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From the Editors

Welcome to the 21st 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.

We are delighted to be able to include in this edition a guest contribution from David Burt, Corporate Counsel for [E.I. du Pont de Nemours and Company](#) (DuPont). In his [article](#), David describes the way in which DuPont's "Global ADR Guide", for use by DuPont's 200 in-house lawyers across the world, came to be developed.

We are also pleased to include an article by Mick Smith, Partner & Co-Founder of [Calunius Capital LLP](#), one of the leading providers of third party funding. Third party funding is becoming ever more prevalent in both litigation and arbitration. In his [article](#), Mick describes the processes of case assessment and case monitoring from the funder's perspective. This is the first of what will be a short series of articles on the important topic of third party funding in international arbitration.

We also include in this edition our usual update on developments from around the globe in international arbitration and investment treaty arbitration, along with specific articles covering some of those developments and other topics of interest in more detail, authored by members of K&L Gates' International Arbitration Group.

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

DuPont Navigates ADR Worldwide

David H. Burt, E.I. du Pont de Nemours and Company*

In this short article I will try to capture how DuPont Legal puts into action its attitudes toward transnational Alternative Dispute Resolution.

Most of DuPont's sales are outside the U.S., with almost half of those in emerging markets. For a company with a surging global profile, Alternative Dispute Resolution is more than a good idea. It is an imperative best practice to mitigate business risk. In-house counsel would do well to ask themselves: How is my company positioning itself for future transnational conflicts? Planning well ahead is the most important key. If your contract calls for an efficient and well-reasoned process, it can enhance fairness and speed resolution. Otherwise you may find yourself in an undesirable default venue.

The DuPont Legal Model's touchstone is: Do our services *efficiently* increase productivity, create easier access to new opportunities, protect what is ours, and improve our clients' outcomes? Are they a testament to our company's quality and values? In resolving a transnational business problem, we believe that mediation and arbitration do all these things cross-culturally, often better than courts.

Contracts agreeing on ADR avoid the gamesmanship that so easily breaks out in local courts. They add value to a deal from the very start, because they relieve uncertainty, and chart an understood and orderly path when trouble does arise. They conserve money and business resources, and in the end help to get trading partner relationships back on track.

So, at DuPont we see our ADR activity as an investment in the future.

The Challenge

One day in 2011 my colleague and boss Tom Sager called me in to hear an idea. "It all came clear to me suddenly," Tom said. "Flexibility, speed, economy, confidentiality and most of all custom tailoring to a business situation! Can you put together something short showing how to include an ADR clause in contracts all over the globe?"

Tom thought that DuPont's global reach and multiplicity of cross-border contracts probably had outstripped any updated inside guidance available to our 200 lawyers on how to contract for Alternative Dispute Resolution. Not only was there a chance to upgrade best practices, but there was an opportunity for team-building. Here's what we did, and how we did it.

First, though, an admission. Despite great efforts at brevity, "something short" became a 58,000 word book about a year later, a copy of which now is in the hands of every DuPont in-house lawyer. Compared with other books on the subject, the resulting internal *DuPont Global ADR Guide* is, indeed, short. (It's a big subject.)

The Goal

In a globally distributed legal department there will be people who are top experts, and people who are neophytes, in almost any legal subject matter. The

state of ADR practice varies from continent to continent; for example, the acceptance of mediation as a best practice in North America contrasts with a more cautious approach in legal culture elsewhere. Arbitration as practiced in the U.S., often encumbered with quite a lot of discovery and motions practice, still contrasts with a more streamlined approach more often found in the civil law countries of the world.

Legal management's objective was not simply to provide model ADR language for use in contracts, but to school our in-house practitioners—principally extremely busy commercial attorneys—in the fundamentals of arbitration practice so that they could exercise informed judgment in light of real business situations. Our department is distributed across the globe; we wanted to be sure that the actual lawyers on the ground serving businesses day to day were knowledgeable enough to customize ADR without the need to refer to the home office or outside counsel, most of the time.

The Global ADR Team

How to craft a truly useful reference that would present the right level of sophistication across the entire audience? With a dispute resolution professional as leader, we first gathered an inside team of commercial lawyers from every continent to have several free-ranging teleconferences, developing a group consensus on design. Each member then collected examples of clauses in use in every region. Unsurprisingly, there were many standard clauses repeated almost directly from arbitral institutions' model clauses, and also some quite creative customized clauses. Although competent for each relevant case, the variation among these clauses validated the need for overall practice guidance.

The DuPont Global ADR Team agreed that our functional goal should be a distributed service model in which each regional office would develop preferences and practices that they could execute routinely using the Team member from that region as a principal resource, with strong backup from the group and from outside counsel when necessary. We decided, therefore, to create an updatable book that first would describe ADR practice generally, building up the description from an elementary level to a business level of competency in as short a

presentation as possible; the remainder of what became the DuPont Global ADR Guide would then describe regional preferences and suggested clause language for use in commonly expected business scenarios. The language would be kept as simple as possible to accommodate two factors: 1) a respect for colleagues to whom English is a second language, and 2) the desire for the text to be readily re-used to explain transnational ADR practice to business clients not trained as lawyers.

We agreed on a basic structure along these lines:

1. The deal-driven choice between arbitration and litigation
2. Arbitration basics: essential elements of an enforceable clause
3. How to prescribe elevated negotiation and mediation
4. Regional preferences and solutions
5. Special considerations in contracts involving Intellectual Property
6. The sparing use of optional elements in arbitration clauses
7. “Developing world” considerations
8. Resolving existing disputes
9. How to get more help

Creating the Global ADR Guide

Most of the content could be supplied from team members, but we decided also to recruit help from outside firms. Certainly they would spot any deficiencies and provide some writing muscle. Also, we wanted to use the opportunity to feature the outside firms more expert in these matters and to help develop relationships between them and our regional counsel. Our internal team was already quite energized and beginning a lively correspondence, getting to know each other better while sharing ideas. We wanted to loop in some trusted outside counsel, including Ian Meredith, Head of K&L Gates' International Arbitration Group.

One might think it an unattractive proposal to private practice lawyers that DuPont wanted to get their help, for free, in writing a book on an abstruse

subject strictly for internal use. How wrong that would be. The response was enthusiastic. Very soon the drafting committee included four eminent outside counsel from firms large and small. As I doled out section drafting assignments (who would write the pages on “institutional versus *ad hoc*”, “seat of arbitration”, or “multiple parties or contracts”, etc.?) I found the drafts whizzing back usually within a week of assignment, and an attitude of genuine eagerness to comment upon the other drafters’ input as well.

In this fashion we filled out the chapter subheadings and the content. My role became that of editor and supplemental author. We discovered that although several institutions and law firms had published ADR clause drafting guides, there did not seem to exist anything aimed squarely at the concerns of the busy in-house practitioner. For the managing editor (me) the need to educate and serve this audience on a practical level led to much re-ordering of chapters and subheadings. Any in-house lawyer who takes on this job should also keep in mind that your contributors will write in a variety of styles, such as American, British and Asian English. It will fall to you to rewrite all submissions to create a consistent voice throughout.

The most challenging aspect of this project was two-pronged: Which arbitral institutions would DuPont choose to recommend, and what language would be the nucleus of the recommended clause for each region?

The first question was resolved through a lot of communication, and perhaps predictably the main deciding factors boiled down to institutions with which our most experienced people previously had good experiences, and geography.

We came to realize that *all* the model clauses suggested by each selected institution (we offered more than one in each region) are deficient from DuPont’s point of view. Most do not address the language of arbitration, evidentiary rules, interim relief, entry of an award as a judgment in courts having jurisdiction, confidentiality, or severability and survival. As a matter of policy, most (but not all) of the time, DuPont leans toward providing all of those measures, subject to the provisions in the arbitral institution’s rules and the local procedural

laws on these issues. Your company may have differing priorities, but certainly we spent a lot of time on detailed redrafting of standard clauses even before considering how customization to a given contract situation might be done.

And – “Wow!”

Responses to the release of the DuPont Global ADR Guide have been gratifying for our team. The first two emails received (from separate senders) happened to have the same word in their subject lines: “Wow!”. Several commercial lawyers under deal pressure have called and written with gratitude for the timely guidance, and others have sought additional information and resources. The Asia Pacific legal team requested that we highlight the ten most important things to study first, and then held a lively conference call on that agenda. There also is a subtle message I believe our busy people have received from management: a willingness to devote our internal talents and resources for the collective good and the long-term benefit of our businesses.

