K&L GATES

ARBITRATION WORLD

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125 ARBITRATION LAWYERS ACROSS 40 OFFICES

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MORE THAN
110
ARBITRATION
DISPUTES
CURRENTLY

12
CURRENT
ARBITRATOR
APPOINTMENTS
(6 AS SOLE ARBITRATOR
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Through 2020 we expect to publish regular stand-alone updates and articles on International Arbitration topics which will appear on K&L Gates Hub. A compendium of the articles will then be drawn into the e-magazine format Arbitration World publication.

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FROM THE EDITORS:

WELCOME TO THE 37TH EDITION OF K&L GATES' *ARBITRATION WORLD*.

Welcome to the 37th edition of *Arbitration World*, a publication from K&L Gates' International Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution.

At the time of publication of this edition, countries worldwide are seeking to cope and come to terms with the emerging Coronavirus (COVID-19) pandemic. As a firm, we are publishing alerts and other content, including a webinar series, specifically devoted to the implications of the virus for the business community, on K&L Gates HUB under the section "**Responding to COVID-19**".

In this edition of *Arbitration World*, we include our usual update on developments from around the globe in international arbitration and investment treaty arbitration, including an update the current status concerning the potential implications of the *Achmea* decision of the Court of Justice of the European Union.

We review the Swedish Arbitration Act 2019, aimed at fostering Sweden's standing as an attractive venue for arbitration. Third party funding of arbitration is now permitted in Hong Kong and we consider the potential significant of this development. With regard to the United Arab Emirates (UAE), we review the UAE Arbitration Law, introduced in 2018, and how it can be expected to shape arbitration in the UAE going forward and consider a mechanism introduced to allow the expedited enforcements of foreign arbitration awards in the UAE. We also re-produce two articles that were previously the subject of Arbitration World Alerts, in particular a report of a decision by the New York Appellate Division, First Department affirming New York's pro-arbitration policy and the limits of judicial review of arbitration awards in the United States, and a discussion of 28.U.S.C. §1782 and how it can result in U.S. resident companies / persons having to provide information or documents to foreign arbitration proceedings, and its potential application to trade secrets.

We hope you find this edition of *Arbitration World* of interest and we welcome any feedback (e-mail **ian.meredith@klgates.com** or **peter.morton@klgates.com**).

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ARBITRATION NEWS FROM AROUND THE WORLD

James Lightley-Hunt (Dubai) and Jonathan Graham (London)

AFRICA

Ethiopia

On 13 February 2020 the Ethiopian parliament approved the ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, making it the 162nd country to ratify the New York Convention, and the 33rd African country to do so, following South Sudan and Cape Verde in 2018, and Angola in 2017. Ethiopia's adoption of the New York Convention comes amidst a wider overhaul of the country's arbitral process, with it being reported that a new domestic arbitration law is currently being consulted on, expected to be based on the UNCITRAL Model Law.

South Africa

Following the enactment of the South African International Arbitration Act 2017 (the **"2017 Act"**) in December 2017 (reported in the 36th edition of Arbitration World), the South African Supreme Court of Appeal has heard its first case concerning the application and extent of the 2017 Act. In Atakas Ticaret VE Nakliyat AS v Glencore International AG (768/2018) [2019] ZASCA 77, the Court was required to consider whether the 2017 Act would prohibit the Court from exercising its discretion under the Admiralty Jurisdiction Regulation Act 1983 (the **"1983 Act"**) to join a party to Court proceedings, in circumstances where there was an arbitration agreement between the party to be joined and the claimant. The Court examined both the 2017 Act, which expressly repeals specific items of South African legislation but makes no reference to the 1983 Act, and Article 1(5) of the UNCITRAL Model Law, which as incorporated into the 2017 Act provides that the 2017 Act shall not affect any other South African law which provides that certain disputes are not arbitrable, or are arbitrable only in accordance with other legislative provisions. Relying on these two matters, the Court held that the 2017 Act did not affect the Court's discretion to join a party to proceedings under the 1983 Act and ordered the joinder, despite the existence of an arbitration agreement between the claimant and the joined party.

AMERICAS

Brazil

The Brazilian Superior Court of Justice has considered the topic of partial arbitration awards and whether they can be the subject of annulment under the provisions of the Brazilian Arbitration Act

2015. In *Fischer América Comunicação v Pro Brasil Propaganda, State Court of Appeal nº 1.543.564/S*, a party sought a stay and annulment of a partial arbitral award. The Sao Paulo State Court granted the application. However, the decision was reversed on appeal with the appellate judge ordering that only a final arbitral award was capable of being challenged by an action to annul. The matter was then appealed to the Brazilian Superior Court of Justice, which referred to provisions of the Brazilian Arbitration Act that expressly provide for both the rendering of, and annulment proceedings against, partial awards, and found that the partial award in question was final and binding in respect of the issues decided and therefore a valid basis of an action to annul.

United States

The United States Federal Court of Appeal for the Ninth Circuit has considered the issue of what constitutes a foreign "arbitral award" capable of enforcement under the New York Convention. *Castro v. Tri Marine Fish Company LLC, et al.* involved the attempted enforcement as an arbitral award by an employer of an "order" concerning the payment of compensation for personal injuries suffered by an employee, which had been drawn-up and executed before an accredited arbitrator in American Samoa prior to the formal commencement of arbitration proceedings. When the employee attempted to sue his employer in the Washington state court for additional damages, the employer invoked the New York Convention to have the order confirmed in the Federal Court as a binding foreign arbitral award. The Federal Court confirmed the order as an arbitral award and dismissed the employee's claim. However, the Federal Court of Appeal reversed the decision, finding that the order was in reality nothing more than a settlement agreement dressed-up by the employer so as to be enforceable under the New York Convention. In making its decision, the Federal Court of Appeal noted that the New York Convention does not define an "arbitral award" and found that in the absence of a definition, "common meaning and common sense" should be applied. The Federal Court of Appeal held that for there to be an arbitral award in existence capable of enforcement, an arbitration must have been taken place.

ASIA

India

In August 2019, President Kovind assented to amendments to India's Arbitration and Conciliation Act (the **"Indian Act"**). Notable amongst these is the creation of an Indian Arbitration Council (the **"Council"**), which aims to promote and develop arbitration and other forms of alternative dispute resolution in India. The Council will be composed of senior judges, experienced arbitration practitioners, and academics. Members will be appointed by the central government. One power to be exercised by the Council will be the "grading"

of arbitral institutions for designation as such by the Indian Supreme and High Courts. The criteria for grading will include infrastructure, quality and calibre of arbitrators, performance, and compliance of time limits for disposal of domestic and international arbitrations. It remains to be seen how these powers will be exercised in practice, particularly with respect to already established international arbitral institutions, and whether the Indian government intends to take an active role in the regulation of arbitration through its appointments to the Council. The Indian Act also sets strict qualification requirements for arbitrators appointed to arbitrations seated in India, which require an individual to have either a professional qualification within the meaning of the Indian laws regulating those professions, another Indian qualification, or experience within an Indian institution. All arbitrators must also be conversant with the Constitution of India. As such, the Indian Act may, in practical terms, limit non-Indian qualified individuals from sitting as arbitrator in Indian-seated arbitrations.

People's Republic of China

In August 2019, the State Council of China announced that international arbitration and dispute resolution institutions would be permitted to establish businesses in the Shanghai Free Trade Zone for the administration of arbitrations seated in mainland China. This follows the establishment of representative offices in the Shanghai Free Trade Zone by several international arbitration institutions, including the ICC and Singapore International Arbitration Centre, for marketing purposes. Granting the major arbitral institutions the power to administer arbitrations within mainland China is a significant and positive step in the development of international arbitration in China, although the detail and implementation of the policy remains to be substantively legislated.

