
K&L GATES
ARBITRATION WORLD
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by Carolyn Branthoover and Max Gelernter (Pittsburgh)

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by Clarissa Coleman and Jonathan Graham (London)

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INTERNATIONAL ARBITRATION
K&L GATES' BENCH STRENGTH

US $26.7 BILLION IN DISPUTE

129 ARBITRATION LAWYERS ACROSS 36 OFFICES

Data as of September 2017

110
ARBITRATION DISPUTES CURRENTLY

38
MERITS HEARINGS IN THE PERIOD AUGUST 2015 - JULY 2017

24
CURRENT ARBITRATOR APPOINTMENTS
(8 AS SOLE ARBITRATOR OR CHAIR)

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FROM THE EDITORS:

WELCOME TO THE 36TH EDITION OF K&L GATES' *ARBITRATION WORLD*.

Welcome to the 36th 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.

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

We report on a recent decision on the interpretation and application of eligibility criteria for arbitrators in arbitration clauses, specifically regarding a term in an insurance policy requiring that the arbitrator must have insurance-related qualifications. We look at the potential benefits of machine translation technology in multilingual arbitration. We also look at means of efficiently and effectively managing disputes in the offshore engineering and construction projects, which frequently involve many issues and can be very document heavy.

On the institutional side, we review the new Rules of Arbitration of the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., or DIS), effective from March 1, 2018, and report on the publication by the Hong Kong International Arbitration Centre (HKIAC) of data on the average cost and duration of HKIAC arbitration proceedings, and draw a comparison to other arbitration institutions.

We also consider the current split in the United States circuit courts regarding who gets to decide the gateway issue of arbitrability—the arbitral tribunal or the court—and the implications when it comes to drafting an arbitration agreement. We report on some recent arbitration appeals heard by the Swiss Federal Supreme Court, which are always the subject of international scrutiny and interest. Finally, we review two recent cases that illustrate the developing approach of the English courts to the public policy exception in the context of enforcing arbitral awards.

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

By Benjamin Mackinnon (London)

AFRICA

South Africa

On 20 December 2017, the South African International Arbitration Act 2017 came into effect (the "**Act**"). The Act incorporates the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law and replaces the Recognition and Enforcement of Foreign Arbitral Awards Act 1977. The Act only governs international arbitrations. Domestic arbitrations continue to be governed by the Arbitration Act of 1965. Amongst the features of the Act is that, whilst arbitration proceedings will be protected by confidentiality when held in private, arbitration proceedings to which a public body is a party are held in public unless, for compelling reasons, the arbitral tribunal directs otherwise.

AMERICAS

United States of America

The US Court of Appeals for the Ninth Circuit has held, in *CVS Health Corporation v. Vividus, LLC*,—F.3d —, 2017 WL 6519942 (9th Cir. Dec. 21, 2017), that the Federal Arbitration Act only authorises tribunals to order non-parties to produce documents at an arbitration hearing, not prior to an arbitration hearing. The Court considered the judgment of the US Court of Appeals for the Eighth Circuit in *Re Sec. Life Ins. Co. of Am.*, 228 F.3d 865 (8th Cir. 2000), which held that it was implicit that tribunals had the power to subpoena relevant documents prior to a hearing. However, it rejected this approach on the basis of the statutory language of section 7 of the Federal Arbitration Act. This put approach is in line with that of the US Courts of Appeals for the Second, Third and Fourth Circuits.

ASIA

India

On 7 March 2018, the Union Cabinet approved the Arbitration and Conciliation (Amendment) Bill 2018 for introduction into Parliament. This would make various amendments to the Arbitration and Conciliation Act 1996 and would remove errors and ambiguities contained in the 2015 amendments to the 1996 Act. Amongst the changes would be clarification of the deadline for the issue of an award as well as the introduction of immunity for arbitrators and provisions on confidentiality.