One outside contributor was the New York-based International Institute for Conflict Prevention and Resolution (“CPR”), a long-time collaborator with DuPont Legal. CPR has persuaded DuPont to convert the Guide into generic form, and permit CPR committees to transform it into an offering benefiting CPR members. Actually, this suits DuPont Legal perfectly. Why? We have a tradition of sharing attitudes, methods and tools for the benefit of the business community. And it is not too lofty to say that as an institution, we believe that ADR has the potential to make the world a better place.

A Final Observation Concerning Mediation

Although it is styled as “alternative”, even arbitration is adversary in nature and therefore fundamentally un-businesslike. Business is about making agreements for common benefit, and not about fighting at large expense over periods of years. Mediation, in contrast, is conducted much more like business, and is good for the bottom line.

Direct business benefits of a mediated resolution include help with settling matters faster, minimizing the expense of litigation, and redirecting dollars away from legal expense into resolution. In 2001

DuPont institutionalized formal evaluation of all litigation for mediation referral. Specially retained outside mediation counsel are available to work with the Strategic Business Unit managers across DuPont’s thirteen businesses, to identify cases for mediation.

The majority of these cases are personal injury or employment matters. Two statistically validated DuPont Legal Six Sigma studies have developed 1) a process to identify mediation opportunities for tort and employment matters, and 2) a process for mediating commercial disputes before they escalate to litigation. A statistical study revealed that average potential litigation cost savings from use of early mediation were \$76,000 per personal injury matter and \$61,000 per employment litigation matter.

Savings in commercial matters referred to early mediation averaged \$350,000. DuPont has proven successful in mediating large and complex business disputes over the last decade with suppliers, customers, joint venture partners, contractors and others. Disputes with significant sums at stake can and do settle via mediation, often while preserving or even improving business relationships placed at risk by contentious disagreement. Even when mediation does not produce settlement, it simplifies conflicts, saving cost.

DuPont therefore would encourage other companies, and especially multinationals, actively to spread the trend toward use of mediation across countries and regions. We would be happy to hear from interested colleagues in other legal departments.

*David H. Burt is Corporate Counsel for E.I. du Pont de Nemours and Company, located in Wilmington, Delaware (USA). The views set forth in this article are those of Mr. Burt and not of K&L Gates LLP and/or its clients.

News from around the World

Sean Kelsey (London)

Africa

Zambia

On 15 October 2012, the High Court in Zambia granted a stay of the first ICC arbitration to be

seated in the country, on grounds that two of the arbitrators are biased. A claim for damages of US\$35 million was launched in January 2011 by two subsidiaries of Anglo-American and South African mining company (“Amari”) against state-owned mining entity, Zimbabwe Mining Development Corporation (“ZMDC”) for cancellation of platinum and nickel concessions. ZMDC alleges that the tribunal’s chair, Stuart Isaacs QC (an English barrister appointed tribunal chair by the ICC, after the parties failed to reach agreement), and Meyer Joffe, a former South African judge, exhibited bias at a jurisdictional hearing in Cape Town in August 2012. ZMDC’s challenge to Isaacs is based, in addition, on his UK nationality—the UK having actively campaigned to have sanctions imposed on Zimbabwe by the EU. The ICC Court in Paris rejected ZMDC’s challenge in September. Amari has challenged the stay.

São Tomé and Príncipe

On 20 November 2012, the Portuguese-speaking island off the coast of West Africa acceded to the New York Convention, and will become the Convention’s 148th member when it takes effect on 18 February 2013.

Asia

Tajikistan

On 12 November 2012, the New York Convention came into force in Tajikistan, making the central Asian republic the 147th contracting state, having acceded to the Convention in September 2012.

Australasia

Australia

In a ruling dated 29 June 2012 which has generated significant interest, the Federal Court of Australia (the “Federal Court”) has held that a charterparty with an arbitration clause is inconsistent with Australian law to the extent it precludes or limits the jurisdiction of the Australian courts. Shipowner “DKN” and charterer “BBCG” entered into an English law charterparty to carry a cargo of coal from Australia to China. The charterparty has a London-seated LMAA arbitration clause. When DKN initiated arbitration of a demurrage dispute, BBCG unsuccessfully challenged jurisdiction on the basis of an Australian statute, the Carriage of Goods by Sea Act 1991 (“COGSA”). As provided in s.2(c) of Australia’s International Arbitration Act 1974

(Cth), s.11 of COGSA preserves the exclusive jurisdiction of Australian courts over disputes in respect of a “sea carriage document” (a term which COGSA does not define). BBCG challenged enforcement in Australia of awards to a value in excess of US\$800,000, plus interest and costs. The Federal Court accepted that “sea carriage document” has a literal meaning, within the Hague-Visby Rules (a set of rules for the international carriage of goods incorporated into COGSA), and rejected the purposive construction of the term adopted in a judgment of the Supreme Court of South Australia. The Federal Court therefore refused to enforce the awards. The Federal Court’s judgment appears to be at odds with the principle of recognition and enforcement of international arbitration awards under the New York Convention. There is considerable interest in whether DKN will appeal, and, if not, whether the Commonwealth Parliament will consider amendment of COGSA. In the meantime, parties contemplating entering charterparties for consignment of goods from Australia, or enforcing such in Australia, will need to consider carefully.

Europe

England

The Commercial Court in London has found that proceedings before it (the “Commercial Court Proceedings”) amounted to a collateral attack on an award rendered in an arbitration (the “Arbitration”), and an abuse of process, even though the defendant in the Commercial Court Proceedings, Thomas Sinclair, had not been a party to the Arbitration.

Kazakhstan-based law firm Michael Wilson & Partners (“MWP”) commenced the Arbitration against a former partner, John Emmott, alleging that he had conspired with others to set up a rival firm. In the arbitration, MWP also contested beneficial ownership in certain shares (the “Shares”) in a petroleum business owned by Mr. Sinclair. MWP argued that Mr. Emmott had breached his contract and fiduciary duty, and held the Shares on trust for MWP.

In 2010, an *ad hoc* arbitral tribunal comprising former House of Lords judge Lord Millett, Christopher Berry and Valerie Davies, accepted Mr Emmott’s argument that the Shares were being held

on trust for Mr. Sinclair, and rejected MWP's claim to beneficial ownership.

MWP subsequently commenced the Commercial Court Proceedings against Mr. Sinclair. Mr. Sinclair contested the Proceedings as a collateral attack on the award in the Arbitration, and an abuse of process. MWP argued it could not be an abuse of process since the Commercial Court Proceedings were brought against a different defendant, who had not been a party to the Arbitration. In his judgment dated 21 September 2012 Mr. Justice Teare said that it was a "remarkable feature" of the Commercial Court Proceedings that "the central allegations" had "already been determined in an arbitration". Teare J ruled that the doctrine of abuse of process could apply in "special circumstances", and he identified Mr. Sinclair's heavy involvement in the Arbitration: he funded Mr. Emmott's defence costs, was called as a witness, was cross-examined by MWP, and was privy to confidential parts of the award due to the decision's direct impact on him. Teare J held that "Whereas many arbitrations have effect only between the parties to them, this arbitration was different", and found that it would be "manifestly unfair" to Mr. Emmott, whom Mr. Sinclair had joined to the Commercial Court Proceedings at the last minute, to make him defend himself against the same allegations again. Teare J was however at pains to underline that "Where a claimant has a claim against two or more persons and is obliged to bring one such claim in arbitration, the defeat of that claim in arbitration will not usually prevent the claimant then pursuing his claim against the other persons in litigation."

European Union

The "Brussels Regulation" sets down rules governing recognition and enforcement, within the EU, of civil and commercial judgments of the courts of EU Member States. Arbitration is expressly excluded from the Brussels Regulation, but the position has been in doubt since the European Court of Justice held in 2009 in the well-known *West Tankers* case that the Brussels Regulation prevented an English court from granting an anti-suit injunction—in support of an arbitration agreement—to oust the jurisdiction of an Italian court before which proceedings had been commenced. In a later case, *National Navigation v. Endesa*, the English Court of Appeal held that, in the wake of *West*

Tankers, it had to respect a Spanish court's refusal to uphold an arbitration agreement. Proposals for clarifying the relationship between arbitration and the Brussels Regulation have been under consideration for a number of years. On 20 November 2012, the European Parliament voted to amend the Brussels Regulation. MEPs rejected calls to partially lift the arbitration exception with respect to the decisions of courts at the intended seat of any disputed arbitration. Instead, they accepted a new recital to the Brussels Regulation, which, amongst other things, clarifies that it does not apply to any action or ancillary proceedings relating to, in particular, the establishment of the tribunal, the arbitrators' powers, the conduct of the arbitration, nor any action or judgment concerning the review, appeal, recognition or enforcement of the award. The recital expressly subjects the Brussels Regulation to the New York Convention, as does a new provision, article 84(1)(a).

