

This newsletter provides information on issues of current interest and an update on recent developments in international arbitration law and practice. It is written in general terms. The application of the law always depends on the particular facts of the case. If you would like to follow up any of the issues raised, please contact one of the individuals listed below:

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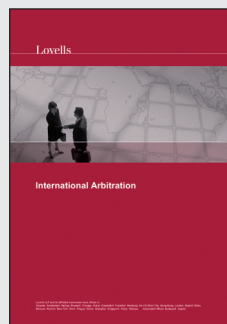
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In this issue

ARBITRATION NEWS

The latest developments in international arbitration, including commentary on recent investment treaty arbitration awards and developments in national laws.



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CHINA AND INTERNATIONAL INVESTMENT LAW

Dr **Monika Heymann** provides an overview of international investment law and its specific application to China and Chinese investors.

DRAFTING ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS

The dispute resolution provisions are often the last clauses to be considered in contract negotiations. All too often, they are cobbled together by candlelight in the race to complete. It is hardly surprising then when arguments subsequently arise as to their meaning and validity. **Jerome Finnis** and **Saira Singh** give some guidance on critical components of arbitration clauses, with a view to avoiding such arguments.

BEIJING COURT REJECTS CHALLENGE TO CIETAC AWARD IN FAVOUR OF FOREIGN PARTY

A common (and probably justified) perception of foreign parties to arbitration in China is that obtaining an award is not the end of the story: the local courts will not necessarily uphold the award in the face of a challenge. However, a recent decision of a Beijing court, which upheld a CIETAC award in favour of a foreign party, may mark the sign of a more favourable attitude towards foreign parties. **Mark Lin** summarises the decision.

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NEWS FROM LOVELLS' INTERNATIONAL ARBITRATION PRACTICE

Commission on Settlement in International Arbitration

Phillip Capper, Head of Lovells' International Arbitration practice, has been invited to participate in a Commission on Settlement in International Arbitration. The Commission was launched by the Centre for Effective Dispute Resolution (CEDR), a leading ADR service provider based in London, and is co-chaired by Lord Woolf of Barnes (the former Lord Chief Justice of England and Wales) and Professor Gabrielle Kaufmann-Kohler, a well-known international arbitration practitioner and arbitrator. The Commission's remit is to investigate approaches to settlement in international arbitration in different jurisdictions and then recommend ways in which arbitral institutions and tribunals could help the parties to find ways of resolving their disputes more quickly and cost-effectively. Amongst the organisations it proposes to consult are major arbitral institutions such as the ICC, LCIA, ICSID, China International Economic and Trade Arbitration Commission (CIETAC), Hong Kong International Arbitration Centre (HKIAC), Singapore International Arbitration Centre (SIAC) and the International Centre for Dispute Resolution (ICDR) (the international arm of the American Arbitration Association). The Commission plans to publish a White Paper in 2008.

INTERNATIONAL TREATIES AND INSTITUTIONS

ICSID

Bolivia's withdrawal from ICSID takes effect

Bolivia's withdrawal from the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) took effect on 3 November 2007, six months after it gave notice of withdrawal. Ever since the notice, commentators have been debating the effect of withdrawal from the ICSID Convention. The stage is set for the debate to be settled in the fairly near future – Bolivia has reportedly asked ICSID to reject a request for arbitration filed by Italian investor, Euro Telecom International (a subsidiary of Telecom Italia). The request was registered by ICSID on 31 October 2007.

Many bilateral investment treaties (BITs) with Bolivia provide for dispute resolution by non-ICSID arbitration options, such as under the ad hoc UNCITRAL Arbitration Rules. Investors relying on such BITs will not be affected by Bolivia's withdrawal from the ICSID Convention.

For investors relying on BITs that provide for ICSID arbitration, the question is whether consent to arbitration was given before the notice of withdrawal from the Convention? Commentators differ on this point. Some argue that an ICSID provision in the BIT does not constitute consent for a particular case; the investor has to initiate an arbitration for there to be "consent". If that is the case, investors in dispute with Bolivia who had not

served notice of arbitration prior to 2 May 2007 (that is, the date the notice of denunciation was received by ICSID) will not be able to avail themselves of ICSID arbitration under the ICSID Rules.

Other commentators maintain that an ICSID arbitration clause in a BIT constitutes the requisite "consent". If the latter view prevails, Bolivia will be "on the hook" for ICSID arbitration for as long as the relevant BITs continue in force. For what it is worth, that will include an obligation to satisfy an adverse award (Article 53 of the ICSID Convention imposes a requirement on the parties to comply with the terms of any award and Article 72 makes it clear that the parties' rights and obligations are not affected by notice of withdrawal where consent to arbitration was given before the notice).

All may become clear before too long.

Ecuador lays down a marker for oil and mining investors

The Government of the Republic of Ecuador has notified the International Centre for Settlement of Investment Disputes (ICSID) that it will no longer consider submitting disputes concerning oil and mining to ICSID. Ecuador also intends that any new contracts with oil companies will exclude ICSID as a forum for disputes.

This news follows hot on the heels of President Rafael Correa's decree virtually doubling the percentage of oil companies' "windfall" profits which must be paid to the State. The windfall tax is payable on profits at prices over a certain level (understood to be around US\$23 per barrel). It is thought that the existing contracts provide for 20% of

windfall profits to be paid to the State. However, on the back of soaring oil prices, the former President, President Palacio, in July 2006 introduced a law increasing the windfall tax to 50% of “windfall” oil profits. On 4 October 2007, his successor announced that foreign oil companies would now have to pay 99% of their windfall oil profits to Ecuador. The justification for the increase is that the people of Ecuador should also benefit from high oil prices.

Aggrieved investors from states which have signed bilateral investment treaties (BITs) with Ecuador may look to the investor protections offered by the BIT for recourse. The preferred dispute resolution mechanism for many foreign investors is ICSID arbitration. The jurisdiction of ICSID to resolve investment disputes between foreign investors and States/State entities depends on the consent of the parties to submit the dispute to ICSID arbitration. Such consent is usually found in the relevant BIT. The consent may or may not be expressed to exclude specific classes of dispute.

Article 25(4) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention) gives contracting states the option to notify ICSID of any classes of dispute which it would not consider submitting to ICSID for resolution. However, any such notification is unlikely to have any legal effect unless and until the consent to ICSID arbitration that has already been given in the relevant BIT has been amended.

Ecuador has entered into BITs with more than 20 States, including the UK, the US, France, Spain and Canada. Most of those BITs provide for resolution of disputes between foreign investors and Ecuador by ICSID arbitration. None qualify that consent to exclude oil and mining related disputes. All but one of the cases pending against Ecuador at ICSID is energy-related. However, perhaps wary of a deluge of claims by disgruntled investors in the oil industry (it will be only too aware of the numerous claims facing Argentina following action taken during its economic crisis in 2001), Ecuador’s notice to ICSID looks like an attempt to limit its consent. Interestingly, it has not (yet) followed Bolivia in withdrawing from the ICSID Convention completely. However, the bad news for Ecuador is that the Article 25(4) notice probably has no legal effect of itself. Unless it amends the BITs, by way of a protocol, oil and mining investors should continue to be able to refer disputes concerning breaches of treaty obligations to ICSID. However, the notice may be a harbinger of things to come. Affected investors should keep a watching brief on existing and new BITs signed by Ecuador.