Singapore

In *BVU v BVX [2019] SGHC 69* the High Court of Singapore ruled that an arbitration award would not be set aside on the basis of public policy or fraud simply because the successful party had failed to call certain witnesses or make certain disclosure requested by the unsuccessful party. The Court confirmed a three-fold test to be applied to set aside an award for non-disclosure or suppression of evidence. First, it must be shown that there is deliberate concealment aimed at deceiving the arbitral tribunal. The Court held that the claimant had not deliberately concealed or withheld relevant material evidence. Second, there needs to be a causal link between the alleged concealment and the decision in favour of the concealing party. The Court found that the respondent's failure to call the particular witness requested by the claimant or to disclose the internal documents sought

"In August 2019, the State Council of China announced that international arbitration and dispute resolution institutions would be permitted to establish businesses in the Shanghai Free Trade Zone for the administration of arbitrations seated in mainland China."

would not have impacted the outcome of the arbitration. Finally, was there good reason for the non-disclosure. The Court found that an intentional decision to take the risk of having an adverse inference drawn against a party, as a result of non-disclosure, was part of the adversarial process and not unconscionable conduct. There had been no obligation on the respondent to call the witness whom the claimant wanted to call or adduce the documents the claimant had requested. Under Article 3.1 of IBA Rules on the Taking of Evidence in International Arbitration, parties are only required to voluntarily disclose documents *"available to it on which it relies"* – disclosure obligations which are narrower than in many Common Law jurisdictions.

EUROPE

England

In *Filatona Trading Ltd and another v Navigator Equities Ltd and others* [2019] EWHC 173 (Comm) the English High Court dismissed a challenge to an award brought on the grounds of jurisdiction

(section 67 Arbitration Act 1996 (the **"1996 Act"**)) and serious irregularity (section 68 of the 1996 Act). The dispute arose from a shareholder agreement (the **"SHA"**) in respect of land in Moscow. Under section 48(5) of the 1996 Act an arbitral tribunal seated in England has the same powers as the English Court. The claimant argued that the arbitral tribunal did not have the power to order a $95 million "buy out" of shares in the relevant Cypriot company, as the English Court would not have such authority in respect of a foreign company. However, the Court referred to section 48(1) of the 1996 Act by which the parties are free to agree on the powers exercisable by the tribunal as regards remedies. The Court concluded that the SHA provided the parties with this relevant power.

In *Sabbagh v Khoury & Ors* [2019] EWCA Civ 1219 the Court of Appeal held that the English Court had jurisdiction to grant an anti-arbitration injunction in exceptional circumstances where foreign arbitration would be vexatious or oppressive. The defendants/ appellants appealed against an injunction restraining them from pursuing an arbitration in Lebanon. The case concerned a family dispute over the assets and shares in a large Middle Eastern construction company following the death of the group's founder. The claimant/respondent, the late founder's daughter, had issued proceedings in England contending that the appellants, who included the late founder's sons, conspired to deprive her of her entitlement to the holding company's shares. Shortly afterwards, the appellants commenced an arbitration in Lebanon pursuant to the holding company's articles of association, and applied to the English Court to stay the English proceedings, under section 9 of the 1996 Act. The Court refused to grant a stay, and the respondent went on to obtain an anti-arbitration injunction. The Court held that neither the assets nor share claim fell within the Lebanese arbitration agreement. The appellants appealed against the decision to award an injunction to the Court of Appeal, who, whilst allowing the appeal in part, ruled that the English Court had jurisdiction to grant an injunction to restrain a foreign arbitration where it would be vexatious and oppressive. The Court of Appeal clarified that the general rule that the Court would not grant anti-suit injunctions in cases not involving exclusive jurisdiction clauses, unless England was the natural forum, did not apply to the grant of an anti-arbitration injunction. Although, the Court emphasised that it would still be "exceptional" for the Court to grant an anti-arbitration injunction restraining foreign arbitration, the Court appears to have been persuaded to grant such an

injunction in this case on the basis of nothing more exceptional than English proceedings, which concerned, at least in part, matters that did not fall within the Lebanese agreement.

In *Soletanche Bachy France SAS v Aqaba Container Terminal (PVT) Co* [2019] EWHC 362 (Comm), the Commercial Court provided insight into the English Court's approach to challenges to arbitrators on grounds of impartiality. The claimant applied to set aside an award in relation to the termination of a construction contract on the grounds, inter alia, of serious irregularity causing substantial injustice, pursuant to section 68 of the 1996 Act. The claimant was contracted to construct an extension to the defendant's container terminal. Before completion the defendant served notice to terminate. After termination the work had been completed by a replacement contractor, B. B had previously been a competitor with the claimant in the tender process. At the commencement of the arbitration, the claimant submitted documentation alleging that there had been corruption involving an employee of the defendant and B, which led to B obtaining the successor contract. One of the arbitrators (Arbitrator X) disclosed he was retained by B as Counsel in an unrelated dispute. The claimant waived any conflict of interest that might exist.

In this unrelated matter, Arbitrator X's initial instruction by B morphed into advising and having an involvement in the pleadings in an active arbitration. Arbitrator X, who had previously disclosed that all his contact with B had been through its solicitors, also went on to have direct contact with B, both of a business and social nature. The claimant claimed that the change of circumstances should have been disclosed. The Court held that given that Arbitrator X had disclosed his initial instruction by B, the change in circumstances were not material. Even if there had been a duty to disclose, a successful challenge under section 68 of the 1996 Act would require the Court to find there has been apparent bias. In this case, the Court held that no reasonable objective observer could conclude that there had been a risk of lack of impartiality by Arbitrator X. The Court found that an arbitrator is not obliged to provide further disclosure unless there is a significant change in any of the circumstances already disclosed. Once he has disclosed "the essentials" of a potential conflict, there is no obligation to provide further disclosure unless there is a material change of circumstances.

Sweden

On 1 March 2019, Sweden's revised Arbitration Act entered into force. Some of the more notable revisions relate to the appointment of the tribunal, consolidation of arbitrations, determination of the applicable substantive law, enhanced party autonomy and the procedure for challenging an award. Under the revised Act, where a party applies to set aside an award on the ground that the arbitral tribunal exceeded its powers, it must show that the excess of mandate

affected the outcome of the arbitration. The arbitral tribunal is also permitted to determine the applicable substantive law in the absence of agreement by the parties.

MIDDLE EAST

United Arab Emirates ("UAE")

In September 2018, Article 257 of the UAE Penal Code, which since December 2016 had imposed potential criminal liability, punishable by imprisonment, on arbitrators who issue decisions and opinions contrary to their duties of impartiality and neutrality, was amended by Presidential decree. The enactment of Article 257 had caused concern amongst the arbitration community and had been presented by some as a backwards step in the development of the UAE as an arbitration-friendly jurisdiction, although it was difficult to assess whether or not the provision had much impact in practice. The amendment excludes arbitrators from the scope of Article 257, although investigators and translators (as stated in the amendment), remain subject to potential criminal liability under the provision.

INSTITUTIONS

International Chamber of Commerce (ICC)

The ICC published an updated *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* (the **"Note"**) in December 2018. Included in the Note is a new policy on the publication of awards by the ICC, in which all awards made from 1 January 2019 onwards may, by default, be published in full by the ICC no less than two years after the date of notification to the parties. However, any party may, at any time before publication, object to publication or require that the published version of an award be anonymised or pseudonymised. Furthermore, the new policy provides parties with an opt-out to publication entirely. The ICC's new policy on publication has not (yet) been reflected in an amended version of the ICC Rules.

Hong Kong International Arbitration Centre (HKIAC)

HKIAC's Administered Arbitration Rules 2018 (the **"Rules"**) came into effect on 1 November 2018. Particularly notable is the requirement under the Rules that parties benefitting from third-party funding must give written notice to all parties, the arbitral tribunal and HKIAC of the existence of its funding agreement and the identity of the third-party funder. These details must be provided in a party's Notice of Arbitration or Answer to Notice of Arbitration, as applicable, on the commencement of the arbitration or thereafter as soon as practicable after the funding agreement is made. The arbitral tribunal may take any third-party funding arrangement into account when determining costs. The topic of

developments in third-party funding in Hong Kong is covered in a separate article in this edition.