On 6 December 2012, the Economic and Monetary Affairs Council adopted at first reading the recast of the Brussels Regulation, which is expected to be published in the Official Journal of the European Union in the coming weeks, and will enter into force 20 days thereafter. It will start applying two years after its entry into force. We will report further in due course on these developments, and on their potential significance for arbitration in the EU.

France

It is not unusual for parties to a dispute resolution agreement to provide that one of them has a unilateral right to submit disputes to some other resolution procedure than that which is binding, to the exclusion of all others, on the other party. For example, and as we described in our last edition, in the context of a relevant recent Russian judgment, an arbitration agreement may provide that one party may at its discretion take action before the courts. Such 'asymmetric' dispute resolution agreements are commonplace in a variety of finance contracts. In a decision with potentially significant consequences for such arrangements, the First Civil Chamber of the French Supreme Court has held that a provision in a dispute resolution clause requiring a bank's customer to sue it in Luxembourg and nowhere else whilst reserving to it (the bank) the right to sue its customer elsewhere is invalid. In its 26 September 2012 judgment in the case of *Ms. X v.*

Banque Privée Edmond de Rothschild the Court interpreted Article 23 of the Brussels Regulation (which entitles parties to specify jurisdiction) in light of the French law concept of *potestativité*. In French law, a ‘potestative’ condition precedent is one “which makes the fulfilment of the agreement dependent upon an event which one of the contracting parties has the power to make happen or to prevent from happening”. Under French law, in certain circumstances, obligations entered into subject to such conditions precedent are void. The decision has prompted comment, not least because it would appear that neither of the courts below had considered application of the ‘potestative’ principle, and further application or clarification of the decision is likely to be awaited with interest. In the meantime, and although the arbitration-friendly French courts have previously upheld ‘one-way’ arbitration agreements, and depending on the circumstances, it cannot be ruled out that a party to such an agreement with a French nexus may seek to run an argument similar to those of Ms. X.

Middle East

Israel

A nine-year saga has ended with the Israeli Supreme Court refusing to lift a stay on Israeli court proceedings, having previously found an agreement to arbitrate amongst Israeli and Singapore parties. “Elbex”, an Israeli company, introduced Singapore’s Tyco Building Services (“Tyco”) to “Megason”, another Israeli company, so that Tyco and Megason could bid for a Singapore contract to install and maintain prison video surveillance equipment, which Elbex would supply. The Tyco-Megason bid was successful, but those companies did not source the equipment from Elbex, which sued both for the equivalent of US\$2.6 million. Tyco and Megason disputed jurisdiction. The Singapore tender agreement into which they had entered pursuant to their winning bid contains a SIAC arbitration agreement, as does the model sub-contract. Tyco and Megason contended that Elbex should be bound by the arbitration agreement. Elbex argued, all the way to the Supreme Court, and ultimately unsuccessfully, that it was a non-party to the relevant agreements. Having failed in its attempts to litigate the dispute in Israel, Elbex requested arbitration in Singapore, albeit some time after the relevant six-year limitation period. On the basis that Tyco and Megason intended defending the

arbitration on grounds of limitations, Elbex sought to persuade the Israeli Court that they were in breach of the requirement under s.5 of Israel’s Arbitration Law of 1968 (as amended), requiring that any party applying for a stay “has been and is still prepared to do everything required for the institution and continuation of the arbitration”. Elbex received short shrift from the Tel Aviv district court, and was criticised for only raising after a stay of the Israeli litigation had been confirmed a point which ought to have been evident long before. The Supreme Court had little difficulty in finding that Elbex had submitted to the jurisdiction of the tribunal in Singapore, refused to allow that the Israeli courts might act in the circumstances as a safety net for a dissatisfied party to arbitration, and again rejected Elbex’s arguments. Whatever other salutary lessons the case may afford, its ultimate outcome is a reminder of the dangers of making recourse to litigation of a dispute in reliance on non-signature of an arbitration agreement.

United Arab Emirates

On 18 October 2012, in the case of *Airmec Dubai, LLC v. Maxtel International LLC*, the highest court in the Emirate of Dubai, the Court of Cassation, upheld enforcement of three DIFC-LCIA awards rendered by a sole arbitrator in London. In particular, it rejected application to the award of a domestic ratification process under the local civil procedure code. It is hoped that the judgment will consolidate the recent positive approach of the Dubai courts to the enforcement of foreign awards pursuant to the New York Convention, of which the UAE has been a member since 2006. For a more extensive consideration of the approach to enforcement in the UAE, please see the [article](#) in this edition.

Institutions

DIS

The German Arbitration Institute—DIS—was established in 1992 as an amalgamation of the Berlin-based German Arbitration Committee and a Cologne-based body that promoted arbitration-related research and education. On 24 October 2012, DIS opened an office in Berlin to operate alongside its main office in Cologne.

HKIAC

The consultation period on the near-final draft revision of the HKIAC Administered Arbitration Rules ended on 26 November 2012. As we have reported previously, the draft Rules make provision for joinder of parties, consolidation of arbitrations, interim measures and emergency arbitrators. The final version of the new Rules can therefore be expected to be published in the near future.

World Investment Treaty Arbitration Update

Dr. Wojciech Sadowski (Warsaw)

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 covers the largest investment treaty award issued to date in a dispute against *Ecuador*, takes a look at a recent case in which Western European states have found themselves sued by investors from regions traditionally considered to be capital-importing, and features the recently executed Canada-China investment agreement.

Occidental gets compensation for its operations in Ecuador

On 5 October 2012 the damages award in the ICSID case between the U.S. Occidental Petroleum Corporation and Ecuador was rendered by the Tribunal. See *Occidental Petroleum Corporation et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 October 2012. The dispute arose from termination by Ecuador of Occidental's oil exploration contract in May 2006. The investment project had already been the subject of an LCIA arbitration culminating in 2004 with an award of US\$ 75 million damages in favor of Occidental Exploration. Following that award, however, the investor found itself allegedly subject to additional and new measures taken by Ecuador, which put an end to its investment in 2006. This led Occidental to the new proceedings, which culminated in the October 2012 award of approximately US\$ 1.76 billion plus interest. The award is the largest damages award issued to date in an ICSID arbitration. The amount was determined

by the Tribunal on the basis of the market value of the investment as of the date of its expropriation, calculated in accordance with a DCF model.

However, the Tribunal reduced the damage amount by a percentage intended to reflect the amount that Occidental allegedly contributed to the termination of the contract.

The decision has been sharply criticised in Ecuador, as the awarded amount corresponds to some 6.75% of the annual budget of the state, and some 40% of the annual state budgetary deficit. Further litigation is to be expected, also because of the dissent by one of the arbitrators, and because some elements in the Tribunal's analysis depart from the holding of an earlier award in another ICSID dispute (*Burlington v. Ecuador*) concerned with the same Ecuadorian measures.

Western European states on the respondent's side

While it has been accepted that in today's world the traditional division between capital-exporting and capital-importing states may no longer be taken for granted, it is still somehow exceptional for a Western European state to find itself sued by a non-European investor. However, the new ICSID case of Chinese investor Ping An against Belgium, registered on 19 September 2012, may change that assumption. The investor claims USD 2.3 billion losses resulting from the nationalization and bail-out measures taken by the Belgian Government with respect to Fortis Bank, in the aftermath of the 2008 financial crisis, which left the Fortis financial group at the verge of collapse. This is not only the first investment treaty case against Belgium, but also the first case filed on the basis of measures purportedly taken by a Western European Government to deal with the financial crisis.

Western European states are likely to see more of these cases coming in the following months. Spain, for example, is already facing an Energy Charter Treaty arbitration instituted by a number of entities, including Impax Asset Management Group Plc and Hudson Clean Energy Partners, demanding compensation for retroactive cuts to the Spanish solar power subsidies scheme. Very recently, another private fund owned by Deutsche Bank has publicly announced its intention to bring a new case

against Spain if the country enacts further legislative curtailments to thermal-solar subsidies.

China-Canada FIPA

Canada has recently disclosed the terms of the agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, concluded at Vladivostok on 9 September 2012 ("China-Canada FIPA"). The Treaty has been submitted for fast-track ratification by the Canadian Parliament. Interestingly, the draft treaty has met with strong criticism, particularly in Canada, where there is concern that Chinese investors will take control of Canadian natural resources companies.

