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INTERNATIONAL ARBITRATION NEWSLETTER

January 2017 LW.com

ICC Amends Arbitration Rules to Increase Efficiency and Transparency in Arbitration

Privy Council clarifies the nature of arbitration clauses, but uncertainties about the clauses' effect still remain.

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FIRM NEWS

NEWS IN BRIEF

ICC Amends Arbitration Rules to Increase Efficiency and Transparency in Arbitration

New "Expedited Procedure" aims to fast-track lower value disputes.

By Philip Clifford, Sebastian Seelmann-Eggebert and Catriona E. Paterson

On 4 November 2016, the International Chamber of Commerce (ICC) released amendments to its Arbitration Rules (the 2016 Rules), which will come into effect on 1 March 2017. The most significant change is the introduction of an "Expedited Procedure". This is a streamlined, "fast track" procedure that aims to resolve lower value disputes within six and a half months of transmitting the file to the tribunal. The ICC has also made other amendments to its arbitration rules designed to increase transparency in ICC Court decision-making and efficiency of the arbitral process.

The ICC's Expedited Procedure Rules

Article 30 and Appendix VI of the 2016 Rules introduce a new, streamlined procedure for resolving disputes with a value of US$2 million or less (although parties can also agree to use the procedure for other disputes).

Salient Features of the Expedited Procedure

The ICC's Expedited Procedure departs from the traditional ICC arbitration procedure in significant respects, all with a view to efficiency and expedition. Notably, in an arbitration under the Expedited Procedure, the:

- ICC Court is empowered to appoint a sole arbitrator to hear the dispute, notwithstanding any contrary provision in the arbitration agreement (Appendix VI, Article 2(1))
- Tribunal has discretion to adopt such procedural measures as it considers appropriate, and in particular may decide not to allow document production, or may limit the length and scope of written submissions, witness statements and expert reports (Appendix VI, Article 3(4))
- Tribunal may decide the dispute solely on the basis of the documents submitted by the parties, without holding a hearing (Appendix VI, Article 3(5))
- Terms of Reference are dispensed with (Appendix VI, Article 3(1))
- Tribunal must hold the case management conference within 15 days of the date on which the file was transmitted to the tribunal (Appendix VI, Article 3(3)), and must render the award within six months of that conference (Appendix VI, Article 4), although the ICC Court can extend either time limit
- Tribunal's fees are calculated on an ad valorem basis, but the fee scale is reduced relative to a standard ICC arbitration (Appendix VI, Article 4 and Appendix III)

When Does the Expedited Procedure Apply?

The Expedited Procedure will apply automatically to disputes with a value of US$2 million or less,[1] unless the:

- Arbitration agreement was concluded before 1 March 2017 (when the 2016 Rules come into effect)
- Parties have opted out of the Expedited Procedure
- ICC Court determines that it is inappropriate in the circumstances to apply the Expedited Procedure[2]

Parties may also choose to apply the Expedited Procedure rules to other disputes.[3]

Benefits and Challenges

While the fees that the ICC and tribunals appointed in ICC arbitrations charge vary according to the amount in dispute, the overall time and costs of pursuing an ICC arbitration (and, in particular, the fees of the parties' counsel) under the normal rules can sometimes be disproportionate if the amounts in issue are relatively low. In the last several years, a number of arbitral institutions have sought to provide for a quicker and cheaper, more streamlined arbitration procedure for relatively low value disputes. The ICC's new Expedited Procedure is the latest of these "fast-track" procedures.

The amended ICC Rules effectively presume disputes falling at or below the US$2 million threshold are better suited to the Expedited Procedure, unless the parties agree or the ICC Court determines otherwise.

Parties can also agree upon the Expedited Procedure for disputes over the US$2 million threshold. Parties may do this, for example, if they believe their disputes are relatively straightforward or they are simply content with a shorter, quicker, process. However, this will require specific agreement.

The challenge for arbitrations conducted under the Expedited Procedure will be to ensure that the procedure adopted does not fall foul of any due process requirements at the seat of arbitration or place of enforcement. As with any arbitration, the tribunal will be required to ensure that the parties are treated equally and given the opportunity to present their case and respond to the case against them.[4] All the major legal systems (and arbitral rules) require a tribunal to observe due process requirements and a failure to do so, including potentially the failure to hold a hearing if so asked by a disputing party,[5] could put the resulting award at risk of being set aside at the seat of the arbitration, or render the award unenforceable in the jurisdiction(s) in which enforcement is sought.[6]

