

International Arbitration Newsletter



Lovells news

CONFERENCE ON EU LAW AND BILATERAL INVESTMENT TREATIES, LONDON

On 4 December 2008 Lovells, in association with the British Institute of International and Comparative Law, will host a conference on "European Law and Bilateral Investment Treaties: the Grey Areas" at its offices in Atlantic House, London. The keynote speaker is Lord Goldsmith QC and the panel of prominent speakers will discuss topics such as the interplay between EU member states' obligations under EC law and their obligations under bilateral investment treaties (BITs); infringement proceedings against member states' BITs before the European Court of Justice; and the relationship between the Treaty of Lisbon and investment protection.

If you would like more information about this conference, please contact Markus Burgstaller (markus.burgstaller@lovells.com).

A copy of the conference programme is available at www.biicl.org/files/3789_program_26.09.pdf.

To register, go to www.biicl.org/events/view/-/id/311/.

ICC AND LCIA

Many of our clients ask us about the differences between the ICC and LCIA rules of arbitration. Included with this issue of the International Arbitration Newsletter is a quick guide, in convenient A5 format, comparing some key features of the two sets of rules. ■

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International arbitration news

INTERNATIONAL TREATIES AND INSTITUTIONS

EUROPEAN COURT OF JUSTICE: Advocate General says “no” to anti-suit injunctions

On 4 September 2008, Advocate General Kokott issued an opinion stating that it is incompatible with the Brussels Regulation I (on jurisdiction and recognition and enforcement of judgments) for a court of an EU Member State to grant an injunction restraining proceedings before the courts of another Member State, even if the proceedings were brought in breach of an arbitration agreement. It is for the court “first seised” to decide whether it has jurisdiction and to stay proceedings in favour of arbitration if appropriate. The issue was referred to the European Court of Justice (ECJ) by the English House of Lords in 2007 in *RAS Riunione Adriatica di Sicurta SpA v West Tankers (The Front Comor)*. The decision of the ECJ is expected in the next few months. Although the ECJ does not have to follow the Advocate General's opinion, it is widely anticipated that it will do so. For more detailed discussion about this development, see the article on page 8.

Chartered Institute of Arbitrators – New e-disclosure guidelines

The Chartered Institute of Arbitrators has produced a protocol on electronic evidence and disclosure in international arbitration. The protocol is for use “in those cases in which potentially disclosable documents are in electronic form and in which the time and cost of giving disclosure may be an issue”. It proposes that parties should consider e-disclosure issues as early as possible in a dispute and that the tribunal should at the preliminary meeting consider how material will be preserved and whether the parties can agree to limit the scope of the disclosure.

The protocol also gives guidance on methods of limiting e-disclosure and saving costs, such as confining disclosure to particular categories or dates, or agreeing keyword search terms.

The protocol has proved a cause for concern for some commentators, fearful that the perceived excesses of disclosure/discovery inherent in common law cultures may creep into international arbitration. However, others take a more pragmatic view, considering that the protocol does no more than recognise that documents are increasingly held in electronic form and provide guidelines as to how to deal with that.

International Bar Association (IBA) – Review of Rules of Evidence

The IBA Rules on the Taking of Evidence in International Commercial Arbitration were implemented in 1999 as a way of bridging the gap between the approaches to evidence in civil law and common law jurisdictions. They are widely used in international arbitration, providing guidelines to parties and arbitrators in a way which achieves a balance between civil law and common law practice. The IBA Rules are now almost ten years old and to coincide with their tenth anniversary a special sub-committee is undertaking a review of the rules. The review will consider how the rules have been applied in the past and how they might usefully be revised. One of the areas which will be considered is electronic disclosure. Feedback has been sought from practitioners around the world, including by way of an online survey. The preliminary results of the survey and their implications were discussed at the IBA conference in Buenos Aires on 14 October and will be discussed again at the IBA's 12th International Arbitration Day in Dubai on 16 February 2009.

ICC – New hearing centre in Paris

The ICC opened a hearing centre in Paris at the end of October 2008. The centre is available for institutional and ad hoc arbitrations, as well as for ADR procedures. The facilities include three large rooms for hearings and seven smaller rooms for breakout sessions or meetings; photocopying and printing; telephone/fax; WiFi connection; video conferencing equipment; and simultaneous translation equipment. More information is available at www.icchearingcentre.org.

ICC – Hong Kong branch of Secretariat

It was announced earlier this year that the ICC planned to open a branch of the Secretariat of the ICC Court of Arbitration in Hong Kong. That plan will come to fruition on 19 November, when the Secretariat opens. The Secretariat will include a case management team to administer disputes in the Asia Pacific region under the ICC Rules of Arbitration.

Permanent Court of Arbitration

The Permanent Court of Arbitration (PCA) has entered into an agreement to enable India to host PCA-administered proceedings on an ad hoc basis. Under the Host Country Agreement, India has agreed to assist the PCA to obtain office and meeting space and secretarial services. The PCA signed a Host Country Agreement with Singapore in September 2007, so there are now two venues for PCA proceedings in Asia, emphasising the potential for growth in arbitration in the region.