From the international law perspective, the China-Canada FIPA offers a rather limited amount of protection to investors. The concepts of "fair and equitable treatment" and "full protection and security", in accordance with most recent Canadian treaty practice, do not extend beyond that which is required by generally accepted international law minimum standards of treatment. Additionally, the national treatment standard and the most-favoured nation ("MFN") standard do not extend to admission and establishment of investments. Both national treatment and MFN standards are also subject to a number of exceptions, comprising, for example, non-conforming measures existing at the time of the entry of the treaty into force, bilateral investment treaties in force before 1 January 1994, as well as grants and subsidies, including government-supported loans, guarantees and insurance.

The dispute settlement mechanism has also been limited with respect to investments in the financial sector. On the one hand, the arbitrability of claims of investors in the financial institutions has been limited only to issues of expropriation and transfers, excluding in particular fair and equitable treatment and MFN standards. On the other hand, a special procedure has been laid out in Article 20(2) of the FIPA, which precludes an investor-state tribunal from deciding on its own whether the responding state has validly raised a defense related to its rights to regulate the financial markets in accordance with Article 33(3) of the FIPA. The procedure requires the investor-state tribunal to suspend the proceedings in order to allow both contracting states

to consult on the validity of the defense and then to produce a joint report or, in a case of a disagreement, to launch a state-to-state arbitration.

Once ratified, the treaty shall enter into force on the first day of the following month after the second notification is received, and shall remain in force for a period of at least fifteen years. Either contracting party may terminate the treaty at any time after the lapse of the original period. However, the termination will be effective one year after notice of termination has been received by the other contracting party, and, with respect to investments made prior to the date of termination of the treaty, the protection of an investor shall continue to be effective for an additional fifteen-year period from the date of termination.

Third Party Funding: Case Assessment and Monitoring

Mick Smith, Calunius Capital LLP**

This article gives a brief primer on the key issues associated with case assessment and case monitoring, respectively prior to and subsequent to, entering a litigation funding agreement ("LFA").

Case Assessment

Case assessment for a Funder is an exercise in analysing the quantitative and qualitative elements of a claim. The key factors that determine a Funder's assessment of an arbitration claim are:

1. **Jurisdiction** – what is the strength of the legal arguments raised by the respondent, if jurisdiction of the arbitral tribunal is contested? Why might the tribunal decline jurisdiction?
2. **Merits** – how strong is the factual matrix supporting the theory of liability? Will the case involve considering open points of law?
3. **Quantum** – how much of the loss flows from the Defendant's conduct? Did the Claimant have an operational track record to support a lost profits claim? Alternatively, were there proven valuable assets held by the Claimant that have been confiscated or impaired by the respondent's conduct?

4. **Recovery** – what is the credit standing of the respondent? Do they have a presence in the OECD world which can be attached? Are they a sovereign state adopting a “won’t pay” policy? What is the size of the claim relative to the size of the respondent?
5. **Duration** – how long will it take to get an award? What is the likelihood of a bifurcation of proceedings to hear jurisdiction separately from merits? Might the damages assessment be heard separately? Is there much scope for an appeal, annulment or revision hearing?
6. **Cost** – what is the likely cost of bringing the arbitration claim, including any ancillary expenses or adverse legal costs?

Quantitative Assessment

This part of assessment is the process of looking at these 6 key variables and turning them into numbers. Cost, Duration and Quantum are the most straightforward, yet all may well be subject to significant deviation from expectation as the arbitration progresses. A conservative day one valuation approach would be to assume Cost and Duration at the upper end of the forecast and Quantum at the lower end, perhaps focusing purely on the Claimant’s wasted investment costs.

Recovery prospects, too, can be relatively straightforward to assess depending on the nature of the respondent. Large corporate and sovereign state respondents will have credit ratings and debt instruments that they have issued from which a probability of their future ability to pay can be extracted.

Which leaves the legal variables, namely how do you quantify the strength of the legal arguments on jurisdiction, liability and the theory of damages. Here the Funder’s view is shaped by past experience, and an ability to fit the facts and shape of the case under assessment to previous successes (or failures). Funders will commonly use their own legal advisers to supplement this experience, where the case raises new issues.

Qualitative Assessment of the Claim

This is the point at which the Funder steps away from the spreadsheet and appraises those less

tangible variables such as the background story, the likely credibility of the Claimant’s evidence/witnesses, the potential tribunal composition and the exposure to significant disclosure of unseen documents.

Case Due Diligence

Both of the above limbs of case assessment are carried out by proper due diligence (“DD”). The DD period is the time of most intensive activity for a Funder (as opposed to case monitoring). However, DD is not an exercise in identifying only cases without risk; rather a Funder in DD seeks to confirm that the case carries the right balance of expected return versus expected risk, assessed on both the quantitative and qualitative bases described above.

In the DD period the Funder requests all the key documents that support the case. The Funder must then build the case investment memorandum which will determine whether or not a Funder finances a case.

To verify the elements of the claim some Funders utilise DD questionnaires to ensure that they cover all the critical questions each time they review a case. Within that they will typically ask to see some or all of the following legal documents:

1. The key contracts underlying the commercial dispute;
2. Documents evidencing ownership of key assets, such as licences and shareholder registers and certificates, including for any indirect holding companies;
3. Any witness statements; and
4. Any legal opinions provided by the Claimant’s lawyers.

To assess the quantum and recoverability of a claim, and to assess the litigants themselves, a Funder may wish to review some combination of:

1. Accounts (ideally audited) and board minutes;
2. Invoices or bank statements;
3. Other statements of assets; and
4. Any available expert reports on damages.

Limitations of DD

As described above, a Funder makes its assessment based on expected returns and risks. By definition, cases that carry with them unexpected risks are more difficult to verify in DD and therefore less attractive. These are the dreaded “known unknowns”. In particular, cases where the merits will be heavily determined by discovery of documents from the defendant are difficult. Patent infringement and misuse of confidential information cases can fall into this camp, though there is a separate industry of specialist Funders whose focus is IP litigation.

By contrast, in investor state expropriation cases, or commercial matters following on from proven criminal activity such as fraud or cartel pricing, there may be a presumption that discovery can only add to an already very strong case.

Between these two ends of the spectrum fall general commercial claims typically originating from breach of contract where liability will be determined by a combination of the wording of agreements and witness testimony. Here, the Funder’s DD will focus heavily on its assessment of the key evidentiary documents and the parties to the dispute.

Case Monitoring

Case monitoring for a Funder is largely about budget control and dealing with material events. True disagreements between the Funder, Claimant and Lawyers on strategy and cost are extremely rare. The Claimant always remains in control of the case guided by its Lawyers, and the Funder is consulted on all material matters where its input as a seasoned litigator is welcomed. This consultation will include sharing experiences on arbitrators or other cases, helping the Claimant and its Lawyers understand analysis provided by financial experts, valuing settlement offers and handling adverse changes in the case. The latter two of these are the most likely to generate friction.

In the event of a material adverse change in the case in the view of the Funder, the reality is that it is virtually unheard of for the Funder to seek to exercise a right to terminate without the Claimant’s consent. Put simply, it is not good for business; and the overwhelmingly likely outcome is for all stakeholders to agree a negotiated exit route.

There is an element of “a Funder would say that wouldn’t they” about this, but to understand why such a dispute is unlikely it helps to look at a Funder’s motivations. Following any material event, the Funder will be weighing up on which one of three paths the case sits:

1. Is the Funder still likely to make a significant profit?
2. If not, does the Funder have a decent chance of emerging with some or all of its original investment intact (and possibly a modest profit) if it continues to fund?
3. Is it likely that any new money invested will be wasted?

It is really only in the latter case (path 3) that the Funder will want to terminate, and if this is the Funder’s view then it is very unlikely that the Claimant’s lawyers **and** any independent assessor will both still view the case as being on path 1 to significant damages. Assuming not, path 2 will not offer the Claimant any real upside to proceeding with the case because of the priority structure in the LFA and ancillary agreements.

Similarly, the consensual nature of the litigation project from the outset means that there should be no significant divergence of views when it comes to the moment to make or accept settlement offers. The same analysis on which of the 3 paths the case is on should apply, save that differing views as to whether a case was on path 1 and path 2 would suggest reasonable settlement offers should be taken very seriously.

Lastly, the negotiations leading up to signing the LFA should have included a moment where the stakeholders reviewed their future expectations on what would or would not constitute a fair net outcome for them, with or without costs included. One technique to ensure a meeting of minds *ab initio* is to distribute a spreadsheet during the DD period setting out a scenario analysis of who gets what and at what time depending on certain quantum outcomes. This tool goes a long way to pre-empting any surprises down the road.

