BAKER BOTTS
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Investment Treaty Arbitration Updates on Most Favoured Nation Clauses, Waiting Periods and Domestic Litigation Requirements

U.S. Personal Jurisdiction Limits on Actions under the New York Convention

New Arbitration Rules Update

The Dangers of Frivolous Challenges to Arbitration Awards

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U.S. PERSONAL JURISDICTION LIMITS ON ACTIONS UNDER THE NEW YORK CONVENTION: *FIRST INVESTMENT CORPORATION OF THE MARSHALL ISLANDS V. FUJIAN MAWEI SHIPBUILDING, LTD.*

It is by now well-accepted that the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") fosters international arbitration by establishing narrow and exclusive grounds on which a contracting state can refuse to enforce arbitral awards made in the territory of another party to the Convention (a "Convention award"). But are there circumstances beyond those grounds enumerated in Articles V and VI of the Convention in which a signatory can refuse to enforce a Convention award? The U.S. Court of Appeals for the Fifth Circuit answered that question affirmatively in *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipping, Ltd.*, 703 F.3d 742 (5th Cir. 2012), holding that U.S. constitutional limits may require courts to dismiss actions to confirm Convention awards in the U.S.

First Investment involved an action to confirm an arbitral award made in London in favor of a Marshall Islands entity (First Investment Corporation) and against one state-owned and one private Chinese entity. After Chinese courts refused enforcement on the ground that the award did not conform to the arbitration agreement, First Investment sought confirmation against the two Chinese entities and the People's Republic of China (the "PRC"). The trial court dismissed the claim, concluding that it lacked jurisdiction over the defendants.

On appeal, First Investment presented three main reasons for reversing the dismissal: (i) foreign entities having no contacts with the U.S. cannot assert due process protections under the U.S. Constitution; (ii) the Convention does not authorize personal jurisdiction defenses to enforcement; and (iii) the Court had jurisdiction over the defendants as alter egos of the PRC, a sovereign state not entitled to due process rights under the U.S. Constitution.

The Fifth Circuit rejected all three arguments. Citing a 2011 U.S. Supreme Court decision, *Goodyear Dunlop Tires Operations S.A. v. Brown,* 131 S.Ct 2846 (2011), the Court held that foreign corporations can assert the due process protections of the Fifth Amendment of the Constitution. (The Supreme Court implicitly reaffirmed this principle in *Daimler AG v. Bauman*, No. 11-965 (January 2014)). The Fifth Circuit likewise affirmed the trial court's determinations that the respondents were not alter egos of the PRC and that there was no subject matter jurisdiction over the PRC.

The Fifth Circuit also held that U.S. constitutional limits on *in personam* jurisdiction apply to actions under the New York Convention even though the Convention does not expressly list lack of jurisdiction as a ground for refusing recognition of a Convention Award. The Court reached this conclusion because, in the U.S. system, the U.S. Constitution's requirements necessarily prevail over a treaty and the legislation implementing it. The Fifth Circuit thus joined the Second, Third, Fourth, Seventh and Eleventh Circuits in reaching this result.

Notably, the defendants in First Investment apparently had no assets in the U.S. Had such assets been present, the court likely would have had *in rem* or *quasi in rem* jurisdiction to hear the action to confirm the Convention award. For that reason, the holding of First Investment may have limited significance where an award holder can show that the award debtor has assets in the U.S.

Interestingly, the Fifth Circuit was not asked to consider whether lack of personal jurisdiction might qualify as a procedural issue accepted under Article III of the New York Convention. That provision explains that contracting states "shall recognize arbitration awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon*" (emphasis added). Arguably, Article III contemplates that generally applicable procedural requirements—potentially including *in personam* jurisdiction requirements—can limit actions under the New York Convention even though they are not referenced in Articles V and VI. The meaning of Article III, however, remains unsettled. Some U.S. courts have relied on Article III to dismiss actions to confirm Convention awards on *forum non conveniens* grounds. Others, however, have held that Article III only incorporates technical filing requirements and not substantive limitations.

Whether through Article III of the Convention or as a matter of U.S. constitutional law, lack of personal jurisdiction continues to provide a potential defense in actions to confirm Convention awards in the U.S.

UPDATE ON MOST FAVOURED NATION CLAUSES IN BILATERAL INVESTMENT TREATIES

Today almost every country has entered into bilateral or multilateral investment treaties, including many recent free trade agreements, for the promotion and reciprocal protection of investments. A bilateral investment treaty ("BIT") is essentially an agreement between two countries containing reciprocal undertakings as to the promotion and protection of private investments made by individuals and companies in each other's territories. Most BITs contain common investor protections such as the right to full compensation for expropriation, the right to transfer funds freely out of the host nation, and the right to fair and equitable treatment and full protection and security by the host nation's government. They also typically allow investors to enforce some or all of these rights directly against host countries through binding international arbitration.

Also common in many BITs is what is known as a "most favoured nation" ("MFN") clause. An MFN clause requires the state party to an investment treaty to provide investors of the other state party with treatment no less favourable than the treatment it provides to investors of third states. This includes treatment extended under other investment treaties. MFN clauses, therefore, link BITs together by allowing investors to take advantage of more favourable treatment provided under other BITs with the host state. Notably, without an MFN obligation the host state potentially retains the option of discriminating economically among foreign investors.

A typical example of an MFN clause is provided by Article 3 of the 1998 German Model BIT:

(1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatments less favourable than it accords to investments of its own investors or to investments of investors of any third State.

(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third State."

MFN clauses are usually general in their wording and leave considerable scope to argue competing interpretations. Some expressly indicate whether dispute settlement is included within their scope, although most are silent on whether MFN treatment includes only substantive rules for the protection of investments (for example, fair and equitable treatment or protection from uncompensated expropriation) or whether MFN treatment extends to the procedural or jurisdictional aspects of a BIT, like dispute resolution.

Given the potential far reaching implications of an MFN clause, in particular, the likelihood of increased treaty and forum shopping, it is important for states and investors alike to know the protections that are covered by a particular treaty. The approach of arbitral tribunals on the scope of MFN clauses, however,

has not been uniform. This is illustrated by the recent decision of *Garanti Koza v. Turkmenistan* (ICSID Case No. ARB/11/20, Decision on Jurisdiction, 3 July 2013).

Garanti Koza v. Turkmenistan concerned a dispute between a UK construction company and Turkmenistan over whether the latter failed to pay for construction work. This case is significant for at least three reasons. First, it was the first time a tribunal was called up to interpret an MFN clause that contains an express statement that it applies to the treaty's dispute resolution mechanism. Second, the case marks the first time a tribunal allowed a claimant to use an MFN clause to invoke a state's consent to a particular arbitral forum found in another BIT. Finally, although the tribunal adopted a broad interpretation of the MFN clause in question, its decision was not unanimous. Turkmenistan's party-appointed arbitrator did not agree with the majority's ruling and issued a separate dissenting opinion.

The case centered on Article 8 of the UK-Turkmenistan BIT, the investor-state dispute resolution provision. Article 8(1) provides Turkmenistan's general consent to international arbitration. Article 8(2) provides that with respect to the applicable international arbitral forum, the specific parties to the dispute "may agree to refer the dispute" either to the International Centre for Settlement of Investment Disputes ("ICSID"), the Court of Arbitration of the International Chamber of Commerce ("ICC") or arbitration under the Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), with the default position being UNCITRAL arbitration if the parties failed to agree within four months from written notification of the claim.

When Turkmenistan refused to agree to ICSID arbitration, the claimant argued that the BIT's MFN clause (contained in Article 3) should allow it to submit the dispute to ICSID arbitration, as that was the dispute settlement mechanism Turkmenistan had consented to in other treaties. Notably, Article 3 of the UK-Turkmenistan BIT expressly provides that it applies to Articles 1-11 of the BIT, which includes Article 8 (the investor-state dispute resolution provision). The claimant argued that Turkmenistan had consented in BITs with Switzerland, France, Turkey and India, as well as in the Energy Charter Treaty, to either ICSID arbitration or UNCITRAL arbitration, at the election of the investor. In particular, Article 8 of the Switzerland-Turkmenistan BIT provided more favourable treatment to Swiss investors. Pursuant to that article, a Swiss investor could choose to submit a dispute with Turkmenistan either to ICSID or UNCITRAL arbitration. A treaty that provides consent to ICSID arbitration is, according to the claimant, more favourable to an investor than one that does not, or alternatively, a treaty that provides a choice between UNCITRAL and ICSID arbitration is more favourable to an investor than one that does not. Turkmenistan's consent to ICSID arbitration was, therefore, established by operation of the MFN clause.