UNCITRAL - Revision of UNCITRAL Arbitration Rules

Should the UNCITRAL Arbitration Rules be revised to address issues relevant to investor-state arbitration? At least two non-governmental organisations (NGOs) think they should. As well as being in widespread use in international commercial arbitration generally, the UNCITRAL Rules are also adopted in many investor-state arbitrations as an alternative to the rules of the International Centre for Settlement of Investment Disputes (ICSID).

The NGOs have suggested to an UNCITRAL working group that the rules should be revised to allow greater transparency in such arbitrations, enabling third parties to access documents generated during the proceedings, including awards, and to provide input to the tribunal. This would bring the UNCITRAL Rules more closely into line, for investor-state arbitrations, with the ICSID Arbitration Rules which contain such provisions (albeit sometimes subject to the consent of the parties to the arbitration).

The UNCITRAL working group is currently revising the UNCITRAL Arbitration Rules, so the NGOs’ intervention was timely. However, although the issue was raised at a meeting of the working group back in February 2007, no decisions were made and it was agreed that the issue would be revisited at a later date. The working group met again in September to review the revised draft rules, but it is understood that there was not time to discuss the investor-State issue. The next meeting of the working group will be in February 2008.

LCIA

The LCIA is to open a branch in Barbados. This will be the London-based institution’s first regional centre. It is likely that the Barbados branch will be promoted as a forum for Latin American and Caribbean disputes. The development coincides with the proposed modernisation of the island’s arbitration legislation, based on the UNCITRAL Model Law on International Commercial Arbitration.

PERMANENT COURT OF ARBITRATION

The Permanent Court of Arbitration (PCA) and the Singapore government have agreed to establish a PCA facility in Singapore. The first PCA facility in Asia, it will provide dispute resolution services for disputes involving States, state-controlled entities or inter-governmental organisations. This is in keeping with Singapore's ambition to be the leading centre for international arbitration in Asia and follows the amendment of the SIAC Arbitration Rules earlier this year. The PCA has also recently set up facilities in South Africa, Lebanon and Costa Rica.

INVESTMENT TREATY ARBITRATION

ICSID tribunal interprets "provisional application" rule in Energy Charter Treaty

States which have signed the Energy Charter Treaty (ECT) are normally obliged to apply it even if it has not formally entered into force. That is the conclusion reached by the tribunal in an ICSID arbitration brought by a Greek investor against the Republic of Georgia (*Kardassopoulos v Republic of Georgia*). The claimant Greek investor, Mr Kardassopoulos, invested in the gas and oil sector in Georgia. He alleged that Georgia expropriated a concession for reconstruction of energy pipelines and infrastructure, in breach of the ECT (and the bilateral investment treaty between Greece and Georgia). Both Greece and Georgia signed the ECT on 17 December 1994. However, the ECT did not enter into force until 16 April 1998, once 30 States had ratified it. Georgia argued that the ECT did not apply because the incidents in dispute took place before 16 April 1998.

The investor relied upon Article 45 of the ECT. This provides that signatory States agree to apply the ECT provisionally pending its entry into force, so long as to do so is not inconsistent with its constitution, laws or regulations and the State has not made a declaration excluding provisional application.

The tribunal decided that Article 45(1) should be interpreted so that States who have signed the ECT are obliged to apply it as if it has formally entered into force, even if it has not actually done so. The exception to this is where provisional application would contravene the relevant State's law. That was not the case here. Nor had either State excluded provisional application of the ECT. The ECT became provisionally applicable for Georgia and Greece on 17 December 1994, the date on which both States had signed it. The investment giving rise to Mr Kardassopoulos' claim was made after that date and so the tribunal had jurisdiction to hear the claim.

This is the first time a tribunal has made a decision on the interpretation of Article 45 of the ECT. It is all the more interesting in light of the pending arbitration between Group Menatep (the majority shareholder in Yukos) and Russia, which has been brought under the ECT. Russia has signed but not ratified the ECT and is expected to contest the tribunal's jurisdiction. The facts of the Group Menatep claim are different to the *Kardassopoulos* arbitration and in any event there is no official system of precedent in international arbitration. Nevertheless, it will be interesting to see whether the tribunal in Group Menatep takes the same approach, especially since there is apparently an arbitrator in common on both tribunals.

On a separate note, the tribunal in the *Kardassopoulos/Georgia* arbitration also expressed interesting views regarding the legality of investments. Georgia contended that the joint venture agreement and concession agreement had been concluded by Georgian entities which lacked legal authority to do so. Therefore, the claimant's joint venture agreement with a state-owned enterprise was void under Georgian law and not subject to protection under the ECT or the BIT. The tribunal expressed the view that while investors could not act illegally in making investments, a host State could not rely on its own failures to comply with its domestic law to avoid jurisdiction. It might well be the case that the joint venture and the concession were illegal under Georgian law. However, that did not mean that Georgia should be absolved of potential liability for the protection of those investments.

Airport claim fails on jurisdictional grounds

Foreign investors must structure their investment to comply with local laws. That is the moral of the award on jurisdiction in the arbitration between German airport operator, Fraport AG, and the Republic of the Philippines. The tribunal by a majority denied jurisdiction on the ground that Fraport's investment had not been made in accordance with Philippine law and therefore did not qualify as an "investment" under the bilateral investment treaty (BIT) between Germany and the Philippines. Article 1(1) of the relevant BIT defined "investment" as "any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State". The Philippine Anti-Dummy Law prohibits foreign investors from owning more than 40% of public

utilities. However, the tribunal found that Fraport had “consciously, intentionally and covertly” structured its investment in a way which it knew to be a violation of the Anti-Dummy Law, namely by means of secret shareholder agreements. The tribunal acknowledged that a government which knowingly overlooks violations of its own laws cannot rely on the illegality of the investment to challenge jurisdiction (echoing the tribunal’s view in the *Kardassopoulos* case – see above). However, there was no evidence here that the government had known or could have known about the structure adopted by Fraport for its investment.

Press reports indicate that Fraport is going to seek the annulment of the award on jurisdiction.

Foreign investors would be wise to take (and follow) legal advice on local laws and regulations. Otherwise, when disputes arise they may find their path to resolution of the dispute blocked.

Damages award in *LG&E v Argentina*

Assessing damages in an investment treaty arbitration is a contentious exercise. Last year, the tribunal in *LG&E v Argentina* found Argentina liable for breaches of the BIT between the US and Argentina. Its recent award on damages has provided some guidance as to the appropriate measure of damages for breaches of the fair and equitable treatment provisions of a BIT.

LG&E sought compensation based on the fair market value of their investment, namely the market value of their shares as at August 2000, less the residual value in October 2002. Argentina did not object to this basis

in principle (although they disagreed with the amount sought and the method by which that sum was calculated). The tribunal decided that that type of valuation was appropriate in cases of expropriation, where the claimant had lost the title to their investment or when interference with property rights has led to a loss equivalent to the total loss of the investment. However, that was not the case here. The value of the investment had actually “rebounded” since the economic crisis of December 2001 and 2002 and the investment was still in existence. The measure of compensation had to be based, the tribunal decided, on the actual loss suffered by the investor as a result of Argentina’s conduct. That loss was the dividends they would have earned but for Argentina’s breaches.