**This article is an edited extract from the chapter entitled: “Mechanics of Third-Party Funding Agreements: A Funder’s Perspective” by Mick Smith, Partner & Co-Founder of

[Calunius Capital LLP](#), within the recently published book *Third Party Funding In International Arbitration* by Lisa Bench Nieuwveld and Victoria Shannon, published by Kluwer Law International, October 2012 ISBN: 9041140794. Further details are available at www.kluwerlaw.com. The views set forth in this article are those of Mr. Smith and not of K&L Gates LLP and/or its clients.

U.S. Supreme Court Fires Shot across Oklahoma's Bow

Paul F. Donahue (Chicago)

The latest skirmish in the seemingly never ending battle between the U.S. Supreme Court and state courts over the enforcement of the Federal Arbitration Act occurred on November 26, 2012, when the U.S. Supreme Court vacated a decision of the Supreme Court of Oklahoma (*Nitro-Lift Technologies, LLC v. Howard*, 568 U.S. (2012), No. 11-1377, November 26, 2012).

The U.S. Supreme Court entered its decision “per curiam” (unanimously and with no identified author) and did so without having oral argument in the case.

The Oklahoma Supreme Court had voided a contract containing an arbitration provision on the grounds that the underlying contract, which contained a non-competition clause binding former employees, ran afoul of substantive Oklahoma law governing covenants not to compete. The U.S. Supreme Court was obviously annoyed that the Oklahoma Supreme Court, “despite this Court’s jurisprudence,” determined that “the underlying contract’s validity is purely a matter of state law for state court determination.”

The case presented an interesting jurisdictional conundrum because the Oklahoma Supreme Court declared that its decision rested on “adequate and independent state grounds.” The U.S. Supreme Court noted that if that were so, “we would have no jurisdiction over this case,” but found it not so because the Oklahoma Supreme Court’s supposed “reliance on Oklahoma law was not ‘independent’—it necessarily depended upon a rejection of the federal claim, which was both ‘properly presented to’ and ‘addressed by’ the state court.” The federal

claim was, of course, that the FAA mandated arbitration of the dispute.

Indeed, the Oklahoma Supreme Court’s very approach, namely that the validity of the underlying contract was purely a matter of state law which supposedly could be determined by the state courts, provided “all the more reason for this Court to assert jurisdiction.”

The U.S. Supreme Court repeated its admonition that the FAA declares “a national policy favoring arbitration.” As a result, when parties commit to arbitrate contractual disputes the FAA requires that “attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, ought to be resolved by the ‘arbitrator in the first instance, not by a federal or state court.’” Quoting from its earlier decision in *Preston v. Ferrer*, 552 U.S. 346, 349 (2008).

Thus, an arbitration provision in a contract is “severable,” and may be examined as to its validity by a state court. But that is the extent of the state court’s inquiry if it finds the arbitration provision enforceable, for then it is for the arbitrator to decide “in the first instance” whether the underlying contract is void for any reason including for violation of public policy or substantive law of an individual state.

The Oklahoma Supreme Court had cast the FAA as a “more general statute favoring arbitration” as opposed to an Oklahoma statute addressing specifically the validity of covenants not to compete under its law which should be controlling. The U.S. Supreme Court found that to be standing the law on its head because there was no conflict between “laws of equivalent dignity.” Rather, the case was a classic one pitting a specific state statute against a general federal statute, which under the Supremacy Clause of the United States Constitution (Article VI., cl.2.) must govern.

Evident in the Opinion is the U.S. Supreme Court’s exasperation with the seemingly limitless willingness of state courts in the United States to craft evasions to the enforcement of arbitration provisions in private contracts. Given the recalcitrance of some state judiciaries, it will no

doubt not be its last encounter with this phenomenon.

What Qualifies as an Investment? A Primer on Protecting Foreign Investments (Part 2)

Dr. Wojciech Sadowski (Warsaw)

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 into which the investor has invested, 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. After looking at the question of who qualifies for protection as an “investor” in the first installment, this second installment will look at the question: **What qualifies as an investment?**

Look to the Treaty Definition in Context

The ICSID Convention contains no express definition of the term “investment.” However, the case law has developed certain guidelines and criteria that help to distinguish an investment from other types of activities. These guidelines and criteria must be viewed through the lens of the definition contained in the relevant bilateral or multilateral investment treaty or treaties and by reference to guidance deriving from key ICSID cases.

The Salini Test

Perhaps the most notable case to consider the issue of what constitutes an “investment” under the ICSID Convention is *Salini Costruttori S.p.A. et al. v. Morocco*, ICSID Case No. ARB/00/1. Although this test has not been uniformly adopted by all

investment treaty arbitration tribunals, it provides some guidance as to the factors that might be considered in evaluating whether an “investment” exists.

In developing what has since become known as the “Salini test”, the *Salini* tribunal rejected the respondent’s objection that a contract for the construction of a highway did not constitute an investment. The four elements that constitute the Salini test are: (1) a contribution of money or something else of economic value; (2) certain duration of the project; (3) assumption of risk; and (4) some contribution by the investor to the host state’s development. *Salini Costruttori SpA and Italstrade SpA v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, para. 52.

The first three of the four criteria are most often applied, and they are occasionally supplemented with other requirements, such as a good faith requirement.

What Definition is Contained in the Treaty?

The relevant BIT or multilateral investment treaty (MIT) are the ultimate guide for what is covered.

While investment treaties contain different definitions, most define “investment” broadly as “every kind of investment”. In that sense, the notion of investment is equated with the notion of an asset, implying almost anything with monetary value. This can include, among other things, real and personal property, shares, stocks or other interests in a company, rights to intellectual property, goodwill, and concession contracts.

It is important, however, to note that the concept of an investment has its limitations. Some recent awards distinguish, for example, the possession of assets from an act of investing and look to the purpose of holding the assets. Thus, a nominal holding of an asset in the interest of a third party could be excluded (see, e.g., *Caratube v. Kazakhstan*, ICSID Case No. ARB/08/12), as could allegedly holding shares only to acquire standing before an international tribunal (see, e.g., *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5). Moreover, one-off deals, such as sales contracts, may not qualify as investments under

some BITs (see, e.g., *Romak S.A. v. Uzbekistan*, PCA Case No. AA280; *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL; *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11), but they could qualify under the Energy Charter Treaty (see *Petrobart Limited v. Kyrgyz Republic*, SCC CASE 126/2003).

Even Non-Conventional Investments Can Meet the “Investment” Definition

It is important to keep in mind that the scope of potential “investments” includes (among other things):

- titles to money, to other assets or to any performance having an economic value
- ownership in investor companies
- funds deposited into a Ponzi scheme
- investments in sovereign wealth funds
- investments in private equity funds
- supply contracts with the government
- corporate governance rights
- market shares
- rights to tax returns

Again, the relevant BIT or BITs should be consulted to confirm any exclusions.

Conclusion

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

- Does a bilateral or multilateral investment treaty exist between the home country and the host country? What level of protection does this treaty offer?
- If no 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 a future edition of *Arbitration World*, we will consider another important question that must be addressed in determining what protection(s) are available: **what are the host state’s obligations under a bilateral or multilateral investment treaty?**

Astro: Affirming Singapore’s Position on Challenging Awards on Jurisdictional Grounds

Ian Fisher and Nicholas J. Watts (Singapore)

As foreshadowed in September 2012’s edition of *Arbitration World*, the High Court of Singapore has delivered its judgment in *Astro Nusantara International BV and others v. PT Ayundra Prima Mitra and others* [2012] SGHC 212 (the “Astro Decision”).

The Astro Decision firmly establishes that under Singapore law where a party has an opportunity to set aside an award on jurisdiction but fails to do so within the prescribed timelines under the provisions of the Singapore International Arbitration Act (Cap 143A) (the “IAA”) and the applicable provisions of the UNCITRAL Model Law (the “Model Law”), then that party cannot apply to the courts to resist enforcement on the grounds that the arbitral tribunal lacked jurisdiction. The IAA is the relevant law of the seat for international arbitrations conducted in Singapore and gives the Model Law, with the exception of Chapter VIII thereof, the force of law in Singapore.

Background Facts

This case arises out of a long running dispute and SIAC arbitration over a failed joint venture between the plaintiff group of Malaysian companies (collectively referred to as “Astro”) and the defendant group of Indonesian companies (collectively referred to as “Lippo”) to provide satellite pay television and multimedia services in Indonesia. Although the underlying subscription and shareholders agreement (the “SSA”) was never concluded between the relevant Astro and Lippo parties, two Astro companies that were not parties

to the SSA provided funding and support services to Lippo upon its request. These two Astro companies were joined by Astro when it commenced the SIAC arbitration in Singapore in late 2008 pursuant to the SSA.

