

This newsletter is a new publication which 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 partners listed below:

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A Quick Guide to ICSID Arbitration

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Arbitration under the ICSID rules is the preferred forum for the resolution of cross-border investment disputes.

Here we set out a quick guide to ICSID arbitration and its related acronym, the "BIT" or bilateral investment treaty.

WHAT IS ICSID?

ICSID is the International Centre for Settlement of Investment Disputes, an organisation of the World Bank Group, established under the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (also known as the ICSID or Washington Convention) which came into force in 1966. The Convention provides that ICSID's jurisdiction extends to any legal dispute arising directly from an investment in a Contracting State by a national of another Contracting State. Contracting States can consent to ICSID's jurisdiction through BITs, investment legislation, or individual contracts with foreign investors.

ICSID arbitration has grown increasingly popular with year on year increases in the number of states acceding to the Convention and in the numbers of claims brought. As of 3 November 2003, 154 States had signed the Convention. 2003 was another high-water mark for investor and state disputes and ICSID had 64 cases on its books at the end of 2003, with a record 30 new arbitrations registered in the year. In 2004, 11 new cases have been registered in January, February and March alone.

WHY WAS ICSID ESTABLISHED AND WHAT DOES IT DO?

Prior to the Convention, cross-border investment was inhibited as investors feared their investments would be exposed to political risks. Where investment did take place, the World Bank found itself increasingly being asked on an ad hoc basis to intervene to assist with the resolution of disputes between foreign investors and states. As the numbers of requests for assistance grew, the burden of dealing with these disputes increased to the point where it was apparent that a more formal solution was required. The Bank was also keen to help promote the flow of international investment, and felt that both these aims would be satisfied by providing a dedicated forum for the resolution of disputes arising from such trade. ICSID was therefore set up to administer neutral international arbitrations to resolve investor-state disputes and thereby also to encourage the flow of investment into developing countries.

ICSID now provides dedicated facilities for the conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the Convention. As globalisation advances and developing nations clamour for foreign investment in significant state-funded infrastructure projects, the role of ICSID has never been more important to facilitate international trade. It is therefore likely that the number of claims referred to ICSID will continue to grow for the foreseeable future.

WHAT ARE THE BENEFITS OF ICSID ARBITRATION?

- **Application of international law** - Unless the parties agree otherwise, ICSID tribunals are charged with applying the law of the Host State party and such rules of international law as are applicable. In practice, this has meant that in order to comply with obligations set out in a treaty, states' conduct must meet the requirements of both domestic and international law.
- **Greater insulation from domestic regimes** - Unlike other arbitral institutions ICSID has its own internal procedure for challenging arbitral awards. ICSID awards cannot be challenged in national courts; any request for annulment of the award is determined by another ICSID tribunal set up for that purpose. This means that ICSID proceedings and awards are better protected from interference by national courts.
- **Enforceable awards** - Awards granted under ICSID arbitration are binding and only capable of challenge under the Convention itself. Contracting States must recognise an award as binding, and enforce the pecuniary obligations imposed by the award within their territory as if it were a final judgment of their national courts. This requirement applies to all Contracting States, even if they were not a party to the original dispute.

- **World Bank support** - The status of ICSID as a World Bank organ encourages parties to comply with awards rather than risk their relationship with the World Bank. There are consequently very few instances of a state refusing to comply with an ICSID award.

WHY IS ICSID RELEVANT TO MY BUSINESS?

Provisions for ICSID arbitration are commonly found in investment contracts between governments of member countries and investors from other member countries. Advance consent by governments to submit investment disputes to ICSID arbitration can also be found in about twenty investment laws and in over 900 bilateral investment treaties, or BITs.

The importance of ICSID for resolving investment disputes is also illustrated by the fact that it is the appointed body in the four main multilateral investment treaties (the North American Free Trade Agreement, the Energy Charter Treaty, the Cartagena Free Trade Agreement and the Colonia Investment Protocol of Mercosur).