The tribunal rejected LG&E’s claim for future loss as being too uncertain and speculative. It also imposed a cut-off date of 28 February 2005 for the calculation of accrued losses. Losses incurred during the “state of necessity”, that is, 1 December 2001 to 26 April 2003, were also to be subtracted (the tribunal having previously accepted Argentina’s defence that their conduct was “necessary”). In all, the claimants were awarded US\$57.4 million including compound interest up to the date of payment in full of the award. This compared with the US\$265.2 million sought by LG&E (US\$174 million of which related to loss of future profits).

Although it set a cut-off date for damages, the tribunal recognised that Argentina would continue to be liable to pay LG&E compensation after that date if it continued to breach its obligations. It thus opened the way for

LG&E to seek additional damages, as and when they have evidence to back up their claim.

LG&E is now doing just that. It has invoked a rarely used provision in the ICSID Arbitration Rules in order to do so. Article 49 of the ICSID Arbitration Rules gives parties the right to seek a supplementary decision on the award, to address issues which the applicant believes the tribunal either did not decide or wrongly decided and should rectify. Requests for supplementary decisions are considered by the original tribunal, unlike requests for annulment of the award, which are considered by a fresh panel (known as an “ad hoc committee”).

LG&E is seeking additional damages, for Argentina’s continuing breach of its obligations after the cut-off date set by the tribunal (28 February 2005). Its request for a supplementary decision has been registered by ICSID and further developments are awaited.

Assessment of damages in *Vivendi v Argentina*

The tribunal in the long-running proceedings between *Compañía de Aguas del Aconquija SA and Vivendi and Argentina* also took a stern line when assessing damages in that arbitration. It had found Argentina in breach of the provisions relating to fair and equitable treatment and expropriation in the BIT between France and Argentina. Vivendi sought damages based on the “fair market value” of their investment (a water concession), to be assessed by reference to lost profits, past and future. The tribunal did not agree – there was no track record of profits, so it was not certain that the

concession would have been profitable at all. Instead, the tribunal decided that the correct measure of damages was the “investment value”, that is, the amount actually invested by Vivendi before Argentina breached its obligations. This resulted in an award of about one-third of the amount sought by Vivendi.

ICSID ad hoc committee partially annuls award

A feature of arbitration under the ICSID Arbitration Rules is the parties’ lack of recourse to national courts to challenge awards. In mainstream international arbitration, the courts of the seat, or place, of arbitration will have supervisory jurisdiction over the proceedings. It is to those courts which any permissible challenge to an award must be made. By contrast, in ICSID arbitration, the party seeking to challenge an award must invoke Rule 50 of the ICSID Arbitration Rules. The rule sets out an exhaustive list of five grounds for annulment, all relating to irregularities in the proceedings or the award. There can be no appeal on a point of law. That is not so different to “normal” arbitration, where the parties often agree to exclude any right to appeal on a point of law, or no such right exists under the national law. However, the destination of the challenge is not a court but an “ad hoc committee” nominated by ICSID. A series of awards have demonstrated that the function of the ad hoc committee is not to interfere with the tribunal’s decision on the merits, however critical the committee may be. The latest in that series is *CMS Gas Transmission Company v Argentina*.

The tribunal had awarded CMS US\$133.2 million in damages, for breach by Argentina of its obligation to afford CMS fair and equitable treatment and of the “umbrella clause”¹. As it has done in the face of other adverse awards², Argentina applied for the annulment of the award, contending that the tribunal manifestly exceeded its powers and/or failed to state the reasons on which its decisions were based. An order was made staying the enforcement of the award pending the outcome of the annulment request.

The limits of the annulment procedure were confirmed through the ad hoc committee’s decision on the defence of necessity: although the committee found that the tribunal’s analysis of the defence of necessity was manifestly wrong as a matter of law, its function was not to review the decision on the merits. There had been no manifest excess of power – the tribunal had done what it was supposed to do, albeit erroneously – and although the tribunal’s reasoning on necessity could have been clearer, there was no failure to state reasons either. The tribunal’s decision on necessity would therefore stand.

The ad hoc committee did annul the part of the award which dealt with the umbrella clause, finding that the tribunal had failed to state reasons for its decision. However, this did not affect the remainder of the award, including the damages award. The stay of enforcement was therefore lifted. This decision is a salutary reminder to those who seek to use the annulment procedure as a way of appealing against an award: even if the tribunal’s

decision was wrong, it will only be annulled if one or more of the five grounds in Rule 50 of the ICSID Arbitration Rules is satisfied.

DEVELOPMENTS IN NATIONAL LAW

UK: House of Lords proclaims a “fresh start”

A fresh start for interpretation of arbitration clauses. That was the effect of the House of Lords’ judgment in *Premium Nafta Products v Fili Shipping Company Limited* [2007] UKHL 40. The House of Lords emphasised that arbitration clauses are to be interpreted widely and left behind verbal distinctions between “arising under” and “arising out of” a contract. These distinctions and linguistic nuances reflected “no credit upon English commercial law”. The Lords instead referred to approaches in Germany, Australia and the USA.

In Lord Hoffman’s words: “*Businessmen in particular are assumed to have entered into an agreement to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets the language.*”

Central to the reasoning was a strong commitment to the principle of separability of the arbitration agreement. Allegations that the contract was induced by bribery did not mean the arbitration agreement was invalid. As Lord Hope said: “*The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside.*”

1 An “umbrella clause” effectively requires the parties to observe any obligations, whether contained in investment contracts or a treaty, relating to investment between them. A typical example is “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.” In some cases, such clauses have been used to elevate a breach of contract to the status of a breach of a treaty obligation, thus opening up the way for use of the dispute resolution mechanisms in the treaty rather than the investment contract.

2 For example, *Compañía de Aguas del Aconquija SA and Vivendi v Argentina* (ICSID Case No. ARB/97/3); *Siemens AG v Argentina* (ICSID Case No. ARB/02/08) (annulment proceedings pending).

Lord Hoffman said: *“The parties ... want ... disputes decided by a tribunal which they have chosen, commonly on the grounds of ... its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.”*

He said that: *“businessmen frequently do want the question of whether their contract was valid, or came into existence, or has become ineffective, submitted to arbitration and ... the law should not place conceptual obstacles in their way.”*

The practical effect of the judgment is two-fold. First, a dispute will be presumed to be within the scope of an arbitration agreement unless it has been expressly excluded or there is clear language to indicate that that was the parties’ intent. Second, even if the main agreement is void, the arbitration agreement within it will remain in effect unless the arbitration agreement itself has been impeached (for example, because the contract never came into existence because of forgery).

UK: No security for costs for party resisting enforcement

Experienced practitioners of international arbitration know that, under English law, a respondent may be entitled to security for its legal costs against the claimant in arbitrations (unless any right to apply

for security has been excluded by agreement). That alone may be an alien concept. The idea, then, that a party seeking to enforce an award might have to provide security for costs must be mystifying. The English Court of Appeal obviously agrees, as it has overturned a judge’s decision granting security for costs in favour of an award debtor resisting enforcement.

In *Gater Assets Ltd v Nak Naftogaz Ukrainiy*³, Gater (the assignee of a Russian award) sought to enforce the award in England and Wales. Both the UK and Russia are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The New York Convention is incorporated in English law by virtue of sections 101-104 of the Arbitration Act 1996. As a signatory to the New York Convention, the courts of England and Wales are obliged to recognise awards from other New York Convention states as binding and enforce them, except in specified narrow circumstances, without imposing more onerous conditions than would apply to the enforcement of a domestic award. The circumstances justifying a refusal to enforce include where recognition or enforcement of the award would be contrary to public policy.