DEVELOPMENTS IN NATIONAL LAW

UK: English court refuses to enforce New York Convention award

The Commercial Court recently refused to enforce a New York Convention award (that is, one made in a country that is a party to the New York Convention), on the ground that there was no valid arbitration agreement. The decision is interesting primarily because it is relatively unusual for the English courts to refuse enforcement of New York Convention awards.

The judge's decision in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm) effectively turned on whether there was a valid arbitration agreement between Dallah and the government of Pakistan. The terms of the New York Convention, implemented in England and Wales by sections 100-104 of the Arbitration Act 1996, require English courts to enforce awards made in New York Convention states unless one of the prescribed exceptions applies. One of those exceptions is where there is no valid arbitration agreement under the law of the country where the award was made.

In *Dallah*, the underlying contract had been concluded between Dallah and "the Awami Hajj Trust", a trust established by the Pakistani government, under the terms of an ordinance. The contract contained a clause referring disputes to ICC arbitration in Paris. When the ordinance lapsed, the trust ceased to exist. When a dispute arose, Dallah commenced arbitration, naming the "Ministry of Religious Affairs, Government of Pakistan" as respondent. The government refused to participate in the arbitration.

The ICC tribunal decided that it had jurisdiction on the ground that the government was bound by the arbitration clause. It then went on to make an award in favour of Dallah on the merits. Dallah subsequently obtained an order from the English court, without notice, giving permission to enforce the award. The government applied to set aside that order, on the ground that there was no valid arbitration agreement under the law of the country where the award was made (that is, France).

The government's application to set aside permission to enforce involved a rehearing on the issue of whether it was a party to the arbitration agreement. It was common ground that as a matter of French law, the government would only be bound by the arbitration agreement if there was a common subjective intention to be bound. The judge found that that was not the case here (thereby reaching a different conclusion to the tribunal, which had applied transnational law). It followed that there was not a valid arbitration agreement. Therefore, the order giving permission to enforce the award against the Government of Pakistan was set aside.

UK: English Appeal Court upholds enforcement of part of New York Convention award

The English Court of Appeal has confirmed that it is permissible to enforce part of a New York Convention award. In doing so, it upheld the decision of Mr Justice Tomlinson from April this year. As a result of the Appeal and lower court judgments in *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation*, parties should no longer be able to mount minor challenges to awards in order to delay their enforcement in New York Convention contracting states.

As reported in the June 2008 issue of this newsletter, the award in question was made in Nigeria in the arbitration of a contractual dispute governed by Nigerian law. IPCO sought to enforce the award in England and Wales. As the UK and Nigeria are both parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), enforcement was governed by the New York Convention regime, as enacted in English law by sections 100-104 of the Arbitration Act 1996 (the 1996 Act). As the award was subject to an application to set it aside in the Nigerian courts, IPCO's original application to enforce had been adjourned pending the outcome of that application in Nigeria. IPCO sought to vary the order for adjournment. The judge at first instance held that there would need to be a "significant change in circumstances" for the court to revisit an earlier order for adjournment. However, "catastrophic" developments in the Nigerian proceedings, which indicated that they would not be decided in the near future, justified the court in reconsidering the question of adjournment in this case. The Court of Appeal endorsed that analysis.

The Court of Appeal was requested to consider whether enforcement of a New York Convention award had to be on an all or nothing basis. Section 101(3) of the 1996 Act speaks of enforcement being entered "in terms of the award". The Appellant, NNPC, argued that "in terms of the award" was to be construed as an "indivisible whole".

International arbitration news *continued...*

However, just as Mr Justice Tomlinson had been concerned that one potentially minor aspect of an award could have the effect of preventing enforcement of significant aspects of the award which were unlikely to be held invalid, the Court of Appeal made clear that to attribute “such a construction [of the Act] would have absurd commercial consequences and cannot have been intended” and would be “inconsistent” with the purpose of the Convention, as reflected by the Act which makes clear that enforcement “shall not be refused” except in the limited listed circumstances of section 103(2).

This is a welcome statement of the law and endorsement of Mr Justice Tomlinson’s earlier decision. For those seeking to enforce New York Convention awards, it is also a reminder to seek to have awards structured under separate headings (or otherwise so that the different “parts” are easily ascertainable on the face of the award). Potentially contentious aspects of an award can then be “severed” for enforcement purposes from less contentious aspects where appropriate.

Lovells, who instructed Michael Lyndon Stanford QC and Ciaran Keller of Maitland Chambers, acted for the successful Respondent, IPCO.

SWITZERLAND: Supreme Court rejects “group of companies” doctrine

The Swiss Federal Supreme Court has rejected the so-called “group of companies doctrine” as a basis for extending an arbitration agreement to a non-party. Under that doctrine, one of a group of companies may be bound by an arbitration agreement despite not being a signatory to it.

Decision 4A_128/2008 of 19 August 2008 concerned a contract between a contractor and sub-contractor for the construction of an industrial complex in Qatar.

The contract contained an arbitration clause referring disputes to ICC arbitration in Geneva. The parent company of the contractor acted as guarantor. A dispute arose and the sub-contractor commenced arbitration against the contractor and its parent company. The parent company claimed that it was not bound by the arbitration agreement in the contract. The ICC tribunal agreed and issued an award denying jurisdiction in respect of the parent company. The sub-contractor applied to the Swiss Federal Supreme Court to set aside the award.

