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The ABCs of Arbitrating Outside of the New York Convention

Non-Convention states such as Iraq and Taiwan can pose complex questions of reciprocity and enforceability for international investors and businesses.

By Joanna Rosen and Yi-Chin Ho

The United Kingdom has recently extended application of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) to the British Virgin Islands, bringing the total number of countries and territories which are party to the New York Convention to more than 150. However, 47 countries are still not party to the New York Convention (Non-Convention States), including several with sizable and growing economies.[1] International investors and businesses should consider carefully the intersecting, and often ambiguous, web of international instruments, domestic laws and policies governing the enforcement of arbitral awards when doing business in or with companies from these 47 countries.

In this article, we identify the sources of law relevant to the enforceability in the US of arbitration awards rendered in Non-Convention States. The take away lesson: all companies should pay close attention to international instruments, as well as domestic laws, governing the enforceability of arbitral awards. These will be relevant not only in the territory of the seat of the arbitration, but also in the state in which a business or trading partner may have assets and in which enforcement may be sought.

Background

Under the New York Convention, arbitral awards are enforceable in a large number of jurisdictions around the world, with limited grounds to refuse enforcement. Outside the European Union, no wide ranging treaty provides for the enforcement of court judgments. The ability to enforce arbitral awards, as compared to court judgments, is often a decisive factor for companies when selecting international arbitration over litigation as their preferred dispute resolution mechanism.

Some Non-Convention States — such as Iraq, Libya, Taiwan and Yemen — are economies with the potential to attract significant foreign investment and international trade. However, their Non-Convention status could significantly impact how business is conducted. International companies investing or doing business in these States should be aware of the difficulties posed with enforcing arbitral awards in those States and structure the deal and contract documents accordingly. Should things go wrong, difficulties may arise if an arbitration is seated in one of these Non-Convention States and a party subsequently seeks enforcement in the US, although there are other instruments and laws to which that party can turn in the enforcement context.

Got Reservations?

The New York Convention generally requires Convention States to enforce arbitral awards rendered in other Convention States. However, many Convention States have adopted the “reciprocity reservation,” which, broadly speaking, limits their obligations to recognize and enforce only those awards rendered in another Convention State. More than 75 countries, including the US, China, India, Japan, Korea, and the UK have entered this reservation. Thus, the place where the award is legally deemed to have been rendered (the “seat”) can have significant consequences in the enforcement analysis.

The Convention Calculus

Companies wanting to ensure maximum flexibility in the enforcement of their award in Convention States should draft the dispute resolution clause to provide that the seat is in a Convention State. However, this may not always be possible. For example, a party from a Non-Convention State may insist upon having the seat of arbitration in its home State. This means that at the drafting stage, companies must consider not just what is most comfortable and cost-effective in the short term, but their long-term goals regarding enforcement. Similarly, companies should conduct diligence at the outset to find out where their business partners have assets. For example, although a Yemenite company may prefer to arbitrate in its own backyard, doing so may not be practical in the long run if arbitration in Yemen would impede enforcement elsewhere where its assets are located.

The New York Convention is Not The Only Treaty in Town

Arbitration awards rendered in States that are not parties to the New York Convention are not *per se* unenforceable in the US. However, where the New York Convention does not apply, a party wanting to analyze the potential for enforcement of a foreign arbitral award in the US needs to consider other international treaties that may permit recognition and enforcement of awards.

First, some Non-Convention States belong to regional organizations or have ratified treaties requiring that the State parties enforce arbitral awards from other jurisdictions. For example, although Grenada, Guyana, St. Kitts and Nevis and St. Lucia are not parties to the New York Convention, they, like the US, are members of the Organization of American States (OAS). All OAS States are bound by the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards which "ensur[es] extraterritorial validity of judgments and arbitral awards rendered in [the OAS's] respective territorial jurisdictions." Companies doing business within OAS States, including the US and/or the five Non-Convention States in the OAS, should be aware of this treaty and its potential assistance in enforcing an award.

Second, States may also have bilateral agreements that apply to arbitrations and/or arbitral awards. When seeking to enforce or resist enforcement of an award in the US or with one of its trading partners, parties should consult the enforcement and reciprocity requirements and provisions of the US bilateral treaties. These could include, for example, treaties of amity and/or friendship, commerce and navigation (FCN). Most FCNs contain language relating to and governing the enforceability of arbitrations between parties of the two contracting countries. The US currently has more than three dozen such bilateral treaties, including with the Non-Convention States of Ethiopia, Suriname, Taiwan and Togo.[2] Although many of these FCNs expressly state that the parties shall not decline to enforce an arbitral award rendered in the other treaty partner country, others do not expressly require reciprocity. In such circumstances, enforcement may be subject to interpretation.

At least one case suggests there is an arguable basis to rely on an FCN to enforce a foreign arbitral award in the US. In *Landegger v. Bayerische Hypotheken und Wechsel Bank*, a federal district court in New York opined that it would be contrary to the spirit and policy of the FCN in question not to recognize and enforce an arbitral agreement rendered in the treaty partner's territory. The current draft of Restatement (Third) of the U.S. Law of International Commercial Arbitration similarly indicates that an FCN could be used to enforce a foreign arbitral award if all of the following conditions apply:

(1) The party seeking enforcement is a citizen of the other State Party to the FCN.

(2) The award is final and enforceable according to the laws of the country in which it was made.

(3) An enforcement action is brought before the proper court.

(4) The arbitral award must not contravene the public policy of the forum state.[3]

Notwithstanding these apparently clear statements, the issue of the enforcement of arbitral awards pursuant to an FCN has received relatively little judicial attention. Therefore, debate remains as to extent to which FCNs can be used to enforce arbitral awards in the US.

Remember National Laws

National laws may provide additional grounds for enforcing or resisting enforcement of an arbitral award, separate and aside from the New York Convention and other treaty law.