Any individual or corporation engaged in commercial activity in a foreign state should consider whether the Convention applies and whether ICSID arbitration may be available. An ICSID claim may be brought in the event of a contractual dispute with a state entity, or for loss suffered as a result of the acts or omissions of a state entity, **whether or not there is a contract between the state and the**

injured investor. If you have invested in a Contracting State - even if your contract is with a private entity - and the state has committed an act (for example, passing an unreasonable and capricious law, or causing physical damage through state agents, such as the police) which damages the value of your investment, the terms of the BIT may entitle you to claim compensation through ICSID arbitration.

Indeed, even if the contract between the investor and the state provides for contractual disputes to be determined by domestic arbitration, it may still be possible to seek redress from ICSID. In the recent case of *SGS v Pakistan* a dispute arose under a contract and, in accordance with the express jurisdiction provisions of that contract, domestic arbitration was commenced by the state. *SGS*, a Swiss company, later sought redress from ICSID in relation to acts of Pakistan which allegedly violated provisions of a BIT between Switzerland and Pakistan. Pakistan challenged ICSID's jurisdiction on the basis of the exclusive jurisdiction clause in the contract. The ICSID tribunal determined that, notwithstanding the contractual clause, it retained jurisdiction to hear the wider BIT dispute in relation to the state's conduct. Note, however, that in a recent case where the Host State had previously admitted liability under the contract, an ICSID tribunal decided to stay its BIT proceedings pending determination by the contractually agreed dispute resolution forum of the amount owing but unpaid under the contract. (*SGS v Philippines*).

MORE ON BITs

BITs are intended to foster economic co-operation and investment between the contracting parties. The first modern BIT was entered into between West Germany and Pakistan in 1959, before ICSID was established. However, since then, the dispute resolution mechanisms in BITs often provide for ICSID to have jurisdiction to determine any investment disputes. This is normally achieved by the state "offering" in the BIT to arbitrate under ICSID - thereby providing added safeguards and incentivising inward investment. Since the 1980s the number of BITs in existence has increased rapidly. The effectiveness of the BIT in encouraging international trade is demonstrated by the fact that there are now more than 2000 BITs in existence. The number of treaties continues to grow and indeed, BITs are now being entered into not just between capital exporting and capital importing countries but between developing countries themselves, who are keen to extend the same level of protection to trade with their economic equals.

HOW DO I KNOW IF I HAVE AN ICSID CLAIM?

In order to decide whether there is a potential ICSID claim, the following questions should be addressed:

- Am I contracting with a party, or otherwise investing, in a country which is a signatory to the Convention?
- Is my contracting party a state entity?

- Alternatively, could a state entity be said to have acted in such a way as to adversely affect my investment?
- Does the commercial activity qualify as an investment? (Note that ICSID has jurisdiction over disputes that arise directly out of an investment. Tribunals decide on a case-by-case basis whether an activity qualifies as an investment under the ICSID Convention. BITs also contain their own definition of what qualifies as a protected investment. Incorporating a clause clarifying that the parties consider the activity to be an "investment" may pre-empt potential jurisdictional challenges.)

If the answer to the above questions is "yes", you may have the right to request ICSID arbitration in the event of a dispute. Note that the Convention itself does not confer rights on the investor. The Convention makes ICSID proceedings available where an investor has a dispute with a Contracting State which consents to ICSID arbitration. Generally, an investor will only have the right to request ICSID arbitration if:

- there is an ICSID arbitration clause in the contract with the state or state entity; or
- there is an applicable BIT or foreign investment law in which the state has given its advance consent to ICSID arbitration; or
- the Host State and the investor's Home State are Contracting States and the Host State is prepared to grant its consent.

AN OVERVIEW OF THE ICSID ARBITRATION PROCESS

How are ICSID proceedings started?