The particularities of each case will determine what is needed to comply with these due process requirements and whether the tribunal will be able, for example, to limit the length and scope of the parties' submissions and factual and expert evidence in practice. The most controversial power under the Expedited Procedure is perhaps that of the tribunal to dispense with a hearing it considers unnecessary. The English Arbitration Act is clear that a tribunal has the power to dispense with a hearing unless otherwise agreed by the parties.[7] However, the position may not be so clear in some other jurisdictions, where the right to a hearing may be considered a due process right that parties cannot give up in advance by selecting the ICC Rules.[8]

Other Measures to Increase Efficiency and Transparency

The ICC has made other changes to its rules, including some designed to increase efficiency and transparency in the arbitral process. The principal changes are:

- **Reduced time to prepare the Terms of Reference**. A distinctive feature of ICC arbitration is the use of Terms of Reference, which are intended to provide a framework for the arbitration. The Terms of Reference contain some procedural parameters for the dispute, as well as the particulars of the parties' respective claims and the relief sought.[9] In practice, the Terms of Reference are typically drawn up in concert between the parties and the tribunal.[10] Under the 2012 ICC Rules, the parties and the tribunal had two months from the date on which the file was transmitted to the tribunal to complete this exercise; this time period has now been reduced to 30 days (although it can still be extended where appropriate).

- **Improved transparency in ICC Court decision-making on the appointment of and challenges to arbitrators**. The ICC has amended Article 11(4) of the ICC Rules to allow the ICC Court to communicate reasons for its decisions as to the appointment, confirmation, challenge or replacement of an arbitrator to the parties. Under the 2012 Rules, the ICC Court could only do this with both parties' consent. However, ICC users have called in recent years for improved transparency in arbitral institutions' decision-making, in particular regarding appointment of and challenges to arbitrators.[11] The amendment to Article 11(4) responds to those calls.

- **Increased filing fee**. The fee for filing a Request for Arbitration with the ICC has increased from US$3,000 to US$5,000.

Final Comment

The ICC Rules are often viewed as providing a heavily administered and full procedure suitable for the most significant international disputes. The Expedited Procedure ushers in a new era for ICC arbitration by introducing a separate, simplified procedure, which may be more appropriate for many lower value disputes. Parties can elect the simplified procedure for higher value disputes if they choose, and similarly, the ICC Court can return to the normal process for lower value disputes if that appears more appropriate. Parties accustomed to ICC arbitration must understand that if the value of their dispute falls below the threshold, under the amended rules the Expedited Procedure will be the default, not the full procedure they may otherwise have expected.

Latham & Watkins Secures Significant Victory for Croatia in High-Profile ICSID Arbitration

Ruling determines that investors must bear the consequences of their failure to engage experts to carry out due diligence before investing.

Latham & Watkins has successfully defended the Republic of Croatia in an arbitration brought under the Rules of the International Centre for Settlement of Investment Disputes (ICSID) concerning the development of a luxury tourist resort on the Adriatic coast. In the award issued on 2 November 2016, the majority of the international tribunal dismissed all claims made against Croatia in an arbitration by members of the van Riet family, Belgian-American real estate investors, who had sought approximately $32 million in damages.

The Claimants alleged that Croatia had violated the Belgium-Croatia bilateral investment treaty (BIT) by failing to provide accurate information on the planning status of land they purchased for the development. In dismissing the claims, the majority of the tribunal rejected the Claimants' criticisms of Croatia's planning laws and emphasised that investors must bear the consequences of their failure to engage experts to carry out due diligence before making an investment.

Latham & Watkins represented the Republic of Croatia in obtaining this significant victory, with a team led by Hamburg and London partner Sebastian Seelmann-Eggebert and London partner Charles Claypoole, with Hamburg associate Felix Dörfelt.

Seelmann-Eggebert said: "The Tribunal had to carefully apply the standards of international law while navigating complex Croatian legislation that was enacted during a period of transition. This award confirms that dissatisfied investors cannot turn to BITs as a form of insurance policy."

Claypoole added: "This decision vindicates the approach adopted by Croatia towards these investors, and we are very happy for everyone who contributed to this victory."

This latest award marks Latham & Watkins' second significant victory for Croatia in an investment treaty arbitration, having previously successfully represented Croatia in the UNCITRAL arbitration brought by Adria Beteiligungs GmbH.

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London Partner Tops List of Future Leaders in Arbitration

London partner Sophie Lamb has ranked as the world's leading arbitration partner under the age of 45 in *Who's Who Legal*'s inaugural "Future Leaders – Arbitration 2017" report.

The guide described Lamb as a "huge name in the business" and "a true star" who "impresses with her professionalism and motivation — one of the future rainmakers of the English arbitration scene."

Who's Who Legal's "Future Leaders – Arbitration 2017" ranking is based on the testimonials of clients and practitioners and highlights "the outstanding members of the next generation."

Also commended in the research were Paris counsel John Adam, described as a "fantastic lawyer, impressively efficient and exceptionally intelligent," and Hamburg associate Jan Spangenberg who was noted as "very organised, highly pragmatic and solution-oriented."