In the US, no law specifically addresses the enforcement of foreign arbitral awards rendered in Non-Convention States.[4] While federal and state statute and judicial principles of comity and reciprocity, as detailed below, clearly favor recognizing foreign court judgments and arbitral awards from Convention States, whether and how these laws and principles apply to foreign arbitral awards rendered in Non-Convention States remains unclear. Thus, those arbitrating or possibly arbitrating in a Non-Convention State who have reason to believe that they face enforcement proceedings in the US should consult with counsel as to whether the US courts would, despite its reciprocity reservation, enforce a Non-Convention award.

FAA – The Federal Arbitration Act (FAA) is the federal statute that, amongst other things, authorizes courts to recognize and enforce arbitral awards. While the FAA "manifests a 'liberal federal policy favoring arbitration agreements,'"[5] the only foreign awards to which the FAA expressly applies are those rendered in Convention States or under the Inter-American Convention on International Commercial Arbitration, which mirrors the language of the New York Convention.[6] While nothing specifically precludes enforcement of other awards, nothing affirmatively permits enforcement either. However, some courts and commentators have concluded that the FAA is broad enough to reach *all* foreign arbitral awards, and that the FAA's express reach to Convention State awards should not preclude or preempt recognition of awards rendered in Non-Convention States.[7]

State Statutes – Most states in the US have general arbitration laws and/or laws specifically relating to international arbitral awards. The international arbitration laws of Connecticut, Florida, Georgia and Oregon expressly authorize enforcement of Non-Convention State awards.[8] On the other hand, the international arbitration statutes of California, Hawaii, Illinois, Ohio and Texas expressly prohibit enforcement of Non-Convention awards.[9] In the middle lie the international arbitration statutes of Colorado, North Carolina and Maryland, which are silent with respect to their application to Non-Convention State awards. Thus, whether those states would enforce Non-Convention awards would be a matter of judicial interpretation.

In addition to international arbitration statutes, most states also have a general arbitration statute. The general arbitration statute of New York, a hub for international arbitration, has been used to enforce foreign awards rendered in Non-Convention States.[10] Because most states modelled their general arbitration statutes on the Uniform Arbitration Act and/or the Revised Uniform Arbitration Act, the enforcement of Non-Convention awards analysis should mirror the analysis under Chapter 1 of the FAA, as neither the Uniform Arbitration Act nor the Revised Uniform Arbitration Act, like Chapter 1, expressly permits enforcement of judgments rendered abroad.[11]

Common Law Principles – In the US, common law principles of comity and equity may require courts to recognize foreign arbitral awards, regardless of where the arbitration was seated.[12] Often, however, the US courts will only enforce a foreign judgment or award if the nation in which the award was rendered would, in turn, enforce US judgments/awards, thus creating a game of "chicken or the egg." For this reason, those seeking to enforce an arbitral award should bear in mind the approach the courts in the territory of the seat of the arbitration have adopted.

Conclusion

Parties can and should take appropriate steps at the contract drafting stage to mitigate the risks that any eventual arbitral award may not be enforceable in the US. The most straightforward way is to ensure any potential arbitration is seated in a New York Convention State. If this is not possible, the contracting parties should consider whether other international instruments, federal or state law, or common law principles may provide adequate means of enforcing their arbitral awards in the US.

FIRM NEWS

Leading International Arbitration Partner Joins Latham & Watkins in Paris

Fernando Mantilla-Serrano, a renowned international arbitration practitioner, will serve as global Co-chair of Latham's International Arbitration Practice and will co-lead the growing team.

Fernando Mantilla-Serrano has joined Latham & Watkins LLP as a partner and Global Co-Chair of the International Arbitration Practice. He is widely recognized as one of the leading international arbitration lawyers globally.

Mantilla-Serrano is acclaimed for the depth of his knowledge and experience in international arbitration representing companies, States, and State-owned entities in highly complex commercial and investor-state disputes with an emphasis on matters involving energy, banking, joint ventures and Latin America. His practice covers numerous sectors, with particular focus on the oil & gas, power, natural resources, construction, manufacturing and automotive industries. Mantilla-Serrano regularly serves as tribunal chairman, sole arbitrator and party-appointed arbitrator, and has also served as an expert before arbitral tribunals and State courts.

Mantilla-Serrano will be based in Paris, from where he will work closely with other arbitration partners in New York, San Francisco, London, Germany, Spain, Hong Kong, Singapore and Tokyo.

Mantilla-Serrano joins Latham from Shearman & Sterling. He was previously head of the International Arbitration Practice at Garrigues in Spain and Counsel at the Secretariat of the ICC International Court of Arbitration, where he remains a member of the Court.

US Supreme Court Revives International Arbitration Decision

The Court's first-ever case involving an investment treaty upheld a US$185 million award in favor of a British company.

By Anne Löhner

On 5 March 2014, the US Supreme Court issued an unprecedented decision in a case involving a bilateral investment treaty — reviving a US$185 million arbitral award in favor of British energy company BG Group PLC against Argentina.[1] In a 7-2 majority opinion authored by Justice Breyer, the Supreme Court held that, when reviewing arbitral awards made under an investment treaty, US courts should interpret and apply threshold provisions concerning arbitration consistent with their interpretations of similar provisions in ordinary contracts. Accordingly, courts should review arbitrators' interpretations of such thresholds with deference.

The underlying dispute arose amidst Argentina's 2001/2002 financial crisis, when the Argentine government passed measures to control inflation and stabilize commodity prices. According to BG, these measures essentially expropriated its investment in an Argentine gas distributor, prompting BG to initiate arbitration under the UK-Argentina bilateral investment treaty. In 2006, an arbitral tribunal acting under the 1976 UNCITRAL Arbitration Rules and seated in Washington, D.C. issued the award in BG's favor. The three arbitrators decided to exercise jurisdiction despite BG's failure to comply with the treaty's 18-month "local litigation requirement" prior to commencing arbitration, finding that such compliance would have been futile in light of Argentina's attempts to restrict investors' access to its local courts. In 2012, the US Court of Appeals for the District of Columbia Circuit vacated the award, holding that the arbitrators had exceeded their jurisdiction by ignoring the local litigation requirement. According to the Court of Appeals, the issue of whether the parties met the pre-condition to arbitrate was an independent question of law to be decided by the courts. In reversing the Court of Appeals' decision, the Supreme Court followed international precedent by leaving the arbitrators to determine whether a case should proceed to arbitration. Justice Breyer noted that the treaty's local litigation requirement was procedural and not a condition to Argentina's consent to arbitrate, likening the requirement to a mere "claims-processing rule."