The majority of the tribunal agreed with the claimant and held that the MFN provision entitled the claimant to avail itself of the more favourable treatment received by Swiss investors, who had the choice to bring ICSID arbitration pursuant to the provisions of the Switzerland-Turkmenistan BIT. Although the majority did not agree with the claimant that ICSID arbitration could be described as objectively more favourable to investors than UNCITRAL arbitration, as each system had its advantages and disadvantages, it found that an investor that was not afforded the choice between the two systems would be at a competitive disadvantage relative to an investor who did have this choice. Turkmenistan's party-appointed arbitrator did not agree with the majority. In her dissenting opinion, she held that Turkmenistan had not consented to ICSID arbitration and that an MFN

clause was "not a basis for creating consent to ICSID arbitration when none exists."

In considering whether Turkmenistan had consented to participate in ICSID arbitration, the majority approached the question in two steps: (i) whether Turkmenistan had consented to participate in international arbitration at all; and (ii) if so, had it agreed to ICSID arbitration. On the first question, the majority held that Article 8 established expressly and unequivocally Turkmenistan's consent to submit disputes with UK investors to international arbitration. On the second question, the majority considered that, through the inclusion of what it described as a "menu of options concerning the arbitration process, and a default selection", Turkmenistan had not consented to ICSID arbitration. Rather it had expressed its willingness to consider three possible kinds of arbitration whenever it was notified by a UK investor of a claim under the BIT, on a case-by-case basis. The majority went on to consider, however, that the question of whether ICSID arbitration was available to the claimant would depend on the terms of both Article 8 and Article 3 of the BIT, both of which were cast broadly.

In contrast, the dissenting arbitrator considered that in order to determine whether Turkmenistan had consented to arbitration, it was necessary to interpret Article 8 as a whole, and not "as composed of segmented and fragmented provisions". In her view, Article 8(1) (consent for international arbitration in general) and Article 8(2) (providing the options of arbitral forums) were "two sides of the same coin". Under the ordinary meaning of Article 8(2), ICSID arbitration could only be used by the foreign investor if it had mutually agreed with the host state that it could do so, which was not the case here.

As for Turkmenistan's argument that an MFN clause could not be used to "import the State's consent to a different arbitration system from one treaty to another", the majority considered that the MFN clause did not import consent as such, but replaced the requirement for an agreement under Article 8(2) with a more favourable provision from another treaty. As Turkmenistan had already consented to international arbitration in Article 8(1) of the BIT, the tribunal concluded that there was no issue of consent here.

The majority also rejected Turkmenistan's argument that the general language of Article 3(3) (that the MFN clause applied to the provisions of Articles 1 to 11 of the BIT) should give way to the more specific language of Article 8 (which made it clear that only UNCITRAL arbitration was available in the absence of an agreement between the parties). The majority reasoned that an MFN clause is necessarily drafted in general terms, and the task is one of determining which of the treaty's various provisions fall to be modified by the application of such a clause.

The dissenting arbitrator disagreed with this analysis. In her opinion, she considered that the application of Article 3(3) was "subordinated" or "conditioned" to the prior application of Article 8(2). Thus, the foreign investor had to first be in a dispute settlement relationship with the host state before the MFN clause could be applied. She therefore did not address the question of how the MFN clause should be applied, as in her view it was not applicable at all. This differed from the majority's view that the MFN clause applied as soon as an investor from a third state was accorded more favourable treatment.

The *Garanti Koza v. Turkmenistan* case, nevertheless, remains unique on it facts because, unlike previous decisions on MFN clauses, the MFN clause in question contained an express statement that it applied to the BIT's dispute settlement provision. The decision adds another layer to the body of arbitral decisions about the scope of MFN clauses generally.

FRIVOLOUS CHALLENGES TO ARBITRATION AWARDS
BEWARE THE CONSEQUENCES

For the past several years various courts have issued warnings against frivolous challenges to arbitration awards. Recent decisions from the United States, Hong Kong and Sweden demonstrate a trend for the courts to hold parties accountable for failed challenges to arbitration awards. The Hong Kong courts have shown a willingness to sanction challenges which are not necessarily frivolous, and the Swedish courts to hold the losing party and its counsel jointly liable for costs as a penalty for a frivolous challenge.

Johnson Controls, Inc. v. Edman Controls, Inc. (docket Nos. 12-2308 & 12-2623, 7th Cir., March 18, 2013), concerned an appeal of a challenge to an arbitration award that failed at the district court level. After affirming the district court decision and upholding the award, the U.S. Court of Appeal for the Seventh Circuit considered an application for sanctions against Johnson Controls. The court deemed sanctions moot because Edman Controls would recover its costs under a contractual fee-shifting provision, but warned that "challenges to commercial arbitral awards bear a high risk of sanctions" because "attempts to obtain judicial review of an arbitrator's decision undermine the integrity of the arbitral process." The Court of Appeal clarified that arguments properly rejected at the first instance level would be deemed frivolous and sanctionable unless supported by a "reasoned colorable argument for altering the district court's judgment". Taken in context, the court clearly believed Johnson Control's appeal to be frivolous and was implicitly saying that most appeals of district court decisions confirming arbitration awards are likely frivolous and sanctionable. This decision solidifies lower U.S. court cases such as the Southern District of New York's decision in *Digitelcom Ltd. v. Tele2Sverige AB* (No. 12 CV 3082) (RJS) (S.D.N.Y. July 25, 2012).

The trend for now sanctioning challenges to arbitration awards is not necessarily limited to frivolous challenges, as can be seen from a recent decision of the Hong Kong Court of Final Appeal. In *Pacific China Holdings Ltd. v. Grand Pacific Holdings Ltd* (CACV 136/2011), an arbitration award was set aside at the first instance level but reinstated upon appeal. Costs were sought against Pacific China Holdings ("PCH") on an indemnity basis (where the receiving party is likely to receive a higher percentage of its costs than if assessed on a standard basis). Even though PCH had an arguable case before the district

court that resulted in vacation of the arbitration award (unlike the frivolous appeal in the Johnson Controls case), the Court of Appeal affirmed the presumption that it was fair to impose costs on an indemnity basis in proceedings regarding arbitration awards, unless special circumstances existed not to do so. This differs from the normal process in civil proceedings of imposing indemnity costs as a sanction for a vexatious challenge. The Court of Appeal approved of the court of first instance decision in the case of *A v. R* ([2009] 3 HKLRD 389), in which the court held that "if the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award. The winning party would only be able to recover about two-thirds of its costs of the challenge and would be out of pocket as to one-third".

In two Swedish cases, *OFAB Ostergotlands Fastigheter AB v. Gaftare AB* (Svea Court of Appeal, case T-6147-10) and *Thomas Lundin v. Telefonaktiebolaget LM Ericsson* (Svea Court of Appeal case T 6123-12), the courts went a step further and penalized both the parties challenging the arbitration awards and their counsel for bringing frivolous challenges. Typically, counsel for the losing party are not normally liable for the prevailing party's costs, only the losing party is. In the case of *Ostergotlands*, the Court of Appeal held that, where the losing party had to pay the successful party's litigation costs, and the losing party's counsel through "negligence or recklessness" incurred costs for that party, both counsel and the losing party could be held jointly liable for those costs. In the *Lundin* case, it has been reported that the court held that counsel would not be liable for costs just because the grounds for challenge were weak but in that case Thomas Lundin's experienced counsel was said to have acted negligently in bringing unfounded actions that would give rise to extra costs for the opposing party. The unique aspect of these cases is the fact that counsel was brought within the ambit of these sanctions as a penalty.