The Supreme Court confirmed the tribunal’s award on jurisdiction. Its starting point was that an arbitration clause only binds the parties to it, subject to limited exceptions. One of those exceptions is where there is the assumption of a debt. However, the Supreme Court clarified that where there is a guarantee of a party’s performance under the main contract, an arbitration clause in that main contract will not give the tribunal jurisdiction over the guarantor unless the guarantee agreement itself contains either an arbitration clause to that effect or a clause referring to the arbitration clause in the main contract. If there is no such clause, the guarantor must have expressed an intention to be bound by the arbitration clause in the main contract.

In this case, none of those conditions was fulfilled. Nor was there any evidence that the parent company had interfered in the performance of the main contract (which in a previous case had been held to justify extension of an arbitration clause to a non-signatory). Furthermore, the mere fact that the guarantor was part of the same group of companies did not justify extending the arbitration clause to it.

The Supreme Court confirmed that the decisive factor in deciding whether to extend an arbitration clause to a non-signatory or non-party will be the parties’ intentions. Those intentions may be expressed in the contract or be apparent by their conduct. However, it is clear that just being part of the same group of companies as the party to the contract will not, of itself, suffice.

FRANCE: Supreme Court decision on *res judicata* in arbitration

A recent decision of the French Supreme Court (Cour de Cassation) has extended the scope of the doctrine of *res judicata* in arbitral proceedings. In doing so, it has put arbitration on the same footing as court proceedings for *res judicata* purposes.

In *G et A Distribution v SAS Prodim* (28 May 2008), the Cour de Cassation held that the claimant should raise any claims it may have arising out of a particular set of facts and based on any legal grounds in the same proceedings. If it fails to do so, it will not be permitted to raise them in any subsequent proceedings. In other words, once an arbitral award has been made, a party to the proceedings will not be entitled to bring a new claim against the same party and arising out of the same facts, even if it is based on different legal grounds. In reaching its decision, the Cour de Cassation applied an earlier, 2006 decision relating to court proceedings (*Cesareo*, 7 July 2006).

From a practical point of view, parties to arbitral proceedings and their counsel should make sure they include at the outset all possible claims and legal grounds that they may have. If they do not do so, they risk their claims being excluded on the basis of *res judicata*, following this decision of the Cour de Cassation.

DUBAI: New arbitration law for the DIFC

A new arbitration law was enacted in the Dubai International Financial Centre (DIFC) on 1 September 2008. As reported in the last issue of the International Arbitration Newsletter, the DIFC is a “free zone” under the UAE constitution and may enact its own English language civil and commercial laws. The new arbitration law is closely based on the UNCITRAL Model Law on International Commercial Arbitration, supplemented by a range of additional provisions. A key change from the previous law is that parties may choose the DIFC as their seat of arbitration whether or not they have any connection with the DIFC. In keeping with other modern arbitration laws, the new DIFC law permits limited intervention by the DIFC Court (whose international panel of judges are supportive of arbitration). The new arbitration law, coupled with the launch of the DIFC LCIA Arbitration Centre earlier this year, can only benefit the growth of the DIFC as a centre for arbitration.

INVESTMENT TREATY ARBITRATION

Ukraine fails in challenge to ICSID arbitrator

Ukraine has failed in its bid to disqualify Jan Paulsson as arbitrator in the ICSID arbitration initiated by Joseph Lemire, an American radio investor. Under Article 57 of the ICSID Convention, a party may propose the disqualification of an arbitrator on account of any fact “indicating a manifest lack of the qualities required”. Those qualities include the ability to exercise independent judgment. The basis of Ukraine’s objection was that Jan Paulsson’s firm was representing Ukraine in another arbitration at the Stockholm Chamber of Commerce (although he was not involved in that arbitration). Ukraine argued that that made any award in this arbitration vulnerable to attack.

Mr Paulsson’s fellow arbitrators disagreed, noting that Lemire’s lawyers had assured Ukraine that they would not seek an annulment of any award on the basis of Paulsson’s connection with the other dispute.

Bulgaria sees off claim under Energy Charter Treaty

An ICSID tribunal has unanimously dismissed all claims brought against Bulgaria by a Cypriot investor under the Energy Charter Treaty (ECT). This is the first ECT claim at ICSID to reach the stage of an award on the merits. Findings of misrepresentation by the investor at the time of the investment proved fatal to the claim and send a clear message that investors must have clean hands when making investments. Not only did the investor lose its claim, but it also had to foot a large part of Bulgaria’s legal costs.

In *Plama Consortium Ltd v Bulgaria*, the investor (PCL) purchased a recently-privatised refinery, Nova Plama, from another investor. The refinery ultimately went into liquidation. PCL, a company registered in Cyprus, made a claim against Bulgaria under the ECT for alleged breaches of the treaty, such as the full protection and security and fair and equitable treatment provisions. Before considering the merits of PCL’s claim, the tribunal had to deal with Bulgaria’s objections to its jurisdiction. Specifically, Bulgaria alleged that PCL and its owner (a French national) had misrepresented the ownership of PCL to the Bulgarian agency which approved PCL’s purchase of shares in Nova Plama. Because of that, the approval of the share purchase was invalid. The tribunal agreed, finding that Bulgaria would not have approved the acquisition of shares by PCL if it had been aware of its true ownership (a private individual with “limited financial resources”, rather than two substantial companies).