Some observers questioned whether the Supreme Court's decision in *BG Group v. Argentina* would be widely applied in the future, arguing that the opinion appeared to narrowly address the specific pre-condition to arbitrate contained in the UK-Argentina bilateral investment treaty. However, commentators generally welcomed the decision's impact as bolstering the perception of the US as an arbitration-friendly jurisdiction.

Back

Ukraine Crisis: US and EU Sanctions

In response to the political crisis in Ukraine, the United States and European Union have initiated a series of targeted sanctions. While the first and second rounds of US sanctions targeted government and military figures, the latest measures also designate private individuals with extensive business interests and close ties to the Russian political leadership.

By Charles Claypoole, William M. McGlone and Les Carnegie

The US sanctions accompany similar measures that have been imposed by the European Union, the Government of Canada and other governments. These other sanctions, along with countermeasures implemented by the Government of Russia, continue to evolve and expand, principally through additional designations of targeted persons.

New US Designations

On 28 April 2014, the US imposed, under the authority of Executive Order 13661, asset freezes on an additional seven Russian officials and froze the assets of 17 companies connected with these officials (bringing the total of designated individuals up to 45, and of designated entities up to 19). The current designations include Russian banks. The designated individuals include Russian government officials and Russian businesspersons, including, according to the White House, "members of President Putin's inner circle."

New US Executive Order

On 20 March 2014, US President Barack Obama issued Executive Order 13662 (EO) establishing an extremely broad framework for possible future sanctions on important sectors of the Russian economy, and expanding upon the authority granted by Executive Order 13660 of 6 March and Executive Order 13661 of 16 March 2014. The EO authorizes the Treasury, in consultation with the US Department of State, to designate persons operating in sectors of the Russian economy, as well as persons materially assisting, or that are owned or controlled by or acting on behalf of, designated persons.

While no parties have yet been designated under the EO, it confers broad authority on the Treasury to designate virtually any person that operates in any sector of the Russian economy that the Treasury decides to target. The EO provides a non-exhaustive list of economic sectors that the Treasury could target, including “financial services, energy, metals and mining, engineering, and defense and related materiel.” Unless and until persons are actually designated under the EO, however, it does not restrict dealings with persons operating in any Russian economic sector. President Obama warned, however, that the US was keeping such measures “in reserve” and would impose such sanctions pursuant to the EO if the situation in Ukraine worsens.

New EU Sanctions

In the latest Council Implementing Regulation 477/2014 on 12 May 2014, the list of people subject to an EU asset freeze has been extended by a further 13 individuals and two entities. This brings the total of individuals sanctioned in relation to the events in Ukraine and pursuant to EU Regulation 208/2014 (5 March 2014) and EU Regulation No 269/2014 (17 March 2014, as amended by EU Regulation 476/2014) to 83 people and two entities. It is worth noting that EU foreign ministers have decided in EU Regulation 476/2014 to widen the criteria according to which persons or entities can be designated. Henceforth the list includes (i) “natural persons responsible for, actively supporting or implementing, actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine…, or which obstruct the work of international organisations in Ukraine”, as well as their associates, and (ii) “legal persons, entities or bodies in Crimea or Sevastopol whose ownership has been transferred contrary to Ukrainian law”, or those who benefit from such transfer.

The individuals are mostly current and former Ukrainian and Russian politicians or military commanders, whereas the entities are two enterprises that have been confiscated by Crimean authorities. The asset freeze applies to all funds and economic resources (which are broadly defined) belonging to, owned, held or controlled by the 83 individuals and two entities. Consistent with standard EU asset freeze wording, the regulations also provides that no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of these individuals or entities.

UK Export Licensing Suspension and New US Export Control Constraints

Beyond the EU and US sanctions described above, the Government of the United Kingdom announced on 18 March 2014 that it has suspended all existing licenses and license applications for exports of military and dual-use items to the Russian military “which could be or are being deployed against Ukraine.” This action illustrates the potential for individual EU Member States to impose additional measures, and the UK government’s announcement encourages “other European nations to take similar action.”

On 28 April 2014, the US Departments of State and Commerce announced new restrictions on exports and reexports to Russia and Crimea under the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). These steps follow the Commerce Department’s Bureau of Industry and Security (BIS) 1 March 2014 hold on issuing new licenses for exports and reexports to Russia of items subject to the EAR and the State Department’s Directorate of Defense Trade Controls (DDTC) 27 March 2014 hold on issuing new licenses for the export or reexport of defense items to Russia.

FinCEN Advisories

The US Treasury Department’s Financial Crimes Enforcement Network (FinCEN) issued Advisories on 25 February 2014 and 6 March 2014 referencing individuals subject to the first EU asset freeze and reminding “financial institutions of their responsibility to take reasonable, risk-based steps regarding the potential suspicious movement of assets related to Viktor Yanukovych departing Kyiv and abdicating his responsibilities and other senior officials resigning from their positions or departing Kyiv.” Financial institutions should consider these reminders in light of the ongoing situation in Ukraine and the expanding US and EU sanctions.

Legal and Business Considerations

As the list of sanctioned parties grows to encompass entities with business interests in Russia and beyond, US and EU persons and firms should carefully scrutinize all operations and business relationships that could involve designated persons. Firms that deal with entities operating in the Russian economy or that are closely aligned with Russian economic interests should closely monitor future designations and consider contingency plans in the event business partners are blocked by the US or EU sanctions regimes.