Gater obtained the English court’s permission to enforce the award, but Nak Naftogaz applied to set aside that permission on the ground that the award was obtained by fraud (thus covered by the public policy exception to enforcement). It also sought security for its costs of the enforcement proceedings, relying on the English Civil Procedure Rules

(CPR). The judge decided that he had jurisdiction to grant security and exercised his discretion to do so. However, the Court of Appeal found fault with the judge’s approach and, by a majority of 2:1, allowed Gater’s appeal, the two judges in question holding that security for costs should not have been granted in this case. Unfortunately, they differed as to the basis for their decision. Rix LJ was prepared to assume (but not decide) that the court did have technical jurisdiction to grant security for costs against the holder of a New York Convention award. However, he held that as a matter of principle the court should not exercise its discretion to grant security for costs. Moses LJ agreed with Rix LJ’s reasons why there should be no security, but took the view that the court had no jurisdiction in this case to grant security.

The main reason underlying the majority’s decision was that to grant security for costs against the holder of a New York Convention award in summary enforcement proceedings would effectively breach the terms of the New York Convention. Both judges concluded that a party resisting enforcement of a domestic award could not obtain security (on the basis that a party resisting enforcement of a domestic award would effectively have lost the right to attack the award’s validity by that stage, and with it any right to security for costs). It would therefore be a breach of the New York Convention to grant security for costs in favour of a party resisting enforcement of a New York Convention award – it would impose more onerous conditions on the enforcing party than if they held a domestic award.

3 [2007] EWCA Civ 988 (17 October 2007).

Because of the uncertainty underlying the basis for the decision, it cannot be said categorically that security for costs will never be granted against a party seeking to enforce a New York Convention award. However, it is very unlikely that such an order would be made. The fact that the New York Convention itself does not contemplate security for costs in such circumstances vindicates that position.

UK: Tribunal not normally required to prompt advocate to deal with a point

An advocate cannot expect a tribunal to prompt him to deal with a particular issue, unless the tribunal appreciates that the advocate has missed or not understood the point. That is clear from the Court of Appeal's decision in *Bandwidth Shipping Corporation v Intaari*⁴.

The tribunal made an award in favour of Intaari and Bandwidth applied to have the award remitted to the tribunal on the ground of serious irregularity under section 68 of the Arbitration Act 1996. Specifically, it argued that the tribunal had acted unfairly, in breach of its general duty under section 33 of the 1996 Act, by failing to prompt its counsel to deal with a point raised by Intaari's counsel during oral submissions.

The Court of Appeal found that the tribunal had not acted unfairly. There was no reason for the arbitrators to think that Bandwidth's legal representatives had not understood the point that had been raised during oral submissions. It clarified that a tribunal will only be required to prompt a party to deal with a particular point if it appreciates that it has missed that point.

Otherwise, it is not unfair to leave it to counsel, particularly where the counsel is highly experienced, to take whatever points he wishes.

The decision is confirmation of the strict approach taken by the court to challenges to awards under section 68, which the Court of Appeal stressed is not to be used just because a party is unhappy with the result of the arbitration.

**UNITED STATES OF AMERICA:
US 2nd Circuit Court of Appeals rules on disclosure of potential arbitrator conflict of interest**

The Federal Appeals Court for New York and Connecticut recently held that "*when an arbitrator knows of a potential conflict, a failure to investigate or disclose an intention not to investigate is indicative of evident partiality*". In *Applied Industrial Metals Corporation v Ovalar Makine Ticaret ve Sanayi*⁵, the chairman of the tribunal had failed either to investigate what he knew to be a potential business relationship between his corporation and one of the parties, or inform the parties that he had walled himself off from learning more. The Court of Appeals affirmed the lower court's decision to vacate the award on the basis that the arbitrator had acted with evident partiality. The decision means that an arbitrator who is aware of a potential conflict has a duty to investigate a potential conflict or inform the parties that he is not going to investigate if he wishes to remain neutral.

The issue of what constitutes a potential conflict of interest and when (and how much) it must be disclosed has already been tackled in the IBA's Guidelines on Conflicts of Interest in International

Arbitration. It is now also the subject of a draft report by the American Bar Association. The report, by its Dispute Resolution Section Arbitration Committee, contains a disclosure checklist and commentary for arbitrators to use in considering whether particular circumstances raise disclosure issues. It is intended to be a step towards harmonising differing disclosure standards across the various states.

SPAIN: Claims arising out of breach of contract not covered by agreement to arbitrate disputes as to interpretation of contract

One of the fundamental issues in an arbitration agreement is identifying the disputes that will be submitted to arbitration. In a judgment of 5 September 2006, the Spanish Supreme Court analysed the scope of an arbitration agreement that submitted to arbitration "*... differences arising out of the interpretation of the contract ...*".

The claim was for breach of contract. The Supreme Court considered that this claim fell under the jurisdiction of Spanish civil courts rather than the arbitrators and stated that "*there is a distinction between interpretation and breach, since semantically they are terms with different meanings and a different legal treatment: the Civil Code devotes Articles 1281 et seq to the interpretation of contracts while the regulation of breaches of contracts appears in Articles 1113 CC et seq*", and that "*effect must be given to the agreement of the parties in respect of the object of arbitration, which refers to questions of interpretation that may arise, and not questions regarding compliance with or breaches of the contract*".

⁴ [2007] EWCA Civ 998 (17 October 2007).

⁵ No. 06-3297-CV, 2007 WL 1964955 (2d Cir. July 9, 2007).

Even though the judgment refers to the repealed Act of Arbitration 36/1988 (applicable in this case), the reasoning applies equally to the current Arbitration Act 60/2003.

The effect of the judgment is that when drafting an arbitration agreement where the seat of arbitration is to be in Spain, it is best to avoid wording such as that in this case, where the tribunal's jurisdiction is limited to particular issues like the interpretation or performance of the contract. It is preferable use to general formulae, submitting to arbitration "*all disputes arising from*" the contract in question. A wider form of wording would be "*all disputes in relation to*": while the former wording would result in only contractual disputes being submitted to arbitration, the latter would extend to cover other contractual or non-contractual relationships between the same parties, as long as they have some link with the contract containing the arbitration agreement.

FRANCE: Proposal to extend access to arbitration in contracts with public utilities

A report and a bill proposal were presented to the Minister of Justice earlier this year on the conditions under which public entities could submit their dispute to arbitration. Under current French law, a French public entity may not provide for arbitration in its contracts unless it has been expressly authorised to do so by the French legislator (Article 2060 of the French Civil Code). However, the report to the Minister of Justice suggests that it would be possible to remove the requirement for express authorisation, thereby permitting

contractual disputes involving French public entities generally to be referred to arbitration (except in the case of service contracts). However, non-contractual disputes could still not be submitted to arbitration.

The use of arbitration would not affect the law applicable to determine the merits of the claim, whilst the procedural law would be specified in a decree and in the arbitration clause.

The arbitral award would be enforceable against the losing party after recognition and enforcement by an administrative judge. The only recourse against the award would be a *pourvoi* before the French administrative Supreme Court ("Conseil d'Etat"). The Conseil d'Etat would be permitted to review the merits of the award only if a party requested it to do so and if the request itself had clear merit.