Conclusion

These cases demonstrate that the courts are increasingly willing to penalize attempts by losing parties to "try for a second bite at the apple" (*Johnson Controls* case) without valid grounds. They provide an important reminder to parties and counsel to give serious consideration to the strength of challenges to awards before launching proceedings.

POTENTIAL FOR DEPOSITORS IN CYPRIOT BANKS TO MAKE CLAIMS UNDER BILATERAL INVESTMENT TREATIES IN RELATION TO THE CYPRUS BANKING CRISIS

Depositors holding funds in excess of €100,000 in two Cypriot banks suffered heavy losses as a result of the €10 billion bailout plan agreed by the Cyprus Government, and following strict capital controls which prevent the withdrawal of any significant sums from Cypriot accounts. Total losses suffered are estimated to be in excess of €4 billion.

Given the scale of the losses, affected depositors are likely to consider possible ways of seeking recourse. As outlined below, one possible course of action is a claim against the Cypriot government under any applicable bilateral investment treaties ("BITs").

BITS AS A POSSIBLE ROUTE TO RECOURSE

To date, Cyprus has signed 16 BITs, half of them with European Union Member States. Whilst the terms of the different BITs (and therefore the protection offered) will vary, most BITs will provide for protection against unlawful expropriation of property without payment of adequate compensation. Most (if not all) BITs will also provide a mechanism for dispute resolution, through which nationals of signatory countries can pursue claims for compensation against the Cypriot government.

Before bringing a claim, affected depositors will need to establish that they qualify for protection under an applicable BIT. In the first instance, an individual depositor should look to see if there are any BITs in force between Cyprus and the country of which he or she is a national. Similarly, a corporate depositor should look for a BIT between Cyprus and the country in which it is incorporated.

Difficulties may arise where individuals hold deposits through companies that are incorporated in other countries. If the country in which the relevant company is incorporated does not have a valid BIT with Cyprus, an individual may still assess the ability to bring an action if that individual's home country does have a BIT in place. Similarly, individuals from countries that do not have valid BITs with Cyprus may fall within the scope of an applicable BIT where they have invested through a company or vehicle that is established in another country.

As many of the affected deposit holders are Russian nationals, they will naturally look for protection under the Russia - Cyprus BIT. Whilst this BIT has been signed, however, it has not been ratified by Russia and so is not presently in force.

PROSPECTS OF SUCCESSFUL CLAIMS UNDER BITS

In order successfully to bring a claim against the Cypriot government, depositors would need to show that either: (i) the bailout conditions (through which funds held in the two affected banks were converted to shares, some of which are frozen and do not attract interest); or (ii) the imposition of currency controls, constitute an unlawful expropriation of property.

Precisely what depositors have to prove in order to succeed in their claims will depend principally on the terms of the relevant BITs, for example how the term 'investment' is defined and what controls exist on the expropriation of that 'investment' under the BIT. Depositors are likely to face challenges in establishing their entitlement to compensation, not least in proving that the value of their investment was higher before the bailout occurred than it is now. It may also be necessary for arbitral tribunals hearing claims under BITs to determine whether any expropriation can be justified as being in the best interests of the public and the community as a whole.

EU MEMBER STATES WHO HOLD BITS WITH CYPRUS

In light of the changes brought about by the Lisbon Treaty and the Treaty on the Functioning of the European Union ("TFEU"), BITs between Member States ("Intra EU BITs") and those between Member States and third countries ("extra-EU BITs") have received a considerable amount of attention. Ultimately the European Commission will release a model EU BIT to be used and adhered to by all Member States. The Commission, in its explanatory memorandum on the transitional arrangements for BITs between Member States and third countries, stated that both BITs entered into with countries prior to their becoming Member States and BITs entered into with third countries will remain in force until specifically terminated.

Also potentially relevant is the ruling of the tribunal in *Electrabel S.A v. the Republic of Hungary* (ICSID Case No. ARB/07/19). In that case, the tribunal found that EU law would prevail over any inconsistent terms of a particular BIT. As a result, claims brought by EU nationals against Cyprus may be further complicated by the need to consider the impact (if any) of EU law. There are a number of provisions of EU law that are potentially relevant to claims brought by depositors against Cyprus (including Article 65 of the TFEU, which provides for the free movement of capital within the EU).

WAITING PERIODS AND DOMESTIC LITIGATION REQUIREMENTS IN INVESTMENT TREATY ARBITRATION: A RECENT DEVELOPMENT IN *PHILIP MORRIS V. REPUBLIC OF URUGUAY*

Introduction

Bilateral Investment Treaties ("BITs") are agreements establishing certain international law protections for private investment by nationals and companies of one state in another state. Most BITs also contain clauses offering arbitration to investors. Many, if not most, BITs refer to the International Centre for Settlement of Investment Disputes ("ICSID"). BITs may set out conditions to a state's consent to arbitration with investors of another state, including procedural requirements. For instance, a treaty may require the investor to attempt to reach an amicable settlement for a certain period ("waiting periods"). A treaty may also require the investor to file a claim before the courts of the host state for a minimum period prior to commencing arbitration ("domestic litigation").

After providing an overview of how arbitral tribunals have dealt with preliminary issues arising out of these types of provisions, we report below on the recent decision on jurisdiction given in the ICSID case *Philip Morris Brands SARL et al. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013). That decision considers, among other things, certain objections based on the substantive and temporal dimensions of the domestic litigation provision of the applicable BIT.

Waiting Periods

Many BITs provide that the investor may only resort to international arbitration after a certain period has elapsed after the dispute has arisen. Three to 12 months is common. If the parties do not settle within the prescribed period, the investor may proceed to arbitration. The obligation to wait is often coupled with an obligation to seek an amicable settlement through negotiations in order to avert the need for arbitration. In practice, however, where the positions are entrenched, negotiations may have become futile by the time the parties decide to resort to arbitration. This is why most commentators refer to this type of stipulation as prescribing a "waiting period" rather than a "negotiation period".

Tribunals have had different reactions to such clauses. In the majority of cases, they have found that the investors had complied with the waiting periods and no issue was raised. In other cases, tribunals found that non-compliance with waiting periods did not affect their jurisdiction, as they characterized such provisions as procedural rather than jurisdictional. The decisive criterion for disregarding the waiting periods when the investor had not complied with them seems to have been the futility of any negotiations. Where the evidence indicated that negotiations were unlikely to lead to a settlement, these tribunals have taken the view that there would be no point in declining jurisdiction and forcing the parties to start negotiations anew.

Other tribunals have taken the opposite track. In December 2012, for instance, an ICSID tribunal declined jurisdiction over an investment treaty dispute between a subsidiary of Murphy Oil Corporation and the Republic of Ecuador, finding that the claimant had not observed the waiting period before commencing arbitration.

Domestic Litigation

BITs may also require that domestic remedies be utilized for a certain period of time – 12 to 18 months is the typical range – before the investor may initiate arbitration proceedings. This is not a requirement to exhaust local remedies; the investor is free to turn to international arbitration once the time has elapsed. In practice, investors have advanced arguments to avoid these provisions.

The Philip Morris Decision

In February 2010, a group of Philip Morris companies commenced arbitration against the Republic of Uruguay under the Switzerland-Uruguay BIT, challenging two tobacco restriction ordinances passed by the Uruguayan health authorities.

Uruguay raised jurisdictional objections to the claim, including that Philip Morris had not satisfied the requirement of the BIT to litigate the dispute in the Uruguayan courts for 18 months before commencing arbitration. The Switzerland-Uruguay BIT provides for a sequence of steps to be followed by the claimants for dispute resolution. As a first step, the parties shall as far as possible attempt to settle the dispute amicably. As a second step, if the parties do not settle within six months, the dispute shall be submitted to the competent Uruguayan courts. If the Uruguayan courts do not pass judgment within a period of 18 months after the proceedings have been instituted, the investor may, as a third and final step, resort to international arbitration.

Phillip Morris had sought the annulment of the Uruguayan ordinances before administrative courts in Uruguay, alleging violations of domestic law (but not of the BIT). However, the Uruguayan courts did not issue a decision within the 18-month period prescribed by the BIT.