In particular, businesses with ongoing contractual relationships with Russian persons or entities should consider carefully not only whether they are compliant with applicable US and EU sanctions, but also whether the designation of their business partners under applicable sanctions could constitute a *force majeure* event or frustration of extant contracts. For instance, recent English case law has highlighted the need for companies facing this situation to exercise caution, and consider potential risks of litigation or arbitration before terminating contracts in light of sanctions risks.

Back

New York Convention Extended to the British Virgin Islands

Recent arbitration act reforms and recognition of the New York Convention improve the climate for international arbitration.

By Catriona E. Paterson

On 24 February 2014, the UK agreed to extend application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) to the British Virgin Islands (BVI). The treaty will enter into force for the territory on 25 May 2014.

The New York Convention is a multilateral treaty that attempts to ensure that foreign arbitral awards are recognized and generally capable of enforcement in the jurisdictions of the State Parties to the treaty in the same way as domestic awards. The courts of the State Parties must also give full effect to arbitration agreements by denying jurisdiction to hear cases if the parties to the dispute are bound under contract to refer the matter to an arbitral tribunal. The New York Convention is widely seen as a seminal instrument in the enforcement of foreign arbitral awards.

The UK, which maintains responsibility for the foreign relations of the BVI, agreed to extend application of the New York Convention following a request from the Government of the BVI.

The extension of the New York Convention to the BVI parallels reforms to the territory's arbitration act, which were passed in December 2013 and which are expected to come into force later this year. These changes are intended to remedy perceived weaknesses in the BVI's previous (outdated) arbitration act and in the territory's legal framework for arbitration.

Back

Update on ICSID's Caseload

While the volume of cases has dropped from an all-time high, Europe and Central Asian cases represent an increasing share of the caseload.

By Jan Erik Spangenberg

The International Centre for Settlement of Investment Disputes (ICSID) recently published its latest bi-annual caseload statistics covering the period up until 31 December 2013.[2] The statistics show that a drop in newly registered cases witnessed in the first half of 2013 has continued during the second half of the year. In all, 40 cases were registered in 2013. This marks a 20 percent drop in comparison to 2012, which saw 50 cases registered — ICSID's all-time high. Of the 40 newly registered cases, only two were registered under the Additional Facility Rules.

Wins and losses at ICSID remain balanced between investors and States. Of all cases registered by ICSID since 1972 that have been finally resolved by way of arbitration, 46 percent resulted in awards upholding claims, in part or in full, in favor of the investor. Of the remaining 54 percent of disputes that went in favor of the State, the arbitral tribunals declined jurisdiction (25 percent), dismissed all claims (28 percent) or held in an early stage of the proceedings that the claims were manifestly without merit (one percent). Looking at only those cases decided in 2013, the statistics were even less favorable for investors, with only 30 percent of awards upholding claims and 70 percent of all decided cases dismissed for lack of jurisdiction or as unfounded.

In 2013, the majority (66 percent) of newly registered cases involved State parties from Europe & Central Asia (33 percent), Western Europe (13 percent) and the Middle East & North Africa (20 percent).[3] Historically, on the basis of all cases registered to date, these regions only accounted for 37 percent of all cases. On the other hand, cases involving South

American State parties have dropped from an overall 27 percent to only 5 percent in 2013. The energy sector remained the largest source of ICSID disputes in 2013, with 27 percent of all newly registered cases stemming from the oil, gas & mining industry and 20 percent from electric power and other energy businesses.[4]

On a final note, in 2013 French arbitrators again scored more arbitrator appointments (27), than the US (12 appointments) and the UK (10 appointments) together, thereby reaching 155 appointments overall and very close to surpassing the number of US arbitrators (163 appointments to date).

A closer look at the ICSID statistics for 2013 therefore shows that — contrary to some recent public criticism of investment treaty arbitration — the success rate has tipped in favor of States and the majority of respondent states are European countries, a shift away from developing countries.

Whether these trends will continue or remain particularities of the year 2013 remains to be seen.

Back

New Rules on Transparency and Party Representation – When Do They Apply?

Potentially far-reaching new guidelines intended to provide a uniform benchmark for the conduct of international arbitrations.

By Jan Erik Spangenberg

At the end of 2013, the United Nations General Assembly adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the Rules on Transparency).[5] As previously reported in this Newsletter, these rules had been developed by the United Nations Commission on International Trade Law (UNCITRAL) Working Group on Arbitration and Conciliation, which had been charged with the task of preparing a legal standard on this topic in 2008.[6]

Pursuant to their Article 1, the Rules on Transparency will apply to all investor-State arbitrations initiated under the UNCITRAL Arbitration Rules arising out of an investment protection treaty concluded after 1 April 2014, unless otherwise agreed by the parties to the treaty. The rules apply to arbitrations pursuant to older treaties only if the parties to the arbitration or the State parties to the treaty have so agreed. The rules are also incorporated by means of the UNCITRAL Arbitration Rules, as revised in 2013, which include a new article 1(4) stating that for investor-State arbitration initiated pursuant to an investment treaty, the Arbitration Rules include the Rules on Transparency.

Parties initiating investor-State arbitrations under the UNCITRAL Arbitration Rules and investment treaties concluded after 1 April 2014 need to be aware of the possible application of the Rules on Transparency and their implication. Parties currently conducting arbitrations under the UNCITRAL Arbitration Rules also need to be aware of the respondent State's ability to agree on the application of the rules to the ongoing arbitration by agreement with the claimant's State. Article 1(2)(b) of the Rules on Transparency does not explicitly require the claimant itself to also agree to the rules.

Implications

The application of the Rules on Transparency may have far-reaching implications. The rules require, *inter alia,* that the parties, through the General Secretary of the United Nations or another repository named by UNCITRAL:

- Make public basic information regarding the dispute, including the name of the parties and the treaty under which the claim is made
- Publish their written submissions as well as transcripts of hearings and orders, decisions and awards of the arbitral tribunal
- Upon request by any person, make available any additional documents, including expert reports and witness statements

The rules also require that substantive hearings are held in public. All transparency obligations are, however, subject to an exception for the protection of confidential or otherwise protected information and the integrity of the arbitral process.