HONG KONG: High Court thinks creatively when considering leave to appeal against award

A recent decision of the Hong Kong High Court⁶ demonstrates the importance of precision when applying for leave to appeal against an arbitration award. Under Hong Kong's arbitration law, leave to appeal will only be granted for alleged errors of law (or mixed law and fact) and only where circumstances justify the correction of such an error. In practical terms, leave is much more likely to be granted where the error concerns a clause in a standard form contract than if the clause concerned is unique or "one off". A correct decision on a standard clause is more likely to be a matter of general public importance than a "one off", which is

unlikely to have repercussions beyond the specific case.

The arbitrator in this case had rejected a claim for liquidated damages. The contract between the parties incorporated the terms and conditions of the Hong Kong Construction Association's Standard Form of Domestic Sub-Contract (1994 edition). That standard form contained a clause (clause 3.4) allowing the deduction from the contract price by Penta of common law damages claimed by CWF. The standard form also provided (in clause 2.4) that its conditions should prevail over the terms of any other documents forming part of the contract.

Among the other documents forming part of the contract was a letter containing a provision allowing deduction of liquidated damages for delay. The liquidated damages provision in the contract was therefore clearly not a standard clause, as it appeared in a letter which formed part of the contract. However, the court held that while the provision itself might be a "one off" clause, that was not really the issue which needed to be considered. The real question was whether the standard terms of contract precluded amendment. This was a general question which could have wider application beyond this particular case. While construing the particular one off contract, the arbitrator was really considering whether clause 3.4 coupled with clause 2.4 in the Standard Form Sub-Contract prevented the parties from agreeing and including in their contract a provision for liquidated damages, without amending the standard terms and conditions. Finding that there was at least a

⁶ *Penta Ocean Construction Company Limited v CWF Piling & Civil Engineering Co Ltd* (15 June 2007).

serious doubt as to the correctness of the arbitrator's award, the court granted leave to appeal and ultimately found in favour of Penta and remitted the claim back to the arbitrator for further decision.

The remission of the award could only be ordered because the court had realised that the issue on appeal was of wider application than at first appeared. On its face, the case concerned a bespoke provision and therefore chances of obtaining leave to appeal ought to have been slim. However, the court appreciated that the real question was the effect of the standard form and whether its terms precluded amendment by additional documents.

The importance of correctly categorising the alleged error when appealing is clear from this decision.

China and International Investment Law

Dr Monika Heymann¹



11

China is of growing importance, both as a market for foreign investment and also as a source of inward investment in the West. With the undoubted benefits of investment, however, there will inevitably come disputes. Wise investors will have familiarised themselves in advance with the legal protections available to them in the event of conflict with their host state or state entity. The purpose of this article is to give an overview of international investment law and its relevance for foreign investors in China² and Chinese investors in other countries. The article will first look at what is international investment law, and then go on to focus on the international investment law applicable to China.

WHAT IS INTERNATIONAL INVESTMENT LAW?

International investment law consists of the rules made between States that guarantee a certain minimum treatment for foreign investors. The main purpose of international investment law is to protect foreign investors from unfair governmental measures in their host country. To achieve this protection international investment law lays down substantive rights for investors (for example, the right not to be expropriated without adequate compensation) and gives them access to international arbitration as a means of redress against their host States.

The most important feature of international investment law is that there is no uniform international investment law worldwide applicable to all States and investors. There is no

general international multilateral investment treaty governing the substantive international investment law and the settlement of investment disputes.

Instead, international investment law is governed by a complex system of international agreements (bilateral and multilateral), often described as a “spaghetti bowl”, customary international law, an increasing number of arbitral awards, and academic texts.

Bilateral Investment Treaties

The bulk of international investment law is determined by bilateral investment treaties (BITs) between two States that govern the treatment of investments made in their respective territories by individuals and corporations from the other country. A BIT lays down substantive rights of a foreign investor and contains dispute settlement provisions (State-to-State and investor-to-State). The dispute settlement provisions in a BIT often provide that an investor can bring claims against the host State before an international arbitral tribunal. This is particularly important because international arbitration offers a more neutral forum for dispute resolution than national courts in the host country of the investor.

Multilateral Investment Treaties

Bilateral investment treaties are supplemented by multilateral investment treaties and multilateral treaties on trade that also govern some aspects of international investment law directly or indirectly.

The North American Free Trade Agreement (“NAFTA”) governs, for example, the investment rules for a certain geographic area (Canada, United States of America and Mexico). The Energy Charter Treaty regulates international investment law with regard to a specific sector (Energy).

Other multilateral treaties govern the resolution of investment disputes. The most important Convention is the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention”)³. The ICSID Convention established the International Centre for Settlement of Investment Disputes (“ICSID”) which is an autonomous international organisation whose purpose is to “provide facilities for conciliation and arbitration of investment disputes between Contracting States” (Article 1(1) of the ICSID Convention).

The ICSID Convention is complemented by the Convention establishing the Multilateral Investment Guarantee Agency⁴ (the “MIGA Convention”). The Multilateral Investment Guarantee Agency provides among other things “good services” to facilitate the resolution of investment disputes (for example, it offers mediation services). These multilateral investment treaties are supplemented by the WTO Regime (for example, the General Agreement on Tariffs and Trade 1994⁵). First, as in most cases foreign investors are also traders, all trade rules within the WTO system also have (at least indirectly) an impact on foreign investors. Second, there are WTO rules relating directly to foreign

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² In this article, “China” is used to mean the People’s Republic of China (without Hong Kong).

³ Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 575 U.N.T.S. 515; 4 I.L.M. 532 (1965).

⁴ Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 1508 U.N.T.S. 99; 24 I.L.M. 1605 (1985).

⁵ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

investment, for example, the Agreement on Trade Related Investment Measures (TRIMS Agreement)⁶.

INTERNATIONAL INVESTMENT LAW AND CHINA

The international investment law regime in China is determined by BITs between China and other countries and multilateral (investment) treaties ratified by China. Currently, China has concluded 118 BITs and is a member of the ICSID Convention and the MIGA Convention. China has neither signed nor ratified the Energy Charter Treaty or a regional multilateral investment treaty, but is currently negotiating its accession to the Energy Charter Treaty as well as a Free Trade Agreement with the ASEAN countries, which should also include provisions relating to investment.

Chinese BITs

China signed its first BIT in 1982 with Sweden, followed by BITs with Romania and the then Federal Republic of Germany in 1983. As of 1 June 2006, China had concluded 118 BITs, although 29 of them had not yet entered into force⁷. With 135 BITs, Germany appears to be the only country that has concluded more BITs than China⁸.

China has signed BITs with Latin American countries (for example, Argentina, Chile and Ecuador), African countries (for example, Ghana, Ethiopia and Ivory Coast), European countries (for example, France, Germany, Poland and the United Kingdom) and Asian countries (for example, Malaysia, Vietnam and

Mongolia). However, there is no BIT between China and the United States of America.

The Content of a Chinese Bilateral Investment Treaty

There is no uniform Chinese BIT. The content of Chinese BITs varies from country to country depending on its bargaining power and China's interest in the protection of its own investors in foreign States. However, in principle, a Chinese BIT addresses the following four substantive issues:

- definition of investment
- conditions for the admission of foreign investors to the host State
- standards of treatment of foreign investors (right to fair and equitable treatment, most-favoured-nation clause)
- protection against expropriation.