In April 2019, HKIAC became the first foreign institution to become recognised as a "permanent arbitral institution" in Russia by the Council for the Development of Arbitral Proceedings at the Russian Ministry of Justice. The Russian Ministry of Justice signed a decree including HKIAC on the list of foreign arbitration institutions with "permanent" accreditation, making HKIAC the first foreign arbitral institution allowed to administer disputes in Russia.

Vienna International Arbitration Centre (VIAC)

Following the decision of the Russian authorities in relation to the HKIAC, an application by the VIAC to administer international arbitration disputes with Russian parties and with Russia as a seat of arbitration was approved on 18 June 2019. Since 11 July 2019, VIAC is now officially listed in the list of foreign institutions recognised as permanent arbitration institutions under Russia's Federal Law of Arbitration 2015. It is anticipated that other arbitral institutions may submit similar applications.

London Court of International Arbitration (LCIA)

As of May 2019, Paula Hodges QC was appointed as President of the LCIA Court, replacing Judith Gill QC.

New Delhi International Arbitration Centre (NDIAC)

In June 2019, the Union Cabinet of Ministers approved the Bill by The New Delhi International Arbitration Centre, establishing the NDIAC. The Indian government anticipates that the NDIAC will become the leading arbitral institution in India.

International Council for Commercial Arbitration (ICCA)

It was announced that Gabrielle Kaufmann-Kohler will be replaced by Lucy Reed as president of the ICCA in May 2020.

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WORLD INVESTMENT TREATY ARBITRATION UPDATE

By Wojciech Sadowski (London)

In each edition of Arbitration World, members of K&L Gates' Investment Treaty practice provide updates concerning recent, significant investment treaty arbitration news items. This edition features the current state of play concerning the implications of the judgment of the European Court of Justice in the *Achmea* case, the recent loss of Pakistan in the ICSID arbitration against Tethyan Copper Company and the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

THE CURRENT STATUS OF ACHMEA

The judgment of the Court of Justice of the European Union ("CJEU") in the case *Achmea B.V. v. the Slovak Republic*, C-284/16, issued on 6 March 2018, is probably the single most impactful development in the investment treaty world in Europe recently. The eventual reach of its implications remains to be seen and it may take years for the implications of that seminal decision to crystallize.

So far, none of the arbitral tribunals sitting in investment treaty cases has declared lack of jurisdiction because of the *Achmea* judgment, although a growing number of prominent arbitrators have resigned from cases in which the *Achmea* defence was raised, and the approaches displayed by the various arbitral tribunals have been diverse.

Some tribunals have chosen to avoid dealing with the problem of *Achmea* implications for the cases before them, on the grounds that the proceedings had already been closed by the time the judgment was rendered. Some arbitral tribunals sitting under the Energy Charter Treaty ("ECT") declared that the *Achmea* judgment does not apply to the cases brought under that treaty *(Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12) and Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1)*. In a non-ECT case *(UP and CD Holding Internationale v. Hungary (ICSID Case No. ARB/13/35)* the arbitral tribunal also held that the *Achmea* judgment does not apply to investment treaty cases proceeded in accordance with the ICSID Convention, since they are entirely insulated from national courts. In its turn, in *Marfin Investment Group Holdings S.A. et al. v. Cyprus (ICSID Case*

No. ARB/13/27), the arbitral tribunal abstained from drawing consequences from the Achmea judgment, noting that it would be for national courts "*to draw the necessary consequences from the Achmea judgment and their national laws with respect to the enforceability of this Award.*"

The standpoint taken by the Member States of the European Union ("EU Member States") with respect to the *Achmea* judgment, on the other hand, is much more aligned with the views of the CJEU. Most of the new EU Member States, which joined in 2004 or later, as well as some of the old EU Member States that have recently been seen frequently on the receiving end of investment treaty claims, have all embraced the CJEU judgment and raised the *Achmea* objection as a defence in all pending arbitrations, as well as in the post-arbitration proceedings. Some of these countries, including Poland, have even taken the decision to terminate all intra-EU bilateral investment treaties ("BITs"). Such move has indeed been promoted and required by the European Commission and may be expected to be followed by other Member States.

It is remarkable in this context that the EU Member States which traditionally supported investment protection treaties and defended compatibility of investment treaty proceedings with the EU law in the course of the *Achmea* proceedings before the CJEU, appear to have changed their position after March 2018. Germany has raised the *Achmea* objection in the *Vattenfall* arbitration and following the decision of the arbitral tribunal in that case, moved to disqualify the entire tribunal.

On 15 and 16 January 2019, the EU Member States issued three concurrent declarations on the legal consequences of the *Achmea* judgment. In those declarations, all Member States took the unanimous position against the arbitrations based on the intra-EU BITs. Moreover, 22 EU Member States also took the position on the inadmissibility of intra-EU arbitrations based on the ECT, while five Member States abstained from taking any view on that issue and one Member State (Hungary) declared that in its view the *Achmea* judgment does not apply to the ECT-based cases.

Then, the Swedish Court of Appeal refused to annul the award rendered in the *PL Holdings S.à.r.l. v. Republic of Poland (SCC Case No. V 2014/163)* on the basis that the *Achmea* jurisdictional objection was not raised before the arbitral tribunal.

On 30 April 2019, the CJEU issued the Opinion 1/17 confirming that the Investor State Dispute Settlement mechanisms in free trade agreements negotiated by the EU with third countries could be compatible with the EU law, if certain conditions (such as these present with the Comprehensive Economic and Trade Agreement with Canada) were met. In the Opinion 1/17 the CJEU distinguished between intra-EU bilateral investment treaties and the agreements with third countries, because of the operation of the mutual trust principle within the EU.

Tethyan Copper Company vs. Pakistan

On 9 July 2019, and ICSID arbitral tribunal rendered the damages award in *Tethyan Copper Company v. Islamic Republic of Pakistan (ICSID Case No. ARB/12/1)*, condemning Pakistan to pay over USD 4 billion in damages, along with legal interest in excess of USD 1.7 billion, and costs in excess of USD 60 million (combining both arbitration and legal costs). It is considered the second largest damages award in the history of ICSID.

The dispute concerned one of the world's largest known copper and gold deposits in the province of Balochistan. Tethyan Copper Company ("Tethyan") , which is a joint venture of Antofagasta and Barrick Gold, initiated a process to develop the Reko Diq mine in partnership with the province. Ultimately, however, Pakistan refused to lease the mine to Tethyan, which provoked the initiation of the ICSID proceedings in 2011.

In the course of the proceedings that lasted eight years, Pakistan attempted twice to disqualify the members of the arbitral tribunal. The first challenge was directed solely against the claimant's appointee. The second, following the unsuccessful outcome of the first challenge, was addressed against the entire composition of the tribunal.

Pakistan also argued that the investment was tainted by corruption and relied on a judgment of its Supreme Court from 2013, which declared the investment agreement void on the grounds of corruption. In the ICSID arbitration, however, the arbitral tribunal considered that the corruption was not proven. The judgment of the Supreme Court did not, according to the arbitrators, affect the obligations that Pakistan had towards the investor.

The jurisdiction and liability decision was issued in 2017. The most recent award, running to 629 pages, represents a detailed analysis by the arbitral tribunal of quantum and cost-related issues.

On 9 August 2019, Tethyan initiated the enforcement procedure before the U.S. courts in Washington D.C.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership

On 30 December 2018, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (the "CP-TPP" or the "TPP-11") entered into force for Mexico, Japan, Singapore,

New Zealand, Canada and Australia. On 14 January 2019 it entered into force for Vietnam. The treaty was signed on 8 March 2018 by eleven states, notably Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. So far, it has been ratified by Mexico, Japan, Singapore, New Zealand, Canada, Australia and Vietnam. It is the successor of the Trans-Pacific Partnership Agreement which was signed in 2016, but never entered into force because of the withdrawal of the United States. The CP-TPP has created the third largest free trade area in the world measured by gross domestic product. Assuming the United States-Mexico-Canada Agreement ("USMCA") enters into force, then after the lapse of the three-year transitional period, CP-TPP shall be the only legal base for investment treaty claims between Mexico and Canada.