A "Transparency Registry", set up by UNCITRAL following the entry into force of the Rules on Transparency can be found at: http://www.uncitral.org/transparency-registry/registry/index.jspx.

The International Bar Association (the IBA) Guidelines on Party Representation in International Arbitration (the Guidelines) present another set of guidelines which parties to any international arbitration may also need to consider applying. The Guidelines on Party Representation only apply, however, where and to the extent that the Parties have so agreed or the

Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that the Arbitral Tribunal has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings (Guideline 1).

The Guidelines, on which we have previously reported,[7] are intended to provide a benchmark for the conduct of counsel in international arbitration. They attempt to mitigate the fact that counsel can be, and often are, subject to differing norms and practices, including those of the arbitral seat or the professional conduct rules of counsel's home jurisdiction(s). The Guidelines' key provisions include:

- A prohibition on ex parte communications with an arbitrator (Guidelines 7-8)
- Guidance on the extent to which counsel may assist with the preparation of witness or expert testimony (Guidelines 18-25)
- Guidance on counsel's obligations with respect to document production (Guidelines 12-17)
- Remedies for counsel misconduct, which could include, inter alia, the imposition of an adverse costs order and/or the drawing of "appropriate inferences" in the tribunal's assessment of evidence or legal arguments (Guidelines 26-27)

While the Guidelines had already been adopted by the IBA Council on 25 May 2013, the discussion on the need for such rules and whether they constitute a right step or a step too far continues. To illustrate this point, at the latest IBA Arbitration Committee's February 2014 Arbitration Day in Paris, during a debate of the Guidelines both Toby Landau QC and Michael Schneider (Lalive) opposed the rules as unnecessary and excessive regulation.

Meanwhile, the London Court of International Arbitration (LCIA) published a draft of its new Arbitration Rules, which include an annex with its own general guidelines on party representation, albeit much less specific than the IBA Guidelines.[8]

Conclusion

For the time being, if and how this development for codification of party representation rules continues and if and to what extent these rules are actually applied in arbitrations from now on remains to be seen. Parties are advised to watch out for agreements on the application of these rules in future specific procedural rules or procedural orders. For the avoidance of doubt, parties may also want to consider expressly stipulating their non-application.

Back

EU and Myanmar to Negotiate a Bilateral Investment Treaty

Without any previous European BITs, a potential EU-Myanmar BIT could open the pathway for more foreign investment into Myanmar.

By Catriona E. Paterson

The move to negotiate a BIT with Myanmar is part of a broader initiative to open Myanmar to trade and investment with the EU. Myanmar currently has no BIT in place with any Member State of the EU, making this treaty of potential significance to any foreign investor seeking to take advantage of Myanmar's re-entry into the global economy. Proponents hope the BIT will bring greater legal certainty and stability by providing key protections for foreign investors and their investments. The BIT would:

(1) Ensure the free transfer of capital into and out of the territories of the State Parties

(2) Ensure the fair and equitable treatment of investments and/or investors

(3) Prohibit the expropriation of property, except as against the payment of compensation

(4) Protect against discriminatory treatment of investments and/or investors

EU sanctions that had previously restricted economic relations with Myanmar were suspended in April 2012, and ultimately lifted in April 2013. In June 2013, Myanmar was also readmitted to EU's "Generalised System of Preferences" tariff preferences, paving the way for increased trade. According to the EU, in 2013, bilateral trade in goods with Myanmar amounted to €569 million, with EU exports to the country increasing by 45 percent to €346 million.

Myanmar has recently taken other steps with a view to enhancing the legal environment for foreign trade and investment. The State enacted a new Foreign Investment Law in 2012 and acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2013 (see our previous report on the subject *"New Accessions to the New York Convention and ICSID Convention"*). In May 2013, Myanmar also signed a Trade and Investment Framework Agreement with the US, which establishes a framework for future cooperation on trade and investment issues.

For a discussion on the EU's competencies to conclude extra-European bilateral investment treaties, please see our previous article **"***New European Regulation Clarifies the Status of Extra-European Bilateral Investment Treaties***"**.

Munich I District Court Held Standard Athlete's Arbitration Clause Invalid

A German court has determined that structural imbalances between individual athletes and sports federations invalidated a standard arbitration clause.

By Jan Erik Spangenberg

On 28 February 2014, the Munich I District Court held that an arbitration clause in an athlete's agreement with a sport federation may be invalid due to a structural imbalance between the parties and a lack of choice on the part of the athlete.

The case concerns disciplinary actions taken by the International Skating Union (ISU) and the German Skating Union (DESG) against a German ice skating star. The athlete was suspended by the ISU from 2009 to 2011 after increased levels of certain regulated substances were allegedly found in a blood sample. The ice skater challenged the suspension and an arbitral tribunal constituted under the rules of the Court of Arbitration for Sport (CAS) heard the dispute. The CAS tribunal upheld the doping suspension. The ice skater's subsequent application to set aside the arbitral award was rejected by the Swiss Federal Tribunal in a decision on 10 February 2010.

The Munich I District Court rendered a new judgment related to a new claim for the athlete brought against ISU and DESG for damages allegedly incurred due to the suspension. The Munich court held that that the arbitration clause in the athlete's agreements with ISU and DESG was invalid. The underlying rationale for the decision was the "structural imbalance" between the parties at the time of the contract formation. The standard athlete's agreements, which included the arbitration clauses, had to be signed in order for the athlete to participate in professional sports competitions. The dominant position of national and international sports federations meant the athletes were forced to accept the terms in question. The Munich court held that the arbitration agreements were, in the circumstances, entered into involuntarily and were accordingly invalid under both Swiss and German law.

Notwithstanding the invalidity of the arbitration clause, the Munich court found that the CAS award and the Swiss Federal Tribunal's decisions were binding and that *res judicata* prevented it from refusing the enforceability of the award. The judgment is not yet binding and may be appealed to the Munich Court of Appeals. Should the judgment stand, it may have far-reaching implications for sports arbitration and the underlying standard athlete's agreements with professional sports federations.