Lippo argued that the arbitral tribunal did not have jurisdiction to join the two Astro companies because they were not parties to the SSA. The tribunal determined in its award dated 7 May 2009 (the “7 May Award”) that it had jurisdiction and accepted the joinder of the two Astro companies. Lippo did not appeal against or otherwise challenge the 7 May Award but proceeded to defend its position in the merits of the arbitration albeit under a protest reserving its position “on any appeal”. Astro was successful in the arbitration and it sought to enforce all of its awards against Lippo in a number of jurisdictions, including Singapore.

In September 2011, Lippo filed its applications to challenge the enforcement of the 7 May Award. Lippo’s position was that it was not seeking to set aside the award (as it was clearly out of time) but was, as an alternative, seeking to resist enforcement by relying on the provisions of Article 36 of the Model Law.

Lippo argued that a party is free to choose between two remedies in the context of challenging an award (referred to as a “double control”). These remedies are: (i) setting aside the award; or (ii) resisting its recognition and enforcement. The “double control” would allow Lippo to choose between setting aside the awards or resisting recognition and enforcement and that, in Lippo’s case, it could rely on a challenge to resist recognition and enforcement even though “no positive” step had been made to set aside the awards.

Astro’s primary arguments were that Article 36 of the Model Law was not applicable under Singapore law and that Lippo’s only avenue to challenge the jurisdiction of the tribunal in the Singapore courts was under Article 16(3) of the Model Law which clearly stipulates a 30 day timeframe to bring a challenge. Lippo was, therefore, clearly out of time.

Decision

At the outset of her decision, Ang J determined that there is no statutory basis under Singapore law to invoke lack of jurisdiction as a ground to resist or refuse enforcement of an award in Singapore and, accordingly, it was not necessary to consider the substantive arguments pertaining to the tribunal’s jurisdiction.

“Domestic International” Awards

The court noted that the IAA makes provision for “domestic international” awards, i.e., awards rendered in international arbitrations seated in Singapore where recognition and enforcement of those awards is sought in Singapore (as distinct from foreign awards) and that domestic international awards have “final and binding” effect under Sections 19 and 19B. The court determined that the recognition and enforcement of an award cannot be divorced from its setting aside and thus a domestic international award is either recognized and is not set aside, or it is *not* recognized and is set aside.

Setting aside

The court held that the only grounds for setting aside a domestic international award in Singapore are found in Article 34 of the Model Law (which prescribes a three month time period running from the date of receipt of the award (Article 34(2)(a)(i))) and in Section 24 of the IAA which provides additional grounds for setting aside based on grounds of fraud, corruption or breach of natural justice that may be raised outside the time limit in Article 34 of the Model Law.

Exclusion of Article 36

It was held that the grounds for challenging an award under Article 36 of the Model Law, that is refusing recognition or enforcement of an award, have no force under Singapore law because this provision of the Model Law is expressly excluded by Section 3(1) of the IAA.

Ang J noted that the deliberate legislative intent to exclude this provision was to have the enforcement of foreign awards governed separately under the New York Convention and have domestic international awards governed by Section 19 of the IAA. In short, this conscious development reflected Singapore’s “legitimate pro-arbitration stance” and

a path of less curial intervention. This marks an important difference in approach from the English position which, according to Ang J, is heading towards “increasing judicial intervention”. Ang J noted that there are at least 12 other Model Law countries that have “unqualifiedly dispensed” with Article 36.

Article 16 of the Model Law

It was confirmed that Article 16(3) specifically deals with a challenge to an award on jurisdiction issued by the tribunal before the hearing of the merits and such a challenge must be brought in the relevant court within 30 days of the date of the award. Accordingly, a failure to challenge the award or a party’s decision not to do so within this timeframe will render the award final between the parties and the issue of jurisdiction *res judicata*.

Ang J stressed that the key point for parties is that:

“There are no passive remedies when it comes to challenging jurisdiction under the IAA—a party wishing to oppose a jurisdictional award *must act*”[at 151].

Ang J alluded to the potential scope for a party with a jurisdictional challenge to “boycott” the arbitration proceedings and then seek to set aside any award under Article 34 of the Model Law. Although a risky strategy, the potential for this plan to work stems from the fact that the rules relating to the arbitration, including time limits for appeal, would no longer apply to the “boycotting” party. Indeed, it would seem that the Model Law itself hints at this.

Appeal

Lippo has indicated that it will appeal the Astro Decision.

No Dispute About It – Dispute Boards are Hot in Chinese Construction Projects

Matthew E. Smith (London), Christopher Tung (Hong Kong), and Denise N. Yasinow (Pittsburgh)

Background on Dispute Boards

Whether they are called Dispute Review Boards (“DRBs”) or Dispute Adjudication Boards (“DABs”), they serve the same function—to resolve disputes cheaply, quickly and effectively as they arise during the course of construction projects. The basic difference between DRBs and DABs is that DABs may make binding determinations, whereas DRBs may only make non-binding recommendations. Either way, swift measures by DRBs or DABs often avoid the necessity for a final determination in arbitration later on. In fact, it is estimated that since the introduction of dispute boards around 20 years ago, at least US\$100 billion worth of recorded construction projects have used dispute boards and the actual figure is likely to be much greater. According to Dr. Cyril Chern, member of the Advisory Panel of the Dispute Board Federation, “the statistics show that if there is an operational Dispute Board in existence on a project, close to 99% of all disputes referred to it will be successfully resolved within less than 90 days and at a cost of about 2% of the amount of the dispute”.

While the DRB and DAB is an American invention, it has become popular internationally in recent years. This is reflected in the incorporation of dispute boards in the contractual documents of various international organizations. The World Bank has adopted the use of DABs, and the ICC issued Dispute Board Rules for inclusion in any construction contract. The ICC Dispute Board Rules allow the parties to select a DAB, DRB, or a hybrid of the two. As for FIDIC, it adopted dispute boards long ago. DABs were originally introduced in the 1995 Orange Book and now appear in all of the FIDIC forms of construction contract. Dispute Boards are also actively promoted by the Dispute Board Federation (DBF) based in Geneva and, in the United States, by the Dispute Resolution Board Foundation (DRBF).

Main Characteristics of Dispute Boards

- The dispute board is appointed at the beginning of the project and makes regular visits to the construction site, particularly for critical construction events, so that it will be familiar with progress and potential problems. Under the FIDIC conditions of contract, the procedural rules require that the board must visit at intervals of not more than 140 days including times of critical construction events, at the request of the contractor.
- The board, like an arbitral panel, usually consists of three people. Each party names a panelist, and these two panelists then nominate the chairperson. All panelists should have expertise, integrity and neutrality.
- The owner and contractor of the project usually shoulder the cost of the board equally.
- The board will hand down a decision quickly. Under the FIDIC rules, the board must give its decision within 84 days, or any other agreed period, from the date of dispute reference.
- While the procedure for the board depends on the contract provisions, under FIDIC contracts, if the parties do not object to a decision by the board within 28 days, then it becomes final and binding. Challenges to or enforcement of the board decision can be made through subsequent arbitration, litigation, or other form of dispute resolution.

The Rise of Dispute Boards in China

While use of DABs and DRBs has increased worldwide, it is gaining especially rapid popularity for major projects in China. The dispute board process was used in many prominent construction projects, including: the Hong Kong International Airport, which cost more than \$20 billion and referred 6 disputes to binding dispute board determination; the Wanjiashai Dam Lots II and III in Taiyuan, which was constructed between 1998 and 2002, worth \$200 million, and had 12 disputes resolved by a dispute board; and the Ertan Hydroelectric Project in Szechuan Province, which was constructed between 1991 and 2000, cost \$2 billion, and referred 40 disputes to a dispute board. Furthermore, dispute boards were also used for projects such as the Xiaolangdi Multipurpose Dam in Luoyang, which cost \$936 million, and the

Highway Project in Xinjiang Province, which cost over \$50 million.

A particular focus for the use of DABs and DRBs in China has been hydropower projects. Such projects are extremely complex with numerous interfaces between investors, contractors and subcontractors at various tiers in the supply chain. They therefore lend themselves well to an integrated, swift approach to dispute resolution by a technically qualified board. Chinese contractors have developed a bank of knowledge and expertise, gained from many thousands of such projects in China, and they are actively exporting this expertise to other projects around the world. This is likely to increase the use of DABs and DRBs on hydropower projects globally.