The Delhi High Court has recently considered whether there is any prohibition under the Arbitration and Conciliation Act 1996 on two Indian

parties choosing a foreign seat of arbitration and whether a non-signatory may be bound to arbitrate. In *GMR Energy Limited v Doosan Power Systems India Private Limited and Ors* CS (Comm) 447/2017, GMR Energy sought to restrain Doosan India from proceeding with arbitration under the Singapore International Arbitration Centre Rules, with a seat of arbitration in Singapore. The Court held that there was no prohibition on international arbitration between two Indian parties and that Indian parties are free to choose a seat outside of India to govern their arbitrations. In respect of the allegation that GMR Energy was a non-signatory, the Court held that Doosan India had established grounds to proceed against GMR Energy in the arbitration on the basis of the following: (i) there was common ownership between GMR Energy and the signatories and they used the same signage and letterheads, (ii) GMR Energy owned the entire issued share capital of one of the signatories, and (iii) GMR had undertaken to discharge the liabilities of one of the signatories and had made part payments in discharge of these.

Japan

The Japanese Supreme Court has given consideration to the issue of arbitrator disclosure and conflicts of interest in the Decision of the Supreme Court of Japan's Third Petty Bench dated 12 December 2017. In this case, a lawyer that represented an affiliate company of one of the parties joined the law firm of the Chairman of the Arbitral Tribunal in a different jurisdiction during the arbitration. The chairman did not disclose this during the arbitration proceedings. The Supreme Court held that arbitrators have a continuing duty of disclosure, including as to matters that are discoverable on a reasonable investigation.

On the specific facts in question, it was not clear to the Supreme Court whether the arbitrator was aware or should have been aware of the circumstances, and the issue was therefore remanded to the High Court for determination.

People's Republic of China

The Supreme People's Court of China has published two judicial interpretations regarding arbitration, which became effective on 1 January 2018. These extend the application of the reporting system, where the Court is minded to refuse recognition and enforcement of an award, to domestic arbitrations, which was previously only applied to international arbitrations. Under the reporting system, lower courts may not refuse to recognise and enforce arbitration awards without requesting approval from the higher people's court, which if it agrees with the lower court must then seek approval from the Supreme People's Court before recognition and enforcement is refused. This, in effect, means only the Supreme People's Court may refuse recognition and enforcement of an arbitration award. The extension of the reporting system

therefore extends the same protections to domestic arbitration awards. The judicial interpretations have also sought to introduce a limited amount of party input into the reporting system by providing a means for the parties to answer the Court's enquiries on the facts (but not to make submissions on the facts or the law within the reporting system).

Russia

The Russian Supreme Court, in *Case No. A64-906/2017*, has held that claims concerning the transfer or use of public property are not arbitrable. The case arose as a bank was seeking enforcement of an arbitration award granting foreclosure on a property that had been mortgaged by the Tomsk Region Committee on Property. Amongst the Supreme Court's reasons were that transactions relating to public property must not be subject to the confidentiality of arbitration and the Supreme Court considered that arbitration is more expensive than litigation so it would not comply with the principles of efficient use of public budgets and was therefore contrary to public policy. This case highlights the risks of enforceability of arbitration awards against Russian public entities.

CARIBBEAN

Cayman Islands

The Grand Court of the Cayman Islands Court of Appeal has held, in *A Company v A Funder* FSD 68 of 2017 (NSJ), that third-party funding is not, as a matter of principle, unlawful. The Court noted that the critical issue is whether a funding agreement has the tendency to corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse. In determining whether a funding agreement is lawful, the Court will therefore consider factors such as the extent to which the funder controls the litigation, the ability of the funder to terminate the agreement, the level of communication between the funded party and its lawyers, the prejudice likely to be suffered by a defendant if the claim fails, the amount of profit the funder may make and whether or not the funder is a professional funder. The approach therefore reflects that adopted in may other common law jurisdictions in recent years.

EUROPE

England

The Law Commission of England and Wales (the "Law Commission") has not included reform of the Arbitration Act 1996 within its Thirteenth Programme of Law Reform. The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed. The Law Commission has explained that *"Because of the cross-government nature of this work, it was not possible to secure Protocol support in time"*. Two areas that had previously been highlighted for potential reform

"The Grand Court of the Cayman Islands Court of Appeal held that third-party funding is not, as a matter of principle, unlawful."

were expressly permitting tribunals to grant summary judgment and allowing the arbitration of trust disputes. These proposals may be taken forward by the Law Commission at a later date.