The peculiarity of Chinese BITs is the reluctance to incorporate a national treatment clause for foreign investors in China. The reasons behind this cautious approach are that China wants to protect its national industries from competition and is determined to maintain state monopolies. The first generation of Chinese BITs that were concluded in the 20th century did not contain a national treatment clause at all. Although the newly concluded Chinese BITs incorporate a national treatment clause, it is still of limited importance. It is generally formulated as a "best efforts" clause that indicates only that China will take appropriate measures progressively to guarantee national treatment to foreign investors.

Dispute Resolution Mechanisms for Investor-State Disputes in Chinese BITs

China has adopted a gradual approach towards the acceptance of international arbitration for the resolution of investment disputes. The first BIT concluded by China contained no provisions relating to investor-State investment disputes. Other, older BITs referred only disputes on the amount of compensation for expropriation or nationalisation to international arbitration. However, since the beginning of the 21st century, the number of BITs submitting all disputes arising out of the respective BIT to international arbitration, in particular to ICSID, is increasing. These include the BITs between China and the Netherlands (2001), China and Germany (2003) and China and Finland (2004). However, these BITs generally require the foreign investor in China to refer the dispute to administrative review in China before he can submit it to international arbitration.

Multilateral Investment Agreements applicable in China

The two multilateral agreements discussed in this article are the ICSID Convention and the MIGA-Convention.

The ICSID Convention

As noted above the ICSID Convention has established an international arbitration institution for investment disputes between a private investor and the host State. It provides a mechanism and procedural rules for the settlement of investment disputes through conciliation (Articles 28-35)

⁶ Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 143 (1999), 1868 U.N.T.S. 186 [Not reproduced in I.L.M.] .

⁷ UNCTAD, Total number of Bilateral Investment Agreements concluded, 1 June 2006 (China) available at <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>, last visited 3/23/2007.

⁸ As of 1 June 2006, Germany had concluded 135 BITs, 19 of which have not yet entered into force. UNCTAD, Total number of Bilateral Investment Agreements concluded, 1 June 2006 (Germany), available at <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1>, last visited 3/23/2007.

or arbitration (Articles 36-55). The main feature of ICSID arbitration is that it is a truly international arbitration and it therefore guarantees foreign investors the most neutral forum for the resolution of investment disputes. The ICSID arbitration system functions completely independently from domestic judicial systems. Local courts of the host State or of the home country of the investor cannot intervene in ICSID proceedings and thus have no influence on the proceedings and the outcome. Unlike commercial arbitration, none of the parties can take legal action before national courts either during the ICSID arbitration proceedings or after the arbitral award has been rendered. Therefore, local courts cannot issue anti-suit injunctions or decide whether an ICSID tribunal has jurisdiction.

Even though China became a member of the ICSID Convention in 1993, until now, no case has been brought against China under the ICSID system. China has been quite slow to accept the jurisdiction of the ICSID Centre. It has ratified the ICSID Convention with a declaration indicating that it would only consider submitting investment disputes on the amount of compensation resulting from expropriation to the ICSID jurisdiction. The relevance of this declaration is unclear, since China has accepted the jurisdiction of the ICSID Centre for all kinds of investment disputes in its most recently concluded BITs. There is an issue as to whether China's acceptance of ICSID jurisdiction in those BITs extends to all other Chinese BITs through the Most Favoured Nation clause. Such a clause is contained in many BITs, and usually indicates that neither contracting party will subject the investment of the other party to a

treatment less favourable than that which it accords to investments of nationals from another State. Although the exact content and extent of a Most Favoured Nation clause can vary significantly, its objective stays the same: all investments should be treated the same (non-discrimination).

Notwithstanding this issue, the ICSID Convention will become increasingly important for investment disputes in China.

Although no claims against China have yet been made at ICSID, in February 2007, ICSID registered the first arbitration request by a Chinese company. Tza Yap Shum, the Chinese owner of a fish flour company (TSG Peru), is claiming US\$20 million from the Republic of Peru for breaches of the BIT between China and Peru.

The Multilateral Investment Guarantee Agency

Another important role for the resolution of investment disputes with regard to China is played by the Multilateral Investment Guarantee Agency (MIGA), created by the MIGA Convention in 1988. It primarily offers a political risk insurance programme for investments (including currency transfer, expropriation, breach of contract, war and civil disturbance) but is also involved in the resolution and settlement of investment disputes because it facilitates the resolution of selected important investment disputes through mediation.

In contrast to ICSID, MIGA has been actively involved in resolving investment disputes in China by mediating disputes between foreign investors and the Chinese Government.

The exact scope of MIGA's role in settling investment disputes in China is unknown, because the mediation services are offered on a confidential basis and MIGA publishes only selected cases. However, MIGA was, for example, successful in amicably resolving a dispute relating to China's unilateral reduction of the prices paid to foreign electric power producers in the late 1990s.

CONCLUSION

This brief overview shows that international investment law is relevant for foreign investment in China, and Chinese investment in foreign countries. However, because of its mainly bilateral structure the international investment law regime in China (and worldwide) still has gaps. Furthermore, China is only cautiously accepting international arbitration for investment disputes. However, the most recently concluded BITs show that China is willing to adopt and accept international obligations relating to investment protection. Therefore, international investment law will become an increasingly powerful tool for the resolution of investment disputes with China.

Drafting Arbitration Clauses for International Contracts

Jerome Finnis and Saira Singh¹



14

The dispute resolution provisions are often the last clauses to be considered in contract negotiations. This is understandable; after all, no one wants to think about disputes when a deal is being done. However, it is a fact that disputes do occur. When they do, it is preferable if the parties can concentrate on resolving the substantive dispute, rather than being sidetracked by issues like the meaning of the dispute resolution clause and its scope or validity. Such distractions are rarely a constructive use of funds.

Parties to international contracts who wish to provide for arbitration of disputes often wonder where to start when it comes to drafting an arbitration clause. They will often start with so-called “boilerplate” contracts that purport to contain all of the necessary elements. Those boilerplates often fall short, however. The parties negotiated their positions and entered into an agreement and it is essential that the parties’ agreement – rather than that recognised in the boilerplate – is the one reflected by the contract. It follows that if the parties have agreed to refer disputes to arbitration, they should negotiate and set out clearly in the contract certain elements that are critical to the arbitration clause. It is essential to have a lawyer with expertise in arbitration draft or at least review contracts. However, the aim of this article is to provide some background to these essential components, so that when negotiations turn to the arbitration clause, potential issues can be identified and then raised with the other contracting party.

The consequences of failing to include the critical components set out in this note range from time-consuming and

costly arguments, to a finding that the arbitration clause – or a resulting arbitral award – is unenforceable.

State clearly whether disputes will be referred to arbitration

The clause should clearly state that disputes “shall be referred” to arbitration. Using permissive words such as “may” or “can” gives rise to uncertainty. If the clause does not contain a clear undertaking by the parties to refer disputes to arbitration, as opposed to national courts, it may be difficult to prevent a party from pursuing court proceedings instead. Most modern arbitration laws, for example, in England and Wales, Germany and France, require national courts to give effect to valid arbitration clauses and to stay court proceedings in favour of arbitration. However, the watchword is “valid” and if there is an issue as to whether the reference to arbitration was to be mandatory, the dispute may end up being litigated.