Subject to one point, ICSID proceedings are much the same as conventional international arbitration regimes. Proceedings are commenced by filing a request for arbitration with the Secretary-General of ICSID, who will send a copy of the request to the other party. The request must contain information on the issues in dispute, the identity of the parties, and their consent to arbitration. An important difference is that the Secretary-General will carefully review each request for arbitration and will not register the request if, on the basis of the information contained in the request, he considers the dispute to be manifestly outside ICSID's jurisdiction. Additionally, if the contracting party to the dispute objects to ICSID's jurisdiction over the matter, this will be determined by the tribunal itself.

Who are the arbitrators?

The tribunal will be constituted as soon as possible after the request is registered. The tribunal consists of a sole arbitrator, or any uneven number of arbitrators otherwise agreed upon with the other party. If the parties are unable to reach an agreement, the tribunal shall be made up of three arbitrators; one appointed by the investor, one by the Contracting State party, and the third, who will be the President of the tribunal, by agreement of the parties. If the tribunal is not constituted within 90 days of registration of the request, either party may ask the Chairman of

the Administrative Council to appoint the remaining arbitrators.

ICSID has a Panel of Arbitrators. If an arbitrator is not a member of the Panel, he or she may still be nominated provided he or she is recognised in the field of law, commerce, industry or finance. A list of the members of the Panel of Arbitrators can be found on the ICSID website under "ICSID Documents and Publications" (see the end of this article for ICSID's web link).

How are the proceedings governed?

The tribunal will decide the dispute in accordance with the rules of law agreed between the parties. However, in the absence of such agreement, the law of the Contracting State party will be applied. The tribunal will decide the questions raised in the proceedings in accordance with the decision of the sole arbitrator or, if more than one, by a majority vote.

Where do the proceedings take place?

About half of all ICSID proceedings are held in Washington DC. However, ICSID has special arrangements with other arbitral institutions where the proceedings may be held if the parties so desire.

Proceedings may be held elsewhere if the parties agree, subject to certain conditions. A number of ICSID tribunals have taken advantage of modern communications technology by holding meetings of the tribunal and sessions with the parties by telephone conference or video-link.

How long does it take and how much does it cost?

The average length of time between registration of a claim with ICSID and rendition of an award on the merits is about 2.5 years. Aside from the initial lodging fee, the administrative costs of ICSID arbitration are a direct function of the duration of the proceeding. Administrative costs (including tribunal fees but excluding lawyers' fees) have averaged US\$200,000 per case in recent years.

What happens after the proceedings?

A certified copy of the tribunal's award will be sent to the parties and will be deemed to have been rendered on the day it was dispatched. As mentioned above, the courts of all Contracting States must recognise the award, even if they were not a party to the dispute. The enforcement of the award will be governed by the laws of the state where enforcement is sought.

ADDITIONAL FACILITY RULES

An increasing number of BITs also refer to ICSID's "Additional Facility Rules". The Additional Facility Rules can be used for conciliation and arbitration proceedings where either the state or the foreign national's state is not a Contracting State to the Convention, or where the dispute does not arise directly from an investment dispute. These rules allow fact-finding and conciliation proceedings to take place, thereby allowing ICSID a broader dispute resolution ambit. In recent years these rules have allowed interested parties to make representations during disputes to which they are not a party,

but which they believe may affect them in the long term.

FURTHER REFERENCE

Protecting investments overseas: Bilateral Investment Treaties, Foreign Investment Laws and ICSID arbitration - Lovells client note available under "Publications" at www.lovells.com. A German version of this note is also available under "Publications" at www.lovells.com.

Further general information on ICSID and other forms of international arbitration can be found in Lovells on-line International Arbitration Guide at www.lovells.com/arbitration

The ICSID homepage can be found at www.worldbank.org/icsid

Confidentiality in International Arbitration

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A GLOBAL UPDATE

Often, one of the reasons that businesses choose arbitration as their preferred dispute resolution mechanism is to avoid airing their disputes in a public forum - perhaps because this would reveal business secrets or sensitive technical information which are confidential between the parties, or simply because the parties prefer to keep matters out of the public eye. A party who chooses arbitration for this reason is therefore likely to be most unhappy if news of, or worse, documents or other details concerning their dispute, are reported in the press or by a third party. Here, we take a brief tour of the law of arbitral confidentiality in a selection of jurisdictions.

