *Daman Real Estate Capital Partners Limited v*

Oger Dubai LLC case [Cassation Case No. 1 of 2016 (JT)], in which the Judicial Tribunal prevented the DIFC Courts from hearing a case relating to the recognition and enforcement of a multi-million AED arbitral award issued by DIAC by ordering that the matter be referred back to the domestic Dubai Courts. The recent Judicial Tribunal decisions, when they are read together, provide that where the seat is onshore Dubai, the Judicial Tribunal will invariably confer jurisdiction to the onshore courts – especially where proceedings to set aside or vary the arbitral judgment have already commenced in the onshore courts. Otherwise, the DIFC Courts will have jurisdiction to (and often do) proceed. This is, of course, entirely consistent with the deference that courts of parallel jurisdictions often extend to each other. In response to these decisions, the DIFC has enacted new directives which provide that the DIFC Courts can order the entire amount of an arbitral award to be paid into the DIFC Courts should the judgment debtor commence onshore proceedings to set aside an award, thereby ensuring that the DIFC Courts and the Dubai Courts support each other in the task of ensuring that awards are enforced in circumstances where they should be properly enforceable.

REMARKS

As recent political events in the Middle East have shown, practical and economic drivers are often paramount in parties' minds when they consider a choice of arbitral seat. It is far too early to tell whether the current political climate will have a significant long-term effect on the growth of the various regional arbitration centres, although it is already having an impact on a practical level – the authors are aware of several arbitrations already needing to move venue. If anything, recent events have reinforced the resilience and pragmatism of arbitrators and practitioners within the GCC, and there is every reason to be optimistic as to the continued growth of arbitration as a preferred form of dispute resolution in Qatar, the UAE and throughout the region.

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