Latham's international arbitration lawyers are based in all the key arbitral centers in Europe, the US and Asia. They have experience representing clients in proceedings heard under all the major arbitral rules across a wide range of industries.

The Asian Lawyer Names Latham Partner Ing Loong Yang "International Arbitration Lawyer of the Year"

The Asian Lawyer's third annual "Emerging Markets" awards recognized Latham & Watkins across seven different categories. Latham was named the overall Emerging Markets International Law Firm of the Year, reflecting the firm's strong practice and high profile work in the ASEAN region. In addition, the publication named Hong Kong partner Ing Loong Yang "International Arbitration Lawyer of the Year."

The awards recognize "the year's most innovative and creative deals … [and] those who have emerged as the most knowledgeable and trusted advisors across a range of practice areas in this exciting and vibrant region."

The full press release can be read here.

NEWS-IN-BRIEF

ICC Commission Report Identifies Financial Institutions' Preferences and Experience with International Arbitration

The report reveals trends in the use of arbitration, dispels common misconceptions and provides insights about when to choose arbitration.

By Claudia Salomon

On November 9, 2016, the ICC Commission on Arbitration and ADR's Task Force on Financial Institutions and International Arbitration released the results of a two-year study regarding the advantages of arbitrating disputes involving financial institutions. The report synthesizes detailed feedback from interviews with more than 50 financial institutions around the world about their experience with international arbitration.

The Task Force examined a wide range of banking and financial activities, whether undertaken by licensed banks or by funds (equity, investment or sovereign wealth), including arbitration in derivatives, sovereign lending, regulatory matters, international financing, trade finance, Islamic finance disputes, advisory matters, asset management and interbank disputes. The Task Force also analyzed both international commercial and investment arbitration.

The key findings are as follows:

The Task Force found that financial institutions do use international arbitration — in a broad array of banking and financial transactions — but not to its full potential. However, arbitration is increasingly a part of the strategic options considered for cross-border banking and financial disputes.

Historically, financial institutions have preferred national courts in key financial centres (*i.e.* New York, London, Frankfurt, Hong Kong), but have sought to avoid the courts in emerging markets. However, the changing regulatory environment and the nature of the financial disputes that have arisen in the wake of the global financial crisis of 2008 have led financial institutions increasingly to view international arbitration as an important alternative to litigation.

Financial institutions tend to use international arbitration when: (i) the transaction is particularly complex; (ii) confidentiality is a concern; (iii) the counterparty is a state-owned entity; or (iv) the counterparty is in a jurisdiction where the enforcement of an arbitral award under the New York Convention will be easier than enforcement of a court judgment.

Arbitration Preferences

The Task Force found that financial institutions expressed the following key preferences when opting for international arbitration:

- *Ad hoc v Institutional Arbitration*
  - Most of the financial institutions interviewed preferred institutional arbitration, rather than ad hoc arbitration. ICC, LCIA, HKIAC and SIAC rules are most frequently selected, although ad hoc proceedings under the UNCITRAL rules have occasionally been chosen.
- *Seat*
  - The arbitration seats selected most frequently are, in alphabetical order, Geneva, Hong Kong, London, New York, Paris and Singapore.
- *Number and Qualification of Arbitrators*
  - Financial institutions generally prefer three-member tribunals, except for more straightforward matters when a sole arbitrator may be appropriate. When selecting an arbitrator, financial institutions consider industry expertise and experience, availability and responsiveness, common sense, language skills, and independence and impartiality.
- *Multi-tier and Unilateral Clauses*
  - Multi-tiered clauses (involving negotiation or mediation before arbitration) are rarely used in agreements involving financial institutions. Unilateral clauses are still viewed as important by a number of financial institutions which consider that litigation provides them with greater legal certainty.
- *Appeals*
  - Most financial institutions perceive the finality of an award in arbitration and the limited grounds for challenge to be an advantage compared to litigation. However, a minority of financial institutions wish to have a means of appeal in arbitration, provided this does not undermine certainty, and there is an upfront agreement between the parties addressing the circumstances in which a party could appeal and the parties have an agreement as to the overall timing.

Perceptions About International Arbitration

Financial institutions perceive the enforceability of awards in over 160 jurisdictions under the New York Convention as a key advantage. For loans and financing in developing markets, one institution reported that rating agencies look more favorably upon transaction documentation that contains an arbitration agreement rather than a jurisdiction clause submitting disputes to state courts. Other advantages of international arbitration include: the ability to appoint arbitrators with sector-specific expertise, the flexibility of the process, neutrality, finality and confidentiality. Although confidentiality is also considered undesirable in certain banking activities, such as derivatives and syndicated lending, where financial institutions seek standardization.