It is also wise to specify that disputes are to be submitted to arbitration, as opposed to any other method of dispute resolution. The easiest way to do this, not surprisingly, is to use the word “arbitration” in the arbitration clause. This may seem overly simple, but in practice it may be overlooked. For example, the parties might say in their clause merely that disputes are to be referred to the International Chamber of Commerce. This is a well-known international arbitration institution. However, it also administers other forms of dispute resolution, such as conciliation, and so a mere reference to the ICC may cause confusion.

State clearly the intended scope of the arbitration clause

The parties should also consider whether they wish to submit all disputes between them to arbitration, or whether they wish to reserve arbitration only for particular kinds of dispute. Lack of clarity will lead to arguments as to whether the arbitral tribunal has jurisdiction to hear the dispute before it.

If the parties want all disputes to be submitted to arbitration, the best solution is usually to provide that “any dispute arising out of or in connection with this agreement” or “any dispute arising out of or in relation to this agreement” will be referred to arbitration. These broad formulations are likely to cover not only disputes arising directly out of the contract (such as breach of contract claims), but also issues relating to the interpretation and validity of the contract and disputes with a more tenuous connection with the contract, such as misrepresentation or tortious claims.

If the intention is to refer only certain types of dispute to arbitration, or to exclude certain disputes from the reference, the parties should decide this at the negotiation stage and ensure that this is set out in full in the arbitration clause. Note that the approach that will be taken in a number of jurisdictions, including England and Wales, Germany, the United States and Australia, is that the parties intended disputes to be heard in one forum, for example, an arbitral tribunal, unless it is clear from the contract that that was not their intention (see the item on the *Premium Nafta* decision of the English House of Lords in the Arbitration News section of this newsletter).

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Institutional or ad hoc arbitration?

There are two types of arbitration: institutional (that is, administered by an institution) and ad hoc (not administered by an institution). An arbitration agreement providing for an institutional arbitration will incorporate the rules of one of the recognised arbitral institutions and will be conducted under the aegis of that institution. The services provided by the arbitral institution vary but may include: assistance with the appointment of the tribunal; fixing the fees of the tribunal; holding any deposit as security for the costs of the arbitration; providing support and guidance for the arbitrators; and review of the award.

In ad hoc arbitrations, the arbitration agreement may specify its own rules, or adopt the arbitration rules of a trade or industry association or, for international arbitrations, the UNCITRAL Arbitration Rules. Alternatively, the agreement might simply provide that the arbitration will be conducted in accordance with the arbitration law of the seat of arbitration (see below).

The rules of the institutional arbitral authorities generally make provision for the essential elements of any arbitration. Parties can modify the rules though it is generally best not to do so, to reduce the risk of introducing inconsistency and confusion. It is worth checking the rules of lesser known arbitral organisations to ensure they are complete and reliable.

If the parties decide to opt for institutional arbitration, it is essential to ensure that the clause sets out the correct name of the chosen institution. Uncertainty as to the intended

institution, or the designation of an institution that does not actually exist (a surprisingly common occurrence), may lead to the clause being struck down.

State clearly the identity of the seat of the arbitration

It is often said, correctly, that an international arbitration cannot float in a “legal vacuum”; there must be a place with which any international arbitration is connected and whose laws will (in part) determine the procedure of the arbitration. That place is known as the “seat” of arbitration. Every arbitration clause should specify the seat of arbitration. Any temptation to provide that the seat of arbitration will “float” or be decided by the arbitral tribunal at the first hearing should be resisted – it can be a recipe for confusion, delay and expense.

The law of the seat of the arbitration will determine issues such as whether, and on what grounds, it is possible to challenge the award. In the absence of any provision in the arbitration agreement, and in the absence of any relevant institutional rules, it is to the arbitral law of the seat that you would look, for example, to establish whether there is any provision relevant to the appointment of arbitrators.

Probably the key factor in selecting the seat of arbitration is to choose a place whose laws will support, rather than hinder or interfere in, the arbitration process. Local arbitration laws may contain mandatory provisions which will apply even if contrary to the parties’ agreement. These mandatory provisions may contain traps for the unwary. For example, a local law could regard as

invalid agreements to submit future disputes (that is, disputes which have not already arisen as at the date of the contract) to arbitration. It is important to examine the potential seat’s arbitration laws in order to avoid possible problems later on. It may even be that the law contains default provisions which, had they known about them, one of the parties would have liked to exclude. For example, the English Arbitration Act 1996 provides a right of appeal on a point of law, but parties are free to contract out of that provision.

If the parties do not select a seat of arbitration, the relevant rules of arbitration (institutional or ad hoc), if any, will probably designate the seat or leave it to the tribunal to decide the seat. For example, the ICC Rules provide that, in the absence of agreement, the seat will be determined by the ICC Court. The LCIA Rules say that if the parties have not agreed a seat, it shall be London unless the LCIA Court considers another location more appropriate.

Popular seats of arbitration include London, Paris, Geneva, Stockholm and Singapore. All are located in jurisdictions with legal environments which are supportive of the arbitration process. It is worth noting that the geographical place in which hearings are held does not necessarily have to be the same as the seat – it is open to the parties and the tribunal to decide that hearings should take place somewhere else if that is more convenient (bearing in mind the location of the parties, the tribunal and the witnesses).

When choosing the seat, it is worth looking forward in time to the enforcement of an arbitral award. In order to avoid problems enforcing the award in the countries where the losing party's assets are located, parties should be wary of choosing a seat in a country which has not ratified the "New York" Convention on the Recognition and Enforcement of Foreign Arbitral Awards. That Convention provides a relatively smooth procedure for reciprocal enforcement of foreign awards.

Deal with the appointment of the tribunal

A key advantage of arbitration is that the parties can appoint part, if not all, of the tribunal which will decide the claim. The process for the appointment of the tribunal should be set by the arbitration clause itself. There are several elements relevant to the appointment process.

First, the arbitration clause should specify the number of arbitrators (usually an odd number, one or three). If the parties cannot decide whether there should be one or three arbitrators, all is not lost if they have opted for an institutional arbitration, such as ICC. The parties should then follow the wording of the standard ICC arbitration clause, which provides for "one or more arbitrators". The ICC Court will appoint a sole arbitrator, unless it considers that the dispute is such as to warrant the appointment of three arbitrators.

Second, consider whether it is desirable for the arbitrators to have expertise in a particular area. If so, remember that the more qualifications are required, the smaller will be the pool of arbitrators from which to select.

Third, the mechanism by which the arbitrator will be selected should also be set out in the arbitration clause. Consider whether you want the tribunal to be nominated by the parties or by the institution (if any) administering the arbitration. Note that if the LCIA Rules are adopted, in the absence of an agreement on party nomination, the parties will not have the right to nominate an arbitrator. In the case of a three member tribunal, consider who will select the chairman. If party nomination is the preferred option, consider how the nomination process will work if there are multiple claimants and/or multiple respondents. If one party refuses to nominate an arbitrator, consider whether you wish to have a default procedure, whereby a nominated organisation (such as the administering institution (if any) or the Permanent Court of Arbitration) would make the appointment. All of these issues should be considered at the drafting stage, to avoid delays and unnecessary expense later on.