Thus, PCL fell at the first hurdle, as it failed to satisfy the tribunal that there was an “investment”, which is a prerequisite for a claim under the ECT.

Even if PCL had overcome that jurisdictional precondition, it would have failed in its claim: although not required to do so, the tribunal did go on to consider the merits of PCL’s claims. It dismissed each one.

When it comes to costs, it is comparatively rare in investment treaty arbitrations for tribunals to order unsuccessful investors to pay the legal costs of states. However, in this case the tribunal ordered PCL not only to bear the costs of the ICSID proceedings itself, but also to pay almost half of Bulgaria’s legal costs (in addition, of course, to bearing its own legal costs). A warning perhaps to other investors who might be tempted to bring substantial, unmeritorious claims when their investments fail.

Chilean investor fails in claim against Argentina

An ICSID tribunal has held that an investor’s business was not adversely affected by measures adopted by Argentina during the 2001-2002 economic crisis. The tribunal took into account the fact that the investor had knowledge and experience of the relevant industry and of economic conditions generally in Argentina when it made its investment. Investors should note that they may not always be able to rely on bilateral investment treaties as a fall-back when their investments under-perform.

Metalpar SA and Buen Aire SA owned shares in an Argentinian company which itself owned Metalpar Argentina SA. That company manufactured bus bodies for public transport vehicles in Argentina and provided financing for customers who purchased them.

International arbitration news *continued...*

The claimants made a claim against Argentina under the bilateral investment treaty (BIT) between Chile and Argentina, alleging that steps taken by Argentina during the economic crisis of 2001/2002 had an adverse impact on their investment. Those steps included the devaluation of the peso and “pesification” (compulsory conversion of US dollar debt into pesos at a one-to-one exchange rate). The claimants claimed that Argentina breached various BIT provisions. In particular, it alleged that Argentina had breached the fair and equitable treatment standard by arbitrarily and illegally issuing regulations which changed the legal framework within which the claimants had decided to invest.

The tribunal dismissed all of the claimants’ claims. It found that Argentina did not engage in conduct that breached the fair and equitable treatment standard. Even if the alleged breaches had been established, there was no evidence that the claimants’ investments had been adversely affected by Argentina’s actions.

The tribunal’s analysis is instructive. It agreed with other tribunals that the fair and equitable treatment provision obliges the state to grant and maintain a stable and predictable legal framework necessary to fulfil the justified expectations of the investor. In the other cases, however, the investors had been awarded a contract or licence by the host state and therefore arguably had legitimate expectations that the contract/licence would be renewed or complied with. Here, there was no licence or contract between the claimants and Argentina and therefore the legitimate expectation test failed.

The tribunal also found it likely that the claimants must have expected their investment to be subject to “ups and downs” or that Argentina might be forced to take measures to deal with an economic crisis which could be foreseen.

Argentina’s “necessity” defence succeeds for the second time

In another of the ICSID arbitrations brought against Argentina arising out of its economic crisis in 2001/2002, a tribunal has accepted that measures taken by Argentina were “necessary”. This is the second time Argentina’s “necessity” defence has succeeded, although the measures taken in the two cases were different. The investor in the first case (*LG&E Energy v Argentina*) has recently applied to ICSID to annul the award.

Continental Casualty Company (Continental), a US company, wholly owned CNA ART, a provider of workers’ compensation insurance incorporated in Argentina. Its investment portfolio consisted mainly of low risk assets, such as cash deposits, treasury bills and government bonds. Most of its assets were denominated in pesos. Continental alleged that Argentina passed laws which destroyed the legal security of its assets and prevented it from hedging the risk of devaluation of the peso. It claimed that Argentina had violated provisions in the BIT between the US and Argentina, namely the provisions regarding fair and equitable treatment, the “umbrella clause” (obliging each party to observe obligations entered into regarding the investment), compensation for expropriation and transfer of funds.

Argentina relied primarily on a provision in the BIT which enabled it to take measures necessary for the maintenance of public order or the protection of its own essential security interests. The tribunal decided that on the facts, the 2001/2002 economic crisis fell within the scope of the “necessity” provision. There did not need to be a total collapse of the country for the government to rely on the provision. The tribunal then went on to decide that the measures taken were largely necessary, in that they contributed materially to the protection of Argentina’s essential security interests. The tribunal did, however, reject the necessity defence in relation to treasury bills which Argentina had offered to restructure – the tribunal found that that had been done too late and at a reduced value. The claimant succeeded only in obtaining an award of US\$2.8 million, as compared with the US\$ 38 million claimed.

There are over 25 further claims pending against Argentina at ICSID, most of them arising out of measures taken during the 2001/2002 economic crisis. Argentina can be expected to raise the “necessity” defence in each case. The debate regarding the correct approach to take to that defence will rumble on.

Ad hoc committee will consider ordering Argentina to provide security

An ICSID ad hoc committee, which was set up to hear Argentina’s application to annul the award in *Enron v Argentina*, has given Argentina 60 days within which to state whether it accepts the obligation to pay the award voluntarily if it is not annulled. In other cases, Argentina has resisted enforcement on the ground that ICSID awards must be presented to an Argentine court in enforcement proceedings, rather than being satisfied immediately.