Recommendations

The Report includes numerous recommendations for tailoring the arbitration procedure to suit the needs of the banking and finance sector, specifying that legal advice should be sought in each case.

The recommendations include ways to reduce time and costs; expressly empower the tribunal to consider dispositive issues or claims and defences on a summary basis; specify that the arbitration shall remain confidential; specify that the arbitrators must have particular expertise relating to the financial sector generally, or a specific financial instrument; address the parties' rights to obtain interim relief; address joinder of parties and consolidation of claims under multiple contracts; allocate costs; provide for appellate review; and assess avenues of recourse under investment treaties.

The Report also recommended that financial institutions develop their own set of internal policies regarding the use of international arbitration and their preferred ingredients of an arbitration agreement, tailored to the particular circumstances and segments of their business.

The full report is available for download from the ICC website.

Claudia Salomon, Global Co-chair of Latham's International Arbitration Practice, served as co-chair of ICC's Task Force on Financial Institutions and International Arbitration.

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Subcommittee on IBA Arbitration Guidelines and Rules Report – 5 Key Takeaways

The Report illustrates wide-spread use of IBA soft law instruments; provides snapshot of international arbitral practice and regional trends.

By Fernando Mantilla-Serrano, Nora Fredstie, Diego Romero

The Subcommittee on IBA Guidelines and Rules recently released the results of a two-year study, which included a survey with 845 meaningful responses and 55 country reports from all six global regions (the Report). The Report highlights the positive reception and wide-spread use of three practice guidelines and rules: the (i) IBA Rules on the Taking of Evidence in International Arbitration, 2010 (the Rules on Evidence); (ii) IBA Guidelines on Conflicts of Interest in International Arbitration, 2014 (the Conflicts of Interest Guidelines); and (iii) IBA Guidelines on Party Representation in International Arbitration, 2013 (the Party Representation Guidelines) (collectively, the Rules and Guidelines).

The Report

Survey responses and country reports were received from all regions: Europe, Latin America, Asia-Pacific, North America, the Middle East and Africa. Participants in the survey were counsel, arbitrators, case administrators, arbitration users and members of academia. Consequently, the Report is truly a snapshot of arbitral practice at an international level, and notes trends in regional arbitration markets of varying levels of sophistication.

The full Report is available for download at the IBA Arbitration Committee's home page.

Fernando Mantilla-Serrano, Global Co-chair of Latham's International Arbitration Practice, serves as Chair of the Subcommittee on IBA Arbitration Guidelines and Rules. Associates Nora Fredstie and Diego Romero serve as Secretaries of the Subcommittee.

Key Takeaways

The Report first outlines how each of the Rules and Guidelines have been received in arbitral practice, case law and publications. Second, the Report provides a comprehensive analysis of the survey results, on which it bases a series of recommendations for the future. For its analysis, the Report draws on the 55 country reports received. The five key takeaways from the Report are:

1. The IBA Rules and Guidelines are well-received by the international arbitration community.

57% of arbitrations relied on the Conflicts of Interest Guidelines, 48% of arbitrations relied on the Rules on Evidence and 16% of arbitrations relied on the Party Representation Guidelines. These percentages are high given that the Rules and Guidelines will only be referred to when the issues the Rules address arise in the relevant arbitration. Although the Rules and Guidelines are not binding, most decision-makers will refer to them in their decisions. This underlines the need for specialized practitioners who are intimately familiar with the Rules and Guidelines.

2. Most survey participants thought the Rules and Guidelines should remain unchanged.

While amendments to the Rules and Guidelines could be considered, there is no pressing need for the amendments at present.

3. The Rules and Guidelines are widely used and accepted.

This is evidence of successful self-regulation in international arbitration.

4. Most survey participants see no need for changes to the Rules on Evidence, although the rules on how and when to produce documents and provide them to the opposing party attracted several comments and suggested modifications.

Several common law lawyers considered the Rules on Evidence too civil law-oriented and thus too narrow, while civil law lawyers considered them too common law-orientated and thus too broad. The disagreement demonstrates that the Rules on Evidence may have indeed found a middle ground. However, this also illustrates the importance, when choosing an arbitrator, of the arbitrator's background, which may influence his or her interpretation of, and reliance on, the Rules on Evidence.

5. Most survey participants preferred that the Conflicts of Interest Guidelines remain unchanged; however, the guidelines concerning disqualification of an arbitrator on the basis of conflicts of interest garnered several comments and suggestions.