The government objected to the jurisdiction of the tribunal on two grounds. First, that the dispute the claimants had submitted to the national courts was not the same as the dispute submitted to arbitration. Second, that the claimants had initiated arbitration before the 18-month domestic litigation prescribed by the BIT expired. In its 2 July 2013 decision on jurisdiction, the tribunal dismissed both objections and found jurisdiction to hear the dispute.

The tribunal dismissed the government's first objection. Interpreting the expression "disputes with respect to investments" in the BIT by reference to the Vienna Convention on the Law of Treaties, the tribunal found that it was sufficiently broad to include any kind of disputes where the subject matter was an investment. In particular, the tribunal noted that the BIT provided that the investor "may appeal to an international tribunal which decides on the dispute in all its aspects," and held that the words "in all its aspects" had to refer to both domestic law and international law claims. Accordingly, the tribunal concluded that the claimants had satisfied the domestic litigation requirement in the BIT by submitting their domestic law claims through their requests for annulment to the Uruguayan courts and therefore did not need to allege a breach of the BIT itself.

The tribunal also dismissed Uruguay's second objection that the claimants had commenced arbitration before the 18-month domestic litigation period had expired. The tribunal considered jurisdictional decisions by other tribunals on the same issues referred to by the parties, but found them inapplicable as they were based on either different language in the treaty or different facts. The tribunal also rejected the position expressed by previous tribunals that domestic litigation requirements are futile, stressing their importance for the host state: "They offer the state an opportunity to redress alleged violations of the investor's rights under the relevant treaty before the latter may pursue claims in international arbitrations". Turning to the words of the BIT, the tribunal found that their ordinary meaning indicated the binding character of each step of the sequence before resorting to arbitration. This conclusion was confirmed by the object and purpose of domestic litigation requirements, which are aimed at offering the host state the opportunity to redress the violations of the BIT. The tribunal added that, despite its compulsory nature, the domestic litigation requirement could be satisfied by actions occurring after the date the arbitration was instituted, as long as the tribunal had not ruled on its jurisdiction.

Since the claimants had filed proceedings before the Uruguayan courts before initiating arbitration, the tribunal held that they had met the objective of the domestic litigation requirement (although the local courts had rendered their decisions after the expiry of the 18-month period). To require them to start over and re-file their arbitration once their 18 months have been met would, in the tribunal's opinion, have been a waste of time and resources.

Conclusion

The decision provides useful guidance on the application of pre-conditions to arbitration, which often present important jurisdictional issues. On the one hand, the tribunal's interpretation of the BIT seems in line with recent arbitral practice. Another ICSID Tribunal concerned with a similar requirement in the Romania-Turkey BIT endorsed the view that the investor is not required to assert a breach of the investment treaty in the local courts, specifying, however, that the disputes brought before the local courts should be of a nature that permits resolution to substantially the same extent as if brought before an international arbitral tribunal pursuant to an investment treaty (*Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013). On the other hand, the tribunal's approach to the question of time limits was less orthodox. The tribunal opted to consider the purpose and aim of the dispute resolution system put in the BIT, as well as the object and purpose of the 18-month litigation requirement. The tribunal's main focus seems to have been that the local courts had the opportunity to consider the dispute and that it had not yet ruled on its jurisdiction.

SOVEREIGN IMMUNITY IN RECOGNITION AND ENFORCEMENT PROCEEDINGS OF ARBITRAL AWARDS MADE UNDER BILATERAL INVESTMENT TREATIES

In *Walter Bau v. Government of Thailand*, the German Federal Court of Justice in Civil Matters had to consider whether, in recognition and enforcement proceedings of a foreign arbitral award made under a bilateral investment treaty ("BIT"), a state could successfully raise a sovereign immunity defence on the basis that the arbitral tribunal had wrongly assumed jurisdiction. By an arbitral award under the Germany-Thailand BIT, the government of Thailand had been ordered to pay Walter Bau around EUR 30 million. Thailand did not pay voluntarily and Walter Bau initiated recognition and enforcement proceedings in both the United States and Germany.

In the German proceedings, Thailand raised a sovereign immunity defence contending that the arbitral tribunal lacked jurisdiction to decide the dispute because there was no "approved investment" complying with the conditions of the treaty. Thailand's sovereign immunity defence faced several hurdles, including that: (i) the arbitral tribunal had determined that it had jurisdiction; (ii) the state had not applied to the courts at the seat of arbitration to annul the decision on jurisdiction and instead participated in the merits phase of the arbitration; and (iii) in the BIT, the state had agreed that the "award will be enforced according to domestic law".

The German Federal Court of Justice, however, held that, as a matter of principle, nothing precluded Thailand from raising a sovereign immunity defence at this stage. The following reasons underpinned its decision:

- The principle of "Kompetenz-Kompetenz" means that an arbitral tribunal has the power to resolve finally its own jurisdiction. An idea initially developed in Germany, it is no longer a part of German law. As with other jurisdictions, under German law, determinations of jurisdiction are subject to court review, both legally and factually, including in particular with regard to awards made in investor-state arbitrations. Whilst under the Germany-Thailand BIT, decisions of the arbitral tribunal were meant to be "binding" and "enforced according to domestic law," this only applies where a valid arbitration agreement exists. Stated differently, an arbitral award is not "binding" on the parties where the arbitral tribunal mistakenly assumes jurisdiction. As a result, a state is entitled to raise a defence of sovereign immunity in recognition and enforcement proceedings relating to such awards made without a valid arbitration agreement.

- A state is not precluded from raising a defence of sovereign immunity in circumstances where it did not challenge an award on jurisdiction at the seat of the arbitration and instead continued to participate in the merits phase of that arbitration. According to the German Federal Court of Justice, this is because an arbitral award has no binding effect in the recognition and enforcement proceedings.

- A waiver of sovereign immunity is not assumed lightly and requires clear and unequivocal language or conduct by a state which leaves no doubt immunity has been waived. Participation in the merits phase of an arbitration by a state without challenging the award on jurisdiction is not sufficient to assume that a state has waived its sovereign immunity from enforcement.

Conclusions

Parties should be aware that in arbitration proceedings against states, a state's failure to challenge an arbitral tribunal's findings on jurisdiction when that ruling is made may not prevent that state from raising such arguments again after a final award has been issued in recognition and enforcement proceedings. In this regard, state parties may be treated differently from private commercial parties. In a dispute between private commercial parties, an award debtor may be precluded from raising the objection of a lack of a valid arbitration agreement as defence to recognition and enforcement where it has not timely challenged a preliminary jurisdiction ruling.

Finally, the decision of the German Supreme Court reiterates that the principle of "Kompetenz-Kompetenz" is no longer fully valid under German law, with German courts being willing to re-examine an arbitral tribunal's decision on its own jurisdiction. It is worth noting that the German courts' treatment of the question of "Kompetenz-Kompetenz" differs from that of the U.S. courts in the parallel enforcement proceedings in relation to the Walter Bau dispute (*Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau AG (In Liquidation)* 688 F.3d 68 (2d Cir. 2012)). Specifically, in the *Walter Bau* case, the U.S. courts held that the parties' agreement on Article 20 of the UNCITRAL Rules constituted "clear and unmistakable evidence that the parties agreed that the scope of the arbitration agreement would be decided by the arbitrators". As a result, they deferred to the arbitral tribunal's decision on its own jurisdiction and did not allow Thailand to raise a sovereign immunity defence on the basis that the arbitral tribunal had wrongly assumed jurisdiction. This deferential approach to the arbitral tribunal's decision on its own jurisdiction runs contrary to the appeal decision in *Republic of Argentina v. BG Group PLC* (No. 11-7021 (D.C. Cir. Jan. 17, 2012)), but consistent with the recent U.S. Supreme Court decision in the same matter. On March 5, 2014, the Supreme Court overturned the Court of Appeals and deferred to the decision of the arbitrators on the same basis as would be the case for arbitration under a contract, consistent with the U.S. courts' holdings in the *Walter Bau* case.