In *A v B* [2017] EWHC 3417 (Comm), the English Commercial Court gave consideration as to whether a single request for arbitration would validly commence arbitration in respect of two separate contracts containing arbitration clauses under the London Court of International Arbitration ("**LCIA**") Rules. In this case, the claimant served a single request for arbitration and paid a single registration fee to the LCIA in respect of the two contracts. The defendant raised a jurisdictional challenge in relation to the request before serving its defense, which was dismissed by the tribunal. The defendant challenged the partial award on jurisdiction under section 67 of the Arbitration Act 1996. The court set aside the partial award on jurisdiction and held that it was *"inconceivable"* that the LCIA Rules could be read as permitting a party to pay only one fee when commencing multiple arbitrations and *"undoubtedly impermissible"* to read the LCIA Rules as giving rise to consolidated proceedings without the consent of all parties. The case contrasts with *The Biz* [2011] 1 Lloyd's Rep 688, in which a party was entitled to commence 10 separate arbitrations under a single notice, which was distinguished on the basis that it was a case where no arbitral rules were applicable.

In *Glencore Agriculture BV v Conqueror Holdings Ltd* [2017] EWHC 2893 (Comm), the issue of whether a notice of arbitration had been validly served arose. The notice commencing the arbitration had been emailed to a junior employee, who did not respond and subsequently left the business. Popplewell J distinguished between the use of a generic email address and that of an individual employee (it having previously been held, in *The Eastern Navigator* [2005] EWHC 3020 (Comm), that sending an arbitration notice to a generic email address promulgated by the organisation as their only email address was good service). Popplwell J then held that *"Whether it constitutes good service if directed to an individual's email address must depend upon the particular role which the named individual plays or is held out as playing within the organisation"*. On the facts, it was held that the junior employee had neither actual, implied nor ostensible authority to accept service of proceedings, and therefore, the notice had not been validly served.

Germany

The German Regional Court of Dortmund, in *Docket No 8 O 30/16 (Kart)*, has recently held that claims for cartel damages would fall within the scope of two arbitration agreements. In reaching this conclusion, the Court gave consideration to *CDC v Evonik* (C-352/13), in which the European Court of Justice ("**ECJ**") held that cartel damages fell outside the scope of a contractual jurisdiction clause if the parties were unaware of the claims at the time of the contract. The Court held that jurisdiction clauses differ to arbitration agreements and noted that *CDC* explicitly did not deal with arbitration agreements so the ECJ's reasoning did not apply.

Sweden

The Swedish government is considering amendments to the Swedish Arbitration Act, which came into force in 1999. Amongst the main changes under consideration are provision for multi party arbitration, a reduction in the time limit for a claim to set aside an award to two months and provisions dealing with the applicable substantive law. If approved, it is expected the amendments would come into force in 2019.

Ukraine

On 15 December 2017, various amendments to the Ukrainian Civil Procedure Code in relation to arbitration entered into force. The recognition and enforcement of foreign awards will now be within the exclusive competence of the Kiev Court of Appeal, with any appeals going to the Supreme Court. In contrast to the previous position, the failure of a debtor to appear in court will no longer prevent recognition of an award. In addition, the amendments also increase the availability of interim measures. The changes are intended to support enforcement of arbitration awards in the Ukraine.

MIDDLE EAST

United Arab Emirates ("UAE")

On 27 February 2018, the UAE Federal National Council approved a draft Federal Arbitration Law, which will only apply in onshore UAE (i.e. not the UAE's offshore jurisdictions of the Dubai International Financial Centre and the Abu Dhabi Global Market). The draft has not been released but it has been reported that it is based on the UNCITRAL Model Law and would replace the existing regime under the UAE Civil Procedure Law (Federal Law No. 11 of 1992).

INSTITUTIONS

Dubai International Arbitration Centre ("DIAC")

During Dubai Arbitration Week 2017, DIAC announced its intention to adopt new rules during the course of 2018. Whilst the proposed new rules have yet to be published, the changes are expected to include rules specifying Dubai International Financial Centre as the default seat, removing the requirement that arbitrators be physically present in Dubai when signing an award, making it clear that legal fees are recoverable and new rules in respect of consolidation.

Federation of Oils, Seeds and Fats Association ("FOSFA")

FOSFA has amended its 2012 arbitration rules. Amongst the main changes is a shift from a two-arbitrator tribunal to a three-arbitrator tribunal in 'first tier' arbitration which will consist of two party-nominated arbitrators and a chair appointed by FOSFA, subject to the parties agreeing to a sole arbitrator. The new rules also extend the time limits for bringing claims and seek to clarify the distinction between claims for quality and/or quantity and other claims (to which different time limits apply). The new rules will apply to disputes arising out of contracts entered into from 1 April 2018.