The Report highlights that the Conflicts of Interest Guidelines should continue to have an international approach with no exceptions for smaller jurisdictions or industries. However, the Report notes that the IBA may consider removing the automatic disqualification of arbitrators in specific circumstances (the so-called "red list") if all the parties, having been fully informed of the situation, consent to the arbitrator. In other words, the parties should be able to waive a conflict of interest in order to protect party autonomy. This ability to waive could also alleviate the problem of conflicts in smaller jurisdictions. If later revisions adopt this suggestion, a party should consider carefully whether consenting to an arbitrator who has a conflict of interest is in that party's best interest. Such a decision is case-specific, so parties should consult with counsel to strategically evaluate.

The Report addresses several other possible amendments, which could be considered for later revisions of the Rules and Guidelines, revisions the Report recommends should take place every 10 years.

Fernando Mantilla-Serrano, Global Co-chair of Latham's International Arbitration Practice, serves as Chair of the Subcommittee on IBA Arbitration Guidelines and Rules.

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The Yukos Saga Continues to Unfold in France

By Aija Lejniece

Four new decisions have been added to the already gargantuan Yukos arbitration record, arising out of arbitral awards with a combined total of US$50 billion against the Russian Federation and in favor of the former majority shareholders of Yukos Oil Company — Hulley Enterprises Limited (Hulley Enterprises), Veteran Petroleum Limited and Yukos Universal Limited (together, the Yukos award creditors).

The Hague District Court set aside the arbitral awards earlier this year, however this has not prevented the award creditors from seeking enforcement in other jurisdictions. The French courts, in particular, have issued a handful of Yukos arbitration enforcement-related decisions throughout 2016. A key issue in these proceedings has been whether property owned by State enterprises, or companies in which the State holds shares, is property of the State and capable of attachment. The more notable developments occurring last year were:

- On 28 April 2016, an enforcement judge at the Paris Tribunal de Grande Instance held that an Orthodox church and cultural center Russia built near the Eiffel Tower was protected by sovereign immunity and could not be seized by Hulley Enterprises.
- On 5 October 2016, the First President of the Paris Court of Appeal suspended the lower court's decision to lift attachments previously obtained by Hulley and Veteran Petroleum on assets owned by SA Arianespace and Roscosmos, the Russian State Corporation for Space Activities.

- On 4 November 2016, an enforcement judge at the Paris Tribunal de Grande Instance upheld 12 attachments against Russian State property secured by Hulley Enterprises. The decision is not publicly available, however, according to reports, the attachments included a bank account held by the Office of the President of the Russian Federation, and a guarantee Société Générale owed to Rosoboronexport, Russia's intermediary agency for the import/export of defense-related and dual use products, technologies and services.
- On 23 November 2016, the First President of the Paris Court of Appeal confirmed the lower court's decision to lift attachments obtained by Hulley Enterprises against €400 million in assets purportedly owned by three Russian State enterprises on the basis that an attachment on monetary claims against a third party who has a direct personal debt towards the award/judgment debtor.

While Russia has argued that the setting aside of the Yukos arbitral awards in The Hague should render all enforcement actions obsolete, none of the French court decisions regarding the attachment of Russian assets have tackled this issue. This is because the enforcement of the Yukos awards are based on an *exequatur*, which the Paris Tribunal de Grande Instance granted to the Yukos award creditors on 1 December 2014. Russia's argument regarding the setting aside of the Final Award are therefore not within the jurisdiction of the courts currently dealing with the enforcement actions.

In addition to challenging the Yukos award creditors' attempts to seize Russian property and enforce the arbitral award, Russia has challenged the *exequatur* of both the Interim and Final Awards before the Paris Court of Appeal. The challenge is pending. The French courts will rule on the effect of the setting aside on the enforcement in France in the context of these proceedings. As will be discussed below, the setting aside is unlikely substantially to derail the enforcement of the awards in France.

Enforcement in France of Awards Set Aside at the Seat

On 20 April 2016, the District Court of The Hague set aside the Yukos arbitral awards. In France, however, a competent State authority setting aside an award at the seat of arbitration does not constitute grounds for refusing recognition and enforcement. While France is a signatory of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) — Article V(1)(e) of which provides that a court may refuse recognition and enforcement if a competent authority in the country in which the award was made has set aside the award — French courts have consistently held that they retain full discretion to enforce an award that a foreign court has set aside.

French case law considers that an international arbitral award is delocalized and therefore not integrated in the legal system of the State where the award was adopted. Thus, an award remains in existence even if set aside at the seat, and its recognition and enforcement depend only on the rules applicable in the State where recognition and enforcement is sought. Under Article 1525 of the French Code of Civil Procedure, courts can only refuse an international arbitral award's enforcement in situations that are also the basis for setting aside an international arbitral award rendered in France. These partly mirror Article V of the New York Convention and are enumerated in Article 1520 of the Code of Civil Procedure: the arbitral tribunal wrongly upheld or declined jurisdiction; the tribunal was not properly constituted; the tribunal overstepped its mandate; there was a violation of due process, or recognition or enforcement of the award is contrary to international public policy. French jurisprudence does not consider the recognition and enforcement of an award that has been set aside at the seat to contradict international public policy.