The ad hoc committee has indicated that if Argentina were to take that position in this case, it would be in breach of its obligations under the ICSID Convention and under the US/Argentina BIT. If Argentina does not, within the stipulated 60 days, indicate that it has changed its position, the committee said that it would be willing to reconsider whether the current stay of enforcement should remain in place and whether Argentina should be ordered to provide security in return for any stay. The prevailing view is that an order for security should only be made in exceptional circumstances. With that in mind, the committee was clear that if it did order security, provision would have to be made for the funds to be held securely. There would therefore be no issue about recoverability of the security in the event that the award were ultimately annulled.

German investor's battle to enforce award against Russia on verge of success

A recent ruling by a court in Cologne could mark the end of a long battle to secure payment of a US\$2.3 million award made in 1998. Franz Sedelmayer had succeeded in a claim against Russia under the Germany/Russia BIT. Highlighting the difficulty in enforcing awards against Russia, the award has not yet been paid and substantial interest has now accrued. However, after a long search, Mr Sedelmayer identified an apartment complex owned by a successor organisation to the KGB. He successfully "attached" the rent income from tenants of the apartments. He then obtained an order from a court in Cologne requiring the premises to be auctioned to pay the debt.

If the auction results in the payment of the debt, this will be the only instance to date of an investor successfully enforcing an award against Russia. ■



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End of the road for anti-suit injunctions in the EU?

The European Court of Justice has been asked to decide whether courts in EU Member States may make orders preventing court proceedings in other Member States where there is an arbitration agreement. An Advocate General's opinion issued in September 2008 gives an indication of the court's likely decision.

In 2007, the English House of Lords asked the European Court of Justice to clarify whether the Brussels Regulation on jurisdiction permitted courts in EU Member States to prevent court proceedings pending in another Member State where there was an arbitration agreement. On 4 September 2008, Advocate General Kokott issued an opinion stating that the courts of EU Member States may not make orders preventing court proceedings in another Member State even if the parties had agreed to arbitrate their dispute. Whilst the European Court of Justice ("ECJ") is not bound to follow the Advocate General's opinion, it often does so.

Such "anti-suit injunctions" have been controversial in the EU since the ECJ held that injunctions by the courts of one Member State preventing proceedings in another are inconsistent with the EC Regulation 44/2001 on jurisdiction and enforcement of judgments (the "Regulation"), even if the "offending" proceedings were brought in breach of an exclusive jurisdiction clause or in bad faith. Since then, there has been considerable debate, particularly in England and Wales, as to whether anti-suit injunctions in respect of court proceedings brought in breach of an arbitration clause were consistent with the Regulation, which contains a briefly worded exclusion of "arbitration".

HOUSE OF LORDS REFERRED ISSUE TO ECJ IN WEST TANKERS

The issue was referred by the English House of Lords to the ECJ for a preliminary ruling in the case of *RAS Riunione Adriatica di Sicurtà v West Tankers Inc* [2007] UKHL 4 in February 2007. The precise question referred to the ECJ by the House of Lords was: *"Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement."*

It is worth looking at the facts of *West Tankers* as they illustrate neatly how this issue can arise. RAS insured an oil refinery in Syracuse, Sicily. The owners of the refinery were also the charterers of the vessel "Front Comor" under a charterparty. *West Tankers* owned the vessel. The vessel collided with an oil jetty at the refinery and caused substantial damage. RAS paid the refinery owners under the insurance policies. The charterparty was governed by English law and provided for arbitration in London. The charterers/owners of the refinery commenced arbitration proceedings against *West Tankers* in London, claiming for their uninsured losses. RAS issued proceedings in their own name in Syracuse against *West Tankers*, in respect of insured losses. In doing so, they relied on their rights of subrogation under Italian law. The issues in the Syracuse action were substantially the same as those in the arbitration. The Italian courts had jurisdiction under Article 5(3) of the Brussels Regulation.

West Tankers sought from the English court an anti-suit injunction against RAS, restraining RAS from taking any further steps in relation to the dispute except by arbitration and requiring them to discontinue the Syracuse action. Colman J granted the injunction and the matter went to the House of Lords.

In referring to the ECJ the question whether an anti-suit injunction was compatible with the Brussels Regulation, Lord Hoffman made some "observations" for the benefit of the ECJ. Through those observations, it was apparent that his view was that such anti-suit injunctions fell outside the scope of the Brussels Regulation, by virtue of the "arbitration exclusion" in Article 1(2)(d) of the Regulation. In addition to the legal arguments for that proposition, Lord Hoffman cited the adverse effect on the growth of arbitration within the EU that a contrary decision by the ECJ would have. Anti-suit injunctions were a valuable weapon in the hands of a court exercising supervisory jurisdiction over an arbitration. If EU Member States were not able to offer the anti-suit injunction tool in favour of arbitration, other jurisdictions were (for example, New York and Singapore). The EU should not handicap itself by denying its courts the right to exercise that jurisdiction.