German Institution of Arbitration ("DIS")

DIS has published its revised arbitration rules, which enter into from 1 March 2018. The reforms are aimed at improving the efficiency and cost-effectiveness of DIS arbitration. The main changes include shorter deadlines for the constitution of the tribunal, a specified period of for submission of the answer, a case management conference within 21 days of the tribunal being constituted and broader rules on the consolidation of arbitrations. See our full report on this development later in this **edition.**

The International Chamber of Commerce ("ICC")

The ICC and Brazil's National Confederation of Industry have jointly launched a new International Arbitration Hearing Centre in Sao Paulo. The new centre is part of the ICC's efforts to better meet the needs of Brazilian users, which also include the introduction of a case management team of the ICC Secretariat in Sao Paulo and a scale of fees and expenses in Brazilian Reals.

Kuala Lumpur Regional Centre for Arbitration ("KLRCA")/Asian International Arbitration Centre

The Kuala Lumpur Regional Centre for Arbitration , in conjunction with its 40th anniversary, has changed its name to the "Asian International Arbitration Centre" (or "AIAC") from 7 February 2018. The name change is part of a larger rebranding for the centre, which aims to further strengthen its regional footprint and presence globally.

London Court of International Arbitration

The LCIA, in addition to celebrating its 125th birthday, has recently published anonymised versions of is arbitrator challenge decisions (supplementing those published in 2011). As summarised by the LCIA, less than 2 per cent of the 1,600 cases registered in the period 2010 to 2017 involved a challenge to an arbitrator and only one-fifth of those challenges were successful, meaning successful challenges were made in only 0.4 per cent of LCIA cases during the period.

Vienna International Arbitral Centre ("VIAC")

VIAC has adopted new arbitration rules, which came into effect on 1 January 2018. As part of the changes, all proceedings will now be administered by VIAC through an electronic case management system. The arbitrators and parties are also under an express duty to conduct the proceedings in an efficient and cost-effective manner, and the failure to do so may be taken into consideration in determining the arbitrators' fees and costs and the allocation between the parties. In addition, the new rules permit respondents to request security for costs if the respondent shows the recoverability of a potential claim for costs is at risk.

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WORLD INVESTMENT TREATY ARBITRATION UPDATE

By Wojciech Sadowski and Patrycja Treder (Warsaw)

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 (i) the judgment of the Court of Justice of the European Union ("**CJEU**") in the *Achmea* case, a decision with potentially significant implications for intra-EU member state bilateral investment treaties ("**BITs**"); (ii) the signing of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, otherwise known as the ICSID Convention, by Mexico; and (iii) the Settlement of the Burlington Resources arbitration.

THE COURT OF JUSTICE OF THE EUROPEAN UNION RENDERS A LANDMARK DECISION WITH POTENTIALLY SIGNIFICANT IMPLICATIONS FOR INTRA-EU BITS

On 6 March 2018, the CJEU rendered a judgment in the case of the *Slovak Republic v Achmea B.V.*, C-284/16 (the "***Achmea* judgment**"). The CJEU declared in it that:

> *Articles 267 and 344 TFEU* [the Treaty on the Functioning of the European Union ("**TFEU**")] *must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

The Court expressly declares that its interpretation of the TFEU applies to "*a provision in an international agreement concluded between Member States, such as*" the one under examination in this specific case. Therefore, whilst in principle it is ruling only on the interpretational questions referred to it