Similar to other modern free trade agreements, the CP-TPP includes a chapter on investment treaty protection. The chapter is divided into sections dealing separately with the substantive standards of investment protection and investor-state dispute resolution mechanism. In accordance with the now prevailing trend in the investment treaty practice, the CP-TPP offers the investors a narrower scope of protection in comparison with the old-generation BITs, both with respect to the substantive protection of investments as with respect to the ability to prosecute the claims in international arbitration. The CP-TPP also includes provisions intended to counteract potential abuses, including the denial of benefits clause.

As an example of how the protection of investors is limited in comparison with the old-type bilateral investment agreements, in the CP-TPP the concept of the minimum standard of treatment is taking the place of the broader and vaguer fair and equitable treatment standard. The CP-TPP not only defines the minimum standard of treatment as the customary international law minimum standard of treatment of aliens, but it further prescribes that "customary international law" results from a general and consistent practice of states that they follow from a sense of legal obligation. Then, the CP-TPP imposes on the investor the burden of proving all elements of its claims related to the minimum standard of treatment, which may be seen as an increased evidentiary obligation to establish before the arbitral tribunal the existence of such practice of the States.

Regardless of these shortcomings, the entry into force of the CP-TPP is a major positive step forward in the protection of international investment in the Pacific Rim region.

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THE NEW SWEDISH ARBITRATION ACT

By Johann von Pachelbel (Frankfurt)

The Swedish Arbitration Act has been revised and became effective on 1 March 2019 (the "SAA 2019"). The revisions of the former SAA of 1999 (the "1999 Act") contain amendments aimed at modernising the act so as to foster Sweden's standing as an attractive venue for domestic and international arbitration. The SAA 2019 orientates towards the UNCITRAL Model Law and applies in ad hoc and institutional proceedings seated in Sweden initiated after 1 March 2019. Some of the new key features of the SAA 2019 are set out below.

JURISDICTIONAL OBJECTIONS – SHORTER DEADLINES APPLY

Under the 1999 Act, the parties had the option of bringing a declaratory action to the District Court in Sweden to determine jurisdiction at any time during the arbitration proceedings. According to the SAA 2019 the parties may – in order to avoid uncertainty and parallel proceedings – only bring such actions prior to the commencement of arbitration, unless the other party does not object to such parallel proceedings following its commencement. Additionally, and in conformity with Art. 16 (3) UNCITRAL Model Law, the SAA 2019 stipulates that if the arbitrators have decided that they have jurisdiction over a dispute, any appeal of this decision to the Court of Appeal must be made within a newly introduced deadline of 30 days, resulting in a final decision on jurisdiction. Like under the old law, the arbitration may continue in parallel with the court proceedings and a party may challenge an arbitral award on jurisdictional grounds in set-aside proceedings at the Court of Appeal.

POSSIBILITY FOR CONSOLIDATION OF ARBITRATIONS

The Swedish act for the first time includes a provision entitling a party to request the District Court to consolidate one arbitration with another if the following three conditions are met: (i) no party objects, (ii) the arbitrator(s) consider the consolidation to be advantageous for the administration of the arbitration and (iii) the same arbitrators have been appointed in both arbitrations (Section 23a, SAA 2019).

The new rule is following a development implemented by many modern institutional rules of arbitration, such as for example the International Chamber of Commerce (ICC) Rules 2017 and the Stockholm Chamber of Commerce (SCC) Rules 2017, which each provide for both consolidation and joinder.

DETERMINATION OF THE APPLICABLE SUBSTANTIVE LAW

The 1999 Act did not prescribe how the substantive law applicable to the dispute should be determined. The SAA 2019 now provides guidance in this respect. Unless otherwise agreed by the parties, the arbitrator(s) shall apply the law or set of legal rules the parties have agreed to, which generally includes the substantive law but not a reference to such law's choice of law rules, as expressly set out in the SAA 2019 (Section 27a, para. 1). Failing an agreement of the parties, the arbitrator(s) shall determine the applicable law in the individual case (ibid., para. 2). In the absence of a specific basis for such determination set out in the SAA 2019 the arbitrators may decide the applicable law as they consider it appropriate. However, the arbitrator(s) shall not adopt *ex aequo et bono* as a legal basis unless the parties have explicitly agreed thereon.

CHALLENGE OF AN AWARD – AN INCREASE OF EFFICIENCY

An important change, and a potential challenge for the parties, compared to the former law follows from the shortening of the time-limit for bringing a challenge of an arbitral award from three to two months from receipt of the award (Section 34, SAA 2019). Also, the deadline for contesting an award whereby the arbitrators concluded the proceedings without ruling on the issues submitted to them for resolution (Section 36, SAA 2019) or decisions regarding the arbitrators' compensation (Section 41, SAA 2019) have been shortened to two months.

Another innovative feature in the new act entitles the Courts of Appeal and the Supreme Court handling challenge proceedings, upon the request of a party, to allow the parties to take oral evidence in English without requiring a translation to Swedish (Section 45, SAA 2019).

One rather peculiar provision from the 1999 Act has survived the latest revision, now appearing at Section 33 of the SAA 2019. According to that stipulation no time-limit applies to the challenge of a so-called invalid award, i.e., an award violating public policy or where the dispute lacks arbitrability or if an award is not made in writing or not signed. The persisting uncertainty regarding the

final and binding nature of an award following the expiry of the usual time for filing a challenge and inherent to Section 33 has been debated in the past. Here, it needs to be taken into account that alleged breaches against public policy have globally become a frequently invoked ground for challenges of arbitral awards. However, the Swedish legislator underscored that – *inter alia* – it must be avoided that arbitral awards violating, for example, the Swedish public policy become enforceable with the support by the Swedish legal system solely because of the expiry of a time-limit for a challenge. Thus, the Swedish legislator preferred to maintain Section 33 in unmodified form.

NEW CAUSALITY REQUIREMENT FOR CHALLENGING AN AWARD BECAUSE OF EXCESS OF MANDATE

The general requirement for the setting aside a challenged award because of procedural error requires that the error "must probably have affected the outcome of the case". This requirement – going beyond the requirements set out by the UNCITRAL Model Law – has now also been added to the SAA 2019 for a challenge of an award due to an excess of mandate (Section 34.3, SAA 2019). Thus, if the tribunal has exceeded its mandate, a challenge and setting aside of the award based thereon still requires that the excess of mandate has "probably" affected the outcome of the case.

LEAVE TO APPEAL TO THE SUPREME COURT MAY BE LIMITED

The decision of the Appeal Court on a challenge of an arbitral award may only be appealed to the Supreme Court if the Appeal Court has granted leave to appeal in consideration of the importance of the disputed issue as a matter of precedent. In the past, such appeal was admissible to all issues in the case provided the Appeal Court had granted leave. However, the Supreme Court may limit the scope of its examination and determine which issues are of precedential value and, thus, permitted to be heard and decided by the Supreme Court (Section 43, SAA 2019).

CONCLUSION

The implementation of the SAA 2019 can be expected to reinforce Sweden's proven arbitration-friendly approach while maintaining some features unique to Swedish arbitration. The revised legal framework is aligned with modern sets of arbitration rules and should serve to increase the effectiveness of domestic and international arbitrations seated in Sweden. The SCC Secretary General Annette Magnusson summarised the revised Swedish statutory rules as follows: "The revised Arbitration Act ensures that Sweden maintains its role as a jurisdiction with a strong, modern legal framework for international dispute resolution. The new legislation is in line with international trends, and will foster growth and development of international arbitration in Stockholm".