Another part of the reason for the rise in China's use of DABs and DRBs is that there are simply more construction projects going on in China. In 2010, China overtook the United States as the world's largest construction market. The Chinese government, in implementing its 11th Five-Year Plan from 2006–2010, spent approximately \$494 billion on infrastructure, which included construction of railways, underground train systems, light-rail systems, hydropower projects, pipelines for oil and natural gas, and airports. In 2009, China produced nearly 1.5 billion metric tons of concrete and 600 million metric tons of steel. Today, China's steel production equals the steel production capacity of Japan and South Korea combined. In fact, predictions have been made that by 2020, China's construction sector will more than double in size to \$2.5 trillion. It will account for 20% of all of the world's construction.

With this in mind, dispute boards do seem to have a bright future in China. The more conciliatory dispute resolution culture in China is particularly well suited to use of DABs and DRBs. Owners, contractors, and engineers have already had positive experiences on major projects in China. The parties are more likely to agree to more contracts (derived from FIDIC, the World Bank, or a number of other organizations) that include dispute boards as a powerful pre-arbitral dispute resolution tool.

A Comparative Analysis of the “Choice of Law” Approaches to Privilege in International Proceedings

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Privilege enables the parties involved in court and arbitration proceedings to withhold evidence that would normally require disclosure to the other party or to the relevant court or arbitral tribunal. Whilst the great value of this protective shield to a party engaged in contentious proceedings is clear, in the context of international disputes, the precise approach to be followed in order to determine the applicable law that should govern whether privilege applies is far from certain. This is primarily due to the fact that the application and ambit of the recognised rights arising under privilege in each jurisdiction may vary significantly and for international disputes the laws and practices of a number of different jurisdictions may come into consideration, for example, the law of the seat of the arbitration, the governing law of the contract, the law of the place where the document was created and the jurisdiction of the parties’ respective lawyers.

This article considers the various approaches of local courts confronted with this choice of law issue in England, France, Germany, Russia, Singapore and New York. Focus is then given to the position in international arbitration, where the goals of achieving certainty and uniformity in approach appear to be closer to realisation.

England

The English courts have considered the issue of what law governs whether a communication or document is privileged and these cases demonstrate that the courts apply the simple conflict of law rule that it is the *lex fori* that applies to determine whether a communication is privileged. This is the law of the country where the question arises, where the remedy is sought to be enforced and where the

court sits to enforce it. This has been recently confirmed by the Court of Appeal in *Bourns Inc v. Raychem Corp* [1999] 3 All ER 154 (CA). Accordingly, the approach of the English courts in determining whether a document is privileged is to rely exclusively on English law principles, irrespective of where the document was created and whether this document would be treated as privileged under any other law.

France

The position is similar in France where, under French law, the law applicable to procedural matters in the courts is the *lex fori*. This is also the case in the context of international disputes dealt with by the French courts. In 1978, the *Cour de cassation* (French Supreme Court) ruled that, “the procedure of an action brought in France may be governed only by French law”, and more recently, the same court held that, “as long as the French courts have jurisdiction, French rules of procedure are applicable”.

Germany

In the German courts, German procedural rules of privilege apply in the context of international disputes and the home country of a party or the place where the document was created is not taken into account. Therefore, in international court proceedings before a German court, whether privilege applies is decided according to the *lex fori*. However, the position is different where a German court seeks legal assistance from a foreign court in connection with the taking of evidence. For example, Article 11 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters states that a person, “may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence: (a) under the law of the State of execution; or (b) under the law of the State of origin...”.

Russia

Unlike various other jurisdictions, Russia does not have a well-developed concept of privilege. There is a narrow limited form of privilege for “advocates”, who are traditionally criminal defence attorneys. Given the lack of current legislative guidance regarding this concept, Russian courts have not provided sufficient explanation regarding the choice of law aspects in relation to privilege. In

some cases, the choice of law will depend on how the evidence is obtained, for example, under the Hague Convention referred to above, the party that requested the obtaining of evidence has the right to request that the foreign law of privilege is applied.

Singapore

Although the courts in Singapore have not substantially addressed the impact of choice of law issues in relation to privilege, issues concerning the admissibility of evidence are generally questions of procedure, which are governed by the law of the forum. However, the courts in Singapore may look to English case law for guidance in this area.

New York

New York federal courts do not simply apply the U.S. law relating to privilege with respect to foreign documents and communications but rather engage in a choice of law analysis to determine which country's law governs the privilege—*Golden Trade, S.r.L v. Lee Apparel Co.* 143 F.R.D. 514. In the interests of comity, the courts will apply the law of the country that has the “predominant” or “most direct and compelling interest” in whether the documents and communications are privileged, unless the law of that country is contrary to the public policy of the U.S. forum. In applying this choice of law analysis, the New York federal courts have adopted the “touch-base” approach, which is a fact-specific enquiry that focuses on whether the documents and communications have a “more than incidental” connection to the United States.

Although the location of the documents and the persons by whom they were sent or received are relevant to the analysis, they are not determinative of which country's law governs the privilege. Other relevant factors include considering whether applying American law offends principles of comity and whether the documents would have been discoverable in the relevant foreign country. The position in New York state courts is not as certain as that in the federal courts but these courts would likely also defer to the jurisdiction with the most compelling interest in the application of its privilege law.

International Arbitration

An arbitral tribunal may decide on a particular choice of law approach in a similar manner to a national court adjudicating international proceedings

involving conflicting laws. According to article 9.2(b) of the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (2010), the arbitral tribunal is required to exclude from evidence or production any privileged document under the legal or ethical rules determined by the tribunal to be applicable. The possible approaches available to the tribunal in determining the applicable law include: (a) the law of the seat of the arbitration; (b) the law governing the substance of the dispute; (c) the law of the country in which the communications took place; (d) the law of the country in which the documents are held; and (e) the law of the country with the closest connection to the events or the documents.

However, there is a growing convergence in favour of the “closest connection test” referred to above. In essence, this test requires the tribunal to apply the law of the jurisdiction with which the document or communication is most closely connected. This approach has potential support in article 33.1 of the Swiss Rules of International Arbitration (2012), which provides that, “the arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection”. According to one commentator, “there is one conflict rule which almost every tribunal applies consciously or intuitively and which has developed into a transnational rule of conflict of laws: the ‘closest connection’ or ‘centre of gravity’ test”.

Implications for Parties in International Disputes

National courts can determine the applicable law with respect to privilege in the context of international disputes on the basis of established choice of law rules. This means that the extent to which the parties' rights arising under privilege are protected may not be the same as the scope that would have been given to such rights under the law of a party's home country. This can lead to uncertainty and unpredictability for parties involved in international disputes. In the sphere of international arbitration, there appears to be a clear movement towards the establishment and acceptance of an internationally-favoured approach in the form of the “closest connection test”. Parties engaged in international arbitration proceedings

should nevertheless consider stipulating a specific and clear approach to be followed by the tribunal to questions of privilege in their arbitration agreement or alternatively ensure that any arbitral rules incorporated by reference make suitable provision.

UAE Arbitration Insight – New York Convention Shifts Enforcement Approach

Omar Momany (Dubai)

History of Enforcement of Foreign Arbitral Awards

Except where a relevant bi-lateral or multi-lateral convention applies, the enforcement of foreign arbitral awards before the UAE Courts was subject to Articles 235 to 238 of Federal Law No. 11 of 1992 (the “**UAE Civil Procedures Law**” or the “**CPL**”), which governs the enforcement of foreign judgments in the UAE.

Pursuant to Articles 235 and 236 of the CPL, no order shall be rendered to execute a foreign arbitration award in the UAE unless the competent court examines:

- whether UAE local courts have a jurisdiction to hear the case adjudicated before the foreign tribunal;
- whether the arbitration award was rendered by a competent forum/body having jurisdiction in accordance with the laws of the foreign state where it was rendered;
- whether the parties to the arbitration award were properly and duly summoned and were legally represented;
- whether the arbitration award is a final and binding award in accordance with the laws of the foreign state where it was rendered and the arbitration award possesses the power to stand as a final award against any similar proceeding between the same parties and subject matter in the foreign state where it was rendered;
- whether the arbitration award is contradictory or in violation of any other judgment or order previously rendered in UAE courts, or violates moral and public orders of the UAE; and

- whether the dispute between the parties was arbitrable and enforceable matter under the laws of the state where it was rendered.

The UAE Courts for many years were entitled, and had in practice, dismissed enforcement applications for foreign arbitration awards on grounds such as the lack of proper jurisdiction of the tribunal at the foreign state where the arbitration award was rendered, the improper summoning or representation of one of the parties in the foreign arbitration proceedings, and most notably the contradiction of the foreign award with the public policy of the UAE.