In **England and Wales**, an obligation of confidentiality is implied into arbitration agreements governed by English law (albeit that the Arbitration Act 1996 itself is silent on the issue). This rule is subject to exceptions, for example where disclosure is reasonably necessary for the protection of the legitimate interests of an arbitrating party. This would include situations where the confidence was breached for the establishment or protection of that party's legal rights vis-à-vis a third party or in order to found a cause of action against, or to defend a claim brought by, the third party. In practice, these exceptions to the rule apply in relatively few cases and the principle of confidentiality is widely respected by the English courts.

In addition, England is one of the few jurisdictions to extend the confidentiality beyond the arbitration itself to related court proceedings, so as

to ensure that the confidential nature of the arbitration is not lost through the back door. However, following *Department of Economic Policy & Development, City of Moscow v (1) Bankers Trust and (2) International Industrial Bank* [2004] EWCA Civ 314, where this question of privacy was specifically addressed, whilst a court hearing relating to an arbitration claim may take place in private, such privacy will not necessarily extend to the court's judgment. It appears that publication of a judgment will be favoured where publication would not disclose significant confidential information and particularly where the judgment involves points of law or practice which could offer guidance to practitioners.

So far as the privacy of arbitration hearings is concerned, this principle has survived challenges raised under the European Convention on Human Rights, which requires justice to be done publicly in open court. It was decided that the member states may respect the parties' election to determine their dispute by confidential arbitration proceedings.

In **Germany**, the tribunal and the parties' lawyers are bound by the strict rules of confidentiality which bind all judicial deliberations and lawyers generally, which are enforceable by criminal sanction. In the case of court proceedings in support of the arbitral process (e.g. challenges to jurisdiction or enforcement proceedings), parties benefit from an additional level of privacy since, as a matter of general practice, court judgments are published without disclosure of the identity of the parties to the underlying dispute or other material which might enable them to be identified.

France also upholds a general principle of confidentiality in arbitration. Perhaps the greatest degree of protection is in **New Zealand**, whose 1996 arbitration statute contains an express provision on confidentiality (although this is currently under review).

The new **Spanish** Arbitration Act (see the item on page 10 of this newsletter) expressly imposes a duty of confidentiality.

Conversely, **United States'** federal law imposes no duty of confidentiality upon the parties, although clearly a US court would enforce an express confidentiality provision contained within a written arbitration agreement or a tribunal's order requiring confidentiality. Similarly, following a 1992 decision of the High Court of **Australia**, which was affirmed by a 3:2 majority in 1995, the Supreme Court of **Sweden** decided in 2000 that there is no legal duty of confidentiality inherent in an arbitration agreement under Swedish law.

There is a similar breadth of approach in institutional rules. For example, the **LCIA** (London Court of International Arbitration) and **WIPO** (World Intellectual Property Organisation) Rules both contain express confidentiality provisions, whereas the rules of other major institutions - including the **ICC** (International Chamber of Commerce) and the **AAA** (American Arbitration Association) - and the **UNCITRAL** Rules impose no such obligation. However, privacy (in the sense of limited access to hearings) is very commonly stipulated.

Given these varied approaches, confidentiality cannot be assumed. If the parties want it, they should expressly agree it in the arbitration agreement or, failing that, at the outset of proceedings. They also need to consider how wide the clause is required to be. Merely providing that the award is confidential may not be enough. Highly confidential documents may be disclosed to the other side and consideration should be given to ensuring that this type of material is also expressly covered by the clause. However, drafting a suitable confidentiality provision is not straightforward since most businesses will need the ability to make at least some limited disclosure; indeed, this is why the drafters of many laws and rules (for instance the English Arbitration Act and the 1998 revision of the ICC Rules) considered, but ultimately rejected, a confidentiality provision.