THE TRICKY ISSUE OF THE GOVERNING LAW OF ARBITRATION AGREEMENTS

The law governing international arbitration agreements is one of the salient issues in the law of arbitration. In circumstances where the parties have remained silent as to the governing law of the main contract, it is likely that the English courts will subject the arbitration agreement to the law of the seat of arbitration (see the recent case of *Habas Sinai v.VSC Steel* [2013] EWHC 4071). The situation is more complex when the main contract contains a choice of law clause. According to the separability doctrine, which is recognized in most developed jurisdictions, arbitration agreements are independent from the main contract and are thus not automatically subjected to the law proper to that main contract. As it is uncommon for parties to specify expressly the law governing the arbitration agreement, arbitrators and parties are sometimes left in a state of lingering uncertainty, particularly if the arbitration agreement is unenforceable under one of the potentially applicable national laws. Two recent English court decisions illustrate the current state of uncertainty.

In *Arsanovia & Ors v. Cruz City 1 Mauritius Holdings* [2012] EWHC 3702 (Comm), the parties expressly chose Indian law to govern the main contract and further agreed to arbitration in London. The court treated the governing law clause as a strong indication that it was the implied intention of the parties to choose Indian law to govern the arbitration agreement as well. There was no contrary indication in favour of English law, other than the choice of London as a seat for arbitration. This was corroborated by a provision in the arbitration clause excluding the application of certain provisions of Indian arbitration law, the natural inference being that the parties intended that law to apply otherwise. As an *obiter*, the court stated that the choice of Indian law might even be treated as an express choice of law in respect of the arbitration agreement.

The case of *Sulamerica CIA Nacional v. Enesa Engenharia SA* [2012] EWCA Civ 638, in contrast, is illustrative of a very different approach. In that case, the subject insurance policies contained a London arbitration clause, as well as an express choice of Brazilian law to govern the insurance policy and an

exclusive choice of forum agreement in favour of Brazilian courts. The defendant contended that the parties implicitly opted for the Brazilian law to govern the arbitration agreement. It relied on three factors: (i) the choice of Brazilian law to govern the insurance policy; (ii) the choice of Brazilian courts; and (iii) the connection of the insurance policy with Brazil. The decision on the law governing the arbitration agreement was of critical importance in that case, given that, under Brazilian law, the arbitration could only be started with the consent of the defendant. Although indicating that the starting presumption was to apply the law of the substantive contract, i.e., Brazilian law, as the presumptively implied choice of parties, the court held that two considerations pointed strongly against Brazilian law (and, concomitantly, in favour of English law as having the closest and most real connection with the arbitration agreement): first, the choice of the seat of the arbitration, coupled with the inevitable acceptance of English law to govern the conduct and supervision of arbitration; and second, the fact that under Brazilian law the arbitration agreement was enforceable only with the consent of defendants and the perceived improbability that the parties intended it to be governed by a law that made the arbitration agreement so one-sided.

In an *obiter* in *C v. D* [2007] EWCA Civ 1282, the Court of Appeal had gone even further, holding that "... it would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration. The reason is that an agreement to arbitrate will normally have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place".

Analysis

It is unsurprising that the English courts have reached different conclusions as to whether one can treat choice of law clauses in the main contract as an implied choice-of-law for the arbitration agreement. The case law of foreign jurisdictions is equally divided on this complex issue. Swedish, Italian and some U.S. courts have applied the law of the seat of arbitration to the arbitration agreement, whereas Dutch, Swiss, Indian and other courts have treated choice of law clauses as an implied choice for arbitration agreements. Various arguments point towards each of the approaches in respect of the role of choice of law clauses. On the one hand, parties that agree to arbitration in London might be supposed to expect that the whole 'package' of English arbitration law will apply to their dispute resolution mechanism. Similarly, in the Brussels I bis Regulation and the Hague Convention on Choice of Court Agreements, the choice of forum agreements are governed by the law of the court chosen, which is of course very similar to submitting the arbitration agreement to the law of the arbitral seat. On the other hand, the application of the separability doctrine to justify a separate law to govern arbitration agreements and to deny that an express choice of law clause for the main contract should be considered as at least an implied choice of law clause for the arbitration agreement, might be considered too far-fetched an extension of the doctrine.

Whilst the decision in *Sulamerica* may have been driven by an understandable desire to uphold the validity of the parties' arbitration agreement, some have doubted whether the approach taken did justice to the parties' intentions. Other possibilities might exist to avoid the application of national law rules invalidating international arbitration agreements. Specifically, it has been suggested that Article II of the New York Convention mandates the application of uniform international standards in determining the validity of agreements to arbitrate falling within the Convention's scope. Under this view, national laws which discriminate against international arbitration agreements or which adopt domestic standards of validity contravene the Convention and cannot be given effect. Rather, under this view the validity of international arbitration agreements must be determined in accordance with evolving internationally-accepted, neutral standards of validity.

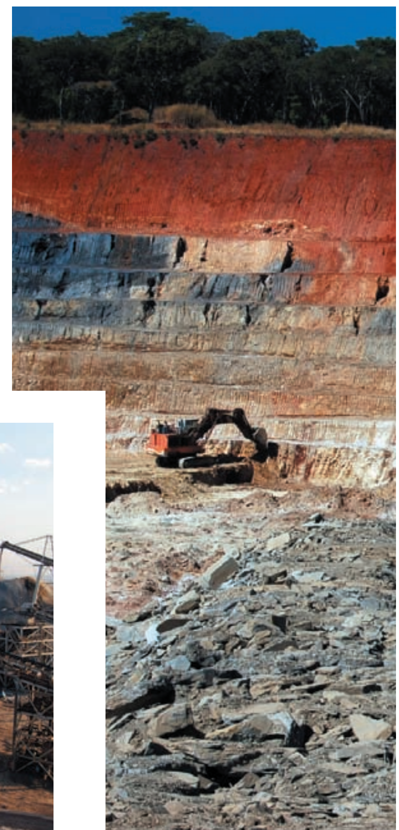
SEEKING INTERIM MEASURES FROM COURTS OTHER THAN THOSE OF THE SEAT – *U&M MINING ZAMBIA LTD V. KONKOLA COPPER MINES PLC*

Konkola Copper Mines Plc ("KCM") owned a copper mine in Zambia. U&M Mining Zambia Ltd ("U&M") had been operating the mine for KCM. In early 2013, KCM terminated the contract for the operation of the mine by U&M. At the same time, KCM sought and obtained an *ex parte* interim injunction from the High Court of Zambia compelling U&M to vacate the mine immediately and hand over certain equipment. U&M commenced an LCIA arbitration in London and applied for, and was granted, an *ex parte* interim anti-suit injunction by the English High Court restraining KCM from taking steps in the injunction proceedings in Zambia.

The main issue for the English court to decide at the on notice hearing of U&M's injunction application was whether KCM had the right to apply to the local (Zambian) court as opposed to the English court (as the court of the seat of arbitration) to obtain interim remedies. Curiously, there was no English case law that was directly on point.

The court held that KCM did have such a right, and discharged the anti-suit injunction ([2013] EWHC 260 (Comm)). In construing the parties' arbitration agreement it found that, because the parties were Zambian and the assets were in Zambia, and because the English court would not always be in a position to order effective interim relief for that reason, the parties must have intended that the Zambian courts would have a supportive function in relation to the conduct of the arbitration. It also took note of the fact that the LCIA Rules refer, in Article 25.3, to a party's right to apply to "any" state court or other judicial authority for interim or conservatory measures, suggesting that a party may apply to courts both at the seat and elsewhere.

Interestingly, the court made clear that a party's right to seek interim relief outside the courts of the seat would only arise "exceptionally". It is not clear from the judgment whether the wording in the LCIA Rules referred to above would, on its own, give rise to such a right.



ENGLISH COURTS POWERS TO RESTRAIN FOREIGN PROCEEDINGS

In *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, the English Supreme Court held that the English courts may grant an anti-suit injunction when foreign court proceedings are brought in violation of an agreement for arbitration in England, even where no arbitration is existing or proposed.