ADVOCATE GENERAL: ANTI-SUIT INJUNCTIONS INCOMPATIBLE WITH REGULATION

The essence of the Advocate General's opinion was that the Regulation precludes a court of a Member State from making an order restraining proceedings in another Member State on the basis that such proceedings are, in that court's opinion, in breach of an arbitration agreement. It is instead for the court first seised (that is, where the "offending" proceedings were brought) to decide the issue of jurisdiction.

In the Advocate General's view, this is consistent with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The Advocate General gave short shrift to Lord Hoffman's observations about the competitive disadvantage that might be suffered by arbitration centres within the EU, stating that "aims of a purely economic nature cannot justify infringements of Community law". She acknowledged that there was a risk of inconsistent decisions concerning the validity of agreements to arbitrate as between the court first seised and the court at the seat of the arbitration. However, unilateral anti-suit injunctions were not a suitable measure to rectify that situation. Instead, the Advocate General called for the Regulation to be amended expressly to include arbitration in its jurisdictional regime. That was also the recommendation of a group of academics in a September 2007 report¹, although that report went on to propose that it should be for the courts of the seat of arbitration to decide the issue of the validity/existence/scope of the arbitration agreement.

COMMENT

The ECJ's decision can be expected in the next few months. The ECJ is widely expected to follow the Advocate General's opinion. If it does so, courts of one Member State will not be able to restrain a party from bringing court proceedings in another Member State, even if they are brought in breach of an arbitration agreement. The amendment of the Regulation to encompass arbitration proceedings is likely to be a long-term project and it is one which has already unleashed controversy amongst commentators.

In the meantime, parties brought into court proceedings in the EU in apparent breach of an agreement to arbitrate in the EU will have to look to alternatives. These are most likely to involve either seeking relief direct from the arbitral tribunal (if an arbitration is already on foot) or relying on the court "first seised" staying the proceedings before it in favour of arbitration. If the latter is the only option, the attitude of that court to arbitration will be crucial.

Whilst this may not be happy news for promoters of arbitration in centres such as London, which are sympathetic to anti-suit injunctions, at least the ECJ's decision on this issue will not affect the ability of courts in the EU to grant anti-suit injunctions in respect of proceedings outside the EU. ■



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Key Points

- An Advocate General has issued an opinion stating that intra-EU anti-suit injunctions in favour of arbitration are incompatible with the Brussels Regulation on jurisdiction
- The ECJ is widely expected to follow that opinion when it gives its decision in a few months
- If so, it will be for the court first seised, rather than the court of the place of arbitration stated in the arbitration clause, to decide whether there is a valid arbitration agreement.

¹ "Report on the Application of Regulation Brussels I in Member States" – Hess, Pfeiffer and Schlosser, September 2007

Institutional versus ad hoc arbitration

One of the fundamental considerations in drafting arbitration clauses is whether to choose “institutional” (otherwise known as “administered”) arbitration or “ad hoc” (also known as “non-administered”) arbitration. There are certain advantages and disadvantages to each, as briefly discussed below.

INSTITUTIONAL ARBITRATION

An institutional arbitration is one in which a recognised arbitral body oversees the arbitration process. There are a number of respected international arbitration institutions, such as the ICC, the LCIA and the AAA/ICDR. The specific services provided by the different arbitral institutions vary, but may include: assisting with the appointment of the tribunal, fixing tribunal fees, holding security deposits, facilitating disclosure processes (such as on-line document viewing), providing support and guidance for the arbitrators, and reviewing the award.

The defined structure of institutional arbitration has its advantages. One major benefit is a set procedural framework, which promotes clarity and efficiency particularly at the outset of the arbitration. For example, most institutional rules contain provisions which will ensure that a tribunal is appointed quickly.

Typically there are also guidelines for unforeseen contingencies, like the sudden death of an arbitrator. This allows parties and arbitrators to focus on the substantive dispute rather than waste time debating when and how the stages of the process should progress.

Institutions also provide reassurance to parties that the process will be fair. An established body which deals with a large number of commercial arbitrations year after year develops a certain expertise in credible dispute resolution. Institutions pride themselves, in fact, on ensuring the independence and impartiality of tribunals selected under their watch.

Moreover, institutions give guidance to the parties when administrative impasses arise. For example, the ICC has a large secretariat comprising numerous counsel who, on a day-to-day basis, are responsible for the smooth administration of a caseload of arbitrations. This type of oversight leaves fewer opportunities for foul play by one of the parties.

A good institution will also support and oversee the arbitrators by providing administrative assistance with, for example, escrow issues or file management. This lessens the burden on arbitrators and allows them to concentrate on substance, which, in turn, often results in more considered and better rulings. In short, institutional arbitration exists to safeguard the process, move the disagreement along to resolution, and ease the administrative burden of all involved.

Finally, while there are no reliable statistics on the matter, experience indicates it is often easier to enforce an award in a foreign country, where a counterparty may have assets, if the award has the imprimatur of a well-known and respected arbitral institution. It is more difficult for a party to challenge an award in foreign courts if it has been rendered by an arbitration panel administered by the ICC, ICDR or LCIA, for example, because judges are more likely to assume that the procedures of those institutions promote a degree of fairness and impartiality in the arbitration that militates in favour of a finding that the award is valid and enforceable.