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THIRD PARTY FUNDING OF ARBITRATION IN HONG KONG IS A GO

By Christopher Tung and Sacha Cheong (Hong Kong)

Third party funding of litigation and arbitration has gained considerable momentum in recent years, such that it has now become 'mainstream' in a number of jurisdictions. To give an idea of the size of the market, the Report of the ICCA-Queen Mary Task Force on Third Party Funding (April 2018) stated that "anecdotal reports suggest that the global market for dispute funding – both litigation and arbitration – is currently estimated as exceeding US$ 10 billion". Further, industry insiders estimate the sums currently committed / deployed in the third party funding industry in the UK alone to be comfortably in excess of US$5 billion.

Historically, in common law jurisdictions, third parties were prohibited from funding an unconnected party's legal proceedings under the doctrines of maintenance and champerty. The UK and Australia abolished these impediments long ago and permit the third party funding of litigation and arbitration. In some other jurisdictions, the call for change has become ever louder. For example, in 2017, legislative amendments were enacted by Singapore and Hong Kong — two of the major dispute resolution hubs in Asia — to enable the third party funding of arbitration disputes.

The fact that Singapore and Hong Kong are opening their doors to third party funding is timely. Whilst professional third party funders have significant funds available for investment, the uncertainty in Europe caused by the 2018 decision in *Slovak Republic v Achmea BV* (**reported in the 36th Edition of Arbitration World**) means it is likely there will be significant funds that might have been earmarked for Europe now looking for a new home.

With respect to Hong Kong, we reported on the key legislative developments in our 34th Edition (**May 2017**) and 35th Edition (**October 2017**) of Arbitration World.

The key events, including more recent developments, can be summarised as follows:

- October 2015: Law Reform Commission issues a consultation paper on third party funding of arbitration in Hong Kong.
- October 2016: Law Reform Commission issues a final report,

setting out its recommendations with respect to the implementation of the legislation and its regulation.

- June 2017: Hong Kong enacts the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. This is the enabling legislation permitting the use of third party funding for arbitration in Hong Kong. However, some of the provisions did not come into immediate effect and were suspended to a future date pending the establishment of an advisory body and authorized body to monitor and review the operation of the legislation and issue a Code of Practice. The objective of the Code of Practice is to set out the expected standards of good practice by third party funders of arbitration and lay down safeguards for funded parties.
- August 2018: the Department of Justice prepared a draft Code of Practice and launched a two-month public consultation.
- 7 December 2018: After considering the responses to the consultation, a finalized Code of Practice was issued called "Code of Practice for Third Party Funding of Arbitration" available here [WEB EDITORS TO INSERT LINK: http://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf].
- 1 February 2019: The amendments made to the Arbitration Ordinance — the enabling legislation permitting the use of third-party funding for arbitration in Hong Kong — came into effect. (The commencement of the amendments made to the Mediation Ordinance has been deferred to a future date to allow further deliberations with the mediation community and stakeholders).

Now that, as of 1 February 2019, third-party funding of arbitration in Hong Kong is permitted, there is a growing sense of anticipation and excitement among the legal community and funders regarding the opportunities that this development will bring to Hong Kong.

One of the key challenges in persuading funders to accept a case is, aside from proving the case is strong on the merits, establishing that an arbitration award against the proposed respondent is likely to be satisfied voluntarily or, alternatively, successfully enforced formally. Some jurisdictions in Asia can be challenging environments for enforcement of arbitration awards, so establishing that there are viable means of enforcing an award is likely to remain just as important in making a business case to funders to accept a particular proposal when it comes to assessing new opportunities in the region.

Inevitably, these legislative developments are likely to provide a significant boost to Hong Kong's standing as one of the leading seats of international arbitration, and it will be interesting to assess the impact on the market in both litigation and arbitration over the next few years.

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The fact that Singapore and Hong Kong are opening their doors to third party funding is timely.

THE 2018 UAE ARBITRATION LAW

By Jonathan Sutcliffe and James Lightley-Hunt (Dubai)

On 16 June 2018, UAE Federal Law No. 6 of 2018 on Arbitration (the "Arbitration Law") came into effect, repealing and replacing Articles 203–218 of the UAE Civil Procedures Code ("CPC"), which had been the subject of extensive criticism for their lack of clarity and certainty. The Arbitration Law broadly adopts the provisions of the UNCITRAL Model Law and aims to bring the arbitration process in the UAE into alignment with international standards.

The Arbitration Law applies to all pending and future UAE-seated arbitrations (excluding the UAE's exempted common law free zones: the Dubai International Financial Centre and the Abu Dhabi Global Market), as well as international arbitrations where the parties have agreed that the Arbitration Law will apply. With the repeal of the prior legislation, arbitrations arising out of agreements entered into before the effective date of the Arbitration Law will be governed by the Arbitration Law, even where the arbitration had commenced under the old regime.

It remains to be seen how the Arbitration Law will shape arbitration in the UAE going forward, although initial reaction in the region appears to be cautiously positive. Of course, the acid test of the Arbitration Law will be in its interpretation by the UAE courts. Summarised below are ten key areas of change in the new regime.

FORM OF ARBITRATION AGREEMENT

The CPC required an arbitration clause to be "in writing" but did not explain what this meant. The UAE courts settled on a narrow interpretation, threatening the validity of arbitration agreements that might be considered enforceable in other jurisdictions.

Article 7 of the Arbitration Law addresses this issue. An arbitration agreement must still be in writing; however, the meaning of the writing requirement is now expanded upon and reflects modern commercial practice. Arbitration agreements may be: (i) incorporated by reference, so long as the reference is sufficiently clear; (ii) contained within an exchange of communications between parties, including by email; (iii) confirmed by a court if parties agree to arbitration during the course of litigation; or (iv) included in pleadings exchanged between parties to either arbitral or court proceedings, where one party asserts

an agreement to refer the dispute to arbitration and the other does not object.

Furthermore, Article 6 of the Arbitration Law now expressly recognises the separability of arbitration agreements, so they may survive the termination, rescission, or voiding of the main contract.

It remains a requirement to ensure that a signatory to an arbitration agreement has legal capacity and specific authorisation to bind a party to arbitration. Lack of legal capacity is a ground for setting aside an award under Article 53 of the Arbitration Law, so it is advisable to ensure that an arbitration agreement is signed by someone with express authority to agree to arbitration on a party's behalf, preferably evidenced by a special power of attorney.

SIGNATURE OF AWARD

Under the CPC, it was considered necessary for awards in UAE-seated arbitrations to be signed by arbitrators physically present in the UAE to ensure enforcement in the local courts—an expensive and often time-consuming measure and (if not complied with) a potential ground for setting aside an award.

Article 41(6) of the Arbitration Law now permits arbitrators to sign the award outside of the UAE, deeming the award made at the seat of the arbitration. Awards may also be signed by arbitrators individually rather than together.

CHALLENGING AWARDS

Although the CPC provided only limited express grounds for parties to challenge an award, these were interpreted broadly by the UAE courts. It was common for domestic UAE arbitration awards to be annulled on technicalities. There was also no time limit placed on a party bringing an action to set aside.

Article 53 of the Arbitration Law now specifies eight grounds that may justify an action for setting aside an award, broadly based on the UNCITRAL Model Law. While the Arbitration Law includes more grounds for challenge, it is to be hoped that their clearer definition should restrict the scope of actions to set aside going forward.

Under Article 54, an action for setting aside must be brought within 30 days of the notification of the award to the parties, although the same grounds may be argued as a defence to an application for ratification and enforcement of an award at any time. An action to set aside does not stay the enforcement of an award, although the court may order a stay of enforcement if a party can show good cause.

If an action to set aside an award is brought, the court may now suspend the proceedings for up to 60 days to allow the tribunal to take action or make amendments to the form of the award in order to eliminate the grounds for setting aside, without affecting the substance of the award.

ENFORCEMENT

Enforcement of a domestic arbitration award in the UAE was often a drawn-out affair under the CPC, requiring ratification of the award in the local courts of first instance prior to execution, and subject to multiple layers of appeal and consequent delay.