French courts have likewise referred to Article VII of the New York Convention, which provides that the Convention shall not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Since French law does not provide that the setting aside at the seat constitutes grounds for refusal of recognition or enforcement of an arbitral award, French courts consider it to be more preferential to a party seeking recognition or enforcement than the New York Convention.

Consequently, the District Court of The Hague's setting aside of the Yukos arbitral awards will unlikely, in itself, stand in the way of the award creditors enforcing the Yukos awards in France.

Case Comment: *Pac Rim Cayman LLC v. El Salvador*

Pac Rim Cayman LLC thwarted in attempt to recover damages from El Salvador (Pac Rim Cayman LLC v. El Salvador, ICSID Case No. ARB/09/12, Award, 14 October 2016).

By Catriona E. Paterson

Gold miner Pac Rim Cayman LLC (Claimant) had invested in El Salvador, conducting exploratory and pre-mining activities in various concession areas, at a time when the State was looking to attract investors in order to develop its mining industry and boost economic development. The State, several years later, however, refused to issue the Claimant permits and licenses needed to exploit the high-grade gold reserves discovered in the El Dorado concession area, a decision the Claimant alleged to be wrongful under domestic and international law, and that allegedly nullified the Claimant's investment into El Salvador. The Claimant referred the dispute to international arbitration under the Central American Free Trade Agreement (CAFTA) and El Salvador's Mining Law, alleging the State's conduct breached the State's obligations owed to foreign investors under these instruments.

El Salvador argued in its defense that the Claimant had simply failed to meet the legal requirements under El Salvador's Mining Law to be issued exploitation permits and licenses, and that the Respondent's conduct could accordingly not be characterized as wrongful. The key issue of fact between the parties was whether under the Mining Law the Claimant was obligated to own land, or be authorized by the land owner to exploit the subsoil of the land, throughout the entire concession area, or only the part of the surface area the mining activities would impact.

In a 2012 award, the tribunal established to hear the dispute declined jurisdiction under the CAFTA on the basis that the State had denied the benefits of the treaty's protections to the Claimant under CAFTA Article 10.12.2. The dispute accordingly proceeded exclusively under El Salvador's Investment Law.

In an award dated 14 October 2016, the tribunal denied the Claimant's claim on the merits. The tribunal's principal finding was that under the local law, the Claimant was not entitled to obtain from the State, and the State was not obligated to grant the Claimant, the permits and licenses necessary to exploit the gold reserves in the El Dorado concession area. As such, the State had not acted in breach of the Mining Law nor, consequently, the Investment Law. The tribunal further awarded El Salvador US$8 million in respect of its expenses, fees and costs

The case attracted significant attention from the outset because of the broader question in public international law regarding the intersection between, on the one hand, the State's treaty obligations to pay compensation for expropriation and to treat foreign investors fairly and equitably and, on the other hand, the State's right to regulate. However, because the tribunal declined jurisdiction under the CAFTA, the public international law question ultimately fell away.

From a procedural standpoint, the dispute nevertheless remains notable because of third parties' participation in the dispute resolution process, and the procedural measures adopted to ensure a significant degree of transparency in the proceedings. During the proceedings, the tribunal heard submission from amicus curiae and non-disputing party submissions from Costa Rica and the United States (in addition to those of the disputing parties themselves) on public interest and public international law issues. Furthermore, a large number of documents in the proceeding were made publicly available, including the parties' submissions, the amicus curiae briefs as well as the non-disputing parties' submissions, and the oral hearings were transmitted live via webcast. As some States move toward greater transparency in investor-State dispute settlement proceedings, cases such as *Pac Rim v. El Salvador* will stand as examples of the procedures that can be adopted to achieve transparency objectives and/or allow third party participation in the dispute.

Not Urgent Enough for the LCIA Means Not Urgent Enough for the English Court

Gerald Metals SA v. The Trustees of the Timis Trust & Others [2016] EWHC 2327.

By Philip Clifford and Daniel Harrison

Background

Having commenced arbitration in London against the Trustees of the Timis Trust under the Arbitration Rules of the London Court of International Arbitration (LCIA Rules), Gerald Metals applied to the LCIA Court to appoint an emergency arbitrator or expedite formation of the tribunal, with a view to preserving the Trust's assets.

The LCIA Rules provide for appointing an emergency arbitrator if there is an "*emergency*" (Article 9B), and for the expedited formation of the tribunal if there is "*exceptional urgency*" (Article 9A). However, in light of undertakings from the Trustees not to dispose of assets other than for full market value and at arm's length, and to give seven days' notice before disposing of any assets worth more than £250,000, the LCIA Court refused Gerald Metals' applications.