Back

ICSID Tribunal Provides Declaratory Relief but Not Monetary Damages to Assignee

Assuming jurisdiction, an ICSID tribunal has heard claims brought by an assignee under a project finance agreement.

By Catriona E. Paterson

In an award rendered on 12 February 2014, a tribunal established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention)[9] upheld the claims of an assignee under project finance arrangements. However, the tribunal declined to award monetary damages, concluding that it could only grant declaratory relief in the circumstances of the case.

Independent Power Tanzania Limited (IPTL) and Tanzania Electric Supply Company Limited (TANESCO), a company wholly owned by the United Republic of Tanzania, had entered into a Power Purchasing Agreement (PPA) in 1995. Under this agreement, IPTL agreed to build and maintain an electricity generating facility in Tanzania. The method and manner in which TANESCO's payment obligations under the PPA would be calculated were, however, contentious from the outset.

In 2005, Standard Chartered Bank (Hong Kong) (the Claimant) acquired IPTL's project-related debt, which included security granted by way of an assignment of IPTL's rights under the PPA. These rights vested in the claimant when IPTL defaulted on its debts in 2006. The claimant therefore brought the ICSID arbitration as assignee of IPTL's right to arbitrate under the PPA.

As to jurisdiction, the primary issue before the Tribunal was whether the assignment of IPTL's rights to the Claimant was valid, despite the fact that the assignment had not been registered, as required by Tanzanian law. The Tribunal considered that the assignment of the right to receive payments from TANESCO should properly be regarded under Tanzanian law as a registerable charge over book debts. Therefore, the assignment specifically in respect of the book debts would be void against a liquidator or administrator as a result of the non-registration. Conversely, the assignment of the right to ICSID arbitration (contained in the PPA) was not something of which a third party would need notice, and therefore registration of the assignment of this right was not required. The Tribunal accordingly concluded that the Claimant, as assignee, was entitled to bring the arbitration and that the Tribunal had jurisdiction to hear the dispute.

However, the Tribunal concluded that it could only grant relief in relation to rights arising under the PPA, and not those arising under associated financing arrangements. The Tribunal was therefore limited to making a declaratory order as to amounts TANESCO owed to IPTL, but could not "make an order requiring TANESCO to pay any such amounts to [the Claimant] independently of IPTL." The Tribunal was also influenced by concerns that an order for payment of the debt could interfere with the order of priority of creditors under the local law, should ITPL face liquidation or administration. In these circumstances, the Tribunal determined declaratory relief would be a more appropriate remedy.

Because the amounts TANESCO owed to IPTL were insufficiently particularized during the course of the proceedings, the Tribunal was constrained to ordering the parties to agree to the amounts the Respondent owed to ITPL. The ICSID proceedings were part of a larger — and more complex — dispute which is rumbling on in other fora, including before the Tanzanian court.

Back

ICSID Awards May Have Significant Consequences for Future Claims Against Indonesia

Awards may invite further claims against Indonesia.

By Jan Erik Spangenberg

On 24 February 2014, arbitral tribunals established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) upheld jurisdiction to hear disputes in two parallel arbitrations brought by Churchill Mining Plc and its Australian subsidiary, Planet Mining Pty Ltd, pursuant to the UK-Indonesia and Australia-Indonesia bilateral investment treaties (the BITs) respectively.[10]

The awards are noteworthy for their interpretation of the BITs' dispute resolution clauses, which Indonesia had maintained did not allow for investors to initiate arbitration proceedings against the State without the State's separate consent. Article 7(1) of the UK-Indonesia BIT states that "the Contracting Party in the territory of which a national or company of the other Contracting Party makes or intends to make an investment shall assent […] for conciliation or arbitration, to the Centre established by the Convention on the Settlement of Investment Disputes […]." Article 11(4) of the Australia-Indonesia BIT contains a clause which states that where a dispute is referred to ICSID arbitration by an investor of one party, "the other Party shall consent in writing to the submission of the dispute to the Centre within forty-five days of receiving such a request from the investor." Indonesia argued that the phrase "shall assent" in the BIT with the UK implied that a further act of consent was required and no binding consent to arbitration had yet been given. According to Indonesia, this two-step process was also stipulated in the BIT with Australia.

The ICSID tribunal jointly appointed in both cases and composed of Gabrielle Kaufmann-Kohler, Albert Jan van den Berg and Michael Hwang SC rejected Indonesia's interpretation, taking into consideration the context surrounding the words "shall assent" and the preparatory materials of the BIT.

The Tribunal also rejected Indonesia's argument that the Claimants' investment fell outside the scope of the BIT. Indonesia argued that under the 1967 Foreign Investment Law, foreign investors can only engage in mining on the basis of direct cooperation with the government and that the Claimants circumvented the law by securing beneficial ownership in the mining licenses of certain local companies. The tribunal held that the admission requirement for foreign investments set forth in Article 2(1) of the BIT constituted a one-time occurrence, i.e. a gateway through which all British investors must pass only once. Since the Claimants' shareholding in the local mining companies had been approved in 2006, the tribunal concluded that the Claimants had obtained the necessary approvals already when making their investments at that time.

The decisions may have significant consequences for future claims against Indonesia under both BITs. Indonesia has already announced that it intends to terminate all of its 67 BITs currently in place. Investors with potential claims will therefore need to monitor this development and make sure that their investments remain protected.

ICJ Grants Timor-Leste's Request for Provisional Measures Against Australia

Documents seized by Australian intelligence agents to remain sealed during arbitration.

By Catriona E. Paterson

On 3 March 2014, the International Court of Justice (ICJ) handed down its decision on Timor-Leste's application for provisional measures against Australia.

The underlying dispute, which has been referred to arbitration, relates to a claim by Timor-Leste that the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS) between the two states is "invalid" because of alleged espionage by Australian intelligence agents during its negotiation. The CMATS governs how the two states exploit off-shore oil and gas reserves in the Greater Sunrise field in the Timor Sea, worth an estimated US$40 billion.