Several provisions of the Arbitration Law seek to streamline the process within the bounds of existing UAE court procedure:

- Article 52 confirms that awards rendered under the Arbitration Law are binding and have res judicata status;
- Applications for ratification are to be made directly to the Court of Appeal and subject to appeal only to the Court of Cassation to reduce the duration of proceedings;
- Under Article 55(2), the Court of Appeal is required to determine applications for ratification and—if ratified—order enforcement of the award within 60 days, unless there are grounds to annul the award.

It is not yet clear how the new enforcement regime will impact awards issued before the enactment of the Arbitration Law as the enforcement provisions in the CPC are repealed.

INTERIM RELIEF

UAE law does not generally recognise or offer interim relief in litigation proceedings, with some limited exceptions. In a significant shift, the Arbitration Law has provided authority to both tribunals and the UAE courts to grant interim relief in support of arbitration.

Article 21 of the Arbitration Law provides that a tribunal may order such interim or conservatory measures as it considers necessary given the nature of the dispute. Parties to arbitration may

request the UAE courts to enforce such remedies, if granted by the tribunal, within 15 days. A nonexhaustive list of interim measures that a tribunal may order is provided in Article 21, which includes orders to preserve evidence or goods; to preserve assets and funds from which an award may be satisfied; to maintain or restore the status quo; and to take action to prevent prejudice to the arbitration process, or refrain from taking action that is likely to cause such prejudice.

In addition, Article 18 of the Arbitration Law empowers the UAE courts to order, at the request of a party to arbitration or the tribunal, such interim or conservatory measures as are considered necessary in respect of existing or potential arbitration proceedings. It remains to be seen how these powers will be exercised in practice and what (if any) interim relief the courts will see fit to order. The examples of interim measures provided in Article 21 may be instructive.

JURISDICTION OF TRIBUNAL

Under the CPC, the principle of "competence-competence", where tribunals have the authority to rule on their own jurisdiction, was not explicitly recognised. Article 19 of the Arbitration Law now expressly empowers tribunals to rule on their own jurisdiction, either by way of a preliminary decision or in the final award. Article 19 also provides strict timeframes in which jurisdictional awards may be challenged: a challenge to a tribunal's award on its own jurisdiction must be brought before the local Court of Appeal within 15 days of notification of the award, following which the court must issue a final—unappealable—judgment on jurisdiction within 30 days.

Article 20 of the Arbitration Law requires parties to raise jurisdictional objections no later than the submission of the respondent's statement of defence. Furthermore, if a party wishes to raise an objection that a claim is outside of the scope of the arbitration agreement, it must be raised immediately following the claim being advanced. In both cases, the tribunal may waive the time limits if there is a reasonable justification for a party's delay in raising its objection.

INTERIM AND PARTIAL AWARDS

The CPC did not contain any specific provisions regarding a tribunal's ability to issue interim and partial awards, which led to some doubt as to their enforceability in the UAE.

Article 39 of the Arbitration Law now expressly empowers tribunals to issue interim and partial awards, which will be recognized and enforced by the UAE courts.

DEFAULT PROCEDURES

The CPC was of limited procedural assistance in ad hoc arbitration, where the arbitration agreement contains no reference to institutional rules or other procedural framework.

Section IV of the Arbitration Law now provides a default set of procedural rules in the absence of an agreed procedure, covering issues such as service of process, commencement of the arbitration, the seat and language of the arbitration, pleadings, and evidential matters.

Section IV also makes provision for modern modes of communication, permitting written communications by email during the course of proceedings, and hearings (including the presentation and interrogation of evidence) to take place by telephone or other "remote" electronic means.

TIME PERIOD TO RENDER AWARD

The CPC's default position was to require tribunals to issue the final award within six months of the commencement of proceedings, subject to any extension agreed by the parties. Following the expiry of the default or extended period, parties could commence court proceedings to hear the same dispute if the award had not been issued.

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Article 42 of the Arbitration Law now grants the tribunal the authority to extend the default six-month period by an additional six months on its own initiative, subject to any further extension agreed by the parties. It also requires a court order for the termination of the arbitration to be obtained before a party may commence court proceedings to hear the dispute.

COSTS

Some UAE court decisions had held that parties' legal costs in arbitration were not recoverable under the provisions of the CPC, in the absence of an agreement on the tribunal's power to award legal costs. In such cases, tribunals were therefore not empowered to make an award of parties' legal costs.

Article 46 of the Arbitration Law empowers tribunals to evaluate and order payment of "the costs of arbitration which shall include: the fees and expenses incurred by any member of the Arbitral Tribunal … and the costs for experts appointed by the Arbitral Tribunal". However, by not expressly including the parties' legal costs (e.g., external counsel fees and expert witness fees) in the provision, significant doubt remains as to their recoverability. Therefore, it continues to be advisable for parties to agree in the arbitration clause to the recoverability of their legal costs of the arbitration or to agree to arbitration rules which expressly empower the tribunal to award legal costs.

Article 18 of the Arbitration Law empowers the UAE courts to order, at the request of a party to arbitration or the tribunal, such interim or conservatory measures as are considered necessary in respect of existing or potential arbitration proceedings.

A STEP FORWARD FOR EXPEDITED ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE UNITED ARAB EMIRATES

By Jonathan Sutcliffe, James Lightley-Hunt, Mohammed Rwashdeh (Dubai)

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In a further significant development in the United Arab Emirates ("UAE") arbitration landscape, UAE Cabinet Resolution 57 of 2018 (the "Cabinet Resolution") provides for an expedited procedure for the enforcement of foreign arbitration awards in the UAE.

The Cabinet Resolution, which was enacted in December 2018, came into force on February 17, 2019, and will sit alongside the 1958 New York Convention (the "New York Convention), which governs the substantive grounds for enforcement of foreign arbitration awards under UAE law. The New York Convention's precedence in substantive enforcement matters is confirmed in the Cabinet Resolution, which is stated to be without prejudice to the conventions that the UAE has entered into with other states.

Articles 85, 86, and 88 of the Cabinet Resolution, which will replace Articles 235, 236, and 238 of the existing UAE Civil Procedure Law concerning the procedure for enforcement of foreign judgments and orders, provide that:

- The relevant provisions of the Cabinet Resolution concerning the enforcement of foreign judgments and orders shall also apply to foreign arbitration awards, provided they are issued in a manner in accordance with UAE law and are enforceable in the country of issue; and
- A petition for enforcement of a foreign arbitration award must be brought directly to the competent execution judge in the UAE, who must issue a determination within a maximum of three days from the date of filing (the execution judge's determination remains, however, subject to the usual channels of judicial appeal).

While the substantive grounds set out in the New York Convention that apply to the enforcement of a foreign arbitration award in the UAE have not changed by the enactment of the Cabinet Resolution, it represents a substantial and seemingly positive change to enforcement

procedure. Previously, a petition for enforcement had to be brought as a normal case in the competent UAE Court of First Instance, which was subject to appeal to the Court of Appeal and then to the Court of Cassation before the award was capable of enforcement by an execution judge. As a result, enforcement proceedings were often drawn out over many months and sometimes years and were highly vulnerable to obstruction and delay.

It is to be hoped that, with the enactment of the Cabinet Resolution, the enforcement of foreign arbitration awards in the UAE will now proceed far more expeditiously, even though the available substantive challenges to enforcement remain; in particular, the UAE courts may still reject all or part of an arbitration award if it violates any aspect of public policy in the UAE (which may include issues of Sharia). As with any new law, it remains to be seen how the Cabinet Resolution will be applied by the UAE courts in practice and whether significant time savings can, in fact, be delivered. One area of uncertainty that may not be resolved until the Cabinet Resolution is tested in the UAE courts is the effect of an appeal lodged by an award debtor against an execution judge's decision to enforce a foreign arbitration award and whether or not enforcement would be stayed until the appeal process is resolved.