The kind of complication which can arise is well illustrated by the recent *Associated Electric* case (referred to on pages 9 and 10 of this Newsletter), where the Bermudan Court of Appeal granted an injunction forbidding a party from relying on an award issued in its favour in one arbitration in support of its case in a second arbitration against the same party (although this was subsequently overturned by the Privy Council).

If there is a general confidentiality provision in the commercial terms of the contract in which the arbitration agreement is contained, there is no reason why that should not extend to any arbitration proceedings. It is often most convenient expressly to cross-refer to such a provision, making sure

that it contains suitable exceptions to allow legitimate disclosure.

If you would like further advice on such a provision, please refer to any of the partners listed at the front of this newsletter.

Arbitration News

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A DATE FOR THE DIARY

Lovells will be holding a seminar on the Energy Charter Treaty and investment treaty claims at our London office on 10 June 2004. For further information contact charlotte.sassen@lovells.com.

INTERNATIONAL TREATIES AND INSTITUTIONS

New York Convention

Nicaragua's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 24 September 2003, which came into force on 23 December 2003, brings the total number of signatories to 134. A complete list of accession states can be found at www.uncitral.org/en-index.htm and www.lovells.com/arbitration.

Energy Charter Treaty

Lovells is acting for a client in an ICSID arbitration against an Asian government under a bilateral investment treaty ("BIT") and the Energy Charter Treaty. This is the first ever claim to allege breaches of both a BIT and the Energy Charter Treaty. The Energy Charter Treaty is a multilateral investment treaty which came into force in 1998. To date there have only been six claims filed under the Treaty.

United Nations Commission on International Trade Law (UNCITRAL)

UNCITRAL's 37th annual session will take place in New York from 14 June to 2 July 2004. The principal arbitration concerns of UNCITRAL

are the finalisation of the proposed revision of Article 17 of the Model Law on International Commercial Arbitration, which gives arbitrators power to grant interim measures of protection in arbitral proceedings, and a proposed new article on the recognition and enforcement of interim measures. The main outstanding issue is whether tribunals should have jurisdiction to order emergency measures on an ex parte basis. For further information turn to www.uncitral.org.

ICC

The ICC has published *Complex Arbitrations*, a special supplement to the ICC International Court of Arbitration Bulletin. This looks in detail at the impact of multi-party and other complex arbitrations. Robert Briner, Chairman of the ICC International Court of Arbitration, notes in a foreword that arbitral tribunals nowadays are regularly faced with disputes that go beyond the two-party, one-contract scenario. This reflects the growing complexity of international business and the disputes which result from them. The text looks at some of the solutions which the ICC Court has had to find to these issues. *Complex Arbitrations* may be ordered from [ICC Publishing](http://www.icc-publishing.com) in Paris, online from the ICC Business Bookstore, or from ICC national committees around the world.

New Model Turnkey Contract

The ICC has just issued a new ICC model contract for the turnkey supply of a industrial plant. The new contract relates to contracts limited to the supply of plant or production lines but does not deal with assets that

"surround" the plant, such as buildings and supply of energy. This adds to the ICC's existing range of model contracts which cover sale, distributorship, franchising and commercial agency. The contracts are intended to be flexible to allow the parties to negotiate their specific requirements. The contracts are also intended to take a fair or neutral stance between the parties' respective interests.

ICC as appointing authority in ad hoc arbitration

With effect from January 2004, the ICC has for the first time introduced new rules allowing it to act as the appointing authority of the arbitrators in non-ICC ad hoc arbitrations. This is a welcome modification to the existing position, which had remained unchanged for 20 years.

Arbitration on the increase 580 requests for arbitration were filed with the ICC in 2003 concerning 1,584 parties from 123 countries (slightly down from 593 in 2002). 369 awards were rendered, an increase of 12 from the previous year.