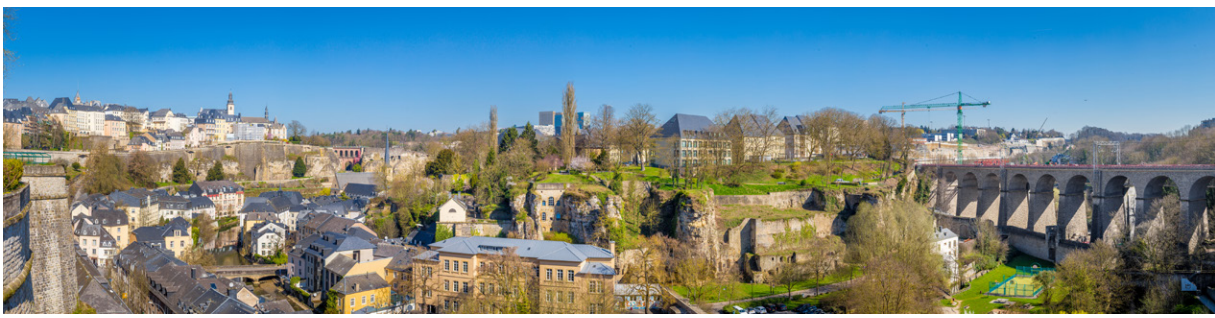
by the German court which focused on the Netherlands/Slovakia BIT, by its own wording, this judgment is likely to have fundamental implications for prospective, on-going and even recently concluded arbitrations that involve nationals of a member state in claims against another EU member state. On the other hand, the "*such as*" language used by the CJEU is likely to give rise to attempts by claimant investors to distinguish the decision by arguing that it should not apply to claims brought under other intra-EU BITs on the grounds that they differ from Article 8 of the Netherlands-Slovakia Treaty (e.g. because they give investors an option to refer the dispute to national courts).

As a result of its limited consideration of the relevant legal principles, the *Achmea* judgment is open to various conflicting interpretations. Its full implications are only likely to emerge after many of the issues are addressed in other investment cases brought before an arbitral tribunal and following challenges before national courts.

At the centre of the Court's decision is its view that the claim under the intra-EU BIT may give rise to an arbitration procedure whereby EU law would be interpreted or applied by the arbitral tribunal without the decision of the arbitral tribunal being under the ultimate control of the CJEU. That, in the eyes of the CJEU, undermines its own position under the TFEU and the Treaty on European Union as the final institution empowered to ensure that EU law is properly applied.

The *Achmea* judgment is likely to be used by respondent member states in any arbitration cases based upon similar provisions included in the 196 intra-EU BITs, which are currently in force between EU member states, to argue that all or the vast majority of them are incompatible with the EU law. As an immediate reaction to the *Achmea* judgment, Poland moved to terminate a number of its intra-EU BITs, including with Austria, Bulgaria, Belgium and Luxembourg, Cyprus, Denmark, Finland, France, Germany, Greece, the Netherlands, Spain and the United Kingdom.

It could be argued that the potentially radical effect of the *Achmea* judgment may be tempered in the future by the EU Commission creating some form of judicial review, even if limited, of the decisions of arbitral tribunals under intra-EU BITs. But for now, unless such a



modification is agreed by member states (and eventually tested again before the CJEU), many intra-EU cases based on similar clauses in intra-EU BITs may in some form be affected by the reasoning of the *Achmea* judgment. The *Achmea* judgment may also be interpreted by the national courts of EU member states as imposing an obligation on them to annul awards rendered in previous arbitrations pursued under intra-EU BITs if the seat of the arbitration is located in the EU, or if the seat is located outside the EU, to oppose their enforcement based on the argument that the dispute had not been open to a 'full review' by the EU courts.

It is important to note that the CJEU in the *Achmea* judgment did not analyse the conformity of the substantive provisions of BITs with EU law, and its conclusions are limited only to dispute settlement mechanisms in such treaties. It is also notable that the *Achmea* judgment does not refer to the Energy Charter Treaty, BITs between EU members states and third countries, investment treaty provisions in the treaties concluded by the EU with other states (such as the Comprehensive Economic and Trade Agreement, or CETA, between the EU and Canada), nor on the ICSID Convention.

As a result of this judgment, individuals and corporations who have so far relied on the existence and enforceability of intra-EU BITs as a mechanism for protection of their EU-based ventures should carefully reconsider their investment structures.

MEXICO SIGNS THE ICSID CONVENTION

On 11 January 2018, Mexico signed the ICSID Convention, also known as the Washington Convention, which established the International Centre for Settlement of Investment Disputes. Mexico thus became the 162nd signatory of the ICSID Convention, and once the ratification process is completed, it will become the 154th contracting state thereof.