The Cabinet Resolution is another step in the UAE's development of a more permissive judicial approach toward the enforcement of foreign arbitration awards following its ratification of the New York Convention in 2006. The enactment of the Cabinet Resolution also resolves uncertainty over the applicable enforcement procedure for foreign arbitration awards after the enactment of the UAE Federal Arbitration Law in 2018, which introduced a more streamlined regime for the enforcement of domestic arbitration awards. It now appears clear that the enforcement of foreign arbitration awards will follow the procedure set out in the Cabinet Resolution, which means that the UAE operates two separate regimes for the enforcement of foreign and domestic arbitration awards.

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DAESANG V. NUTRASWEET: NEW YORK APPEALS COURT RESTORES PARTIALLY VACATED ICC ARBITRATION AWARD AND REINFORCES PRO-ARBITRATION POLICY AND LIMITS OF JUDICIAL REVIEW OF ARBITRATION AWARDS FOR "MANIFEST DISREGARD OF THE LAW"

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By Martin Gusy, Matthew Weldon, Tom Warns (New York)

On September 27, 2018, the New York Appellate Division, First Department, reaffirming New York's pro-arbitration policy and the limits of judicial review of arbitration awards in the United States, reinstated a US$100 million ICC arbitration award in favor of Daesang Corp. ("Daesang") against NutraSweet Co. ("NutraSweet") that had been partially vacated by a lower court on May 15, 2017.

THE LOWER COURT'S PARTIAL VACATUR OF THE ARBITRATION AWARD

The two arbitration awards in question (a partial-final award and a final award) were rendered in a New York-seated ICC arbitration, and in which the arbitral tribunal ultimately ruled in Daesang's favor. The awards dismissed fraudulent inducement counterclaims advanced by NutraSweet in the arbitration because the tribunal concluded that New York law does not permit such claims to be based solely on contractual representations.

When Daesang moved to confirm the awards in the lower court, NutraSweet responded by cross-moving to vacate the dismissal of NutraSweet's fraudulent inducement counterclaims. The lower court granted NutraSweet's motion to vacate the awards to the extent they dismissed NutraSweet's counterclaims for equitable rescission, fraudulent inducement, and breach of contract. The lower court also interestingly remanded the matter to the arbitration tribunal for "redetermination" of those claims on the basis of manifest disregard of the law. *See Daesang Corp. v. NutraSweet Co.*, 58 N.Y.S.3d 873 (N.Y. Sup. Ct. 2017).

In particular, the lower court concluded that the arbitral tribunal's dismissal of the equitable rescission claim violated "the well-established principle" under New York law that a fraud claim can be based on a breach of contractual warranties where the misrepresentation pertains to a present fact and that a "careful reading of the transcript" demonstrates that there was no waiver of NutraSweet's breach of contract argument. The lower court thus partially vacated the arbitration awards on the ground that the tribunal had manifestly disregarded the law. Daesang appealed.

THE APPELLATE DIVISION'S REVERSAL

The New York Appellate Division reversed the lower court and reinstated the awards

Preliminarily, given the international elements of the dispute, the Appellate Division noted that the parties agreed that the enforcement of the arbitration award is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (generally known as "the New York Convention"), and by the U.S. Federal Arbitration Act ("FAA"). Indeed, the parties agreed that because the awards were rendered in the United Sates, the provisions of Chapter 1 of the FAA (9 U.S.C. § 208) govern whether the awards may be set aside or vacated, but the Appellate Division also found that the "[New York] Convention [art V, §§ 1, 2] and the FAA [9 U.S.C. § 207] mandate […] that a court 'shall confirm [an arbitral] award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.'"

The specified grounds for refusal or deferral of recognition alleged by NutraSweet were that the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made (citing to 9 U.S.C. § 10(a)(4)), and the "implied ground of manifest disregard of the law."

In reviewing the alleged grounds to support NutraSweet's position and the lower court's partial vacatur of the arbitration awards, the Appellate Division held that to satisfy the very high standard of "manifest disregard for the law," NutraSweet would have needed to prove that the arbitrator "knew of the relevant principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." With respect to the dismissal of NutraSweet's counterclaim for equitable rescission, the Appellate Division found that NutraSweet could not meet this "high standard" since it was plain from the arbitral tribunal's ruling that the arbitrators *"accept[…] the authority of the decision on which NutraSweet primarily relied [and] after analyzing the [the] case law offered by both sides,"* made a good faith effort to apply the standard proffered by NutraSweet to the facts of the case, even though it, in the end did, not apply it as it found the case law cited by Daesang more compelling. Thus, according to the Appellate Division, the arbitral tribunal at most committed a mere error of law finding that the equitable rescission counterclaim was not viable under New York law, and therefore the awards did not suffer from "manifest disregard of the law." "Manifest disregard of the law 'requires more than a simple error in law or a failure by the arbitrators to understand or apply it,'" and as many courts interpreting the FAA have held, under the doctrine of manifest disregard, arbitrators are given "extreme deference."

In reversing the lower court, the Appellate Divisions not only stressed that it is a "high standard" to establish manifest disregard of the law in New York, rarely resulting in the basis of vacatur, but it also reiterated the long-held principle that judicial review of arbitration is "extremely limited," and that awards must be upheld where the arbitrator offers "even a barely colorable justification for the outcome reached." The Appellate Division noted that order of the lower court partially vacating the arbitration "cannot be justified under the 'emphatic federal policy in favor of arbitral dispute resolution' embodied in the FAA, a policy that 'applies with special force in the field of international commerce,'" citing to the U.S. Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

KEY PRACTICAL TAKEAWAYS FROM THE APPELLATE DIVISION'S REVERSAL

In New York and within the larger Second Circuit, the concept of manifest disregard of the law as a basis for vacatur of an arbitration award subject to Chapter 1 of the FAA is still to be applied both with great selectivity and with extreme restraint. The Second Circuit has clarified, in light of *Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L.Ed.2d 254 (2008), that it regards the doctrine of manifest disregard of the law as "a judicial gloss on the specific grounds for vacatur enumerated in section 10

of the FAA," rather than as "a ground for vacatur entirely separate from those enumerated in the FAA" (*Stolt–Nielsen SA v. AnimalFeeds Int'l. Corp.*, 548 F.3d 85, 94 [2d Cir. 2008], *rev'd on other grounds* 559 U.S. 662, 130 S. Ct. 1758, 176 L.Ed.2d 605 [2010]). To the extent the manifest disregard of the law doctrine is still available to challenge an arbitral award (as it is in some but not all U.S. circuits), it is extremely rare for courts in the United States and in New York to vacate arbitral awards on the grounds that the tribunal acted in manifest disregard of the law because the standard is so high (even when it is applicable), and it is not to be applied to second guess the arbitral tribunal's legal and procedural rulings, even if they might reasonably be criticized on the merits.

The Appellate Division's reversal of the partial vacatur should provide much-needed comfort to users of international arbitration, especially in New York. As noted by the Association of the Bar of the City of New York, whose *amicus curiae* brief submitted in support of the appeal was cited in agreement by the Appellate Division in its decision, any suggestion that New York courts will review an arbitrator's factual and legal determinations as though they were a judicial appeal would "discourage parties from choosing New York as the place of arbitration." Users of international arbitration depend on consistency and predictability, including that the decision of the arbitrators will be final and not subject to judicial review, except in strict accordance with the New York Convention. With the assurances from the Appellate Division's decision in the NutraSweet case, users should be content to continue to arbitrate their international disputes in New York, a preeminent center for international arbitration.

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CONGRESS CONSIDERS CLOSING TRADE SECRET "DISCOVERY LOOPHOLE": SECTION 1782

by Carolyn Branthoover and Max Gelernter (Pittsburgh)

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Imagine that your company is located in the United States and owns a valuable trade secret. Half way across the world, in Europe, two parties are involved in an arbitration. Your company is not a party to the arbitration, but information about your trade secret is relevant to the parties' claims.