ICSID

The total number of International Centre for the Settlement of Investment Disputes ("ICSID") investment treaty arbitrations commenced in 2003 was a record 30, leaving ICSID with 64 ongoing matters at the end of 2003, with a further 11 cases being registered in the first quarter of 2004. This reflects the rapidly increasing volume of Bilateral Investment Treaty arbitrations (see our main feature in this Newsletter).

LCIA

104 cases were filed with the LCIA in 2003, up 16 from 2002.

International Bar Association

A Working Group set up by the IBA's Committee on Arbitration and ADR has developed guidelines on conflicts of interest facing arbitrators in international arbitration. The guidelines, which are to be submitted to the IBA Council in May 2004, set out general standards for the independence and impartiality of arbitrators and guidance on the types of situation which warrant disclosure by or disqualification of an arbitrator.

DEVELOPMENTS IN NATIONAL CASE LAW

Enforcing international arbitration awards in Germany (German Federal Court)

In order to enforce an arbitral award under the New York Convention, the award must be submitted to the enforcing court in original or certified copy form with certified translations of the award and the arbitration clause. However, the procedures for enforcing a foreign award were less stringent under German law and the German Federal Court recently had to consider which provisions took precedence, the Convention procedures or the German procedures. It was decided that German law would take precedence over the Convention, provided that it was more favourable to the enforcing party than the Convention, which it was here. This therefore removes one procedural challenge to the enforcement of arbitral awards in Germany.

Days may be numbered for the English anti-suit injunction (European Court)

In international contracts parties often provide for the courts of one country to have exclusive jurisdiction to resolve their disputes. However, when a dispute arises, one party may refer the dispute to the courts of another country. In such cases, in the past the English courts have sought to give effect to an English law exclusive jurisdiction clause by ordering an "anti-suit" injunction to restrain the foreign proceedings. The same principle applies to restrain foreign proceedings started in contravention of an English law arbitration clause. However, recent developments in the European Court in favour of the court first seised of the dispute retaining jurisdiction cast doubt over how long the anti-suit injunction will remain.

In *Gasser v MISAT* two sets of proceedings were started between the same parties in relation to the same subject matter. The first were started in Italy and the second in Austria. Gasser argued that there was an Austrian jurisdiction clause in the contract between the parties, but this was disputed by MISAT. The Brussels Regulation and other international rules governing these jurisdictional issues provide that (a) the court first seised of the matter should retain jurisdiction and (b) that effect should be given to a jurisdiction clause agreed between the parties. Although, in theory, the court first seised should respect the jurisdiction clause, that does not always happen, and in this case, of course, the existence of a jurisdiction clause was disputed. Such a conflict is resolved by the second court staying its proceedings until the

first court has ruled on its own jurisdiction. If the first court accepts jurisdiction over the dispute, this must, under the Brussels Regulation, then be recognised by other states party to the relevant international conventions. Arguably, this would remove the jurisdiction of the English court to grant an anti-suit injunction, since such an injunction would have the effect of pre-empting the decision of the court first seised, before it had ruled on its own jurisdiction.

The English House of Lords has, in the case of *Turner v Grovit*, also asked the European Court to look at the question of whether there is jurisdiction under the Brussels Regulation/Brussels Convention to grant an anti-suit injunction where foreign proceedings have been started vexatiously to defeat the parties' agreed jurisdiction clause. It is likely that the ECJ will seek to limit the ambit of the anti-suit injunction as far as possible, in line with the growing trend to allow the court first seised to retain jurisdiction.