According to the official statements, by signing the ICSID Convention, Mexico aims to boost the in-flow of foreign investment. However, the signature may also be considered as part of the preparations for the last round of the North American Free Trade Agreement ("**NAFTA**") renegotiations which took place in late January 2018, especially as the future shape of the NAFTA investor-state dispute resolution mechanism is uncertain. The existing NAFTA contracting states (the United States and Canada) are already signatories to the ICSID Convention.

The signing of the ICSID Convention by Mexico will further expand the territorial scope of that successful international instrument, which covers most of the globe. The most notable exceptions now include Brazil, India, Iran, Iraq, Poland and Vietnam.

SETTLEMENT OF THE BURLINGTON RESOURCES ARBITRATION

On 4 December 2017, ConocoPhillips reached an agreement that Ecuador will pay US$337 million to its wholly owned subsidiary, Burlington Resources Inc. ("**Burlington**"). The settlement was reached after the arbitral tribunal, in the case of *Burlington v. the Republic of Ecuador*, ICSID Case No. ARB/08/05, awarded damages in the amount of US$380 million to Burlington for the unlawful expropriation of its investment and in the amount of US$42 million to Ecuador as a result of its environmental and infrastructure counter-claims in February 2017.

The background to the dispute extends back almost two decades. In 2001, Burlington acquired a minority interest in the production sharing contracts executed by Ecuador for the exploration and exploitation of two oil-producing blocks. Under those contracts, Burlington assumed the entire risk of oil exploration and exploitation and in exchange it was to receive a share of produced oil. When the price of oil significantly increased, Ecuador asked to renegotiate the terms of the contracts to increase its share. As its offer was not accepted, Ecuador introduced a series of legislative measures, imposing a windfall levy of 99 per cent on the "extraordinary" oil revenues. Burlington refused to pay the levy, thus Ecuador launched proceedings to take over Burlington's share of produced oil under the contracts. As the investment became unprofitable, Burlington had to stop its business operations, and Ecuador took possession of the two blocks. Finally, Ecuador terminated the production sharing contracts. The arbitral tribunal concluded that Ecuador's actions amounted to the unlawful expropriation of Burlington's investment and that Ecuador should pay compensation to Burlington in the amount of US$380 million.

In the course of the arbitral proceedings, Ecuador raised counterclaims seeking compensation for damage to the environment and to the infrastructure of the oilfields alleged to have been caused by (among others) Burlington. The arbitral tribunal awarded Ecuador compensation in the amount of US$39.2 million for the environmental claims and US$2.6 million for the infrastructure counterclaims. It is the first time in the history of investment treaty arbitration that damages have been awarded against the investor and in favour of the state. We discussed this topic more extensively in the 34th edition of the **Arbitration World** issued in May 2017.

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CALLING ALL "INSURANCE" ARBITRATORS—OR NOT: ARBITRATOR QUALIFICATIONS IN INSURANCE COVERAGE ARBITRATIONS

By Carolyn M. Branthoover and D. Julian Veintimilla (Pittsburgh)

Arbitration clauses are an increasingly common feature of insurance and reinsurance policies, requiring insurers and policyholders to submit their disputes to determination by an arbitral tribunal rather than a court. An important part of any arbitral process is the selection of the arbitrators who are to decide the disputed matter.

Accordingly, the arbitrator selection process has the potential to be its own source of concern, if not disputes. We covered this topic as it relates to the selection of arbitrators under the unique specifications of Bermuda Form policies in the July 2016 edition of **Arbitration World**.

In the insurance arbitration context, one aspect of arbitrator selection that has attracted attention of late is the requirement, appearing in some standard arbitration provisions, that the appointed arbitrators have experience in the area of insurance. This qualification requirement was brought front and center in a case recently decided, first, in November 2017 by the English High Court and, second, in March 2018, by the English Court of Appeal in *Allianz Insurance PLC and another v Tonicstar Ltd*. [2018] EWCA (Civ) 434. This article examines some of the common rules and practices generally applicable to the selection of arbitrators. It then analyzes how such rules and practices operate when the parties' arbitration agreement specifies insurance-related qualifications for the arbitrators, including a discussion of the recent *Tonicstar* decision and the approach likely to be taken by a U.S. court.