The parties have no way of obtaining your trade secret through their local laws and procedures. But now imagine that you have been served with a subpoena and a district court in the United States forces you to produce documents related to your trade secret. Seem fair? Probably not. And yet, this can be a reality under 28 U.S.C. § 1782.

Section 1782 is a federal statute that authorizes a U.S. district court, upon application by a foreign tribunal or any party with an interest in a proceeding before a foreign tribunal, to order a person found or resident in the U.S. district to provide information or documents for use in the foreign proceeding. In a prior **Arbitration World article**, we discussed Section 1782 and noted that a party unconnected to a foreign proceeding may nonetheless be subjected to costly and burdensome discovery in connection with an arbitration to which it never consented. This article furthers that argument. In addition to high discovery costs for U.S.-based parties, Section 1782 can result in significant, less-tangible costs as well, such as disclosing the crown jewels of a company: its trade secrets.

In 1964, Congress expanded the scope of Section 1782 to its present day form and, in doing so, hoped that foreign countries would be encouraged to pass similar laws so that American citizens would have similar access to information considered important to the resolution of their disputes by foreign tribunals. *See* Act of Oct. 3, 1964, § 9(a), 78 Stat. 997; Senate Report No. 1580, 88th Cong., 2d Sess. 7–8 (1964). Congress's hoped-for result has not materialized. No other countries have passed a comparable law. Nevertheless, Section 1782 remains a valuable tool for parties engaged in foreign proceedings, and it continues

to be employed in U.S. district courts to obtain court-ordered discovery from third parties unconnected to the foreign proceedings.

According to economists, trade secrets comprise approximately two-thirds of companies' intellectual property portfolios (statement of Chairman Darrell Issa at the hearing "*Safeguarding Trade Secrets in the United States*," before the Subcommittee of the House of Representatives on Courts, Intellectual Property, and the Internet, on April 17, 2018, as described further below). In the United States, trade secrets are protected by the Defend Trade Secrets Act, 18 U.S.C. § 1836, et seq., and courts regularly issue protective orders to safeguard trade secrets. Courts outside the United States, however, do not offer comparable protections. As recognized by the European Union, "[t]he main factor that hinders enforcement of trade secrets in [European] Court[s] derives from the lack of adequate measures to avoid trade secrets leakage in legal proceedings." (The European Commission, *Study on Trade Secrets and Confidential Business Information in the Internal Market* (April 2013)). This presents a significant issue of concern for American companies subjected to Section 1782 subpoenas requesting production of trade secret information. As one commentator puts it, Section 1782 has become a "one-way street for the acquisition and export of U.S. information." (statement of James Pooley at the April 17, 2018 hearing before the Subcommittee of the House of Representatives, referred to above).

To address this predicament, in April 2018, the U.S. House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet held a hearing on "*Safeguarding Trade Secrets in the United States*" and considered potential remedies to close "the discovery loophole", as described by Chairman Issa, that is Section 1782. The subcommittee considered a wide range of remedies potentially available from each branch of government: The executive branch could enter reciprocal trade agreements, the courts could issue Section 1782 protective orders, and Congress could amend Section 1782.

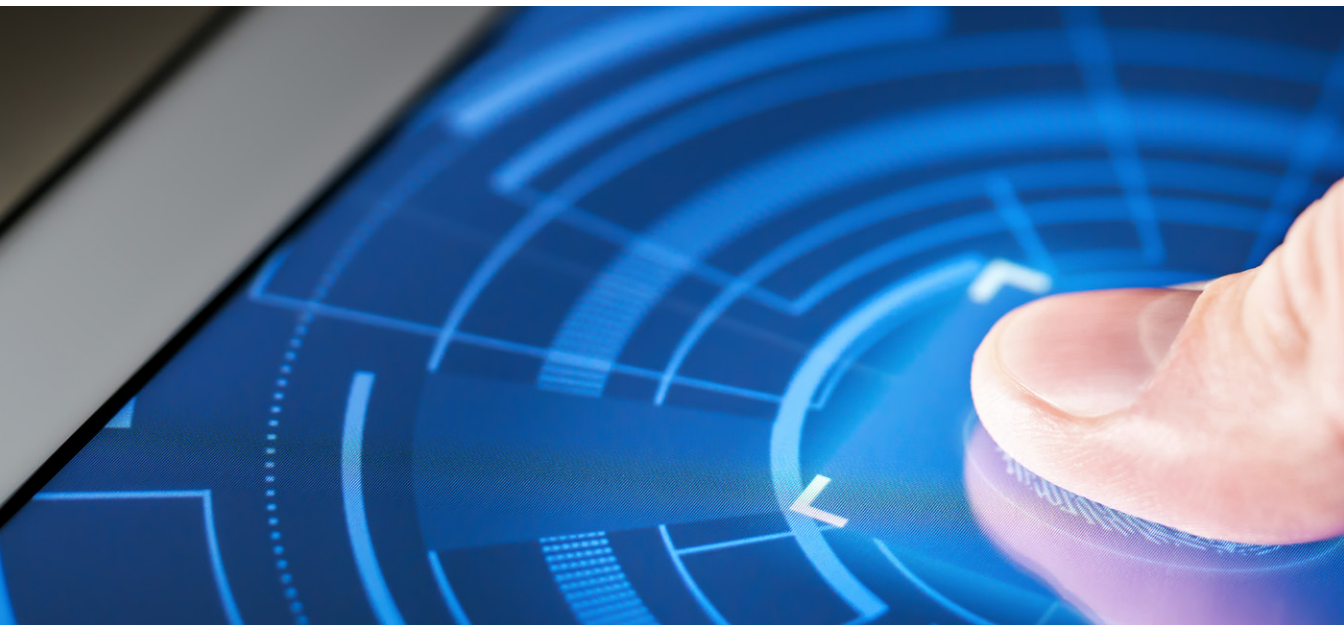
The conversation to protect American trade secrets continues. The Intellectual

Property Owners Association ("IPO") (a trade association for owners of patents, trademarks, copyrights, and trade secrets) has resolved to support amending Section 1782 to require:

1. That information produced pursuant to the statute be subject to adequate protections for confidential information, including trade secrets, in the foreign proceedings;
2. That the information is discoverable or admissible in the foreign proceeding; and
3. That prior to the application having been made, the applicant could have been subject to an equivalent order for production under the rules of this jurisdiction or the foreign jurisdiction.

No legislative solutions, however have yet been formally proposed, and Section 1782 remains in its 1964 form. Accordingly, Section 1782 will continue to be used as a vehicle to support international arbitration and other foreign proceedings and thus obtain the trade secrets of U.S.-based companies that would otherwise be protected. This is emblematic of how costly Section 1782 can truly be. Until Congress closes this "discovery loophole," companies need to be prepared to defend against Section 1782 subpoenas to protect their prized trade secrets.

Section 1782 includes some measure of possible protection. It provides that any order issued pursuant to Section 1782 "may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing." It may be of limited comfort but, to the



extent that a U.S. court is persuaded that trade secret information should be produced for use by third parties in a foreign proceeding, it should be prevailed upon to require that production take place pursuant to various protective measures, including the protections afforded by a confidentiality order. Just such a precaution was recently suggested by the Third Circuit in *In re: Application of Biomet Orthopaedics Switzerland GMBH*, No. 17-3787, 2018 WL 3738618 (3rd Cir. Aug. 6, 2018). In Biomet, the federal appeals court saw "no reason to foreclose potential 1782 aid just because trade secrets are involved." At the same time, however, the court was sympathetic to the proprietary nature of the information that was the subject of discovery and remanded the case to the district court "to consider whether a more tailored request, and the imposition of conditions on the use of and access to information, might address" these concerns.

The amendment of Section 1782 to provide heightened protection for proprietary information will continue to be the subject of discussion. Until that discussion leads to concrete legislative action, parties should take advantage of the discretionary authority conveyed by Section 1782 and the apparent willingness of the federal courts to provide safeguards for the protection of a company's trade secrets.

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