Facts

AES Ust-Kamenogorsk Hydropower Plant LLP ("AES") operated an energy producing hydroelectric plant in Kazakhstan under a concession agreement with Ust-Kamenogorsk Hydropower Plant JSC ("JSC"). The concession agreement was governed by Kazakh law, but provided for arbitration in London. In a series of court proceedings in Kazakhstan (brought in violation of the arbitration agreement), the Kazakh courts declared the arbitration agreement invalid and refused to stop local proceedings. AES obtained an interim injunction in the English courts against JSC ordering it to stop proceedings in Kazakhstan, even though AES had not brought arbitration proceedings and had no intention of bringing any such proceedings. AES was concerned that JSC would continue litigation in the Kazakh courts and accordingly sought permanent injunctive relief from the English courts.

Judgment

The Supreme Court upheld the decisions of the lower courts allowing AES to obtain a permanent injunction and a declaration that JSC could not bring any proceedings otherwise than in the agreed arbitration forum, regardless of the fact that AES did not itself contemplate bringing any arbitration proceedings. The Supreme Court stressed that an arbitration agreement contained not only a positive obligation of the parties to arbitrate their disagreements in a certain forum, but also an equally important negative promise not to take their disputes to any other forum.

Implications

English courts have once again proved their reputation for being arbitration friendly. Under an English arbitration clause a party which has no claims of its own, but which is threatened with litigation in its counterparty's local courts, may go to the English courts to seek to restrain an opponent from bringing foreign proceedings. A breach of such a restraint amounts to contempt of court and can lead to a fine or even the arrest of individuals involved in the breach. Further, the English courts can also refuse to recognise or enforce a foreign court judgment obtained in breach of an injunction.

It should be noted that, within the EU, an anti-suit injunction cannot be granted where parallel proceedings have been brought in another EU member state.

THIRD PARTIES' RIGHTS TO ARBITRATION UNDER THE ENGLISH CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

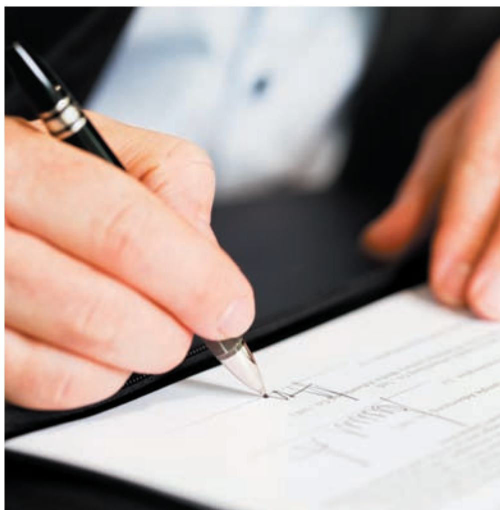
The English Court of Appeal has recently considered the circumstances in which a third party with rights under a contract to which it is not a party can claim the benefit of an arbitration agreement contained in that contract *(Fortress Value Recovery Fund I LLC & Ors v. Blue Skye Special Opportunities Fund LP & Ors* [2013] EWCA Civ 367).

The claimant (Fortress), brought court proceedings in England against the defendants, some of whom were parties to a contract (partnership deed) containing an arbitration agreement, and some of whom were third-party fund-managers entitled to the benefit of certain exclusions and indemnities set out in the contract.

At first instance, the Commercial Court held that those defendants that were a party to the contract were entitled to rely on the arbitration clause to have the court proceedings against them stayed pursuant to section 9 of the Arbitration Act 1996. However, the Commercial Court did not accept that the third-party fund-managers could invoke the arbitration agreement to have the court proceedings against them stayed.

The Court of Appeal upheld the decision against the third-party fund-managers, albeit on slightly different grounds. In its judgment, the Court of Appeal did not agree with the Commercial Court that the third-parties' application must fail because they were not seeking to enforce a right of action in arbitration (i.e., a claim for an indemnity) but instead were seeking only to have their contractual defence (based on the exclusions) arbitrated. The Court of Appeal held that section 1(6) of the Contracts (Rights of Third Parties) Act 1999 precluded such a distinction.

In construing the contract, however, the Court of Appeal held that it was easier to conclude that the parties had intended that the third parties should be entitled to claim the benefit of a right of indemnity on condition that they did so pursuant to the terms of the arbitration agreement that the parties themselves were bound by. The Court of Appeal did not feel able to go further and impute to the parties an intention that the third parties' contractual defences could only be pursued and determined in arbitration proceedings. In conclusion, the Court of Appeal observed that the situation that had arisen could easily have been avoided by the inclusion of an express provision in the agreement.



DUBAI COURT OF CASSATION DECISION ON NON-RECOVERABILITY OF COUNSEL FEES IN DIAC ARBITRATION

In a judgment rendered on 3 February 2013 (Property Appeal No. 282 of 2012), the Dubai Court of Cassation refused to enforce an award of legal fees incurred in an arbitration conducted under the Dubai International Arbitration Centre Rules 2007 ("DIAC Rules"). Although there is no strict doctrine of precedent in the UAE, there is a prospect that the legal reasoning in this judgment will be relied on in the future. As such, parties may be prevented from enforcing DIAC awards for legal costs in the UAE unless the tribunal was expressly authorised to award legal costs by the parties.

The arbitration arose out of an agreement involving the sale and purchase of property in Dubai. In its final award, the tribunal found in favour of the claimant and ordered the respondent to pay damages, interest, and the claimant's costs incurred in the arbitration. Of the costs that were assessed, a portion comprised legal costs (i.e., costs associated with legal representation in the proceedings).

In the enforcement proceedings, the respondent attempted to set aside the award on various procedural and technical grounds, including that the tribunal did not have the power under the DIAC Rules to award legal costs. The Dubai Court of First Instance ratified the award. On appeal by the respondent, the Court of Appeal upheld the Court of First Instance judgment. On further appeal by the respondent, the Court of Cassation affirmed the decision of both lower courts to ratify the award. However, the Court of Cassation found against the award of legal costs, and delivered an analysis in respect of an arbitrator's power under the DIAC Rules to award such costs.

The Court of Cassation held that, in awarding the winning party its legal costs, "the arbitrators have exceeded their powers beyond that granted to them by the DIAC Rules of Arbitration 2007 and UAE law". Consequently, an arbitrator's power to determine costs "may not be broadened by conferring on them an absolute and unfettered discretion to award any costs at any level and for any reason, as they consider appropriate". Citing the relevant Articles and Appendix under the DIAC Rules (Articles 2(1) and 2(4), 17(1), 30(6), 37(10) and Appendix, Articles 2(1), 2(4) and 2(6)), the judgment stated that, under the DIAC Rules, recoverable fees and expenses "do not include the legal costs paid by the parties to their attorneys representing them". The Court of Cassation added that:

"Where the law is silent, fees and expenses that are not clearly and expressly referenced in the arbitration clause are not recoverable as incidental costs directly related to the award".

Following a strict reading of this judgment, arbitrators in DIAC proceedings may risk invalidating their awards by awarding legal costs. However, it is important to note that UAE court decisions do not establish binding precedent. Further, while the Court of Cassation expressly referred to the DIAC Rules, the judgment made two references to the arbitration having been conducted under the predecessor 1994 Rules of the Dubai Chamber of Commerce and Industry ("DCCI Rules"). It is not clear whether these references derive from the arbitration agreement or the final award. They are nevertheless noteworthy because Article 48 of the DCCI Rules appears to allow the award of legal costs.

Arbitration practitioners had been aware of uncertainty under the DIAC Rules regarding the recoverability of legal costs. Despite that, there have been numerous awards for legal costs in DIAC arbitrations, which reportedly have been enforced in the UAE. However, in light of this judgment, and absent any amendment to the DIAC Rules in this regard, parties would be well advised to incorporate in their arbitration agreements (or terms of reference) that the tribunal has the power to award legal costs in DIAC arbitrations. Absent such express power, there will, in light of the judgment, remain a degree of uncertainty regarding the prospects of enforcing such awards in the UAE.

U.S. COURT ENFORCES INTERNATIONAL ARBITRAL AWARD ON PUBLIC POLICY GROUNDS NOTWITHSTANDING MEXICAN COURT'S NULLIFICATION

In a recent decision, the U.S. District Court for the Southern District of New York confirmed an arbitral award issued by an ICC panel seated in Mexico City, even after a Mexican appellate court issued a 486-page decision holding the award invalid (2013 WL 4517225 (S.D.N.Y.)). According to Judge Hellerstein's opinion, the question to be answered was "Which is to be given primacy, the award or the nullifying judgment"? Following a thorough analysis of the procedural history through the Mexican court system, the U.S. District Court held that the nullification decree violated basic notions of justice as the Mexican court had applied a law that did not exist at the time the parties' contract was formed nor at the time the dispute arose and that left the aggrieved party without recourse.