ARBITRATOR SELECTION AND QUALIFICATION

Arbitration is grounded in the concept of party autonomy, and this concept extends to the ability of parties to determine how arbitrators are selected. Arbitration agreements routinely include specific procedures that the parties are to follow to select arbitrators, and the parties' ability to self-regulate this process is explicitly acknowledged, for

example, in the U.S. Federal Arbitration Act. 9 U.S.C. § 5 ("*If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.*"). Similarly, Section 16 of the Arbitration Act 1996 (applicable to arbitrations seated in England) provides that "*[t]he parties are free to agree on the procedure for appointing the arbitrator or arbitrators.*" Institutional rules of arbitration also provide for the manner in which an arbitral panel is to be composed (see, e.g., ICC Rules of Arbitration, Arts. 7, 8 and 9), subject to the potential modification of the process in the parties' arbitration agreement.

An important part of the arbitrator selection process is sensitivity to issues of any potential arbitrator partiality. Often, the arbitration agreement will explicitly require that arbitrators be impartial; even when it does not, institutional rules of arbitration typically have their own requirements of arbitrator impartiality. E.g. ICC Rules of Arbitration, Art. 11.1 ("*Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.*"). Those requirements, arising from the parties' agreement and/or institutional rules incorporated by reference, are also supplemented by the procedural law at the seat of the arbitration which will often also require that arbitrators be impartial.

THE *TONICSTAR* DECISION

Because the manner in which an arbitration is conducted must conform to the parties' agreement, an arbitration panel composed in a way that does not comply with that agreement is subject to potential challenge, and, if not validly constituted, any award that the tribunal issues risks being set aside by a court. *See, e.g., Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 625 (5th Cir. 2006).* The recent English Court of Appeal decision in *Tonicstar* addressed a challenge to a party-nominated arbitrator who, it was alleged, did not satisfy the insurance-related arbitrator qualifications specified in the parties' agreement. *Tonicstar* involved a reinsurance dispute related to liabilities arising out of the September 11, 2001 attack on the World Trade Center. The reinsurance contract contained an arbitration clause providing that "*the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance.*"

The respondent-reinsurers selected as their arbitrator a lawyer (specifically, a senior English barrister) who had significantly more than ten years of experience working in insurance or reinsurance law. The claimant-insurers, however, challenged the reinsurers' selected arbitrator, arguing that he was not qualified to serve under the terms specified in the contract. More specifically, they argued that the arbitration clause required that the arbitrators have experience working in the insurance industry and that a

lawyer practicing insurance/reinsurance law did not satisfy that requirement. The claimant-insurers were successful before the English High Court, where Mr. Justice Teare was influenced by an unreported 2000 decision. The Court of Appeal, however, was not persuaded by either the claimant-insurers' arguments or the previous unreported decision and reversed the decision of the High Court.

Before the High Court, the reinsurers had argued that "*[t]he ordinary and natural meaning of 'experience of insurance or reinsurance' included experience acquired not only from working within the insurance and reinsurance industry but also from working with or on behalf of that industry.*" The reinsurers also had argued that this "ordinary and natural meaning" was reflected in other writings, including standard wording recommended by the nonprofit insurance organization, AIDA Reinsurance and Insurance Arbitration Society ("**ARIAS**"). The referenced ARIAS language provided that "*[u]nless the parties otherwise agree the arbitral tribunal shall consist of persons…with not less than ten years' experience of insurance or reinsurance* ***as persons engaged in the industry itself or as lawyers or other professional advisers.***" According to the reinsurers, if the claimant had wished to exclude lawyers from serving as arbitrators, they could have specified as such and cut short arguments based on standard wordings to the contrary used elsewhere by the insurance industry.

The High Court ruled against the reinsurers, in large part, on the basis of an unreported 2000 decision, referred to as *Company X v Company Y*, which held that, where such an industry-related qualifications clause exists, "*it was reasonably clear that the parties who adopted the clause intended a 'trade arbitration,'*" meaning that "*the tribunal was to consist of persons from the trade or business of insurance and reinsurance*." Mr. Justice Teare indicated that, while there was "*undoubted force*" in the reinsurers' arguments, as a judge of first instance, he was constrained to follow the earlier decision that had stood unchallenged for seventeen years.