Timor-Leste applied to the ICJ for provisional measures in support of the arbitral proceedings, after Australian intelligence agents seized documents from the Australian premises of a legal representative to Timor-Leste, allegedly on national security grounds. The documents seized included those relating to the pending arbitration and confidential correspondence between Timor-Leste and its legal advisers.

In the ICJ proceedings, Timor-Leste requested the return of the seized material, a formal apology from Australia and an assurance that there would be no further interception of its communications with its legal advisers. Timor-Leste argued that it had a right under international law to confidential communication with its lawyers and counsel in relation to the arbitral proceedings and possible future negotiations with Australia. Australia countered that there was no principle of immunity of state papers and that confidentiality of state communications did not apply insofar as they concerned criminal conduct or a threat to national security.

In its decision, the ICJ noted that provisional measures are intended to preserve the rights claimed by the parties pending a decision on the merits of the claim. As such, Timor-Leste did not need to prove that the rights asserted existed in international law, but only that they were "at least plausible" and linked to the provisional measures sought. The ICJ concluded that the State's asserted right to conduct the arbitration and negotiations without interference derived from, or were concomitant with, the principle of sovereign equality of states and the need to maintain equality when states are peacefully settling an international dispute.

The ICJ also considered that there was a "real and imminent risk" that Timor-Leste could suffer irreparable prejudice if the material was divulged to those involved in the arbitration or negotiations with Timor-Leste.

Although the ICJ did not order the return of the seized material, it did instruct Australia not to disclose the material to the disadvantage of Timor-Leste until the conclusion of the pending case, to keep the material under seal and not to intercept communications between Timor-Leste and its legal advisers in relation to the arbitration.

Back

Arbitrator Disqualified by Co-Arbitrators for the Appearance of a Lack of Impartiality, an ICSID First

Appointment on a similar arbitration in the past was sufficient to disqualify arbitrator.

By Rebekah Soule

On 20 March 2014, two arbitrators disqualified a co-arbitrator for having an appearance of partiality arising from a past appointment by the respondent on a similar arbitration with significant overlaps in the facts and law at issue.[11] This is the first time under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) that an arbitrator has been disqualified by his or her colleagues.

The claimants, Caratube International Oil Company LLP and Mr. Devincii Salah Hourani, had moved to disqualify the respondent-appointed arbitrator. The claimants asserted that he could not be independent or impartial because he had served as an arbitrator on behalf of the respondent in *Ruby Roz Agricol v. The Republic of Kazakhstan*, a case with significant overlap in the law and the facts with the case at bar. The claimants also submitted that the arbitrator could not exercise independent and impartial judgment as he had been appointed to serve as arbitrator numerous times by counsel for the respondent State — Kazakhstan — which he had allegedly not fully disclosed.

In his response to the challenge, the arbitrator provided assurances of his independence and impartiality and emphasized that he continued to consider his disclosures regarding past appointments sufficient and in accordance with the relevant rules and good practice, including Rule 6 of the ICSID Arbitration Rules and Section 3.3.7 of the International Bar Association Guidelines on Conflicts of Interest.

In reaching their decision to disqualify the arbitrator appointed by the respondent, the co-arbitrators held that proof of actual dependence or bias was not necessary; rather, it was sufficient to establish the appearance of dependence or bias. In their view, the similarities between the two cases warranted the disqualification. The co-arbitrators emphasized that the similarities between cases were important considerations in assessing impartiality, as an arbitrator cannot be expected to maintain a 'Chinese wall' in his own mind separating knowledge of documents or information gained in one arbitration that may be relevant to another. Given the similarities between the two cases, the co-arbitrators concluded that the claimants had sufficiently established the existence of the appearance of a lack of impartiality or independence, thus disqualification was warranted.

The co-arbitrators went on to determine that the mere fact that the challenged arbitrator had been appointed by counsel for the respondent before did not indicate a lack of independence or impartiality on its own. However, they declined to offer any further views on the question of repeat appointments, an issue that has proved to be controversial. The co-arbitrators also left open whether the challenged arbitrator's disclosures were sufficient.

This decision serves as a timely reminder to disputing parties to consider carefully their arbitral appointments, or those of their opponents, in particular where two or more disputes may arise out of similar fact patterns.

Back

Japan: Major Overhaul of JCAA Rules

JCAA stays abreast of international arbitration norms with the first major changes in a decade.

By Daiske Yoshida

The Japan Commercial Arbitration Association (JCAA) has significantly changed its Commercial Arbitration Rules, effective 1 February 2014. These changes represent the first major overhaul of the Rules since 2004. Amongst the most notable changes are the following:

- **Emergency Arbitrator:** The JCAA has instituted a procedure for appointing an emergency arbitrator. The JCAA will appoint an emergency arbitrator within two days of an application, who generally decides on emergency measures within two weeks of the appointment. The request for arbitration may be submitted within 10 days after the application for an emergency arbitrator. However, Japan's Arbitration Act has not yet been updated to recognize the enforceability of emergency measures. Thus, although Japanese courts currently may enforce interim measures, such as preserving the status quo, the courts lack a mechanism to enforce emergency measures.
- **Interim Measures and Expedited Procedures:** In accordance with the 2006 Model Law of the United Nations Commission on International Trade Law, the Rules now specify the types of interim measures an arbitral tribunal may order, such as preserving the status quo and protecting assets and evidence, as well as the conditions for granting such measures. The rules no longer limit expedited procedures to cases where the amount in controversy is JPY20 million (approximately US$200,000) or less.
- **Mediation:** The old rules did not refer to mediation, but the Rules now provide that the parties may agree at any time during the arbitration to refer the matter to mediation under JCAA's commercial mediation rules. The arbitrator may not act as the mediator unless all of the parties agree. An arbitrator who also acts as the mediator may not have ex parte communications with the parties, unless agreed otherwise. Admissions and other statements made during the mediation are not admissible as evidence in the arbitration.
- **Multiple Claims and Multiple Parties:** The Rules now provide for greater flexibility in multi-claim and multi-party arbitrations. A claimant may make multiple claims in a single arbitration, provided that (1) all parties agree, (2) all claims arise under the same arbitration agreement, and (3) all claims arise between the same parties. The third requirement includes three conditions: (a) the same or similar questions of fact or law arise from the claims, (b) the arbitration agreement calls for a JCAA arbitration, and (c) the arbitral proceeding can be conducted in a single proceeding with regard to such issues as hearing location, the number of arbitrators, and language of the proceeding. Separate proceedings may be consolidated before the tribunals are constituted, based on similar criteria.