In addition, the CPL sets out certain processes for the enforcement of domestic arbitration awards. Before a domestic award can be enforced in the UAE, the award must be ratified by the UAE courts. Once ratified, the award becomes equivalent to a UAE court judgment and can be enforced. The CPL sets out grounds for challenging the enforcement of arbitration awards issued in the UAE. These grounds could eventually empower the courts, and had led them to reject enforcement and nullify a domestic arbitration award on a variety of grounds. The grounds for nullifying a domestic award are set out in Article 216 of the CPL. These include if an award:

- is given without an arbitration agreement or is based on an invalid agreement to arbitrate, or if it is void because a time limit has been exceeded, or if the arbitrators have exceeded the limits of the agreement to arbitrate;
- if the ruling has been given by arbitrators not appointed according to the law, or if given by some of them without being so empowered in the absence of the others, or if given under an agreement to arbitrate in which the subject of the dispute is not stated, or if given by someone not competent to agree to arbitration or by an arbitrator who does not fulfil the legal requirements; or
- if there is something invalid in the ruling or in the procedures leading to the ruling.

It is the last provision which broadens the scope for arguments concerning ratification of a domestic award. This is due to the vagueness of that provision and the ability to interpret it broadly.

Because the application to ratify an award is made to the courts applying the usual court procedures, ratification of an award in the UAE becomes the subject matter of a stand-alone legal action. While the courts are not permitted to re-examine the merits of the underlying dispute, in practice defendants take the ratification proceedings as such an opportunity. The courts had offered them the chance to raise the same arguments that were previously made during the arbitration, and to challenge the validity of the award on sometimes insignificant procedural grounds which effectively drag the courts into looking at the procedures and sometimes the merits on which the domestic arbitration award was established.

Although expressly stated in the CPL that grounds set out in Article 216 were to apply to the execution of domestic arbitration awards only, the UAE courts have been inclined in the past to also accept such grounds to challenge the enforcement of foreign arbitration awards in preference to the more liberal enforcement system set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (the “**NY Convention**”), which provides only limited grounds for non-enforcement of foreign awards. This has meant that defendants in enforcement actions have been allowed to raise technical arguments and defenses against enforcement of foreign arbitration awards that they are not allowed to argue should the NY Convention regime apply.

This approach by the UAE courts to the enforcement of foreign arbitration awards seems to be changing following the UAE’s accession to the NY Convention.

UAE Ratification of New York Convention

The UAE ratified the NY Convention in November 2006 without any reservation. The UAE’s ratification of the NY Convention came in recognition of the need to facilitate the process for resolving disputes involving international players doing business in the UAE and the wider Middle East region. This has been looked at as an effective vehicle to encourage and attract foreign investments into the UAE. Since the UAE’s ratification of the NY Convention, under Federal Decree no. 43 of 2006, there has been a debate around the suitability

of the UAE’s current legislation to implement the NY Convention system for the enforcement of foreign arbitral awards and whether further legislative action, such as enacting an arbitration law, is required. The better view is that the NY Convention enforcement system has become a matter of local law since its adoption by Federal Decree no. 43 of 2006 and should therefore be enforced by the local courts. That said, the UAE legislators have been deliberating on the final draft of a domestic law for arbitration which is derived from the UNCITRAL model law.

Although ratification of the NY Convention is an important step, the crucial test is the enforcement of the NY Convention by local courts and it is here where practice remains uncertain and the evidence patchy. There exist to date a few isolated examples of enforcement of arbitral awards in the UAE and arguably, only the latest two decisions rendered by the Dubai courts (first instance and appeal) are clear demonstration that the UAE treats its enforcement obligations under the NY Convention seriously. However, these remain isolated precedents and the UAE courts’ practice in relation to the enforcement of foreign arbitral awards is yet to be further established. That said, the three most recent cases represent a significant step away from the old approach of the UAE courts in relation to the enforcement of foreign arbitral awards. The three court judgments issued by the UAE courts, following on from the UAE’s ratification of the NY Convention, which are considered the “approach changers”, are summarized below.

Recent Judgments – Shifting the Approach

Fujairah Federal Court of First Instance ruling
In a ruling dated 27 April 2010, the Fujairah Federal Court of First Instance enforced two awards, one on the merits and the other one on costs, issued by a sole arbitrator in London under the rules of the London Maritime Arbitration Association (LMAA) following an application for enforcement by the award creditor under the NY Convention. The court decision noted that (i) the awards were duly certified and issued in the United Kingdom, (ii) the UAE has ratified the NY Convention with effect from 19 November 2006, and that (iii) the awards were issued pursuant to English law in the UK, which is a signatory to the NY Convention.

It is notable that the Court's conclusions were further prefaced by an express reference to the prohibition on reviewing the merits of awards, and the obligation to comply with international treaties and conventions, which under UAE law come to form part of the domestic law, in the enforcement of foreign award. The enforcement action was uncontested within the UAE, and therefore remains unchallenged.

Dubai Court's ruling in *Maxtel International FZE v. Airmec Dubai LLC*

In January 2011, the Dubai Court of First Instance enforced two awards, one on the merits and one on costs, issued by a sole arbitrator in London under the Dubai International Finance Centre-London Court of International Arbitration (DIFC-LCIA) Rules involving two Dubai-based companies, one free zone, one limited liability, following an application for enforcement by the award creditor under the NY Convention.

The award debtor objected to the enforcement of the awards, seeking nullification on a number of procedural grounds. After stating that (i) both awards were "undoubtedly foreign awards, were both issued outside the UAE in London in accordance with the New York Convention", that (ii) it was well established that the UAE had ratified the NY Convention by Federal Decree no. 43/2006, and having set out in full Articles 1, 3, 4 and 5 of the Decree 43, the Dubai Court of First Instance held that "the court's supervisory role when looking to recognise and enforce a foreign arbitral award is strictly to ensure that it does not conflict with the Federal Decree under which the UAE acceded to the New York Convention on the recognition and enforcement of foreign arbitral awards and satisfied the requirements of Articles IV and V of the Decree in terms of being duly authenticated".

Importantly, the Dubai Court of First Instance expressly discarded the application of Articles 235 and 236 of the CPL to the enforcement of foreign awards in the UAE. This ruling has been appealed before the Dubai Court of Appeal which has rejected the appeal and upheld the enforcement (22 February 2012). Most recently, the Dubai Court of Cassation (the highest court in the Emirate of Dubai) has also confirmed the enforcement decision.

Dubai Court's recent ruling

The facts of the case are that the claimant commenced proceedings before the Dubai Court of First Instance against the defendant seeking to have a SIAC (Singapore International Arbitration Centre) arbitral award recognized and enforced.

In 2007, the claimant and the defendant entered into an agreement whereby the latter was granted broadcasting rights for six one-day cricket matches in the Middle East for a license fee payable by the defendant to the claimant. The agreement provided that any dispute arising under the agreement would be submitted to mandatory arbitration in Singapore under SIAC Rules.

A dispute arose between the claimant and the defendant and the matter was referred to SIAC arbitration. The arbitral award in question was issued in 2010 in favor of the claimant. The claimant filed an action before the Dubai Court to have the award recognized pursuant to the NY Convention. On May 2011, a default ruling was made dismissing the action with fees and costs on the basis that the award was not ratified in the country of origin and could therefore not be executed under Articles 235 and 236 of the UAE CPL even though clearly stating that the ratification process under the UAE CPL applied only to UAE domestic awards (with the exception of foreign awards).

The claimant challenged the Dubai Court decision before the Dubai Appeal Court seeking recognition of the SIAC arbitral award. The Dubai Appeal Court held that "Whereas both UAE and Singapore are signatories of the New York Convention, and Article 3 of the said convention stipulates that 'Each state party shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'. And whereas the Dubai Appeal Court reviewed the fulfillment of all the conditions required according to the New York Convention, it ruled that the lower Court's dismissal of the action was incorrect. The court rendered its judgment recognizing and enforcing the arbitral award issued by the SIAC arbitrator".

Conclusion

The UAE courts had a long history of negatively approaching applications for the enforcement of foreign arbitral awards. This history has been well established for many years prior to the UAE accession to the 1958 NY Convention. Following the UAE accession to the NY Convention in 2006, it has taken a few years for this approach to start changing towards a more arbitration-friendly one. Although long overdue, a few precedents of the UAE court decisions recognising and enforcing foreign arbitral awards under the NY Convention were issued in the last two years. Those court decisions have started to build a body of case law effectively putting in place a new approach built on the UAE's recognition of its obligations under the NY Convention. It is yet for this practice to be further tested and established. The enactment of a UAE arbitration law that is modern and based on the UNCITRAL model law will undoubtedly pave the way for a brighter future for the recognition and enforcement of foreign arbitral awards, and will certainly be viewed positively by foreign investors.

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