For further information on selecting the tribunal, see the article in the May 2007 issue of the International Arbitration Newsletter.

Determine the language of the arbitration

The arbitration clause should specify the official language(s) of the arbitral proceedings. If the language of arbitration is not specified, one or more parties to the arbitration could be put at a significant disadvantage, in terms of needing to obtain translations and hiring interpreters to attend the hearings. Under the CIETAC Arbitration Rules (Article 67), if the parties have not agreed on the language, "the Chinese language shall be the official language to be used in

the arbitration proceedings". This could be an unwelcome surprise to (say) a Swiss company with no knowledge of Chinese. The language of the arbitration can also have a bearing on the selection of arbitrators; obviously you will want your arbitrator(s) to be fluent in the language of the arbitration.

Last word

The key elements in an arbitration clause are: a clear intention to refer disputes to arbitration; the scope of the clause; institutional or ad hoc; the identity of the seat; the number of arbitrators and the appointment process; and the language of the arbitration. Whilst the arbitration clause could contain further provisions relating to the conduct of the arbitration, if these key issues at least are included and properly drafted, there is more chance that the resulting arbitration clause will be valid and enforceable, saving the wasted time and costs of unnecessary procedural disputes.

Beijing Court Rejects Challenge to CIETAC Award in Favour of Foreign Party

Mark Lin¹



17

It is often said that, although foreign parties are increasingly getting a fair chance of hearing before a CIETAC tribunal, the real battle starts when the foreign party has to enforce the CIETAC award through the Chinese court system. And it is at this stage when the foreign party's perceived fear of arbitrating with a Chinese counter-party intensifies. In fact, the personal experience of the author is that every single one of the favourable awards he has obtained for foreign clients has been the subject of an application to set aside. Article 70 of the Arbitration Law ("AL") provides that, in the case of "foreign related" arbitral awards, if a party is able to adduce evidence to establish the existence of one of the situations under the first part of Article 260 of the Civil Procedure Law ("CPL"), the court may rule to set aside the award. Those situations are as follows:

- Where the parties did not include an arbitration clause in the agreement, or have not concluded a written agreement on arbitration subsequently.
- Where the respondent did not receive notice of appointment of arbitrator or commencement of arbitration proceedings, or was unable to make submissions due to reasons beyond its control.
- Where the composition of the arbitral tribunal or the arbitration procedures conflicted with arbitration rules.
- Where the matter to be arbitrated falls outside the scope of the arbitration agreement or the jurisdiction of the arbitration commission.

It should be noted that Article 70 of the AL specifically limits the grounds for setting aside a foreign-related award to one of the situations under the first part of Article 260 of the CPL². None of these situations includes the much loathed ground of "public interest"³. In short, none of the grounds under the first part of Article 260 entitles a losing party to challenge the merits of the award. As correctly stated in the Opinion issued by the Beijing Higher People's Court Concerning Several Questions Relating to the Determination of Applications to Determine the Validity of Arbitration Agreements or Setting Aside of Arbitral Awards dated 3 December 1999 ("1999 Beijing Higher People's Court's Opinion"), when reviewing an application to set aside an arbitral award, the scope of review can only be in accordance with the provisions of the AL and the court should only review questions of procedure (and not questions of substance) in the case of a foreign-related arbitral award.

In a recent decision of the Beijing Second Intermediate People's Court dated 19 December 2006 [(2006) Er Zhong Min Te Zi No.1709]⁴, the court upheld a unanimous CIETAC award in favour of a foreign party. The arbitration arose from the failure of the owner of a hotel to make various payments or reimbursements to the hotel manager under the management contract. The hotel manager obtained a unanimous award and the hotel owner decided to apply to the Beijing court to have the CIETAC award set aside. The award included an award in respect of the hotel manager's legal costs.

The issues

The hotel owner tried to rely on Article 58 of the AL, which as the 1999 Beijing Higher People's Court's Opinion states, applies to domestic arbitral awards only. Article 58 allows the court to review questions of substance, including questions of evidence. Article 58 also allows the court to set aside an arbitral award on grounds of public interest. It is not uncommon, in the author's experience, to see PRC counsel trying to rely on Article 58 when applying to set aside a foreign-related award despite the clear wording in the AL.

In particular, the owner tried to argue that the award contravened public interest. The hotel management contract provided that the hotel manager had complete freedom in determining the terms of employment of the hotel's senior managerial staff, and the punctual payment of such staff's benefits was the hotel owner's responsibility under the hotel management agreement, which the hotel manager was authorised to pay out from the hotel's operating account. Part of the hotel manager's claim was the reimbursement of payments of the senior management staff's benefits which the owner refused to pay and the hotel manager was forced to advance, including their pension plans. The owner tried to argue that the manager's claim of reimbursement was a dispute arising from a labour contract (which cannot be arbitrated under the AL) and an award directing the reimbursement of the hotel manager's payment of the senior managerial staff's pension plans was therefore contrary to public interest.

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2 There is a school which goes even further to suggest that the intention of Article 70 of the AL is to limit the court's power to set aside a foreign-related award only on the ground of the lack of an arbitration agreement.

3 Much loathed not because the concept of public interest is controversial, but because of the rather unpredictable or indiscriminate application of this principle by some of the lower courts in China as an excuse for setting aside or refusing to enforce an arbitral award.

4 Lovells, together with local counsel, acted for the foreign party in this court action.

The owner claimed that the award on legal costs should be set aside because it was not within the scope of the arbitration agreement.

The decision

The Beijing court rejected the owner's attempt to bring in Article 58 of the AL and ruled that an application to set aside a foreign-related arbitral award was to be determined by reference to Article 70 of the AL and Article 260 of the CPL.

What is even more encouraging is the clear statement from the court that the ground of public interest could not be used as a basis for setting aside a foreign-related award under the law, and the court would therefore refuse to review the award under that ground.

The Beijing court also rejected the owner's argument that the award should be set aside because the award on legal costs was outside the scope of the arbitration agreement. The tribunal's award on legal costs was made according to the provisions of CIETAC's arbitration rules and not according to the agreement of the parties. There was therefore no question of legal costs not falling within the scope of the arbitration agreement. A better approach might have been that legal costs were in fact within the scope of the arbitration agreement: by agreeing to submit to CIETAC arbitration, the parties had agreed to abide by CIETAC's arbitration rules. These give the tribunal power to order the losing party to compensate the winning party's expenses reasonably incurred by it in pursuing its case.

Comment

This is a welcome decision from the Beijing court. Not only is it evidence that the court will determine the application independently⁵, but it is also a clear statement from the court that Article 58 and, in particular, public interest has no place in an application to set aside a foreign-related award.

This case does, however, also highlight the unsatisfactory fact that the courts have no power to award costs against the losing party. The practical effect of this is to encourage a losing party to "have a go" at frustrating the enforcement process with no fear of being penalised in costs (as opposed to the position in a CIETAC arbitration). This behaviour is further encouraged by the availability of a large pool of local lawyers who are prepared to take on such a case at a relatively low fixed fee. A review of the courts' power to award costs against the losing party in appropriate cases would be a step in the right direction, by removing yet another structural hurdle to the smooth and inexpensive enforcement of arbitral awards.

A version of this article appeared in the October 2007 issue of the Asia Dispute Review.

⁵ The hotel owner's chairman is reputedly a member of the National People's Congress.

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