Gerald Metals therefore applied to the English Commercial Court for a freezing injunction (and related information about the assets) under Section 44 of the Arbitration Act 1996 (the Act).

Section 44(3) provides that:

> "*If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets*" (emphasis added).

However, Section 44(5) states that:

> "*In any case, the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively*."

The Commercial Court Judgment

Mr Justice Leggatt rejected Gerald Metals' application, suggesting that if the case was not sufficiently urgent for relief under Articles 9A or 9B of the LCIA Rules, the case was not sufficiently urgent for the court to grant relief under Section 44(3) of the Act. Furthermore, by Section 44(5), the court can only act if the powers of the arbitral institution and the tribunal to be constituted are inadequate or cannot be exercised. In this case, Gerald Metals had sought assistance from the LCIA, but had been refused. The LCIA's powers were not said to be inadequate.

Mr Justice Leggatt noted that paragraph 9.12 of Article 9B of the LCIA Rules states that:

> "*Article 9B shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitration Tribunal; and it shall not be treated as an alternative to or substitute for the exercise of such right*."

However, he did not consider that this gave parties a free choice as to whether to seek relief from the LCIA or the court. He simply confirmed that Article 9B should not prevent a party from applying to the court in appropriate cases.

Comment

Some commentators have expressed concern that this decision marks a narrowing of access to the English courts for interim relief in support of arbitrations. However, the essence of this case was that no interim relief was really necessary. The case was not urgent enough under the LCIA Rules and so, the tests being very similar, the case was not urgent enough for the court to intervene either.

Mr Justice Leggatt did, however, correct those who previously believed that parties had a free choice whether to apply to the arbitral institution for interim relief or the English court. He pointed out that, in line with the parties' selection of arbitration to resolve their dispute, and under Section 44(5) of the Act, the court should only intervene "*if or to the*

extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively".

Importantly, this decision does not affect the availability of relief from the English court when relief is really needed — if a tribunal or emergency arbitrator would not be able to act sufficiently quickly or effectively (for example, because the application must be made ex parte, or the relief must bind third parties).

Back

ICC Relaunches Guidelines for International Investment

The Guidelines provide policy guidance to business, governments and other stakeholders on promoting sustainable foreign direct investment in the contemporary investment environment.

By Daniel Harrison

On 18 October 2016, the International Chamber of Commerce (ICC) relaunched its Guidelines for International Investment (the Guidelines). Although the Guidelines contain no substantive revisions to the version published in 2012, the relaunch is designed to help achieve the recently adopted United Nations Sustainable Development Goals and contribute to the continued growth of foreign direct investment.

What are the Guidelines for International Investment?

The promotion of foreign direct investment has been a long-held priority for the ICC, beginning in 1949 with the publication of its first International Code of Fair Treatment for Foreign Investments. The Guidelines were originally published in 1972 and comprehensively revised in 2012.

The Guidelines have no legal effect, but are designed to provide an international code of fair treatment by setting out the responsibilities relating to international investment of the investor, the investor's State and the host-State of the investment. These responsibilities cover a range of areas, such as investment policies, ownership and management of investments, anti-corruption and the legal framework. The 2012 Guidelines included amendments to existing chapters (including on labor and fiscal policies) and new chapters (on competitive neutrality and corporate responsibility) to reflect the environment for international investment at that time.

For example, in respect of investment policies the Guidelines provide, among other things, that:

- An investor should ensure in consultation with the competent authorities, that the investment complies with the laws of the host and home country
- The investor's home-State should offer guarantee facilities against non-commercial risks the investor encounters (either nationally or through participation in an international investment insurance agency)
- The host-State communicate to prospective investors its rules, regulations, policies, relevant official bodies, and general conditions the government wishes to apply to incoming direct private investment, in a timely and transparent manner

Why the relaunch?

The recent relaunch of the Guidelines involves no substantive updates; the only revisions are to parts of the preface. The ICC's decision to relaunch the Guidelines now was driven by the Guidelines' increasing relevance as FDI inflows and outflows from developing and transition economies have continued to grow.

First, international investment is currently at the forefront of the ICC's agenda, and the Guidelines form an integral part of the ICC's plan. According to its "Programme of Action for 2016", the ICC intended this year to promote cross-border trade and investment, and an open economy to foster jobs; to create sustainable development; and to improve living standards. The ICC also identified as part of its February 2016 Trade and Investment Policy its aim to foster progress toward high-standard multilateral and regulatory frameworks for international investment.