The dispute arose between a subsidiary of KBR, Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. ("COMMISA"), and the exploration and production arm of Mexican state-owned petroleum company, PEMEX, over a 1997 contract to construct natural gas platforms in the Gulf of Mexico. The contract, governed by Mexican law, included a clause for arbitration in Mexico City. The law under which PEMEX was organized expressly permitted it to agree to arbitrate disputes.

The case had an extensive procedural history before it reached the U.S. court. After each party accused the other of breaching contractual obligations, COMMISA initiated arbitration proceedings. PEMEX, in turn, rescinded the contract. COMMISA also challenged the rescission in the Mexican courts on the basis that the statute permitting rescission was unconstitutional, as well as inapplicable to the parties' dispute. Ultimately, the Mexican Supreme Court held that the rescission statute was constitutional and that an aggrieved party had recourse to the courts to resolve contractual disputes arising from the rescission. The Supreme Court did not address whether such disputes could be resolved in arbitration.

Meanwhile, after the arbitral tribunal was constituted, PEMEX challenged its jurisdiction, but not on the grounds that the dispute was not arbitrable. The three-member tribunal issued a preliminary award holding that it had jurisdiction. PEMEX moved for reconsideration on several grounds, including for the first time that arbitration was an impermissible forum for deciding disputes related to administrative rescissions. The tribunal issued another order reaffirming its earlier decision on jurisdiction.

In its final award, the majority of the tribunal found for COMMISA on most of its substantive claims and issued an award for damages. The dissenting arbitrator held that the panel lacked jurisdiction because, among other reasons, there had been a change in Mexican law during the arbitration providing that administrative rescissions could not be subject to arbitration proceedings.

PEMEX ultimately prevailed at the Mexican court of appeals after several attempts to nullify the award. The appellate court ruled that public policy barred private tribunals from resolving disputes involving administrative rescissions because the purpose of such acts is to safeguard the financial resources of the state. Besides citing a 1994 Supreme Court decision, the court also relied heavily on a 2009 statute (enacted several years after commencement of the COMMISA arbitration) that forbade arbitrators from hearing administrative rescissions. Post-nullification, COMMISA filed a damages claim in the Mexican administrative court, but the court dismissed the case on the grounds that a 45-day statute of limitations (then long passed) barred COMMISA's claims.

COMMISSA next brought proceedings in New York under the Federal Arbitration Act and the Panama Convention to confirm the award. The court's analysis focused on Article 5 of the Panama Convention (virtually identical to provisions in the New York Convention) and whether its permissive phrasing gave the court discretion to enforce the award despite the fact that it had been held invalid under the law applicable to the contract at the seat of the arbitration.

A handful of U.S. courts have addressed similar requests; most had declined to enforce arbitral awards that had been nullified by foreign courts at the seat. The test articulated by the courts as to when discretion to enforce could be invoked notwithstanding a nullification by a competent foreign court was where "extraordinary circumstances" were present (NY and Second Circuit) and when to do so would be "repugnant to fundamental notions of what is decent and just in the United States" (DC Circuit). Only one court, the DC District Court, has confirmed an arbitral award in the U.S. that a foreign court had rejected at the seat of the arbitration.

Under the facts of COMMISA, the district court found that the Mexican court's decision vacating the award violated "basic notions of justice" and that deference was therefore not required. According to the court, "[a]pplying a law that came into effect well after the parties entered into their contract was troubling. But this unfairness was exacerbated by the fact that the [Mexican appellate court's] decision left COMMISA without a remedy to litigate the merits of the dispute that the arbitrators had resolved in COMMISA's favor."

The case is on appeal before the Second Circuit.

NEW ARBITRATION RULES UPDATE – KEY AND INTERESTING FEATURES

During 2013, a number of prominent arbitral institutes updated their arbitration rules. The International Bar Association ("IBA") also announced guidelines regarding the conduct of party representatives in international arbitration.

SINGAPORE INTERNATIONAL ARBITRATION CENTRE

In terms of arbitration caseload, the Singapore International Arbitration Centre ("SIAC") is considered the fastest growing arbitral institute internationally. This is no doubt due to the increasing popularity of Singapore as a seat of arbitration as well as the modern and efficient arbitration framework provided by the SIAC Rules.

A new version of the SIAC Rules came into force on 1 April 2013, amending the 2010 version. The following is a summary of the key new features:

■ **New Court of Arbitration established:** A new Court of Arbitration has been established that will assume responsibility for case administration, which function has been inherited from the Board of Directors. The Court is comprised of 16 renowned arbitration practitioners from around the world. The Court's role includes determining challenges to arbitrators (Rule 13) and jurisdictional objections (Rule 25). With the exception of decisions on jurisdiction, any decision of the Court, its President or the Registrar relating to an arbitration shall be "conclusive and binding" upon the parties, there is no requirement to provide reasons for such decisions (Rule 36.1) and the parties waive any right of appeal or review of such decision to any state court or judicial authority (Rule 36.2).

■ **Registrar powers:** The Registrar now has the discretion or power: to extend or shorten any time limits prescribed under the Rules (Rule 2.5); to determine whether an arbitration has indeed commenced as a result of a notice of arbitration being in "substantial compliance" with the Rules (Rule 3.3); if an objection regarding the existence or validity of an arbitration agreement is raised prior to formation of the tribunal, to determine whether this should be referred to the Court (Rule 25.1); and to determine separate advances on costs for claims and counterclaims (Rule 30.2).

■ **Party representatives:** It is no longer necessary for a party representative to provide "proof of authority" in order to represent a party (Rule 20.1).

■ **Tribunal's powers:** The Tribunal has been granted the power to decide, where appropriate, any issue that arises in the proceedings, but which has not expressly or impliedly been raised in written submissions – for example, if a new issue arises in a witness statement or expert report. The Tribunal must, however, notify the other party of the issue and give them an opportunity to respond (Rule 24.1(n)).

■ **The Award:** The Tribunal may now award post-award interest, thus removing a restriction that was previously in place (Rule 28.7). SIAC has also now obtained the consent of parties to publish any award after redacting the party names and identifying information. The latter appears to follow an established practice of the ICC, which publishes the substance of select awards around three years after they have been rendered. It is not yet clear when SIAC will choose to publish awards rendered under its Rules.

HONG KONG INTERNATIONAL ARBITRATION CENTRE RULES ON ADMINISTERED ARBITRATION AND HONG KONG ARBITRATION ORDINANCE

Hong Kong has historically been the most prominent arbitral seat in Asia. It now faces increasing competition, at least in Asia, from Singapore. It is therefore hardly coincidental that recent amendments to the Hong Kong International Arbitration Centre Rules on Administered Arbitration (the "Rules") bear a striking resemblance to existing provisions of the SIAC Rules.

The new Rules, which were last updated in 2008, came into operation on 1 November 2013. The following are key features of the new Rules:

■ **Emergency arbitrator:** A new procedure has been introduced whereby any party may apply for urgent interim or conservatory relief through an "emergency arbitrator", before the tribunal has been formally appointed (Article 23.1). This procedure may not be suitable for parties who prefer to seek such relief through national courts because of potential difficulties in enforcing decisions of an emergency arbitrator in a foreign jurisdiction.

■ **Multiple parties or multiple contracts:** The tribunal now has the power to join additional parties to ongoing proceedings if the new party is also bound by an arbitration agreement under the Rules (Article 27.1).

■ **Expedited procedures:** Where the total amount in dispute does not exceed HKD 25 million (USD 3.2 million), either party may request that the arbitration proceed on an expedited basis (Article 41). Under the previous rules, the cap was USD 250,000.