Institutional arbitration does have its disadvantages, however. The established administrative procedures of an institutional arbitration can be time-consuming. Consequently, institutional arbitration may not be suitable where speed is of the essence for resolving the dispute. The process can be slowed, for instance, when, as is the case with the ICC, the institution plays a role in reviewing the tribunal’s award. Institutions are continually examining how to expedite the arbitral processes, but the criticism that certain procedures decelerate the process is certainly valid. Another perceived drawback is added expense; in addition to the fees of the arbitrators and the costs of the venue, the arbitration institution itself must be paid for the administrative service it provides. The general perception that institutional arbitration tends to be more expensive, however, is not necessarily correct. An efficiently administered arbitration with minimal procedural quarrels might actually save the parties legal expenses. It is true, though, that fees of some institutions can be sizeable and create an additional layer of expense. In selecting an institution, parties should weigh this factor carefully.

AD HOC ARBITRATION

Quite different from institutional arbitration is ad hoc arbitration, where the parties design their own rules and procedures. The benefit of ad hoc arbitration is that the process can be tailored to the parties’ specific needs. This allows for flexibility not only in the eventual arbitration process, but also in the parties’ negotiation of the arbitration clause. The parties can also decide the timetable for the arbitration and how to handle the tribunal’s fees.

Moreover, if the parties do not want to draft all their own arbitration rules, they can adapt an established set of arbitral procedural rules, such as those of UNCITRAL. The UNCITRAL Rules, prepared in consultation with lawyers from a range of countries, were specifically designed for the purpose of assisting in ad hoc arbitration.

Ad hoc arbitration may be particularly suitable where one party to a commercial contract is a state or state-owned entity. Independent states are sometimes reluctant to submit to the authority of an institution. In such instances, resorting to an arbitration clause adopting ad hoc arbitration can assist in closing the commercial deal.

For all its flexibility, ad hoc arbitration poses some significant risks. In particular, there is no arbitration institution to assist the parties if difficulties arise during the dispute resolution process. Parties instead have to ensure they adequately provide for every contingency which could occur – including those that could hinder or halt the arbitration (for example, a seriously ill arbitrator). Parties may find it difficult to anticipate all potential contingencies at the time of contract negotiation, which can create uncertainty later.

In ad hoc arbitrations where there is disagreement on the procedural rules to apply, the parties and the arbitrators will generally look to the law most logically connected to the arbitration, whether that is where the arbitration hearing is to be held or the substantive law selected by the parties under the contract. This often gives rise to further disagreements and may subject the parties to rules both unsuitable and undesirable. In the worst-case scenario, the lack of clarity can spawn satellite litigation or a complete breakdown of the process. This, in turn, may threaten the enforceability of the award.

CONCLUSION

While there are benefits and drawbacks to both institutional and ad hoc arbitrations, many sophisticated commercial enterprises prefer the structural guidance and procedural predictability of institutional arbitration. However, businesses minded to opt for institutional arbitration should consider carefully the rules of the various institutions as they do vary. For those who are attracted by the idea of an institution handling administrative matters, but who desire the flexibility of an ad hoc procedure, there is a middle ground. A number of international institutions, such as the ICC and the LCIA, will administer arbitrations under the UNCITRAL Rules. ■



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Key Points

- A key decision when drafting an arbitration clause is whether to choose institutional or ad hoc arbitration
- Advantages of institutional arbitration include a set procedural framework, promoting clarity and efficiency, guidelines for unforeseen contingencies and guidance when administrative impasses arise. Disadvantages include expense in particular
- In ad hoc arbitration, parties can design their own rules and procedures. However, there is no institution to assist if difficulties arise.

All change in Hong Kong: a commentary on proposed amendments to the Hong Kong arbitration ordinance

The Government of Hong Kong recently published a Consultation Paper on Reform of the Law of Arbitration, together with a draft Arbitration Bill.

It is proposed that following the consultation, a new Arbitration Ordinance based largely on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) will come into force. On the current timetable for this process, it is envisaged that the Draft Arbitration Bill will be passed into law in 2009. This article considers whether the proposed reforms will achieve their objectives and whether any opportunities have been missed.

THE CURRENT LAW

The current Arbitration Ordinance has different regimes for “domestic” and “international” arbitrations. Domestic arbitration is governed by Part II of the current Ordinance and is largely based on the English Arbitration Act 1950 (which itself has now been repealed). International arbitration is governed by Part IIA of the current Ordinance and is governed by the Model Law, which is incorporated by reference into the Ordinance. The domestic regime was updated in 1996 to minimise differences with the international arbitration regime. At the same time, it was acknowledged that the Ordinance should be redrawn in order to apply the Model Law to both regimes.

THE AIM OF THE REFORM

The aim of the reform is to create a new Arbitration Ordinance which will be as user-friendly as possible to users of arbitration in and outside Hong Kong. Adherence to the Model Law will, it is hoped, enable the Hong Kong business community and arbitration practitioners to operate in a regime which accords with widely accepted international arbitration practices and developments.

The Government intends that the new Ordinance will encourage more international business parties to choose Hong Kong as their place of arbitration. This in turn should reinforce and promote Hong Kong as the leading regional centre for legal services and dispute resolution.

A UNITARY REGIME?