Also, the Rules now provide for joinder of a third party if (1) all of the parties and the third party agree in writing, or (2) all of the claims are made under the same arbitration agreement, provided that the third party consents in writing if, after the tribunal has been constituted, a party applies to join the third party.

Under the old rules, in multi-party arbitrations, each respondent had the right to request a separate arbitral proceeding under a different tribunal – which was intended to guarantee each respondent's right to appoint an arbitrator. This right has been repealed. Instead, in three-arbitrator tribunals in multi-party arbitrations, if the two party appointed arbitrators cannot agree on the third arbitrator, the JCAA will make the appointment; and if one of the parties fails to appoint a party arbitrator, the JCAA will appoint all three arbitrators. The JCAA may appoint the arbitrator already appointed by the claimant(s) or respondent(s) as one of the three arbitrators, if no party raises an objection.

Whether these amendments will have an effect on the relatively low number of JCAA-administered arbitrations remains to be seen. Nevertheless the changes demonstrate that the JCAA is keeping abreast of worldwide trends in international arbitration rules and practice.

Back

Endnotes

1 The States that are not party to the New York Convention are: Andorra, Angola, Bhutan, Burundi, Cape Verde, Chad, Comoros, Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Grenada, Guinea-Bissau, Guyana, Iraq, Kiribati, North Korea, Libya, Malawi, Maldives, Federated States of Micronesia, Namibia, Nauru, Niue, Palau, Papua New Guinea, Saint Kitts & Nevis, Saint Lucia, Samoa, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Suriname, Swaziland, Taiwan, Timor-Leste, Togo, Tonga, Turkmenistan, Tuvalu, Vanuatu, and Yemen.

2 *See* United States Department of States, Treaties in Force, A List of Treaties and Other International Agreements of the United States in Force on January 1, 2011, available at http://www.state.gov/documents/organization/169274.pdf.

3 *See* Restatement (Third) of the U.S. Law of International Commercial Arbitration – Tentative Draft No. 2 (April 16, 2012), Chapter 4, Topic 1 (citations omitted); *see also Landegger*, 357 F. Supp. at 692-94.

4 While arbitral award made in nations that have ratified or acceded to the Inter-American Convention on International Arbitration ("Inter-American Convention") are enforceable in the United States, *see* 9 U.S.C. Sections 301, 304, all of the parties to the Inter-American Convention are also members of the New York Convention.

5 9 U.S.C. Section 208; *Gilmer v. Interstate/Johnson Lee Corp.*, 500 U.S. 20, 25 (1991); *Mitsubishi Motors Corp.*, 473 U.S. at 631; *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

6 *See* FAA, Chapters 2 and 3.

7 *See* Restatement (Third) of the U.S. Law of International Commercial Arbitration – Tentative Draft No. 2 (April 16, 2012), Chapter 4, Topic 1. *See* also e.g. *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1292 (11th Cir. 2011); *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005); *Weizmann Institute of Science v. Neschis*, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005); *DaPuzzo v. Globalvest Management, Co.*, 263 F. Supp. 2d 714, 727 (S.D.N.Y. 2003).

8 Conn. Gen. Stat. Sections 50a-101(2), 50a-135(1); Fla. Stat. Section 684.25; Ga. Code Section 9-9-42; Or. Rev. State Section 36.522(1).

9 Cal. Code. Civ. P. Section 1297.12; Hawaii Rev. Stat. Section 658D-4(d); Section 710 Ill. Comp. Stat 30/1-5(b); Ohio Rev. Code Ann. Section 2712.02(B); Tex. Civ. Prac. & Rem. Code Ann Section 172.001(b).

10 *See Landegger v. Bayerische Hypotheken und Wechsel Bank*, 357 F. Supp. 692, 694 (S.D.N.Y. 1972).

11 Restatement (Third) of the U.S. Law of International Commercial Arbitration – Tentative Draft No. 2 (April 16, 2012), Chapter 4, Topic 1.

12 *See Hilton v. Guyot*, 159 U.S. 113, 163 (1895) and *Weizmann Institute of Science v. Neschis*, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005).

13 *BG Group PLC v. Argentina*, No. 12-138 (U.S. Sup. 2014).

14 The ICSID Caseload – Statistics are available for download at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics (last accessed on 9 April 2014).

15 The classification of the geographic regions used by ICSID in its statistical reporting is based on the World Bank's regional system, available at: http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK:180619~theSitePK:136917,00.html.

16 The classification of sectors used by ICSID in ist statistical reporting is based on the World Bank's sector codes, available at: http://siteresources.worldbank.org/PROJECTS/Resources/SectorCodesLists.pdf.

17 Resolution adopted by the General Assembly on 16 December 2013 on the report of the Sixth Committee (A/68/462), Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C; and ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), chap. III and annex I.

18 International Arbitration Newsletter, March 2013 http://www.lw.com/presentations/news-in-brief-uncitral-agrees-to-rules-on-transparency.

19 International Arbitration Newsletter, July 2013 http://www.lw.com/thoughtLeadership/IA-News-in-Brief-Guidelines-on-Party-Representation.

20 New LCIA Rules 2014, Revised Draft, 18 February 2013, http://www.uncitral.org/transparency-registry/registry/index.jspx (last accessed 9 April 2014).

21 *Standard Chartered Bank (Hong Kong) v Tanzania Electric Supply Company Limited (TANESCO)* ICSID Case No. ARB/10/20, Award (12 February 2014).

22 *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decisions on Jurisdiction, 24 February 2014.

23 *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr Bruno Boesch (20 March 2014).

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