Second, the ICC connects the relaunch to the United Nations Sustainable Development Goals (SDGs), which came into force at the start of 2016. Several of the SDGs relate to issues of international investment, including: (i) promoting sustained, inclusive and sustainable economic growth; (ii) building resilient infrastructure and promoting inclusive and sustainable industrialization; and (iii) reducing inequality within and among countries.

Third, the ICC notes that the annual investment gap in key development sectors for developing nations is approximately US$2.5 trillion (as estimated by UNCTAD in 2014), and that the private sector will be an essential partner in helping bridge that gap. The ICC has identified specific concerns within the international investment community that the Guidelines are designed to address:

1. **Business confidence regarding sovereign debt policies, macro-economic imbalances, taxation and regulatory uncertainty.** In many developing markets, there is uncertainty as to the host State's ability to develop stable and meaningful economic or fiscal policies, resulting in significant business uncertainty and discouraging inward investment.

   The Guidelines address this in particular in chapter 3 (Finance), which recommends that the host-State encourage investment from abroad through implementing stable, predictable laws and regulations. The Guidelines also focus on investors' specific concerns regarding tax, stating that governments of host countries should, for example: (i) take steps to avoid double taxation; (ii) allow only taxation on income that is sufficiently connected to the country, and allow those expenses to be deducted that can reasonably be allocated to the business operations; and (iii) refrain from imposing on foreign investors any taxes that are more burdensome than those imposed on domestic investors.

2. **Re-regulation of foreign investment.** The ICC has stated that the re-regulation of cross-border investments seems to be returning, citing the *2011 World Investment Report*, which found that 32% of all investment regulations classified as "restrictive" in 2010 compared to only 2% in 2000. The same study described 68% of such regulations as "liberalizing" regulations in 2010 compared to 98% in 2000.

   The Guidelines encourage the governments of host countries to reduce non-tariff barriers and minimize bureaucratic burdens on foreign investors. The Guidelines also state that such governments should not impose export obligations on foreign investors beyond those required for national security, and should permit foreign investors to import relevant equipment and materials without undue formalities or excessive customs or other duties.

3. **State-owned enterprises (SOEs) and sovereign wealth funds (SWFs).** Some countries have created State-owned or State-controlled enterprises or sovereign wealth funds. Such entities often receive various economic and political benefits unavailable to private investors. This leads to market distortion and can discourage foreign investment overall.

   The Guidelines address this issue in chapter 10 (Competitive Neutrality). The Guidelines provide that the governments of host countries should refrain from using SOEs or SWFs as vehicles to achieve geopolitical objectives, and advises those governments to engage with the governments of investors' countries and international institutions to establish competitive neutrality norms and appropriate forms of recourse. The Guidelines also encourage an international dialogue between the governments of host countries and of investors, to reduce the benefits offered to SOEs or SWFs, thereby fostering a more harmonious and fruitful environment of competitive neutrality.

In a world of increased international investment and investment disputes, the Guidelines provide a framework for potential investors as well as for the investor's home State and the host-State of the investment. Governments and investors can adapt the Guidelines depending on the specific circumstances of any investment; however, the Guidelines are at the very least useful starting point.

Endnotes

1 Article 30(2)(a) and Article 1(2), Appendix VI of the 2016 Rules.

2 Article 30(3), 2016 Rules.

3 Article 30(2)(b), 2016 Rules.

4 *See, e.g.,* Article 18 of the UNCITRAL Model Law and Article 33(1) of the English Arbitration Act 1996.

5 *See, e.g.,* Article 24(1) of the UNCITRAL Model Law, which provides that a tribunal "shall hold [oral hearings for the presentation of evidence or for oral argument] […] if so requested by a party". While some jurisdictions may allow the parties to agree not to hold a hearing through the adoption of a particular set of arbitration rules, it should not be assumed that this will be the case in all jurisdictions.

6 A court may refuse to enforce an award under the New York Convention if "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case" (Article V(1)(b)). Similarly, in major domestic legal systems generally, a court may refuse enforcement of an arbitral award if the arbitral proceedings breached applicable due process requirements. See e.g. Article 36(1)(a)(ii) of the UNCITRAL Model Law, Articles 1520, 1522 and 1525 of the French Code of Civil Procedure and Section 201 of the US Federal Arbitration Act.

7 Article 34(2)(h) of the English Arbitration Act 1996.

8 *See, e.g.,* Article 24(1) of the UNCITRAL Model Law, which states that: "[U]nless the parties have agreed that no hearings shall be held, the arbitration tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party." *See also* Article 182(3) of the Swiss Private International Law Statute, which states that "[w]hatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure."

9 Article 23(1) of the 2012 and 2016 Rules explain the content of the Terms of Reference.

10 Article 23(2) of the 2012 and 2016 Rules.

11 *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at pp. 2 and 22 (Queen Mary University and White & Case, 2015).

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