■ **Arbitrator fees:** Arbitrators will now be bound by standard terms of appointment (see Schedules 2 and 3). Parties are now able to agree on whether arbitrators will be remunerated on the basis of hourly rates or capped amounts based on a schedule (by reference to the amount in dispute). If the parties fail to agree on the form of remuneration, hourly rates will apply (Article 10).

On 19 July 2013, certain amendments to the Hong Kong Arbitration Ordinance came into force, which to some extent correspond, and are supportive of, amendments to the Rules. The core amendments are as follows:

■ **Emergency arbitrator awards:** Hong Kong courts now have the express power to enforce an award made by an emergency arbitrator, whether made in or outside Hong Kong (Sections 22A and 22B).

■ **Hong Kong and Macao awards:** Ratification of a bilateral arrangement between Hong Kong and Macao regarding mutual recognition and enforcement of arbitral awards (Sections 98A to 98D).

■ **Arbitration costs:** Revised procedure whereby a party may apply to the Hong Kong courts for assessment of arbitration costs (Section 75).

AMERICAN ARBITRATION ASSOCIATION: COMMERCIAL ARBITRATION RULES AND OPTIONAL APPELLATE ARBITRATION RULES

A new version of the Commercial Arbitration Rules ("Arbitration Rules") of the American Arbitration Association ("AAA") came into effect on 1 October 2013. These Arbitration Rules are typically used in U.S. domestic arbitrations. The core amendments are as follows:

- **Interim relief:** An emergency arbitrator is now available to grant interim relief prior to formal appointment of the tribunal (Section R-38). This avenue was previously available only if the parties specifically agreed to such procedure in their arbitration agreement.

- **Case management:** The tribunal now has greater case management powers. These include: convening a preliminary meeting as soon as practicable after appointment of the tribunal (Section R-21), during which various procedural "checklist" items should be addressed (Section P-2); the tribunal and parties are to exercise care against "importing procedures from court systems" as the arbitral process is intended to be more simple, less expensive and speedy (Section P-1); and the power to order "appropriate sanctions" where a party fails to comply with the Arbitration Rules or any procedural directions (Section R-58).

- **Dispositive motions:** Any party may make an application for a "dispositive motion" (such as, summary dismissal of the dispute or strike-out of specific claims) provided the applicant first demonstrates that such is likely to succeed and narrow the issues in dispute (Section R-33).

- **Mediation:** If the amount in dispute exceeds USD 75,000, the parties are obliged to attempt to resolve the dispute through mediation, which is to take place concurrently with (and not delay) the arbitration (Section R-9).

- **Document production/disclosure:** The overarching principles regarding disclosure of documents are to seek to achieve an "efficient and economical resolution of the dispute" while promoting equality and fairness between the parties. The tribunal may direct a party to disclose documents which are the subject of "reasonable" requests from another party provided that such are: (i) not available to the requesting party; (ii) reasonably believed to exist; and (iii) relevant and material to the outcome of a disputed issue. With regard to electronic documents, the tribunal shall direct that any such document be disclosed in a manner that is "most convenient and economical" for the disclosing party (Section R-22).

Further, on 1 November 2013, a new version of the AAA Optional Appellate Arbitration Rules ("Appellate Rules") came into force. These Appellate Rules provide a mechanism whereby parties may agree to subject their arbitral award(s) to appeal before a AAA appeal tribunal. Interestingly, the Appellate Rules may be utilised regardless of whether the underlying arbitration is conducted under the Arbitration Rules. Appeals will be permitted if the underlying award is based on "an error of law that is material and prejudicial" or "determinations of fact that are clearly erroneous" (Section A-10). The aggrieved party is required to file an appeal within 30 days of receipt of the underlying award. While any appeal proceedings are ongoing, the award will not be enforceable.

ABU DHABI COMMERCIAL CONCILIATION AND ARBITRATION CENTRE

The Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC") was established in 1993, as a department of the Abu Dhabi Chamber of Commerce & Industry (now known as the Abu Dhabi Chamber). Its old arbitration rules, or "Procedural Regulations", were enacted in 1993, and did not undergo any substantial development (the "1993 Rules"). In essence, they provided for an arbitration procedure that broadly resembled UAE local court proceedings, and were not reflective of current international arbitration best practice. It nevertheless remained the preferred arbitral institute of many Abu Dhabi-based parties, especially Abu Dhabi government bodies and Abu Dhabi government-controlled entities.

On 1 September 2013, a new set of Procedural Regulations (the "2013 Rules") came into force. The 2013 Rules appear to have the character and detail found in the rules of leading international arbitral institutes. There are a number of provisions of the 2013 Rules that were either missing from, or were not sufficiently clear in, the 1993 Rules. These include the recognition of party autonomy (Article 15), appointment of the tribunal (Articles 8-12), the tribunal's power to determine its jurisdiction (Article 22), and arbitrator fees (Articles 43 and 44).

Despite these developments, there remain certain features of the 2013 Rules that continue to resemble UAE local court proceedings. These include optional "pleading sessions" (Article 24), default Arabic language absent agreement between the parties (Article 18), and, although the tribunal has the power to award "costs", it is not clear whether this includes legal fees.

One criticism that has been directed against ADCCAC in the past relates to its secretariat and case management. It is hoped that with the implementation of the 2013 Rules, there will be a corresponding development of its reputation among the arbitration community.

Importantly, there remains some question regarding the status and operation of the 2013 Rules. The 2013 Rules appeared on the ADCCAC website briefly, which shortly thereafter reverted to displaying the 1993 Rules, and continued to do so as at the date of writing this article. The status of the 2013 Rules therefore remains uncertain.

INTERNATIONAL BAR ASSOCIATION GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION

On 25 May 2013, the IBA Council adopted the IBA Guidelines on Party Representation in International Arbitration (the "Guidelines").

The perceived need for the Guidelines arose because of the differing ethical and professional conduct rules that apply to party representatives from different jurisdictions and legal traditions. The Guidelines seek to establish common principles by which party representatives in international arbitration should abide, to the extent that parties agree to their application. In general, they seek to ensure that party representatives act with "integrity and honesty" and are deterred from engaging in conduct that results in unnecessary delay or expense to proceedings (including tactics designed to obstruct the arbitral process).

The following core principles are contained in the Guidelines:

■ **Party representation:** Once the tribunal has been formed, a person should not accept a party representative appointment if such would create a conflict of interest for a tribunal member. If, however, this guideline is breached, the tribunal may "take measures appropriate to safeguard the integrity of the proceedings", including exclusion of the proposed party representative from participating in the proceedings.

■ **Communication with arbitrators:** Unless otherwise agreed by the parties, a party representative should not engage in any *ex parte* communications with arbitrators regarding the arbitration. There are exceptions, including communications with a prospective arbitrator nominee regarding his or her experience, expertise and availability, communications with a party nominated arbitrator regarding selection of a tribunal chairman and (where agreed between the parties) communications with a prospective tribunal chairman regarding his or her experience, expertise and availability, provided that no views on the dispute are sought.

■ **Submissions to the tribunal:** A party representative should not make any "knowingly false submission of fact" to the tribunal, and should promptly correct any such previous submission "subject to countervailing considerations of confidentiality and privilege". Witness or expert evidence known to be false should not be submitted. If the falsity is discovered subsequently, the representative shall take remedial measures, including advising the witness to testify truthfully (including correcting or withdrawing false evidence). In extreme circumstances, the representative should withdraw.

■ **Information exchange and disclosure:** Where proceedings may involve document production, a representative shall inform his or her client of the need to preserve relevant documents. A representative shall desist from requesting, or objecting to, the production of documents "for an improper purpose, such as to harass or cause unnecessary delay".

■ **Witnesses and experts:** Before seeking any information from a potential witness, a party representative should identify himself or herself and the party he or she represents. It is permissible for a representative to assist a factual/expert witness with preparation of a statement/report, provided that it reflects the witness's own account of facts/opinions, to discuss a witness's prospective testimony for the purposes of preparations and to pay a witness his or her reasonable expenses incurred in connection with attending to give evidence.

■ **Remedies for misconduct:** The tribunal, after having notified the parties and given them an opportunity to respond, may caution a representative, draw adverse inferences from the evidence he or she has (or the client has) adduced and/or make an award of costs against the party in question.

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