The draft Arbitration Bill attempts to apply the Model Law to both the domestic regime and the international regime. However, it also introduces provisions which enable parties to contract out of the full effect of the Model Law, which undermines the legislative aim of creating a unitary regime.

It could be argued that the change to the domestic regime has been rendered somewhat illusory by the proposal that parties to arbitration agreements will be able to opt-in to certain key provisions that had previously only applied to domestic arbitrations. In addition, these opt-in provisions will automatically apply to domestic arbitration agreements entered into before the new Ordinance comes into force and to domestic arbitration agreements entered into at any time within a period of six years of the Ordinance becoming law.

This would enable parties, for example, to agree to allow a preliminary question of law to be determined by the courts or to permit an arbitral award to be challenged in the courts on the grounds of serious irregularity or to be appealed on a point of law. These “domestic” features have been retained after some lobbying by the largest group of users of arbitration in the jurisdiction. However we fear that, in doing so, a chance has been missed to increase the finality and autonomy of the arbitral process, for example by allowing recourse against an award to be limited only to the procedural grounds in Article 34 of the Model Law.

Arguably this important concession also represents a step backwards in the promotion of the ideals of arbitration, i.e. minimal court interference, and of Hong Kong’s role as a regional leader in international arbitration.

FEATURES OF THE OLD REGIME SURVIVE

Some provisions of the old regime have been retained in the draft Bill. For example, the tribunal is empowered to make an award on costs both of the proceedings and of any request by a party for a direction or interim measure. In making its award, the tribunal should take into account all relevant circumstances, such as the fact that a party has made an offer during the proceedings to settle the dispute and the conduct of the parties during the proceedings. In addition, the parties are able to agree that the costs of the arbitration should be assessed by the courts. There is a clear “court litigation” flavour to this provision. Instead, the new Arbitration Ordinance could have further increased the autonomy of the arbitral process by giving the tribunal absolute discretion to award costs.

CONFIDENTIALITY

Confidentiality of the proceedings is one of the most attractive features of arbitration but it is not dealt with by the Model Law. One of the most notable features of the draft Bill is that any court proceedings relating to arbitral matters will be heard in open court, unless a party applies for an order to the contrary. Currently, court proceedings are to be heard behind closed doors, unless a party applies for an order with the opposite effect. The proposed change arguably undermines one of the key attractions of arbitration.

The Government cites the need to balance the protection of the confidentiality of arbitral proceedings against the public interest in having transparency of process and public accountability of the judicial system. However, given the importance that parties accord to matters of confidentiality and the stated aim of attracting international and local businesses to use Hong Kong as an arbitration hub, this proposed change is surprising.

On a more positive note, the draft Bill maintains statutory protection of arbitral confidentiality by providing for a general rule of confidentiality in arbitration proceedings with limited exceptions.

INTERIM MEASURES

The draft Bill largely adopts the Article 17 Model Law provisions on interim measures. The main difference is that Article 17J (relating to court-ordered interim measures) is excluded. Instead, the draft Bill preserves the existing position in Hong Kong that the court is able to order interim measures in relation to arbitral proceedings seated both in or outside Hong Kong. This is subject to the requirement that if the measure relates to foreign arbitral proceedings, it will only be granted if those proceedings are capable of giving rise to an arbitral award which may be enforced in Hong Kong and that the measure is of a type that may be made by a court in Hong Kong in relation to arbitral proceedings seated in Hong Kong.

In our view, the first condition of linking the enforceability of the award to the granting of an interim measure is unnecessary. It is often too early for anyone to form any meaningful view on the ultimate enforceability of an award at the time of granting an interim measure. It is open to the parties to change their case at any time prior to the issuance of an award.

It is preferable that the interim measure be dealt with on its own merits, with issues concerning the enforceability of the award being left to the enforcement stage.

CONCLUSION

There is no doubt that the aims motivating the reform of Hong Kong's arbitration law are admirable. In many ways, the draft Bill is an improvement and represents a step forward for Hong Kong arbitration law in that there will be one unified piece of legislation.

When one bears in mind the key factors that influence parties' decisions to opt for arbitration over litigation (for example, finality, procedural flexibility, limited court interference and confidentiality), it is questionable as to how much of a change the reforms will represent in practical terms and as to how "pro-arbitration" they actually are. By not minimising the opportunities for the courts to be involved in the arbitral process and thereby failing to reinforce the finality, autonomy and confidentiality of the arbitral process, a valuable opportunity may have been missed to legislate for arbitration in Hong Kong as a real or more attractive alternative to litigation. Hong Kong risks sending the wrong signal to the international business community.

A version of this article first appeared in the September 2008 issue of the IBA Arbitration Committee Newsletter. ■



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All change in Hong Kong: a commentary on proposed amendments to the Hong Kong arbitration ordinance *continued...*

Key Points

- The Hong Kong Government has published a consultation paper on reform of the law of arbitration, with a draft Arbitration Bill
- The draft Bill is based on the UNCITRAL Model Law, with some changes. It is envisaged that it will pass into law in 2009
- The aim of the reform is to create a user-friendly arbitration law which will attract encourage international businesses to choose Hong Kong as a place of arbitration
- The reform does represent a step forward, but there are ways in which it arguably does not go far enough.

Contacts

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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