Switzerland adopts new arbitration rules

The new Swiss Rules of International Arbitration, based on the UNCITRAL Arbitration Rules, came into effect on 1 January 2004. The Swiss rules include a number of new provisions, including provisions for joinder of arbitrations where one or more of the parties in different arbitrations are the same; more flexible rules on costs to take account of the conduct of the parties, such as on late amendments to their case or on interim applications; greater emphasis on the independence of the arbitrators and any experts; and power to request the arbitrators to

give "an interpretation of the award" rather than just correct clerical and similar errors notified to them by the parties. It is likely that this latter power will be used to clear up any ambiguities or difficulties with the award, which otherwise may have resulted in the need to appeal the award to the courts. A new expedited procedure has also been introduced, where the parties agree to it, to resolve claims not exceeding CHF 1 million. The expedited procedure aims to resolve disputes within 6 months of the arbitral tribunal being appointed and receiving the papers. For further information refer to the new website www.swissarbitration.ch.

Confidentiality of award (UK Privy Council, on appeal from Bermuda)

In a recent case, one party applied for permission to refer to an award made in an earlier arbitration which was relevant to a later arbitration. The other party challenged its right to do this. The case was ultimately referred to the Judicial Committee of the Privy Council, which overturned an injunction granted by the Bermudan Court of Appeal which would have prevented disclosure of an arbitration award in one arbitration for use in the second arbitration between the same parties (*Associated Electric & Gas Insurance Services Ltd v European Reinsurance Company of Zurich* [2003] UKPC 11 (Privy Council, on appeal from the Court of Appeal of Bermuda). The Privy Council's reasoning was that to hold otherwise would be to prevent enforcement of the first award, which would be fundamentally inconsistent with and frustrate the purpose of the arbitration.

The other interesting point which this case raised was the extent to which the findings of fact of one arbitrator would bind another arbitrator in related proceedings. Court proceedings are subject to the principle of issue estoppel, which prevents parties re-arguing a point already decided between them by another court. The principle behind this point is to ensure that the same points are not endlessly re-litigated. The Privy Council made clear that this concept applies equally to arbitration proceedings.

Brazil adopts free trade dispute resolution mechanism

Brazil is close to ratifying the Olivos Protocol for the Settlement of Disputes within the Mercado Común del Cono Sur (Mercosur). The protocol, which was signed on 18 February 2002 by member states Argentina, Brazil, Paraguay and Uruguay, aims to improve the Mercosur (Latin American free trade agreement) dispute settlement system by ensuring the uniform application and interpretation of legal instruments that govern its integration into domestic law.

The Brazilian Legislative Branch approved the Protocol by Legislative Rule 712/03 of October 14 2003, and therefore the Protocol should become effective shortly.

The Protocol provides for member parties to resort to ad hoc arbitral proceedings where disputes (i) cannot be settled through direct negotiations or the intervention of the Common Market Group, and (ii) concern the interpretation, application or breach of any Mercosur legal instrument.

An important feature of Mercosur arbitration proceedings is the ability of its Permanent Review Tribunal to review awards. In addition, should a state party in a dispute fail to comply with an arbitral award, the other party will be entitled to initiate temporary compensatory measures. Only in limited circumstances will the state be able to challenge these. In the event of a challenge, the ad hoc arbitral tribunal or Permanent Review Tribunal will decide the issue.

This is another clear step in moves by Brazil in particular, and Latin America in general, to promote the region as a viable centre for international arbitration.

Spain adopts new Arbitration Act

Spain has passed a new Arbitration Act, effective from 26 March 2004. The Act represents part of Spain's drive to modernise its legal system with a view to making Spain the first choice for Latin American businesses wanting to arbitrate within the EU. The Act is based on UNCITRAL's Model Law and was drafted by three Spanish law professors and Fernando Mantilla-Serrano, formerly of the ICC. In line with the general trend, the Act allows the tribunal to determine all matters in relation to its own jurisdiction and grants power for the tribunal to order appropriate interim measures. Courts have power to intervene in the process to support the arbitral tribunal's functions. However, there are limited grounds of appeal from the award; essentially these amount to the tribunal not having, or exceeding its, jurisdiction or the award contravening a party's constitutional rights.

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