The Court of Appeal, being unconstrained by a lower court's decision, reversed the High Court's decision, finding that the reinsurers' arguments had more force than the unreported decision to which the High Court had cited. Indeed, the Court of Appeal questioned the reasoning of that unreported decision, finding no basis to support its holding that the parties' arbitral clause evidenced an intention to enter into a trade arbitration and, further, overruled it. "*The words of the clause do not say that a person appointed as an arbitrator must have been employed in the insurance or reinsurance industry for at least 10 years.*" The clause only requires "*experience of insurance or reinsurance*" and "does not impose any restriction on the way in which that experience has been acquired." Further, the Court of Appeal held that

the context in which the clause appears would not support a limitation requiring an arbitrator to have worked within the insurance industry. Even if the language of the clause appeared ambiguous (which the Court did not think was the case), there was no reason to believe that the parties intended the clause to refer to a "*trade arbitration*" as the insurers understood the term. In support of this fact, the Court pointed out that "*there are many examples of standard terms drafted by trade associations which provide for arbitration of disputes but do not require persons appointed as arbitrators to be members of the trade or prevent lawyers who have never been engaged in the trade from being appointed.*"

ARBITRATOR CHALLENGES IN THE UNITED STATES

U.S. courts have not addressed the narrow issue presented in *Tonicstar*. Generally, when U.S. courts have considered issues related to arbitrator selection and qualification, they have done so from the perspective of arbitrator partiality and allegations of bias. This body of case law largely establishes that generalized allegations of bias are not likely to result in disqualification. *See, e.g., Trustmark Ins. Co., John Hancock Life Ins. Co.*, 631 F3d 869 (7th Cir. 2011). It has also given rise to a widely followed four-part test to determine the existence of "evident-partiality" in arbitrators.

> To determine if a party has established [evident] partiality, a court should assess four factors: "(1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding."

Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 74 (2d Cir. 2012).

The fact that U.S. courts have not ruled on the precise issue presented in *Tonicstar* leaves unclear how they would do so if the issue arises. Having said that, there are several reasons why a U.S. court would likely be persuaded by the arguments put forward by the reinsurers in *Tonicstar* and interpret similar qualifications language as the English Court of Appeal did. First, the same ARIAS language that was found supportive of the Court of Appeals' decision in *Tonicstar* is found in the ARIAS Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes and, accordingly, provides similar evidence of the meaning of "insurance experience" as ordinarily understood within the insurance industry. Second, assuming that similar arbitrator qualification language is found in a standard form insurance policy prepared in the first instance by the insurance company and not subject to negotiation during the underwriting process, the widely recognized principle of contra *proferentum* will also aid a policyholder in arguing that the qualification language should be construed broadly for the benefit of the policyholder, subject to the effect of any specific exclusion of that principle. Third, although obviously not binding on a U.S. court, the comprehensive and well-reasoned decision by the Court of Appeals in *Tonicstar* would likely be persuasive.

THE ARBITRATION AGREEMENT: WHAT POLICYHOLDERS CAN DO

To the extent that arbitration agreements are beginning to appear with greater frequency in certain insurance policies—for example, in cyber-liability insurance policies and in representations and warranties policies—they are typically appearing as part of the policy form offered by an insurer. These provisions, however, may well be negotiable, and policyholders should first consider whether they prefer to have potential disputes resolved by a court instead of by arbitration. If, however, the policyholder is amenable to having its disputes resolved by arbitration (and/or the insurer is insistent upon it), policyholders should then review the proposed language carefully and attempt to negotiate any necessary or appropriate modifications. For example, it is likely to be beneficial to most policyholders to eliminate completely any specified insurance industry qualifications for arbitrators—so

as to avoid the appointment of insurance industry insiders who may be predisposed to support policy interpretation arguments advanced by insurers. It is not unreasonable for a policyholder to be concerned about whether an arbitrator coming from the insurance industry might have a bias (whether conscious or unconscious) towards ruling in favor of the insurance company. As one commentator put it:

> "[w]hen a private arbitrator has significant ties to the insurance industry...he or she may derive substantial income through his or her activities as an arbitrator... retained by insurance company customers. In those situations, a reasonable person could justifiably question the arbitrator's ability to be impartial or independent in a case pitting an insurance company against a policyholder."

Richard C. Giller, ***Policyholders Should Be Wary of Industry-Specific Arbitration Provisions***, American Bar Association (Aug. 15, 2014). If, however, the insurer insists that arbitrator qualification language remain in the arbitration agreement, policyholders should insist that the qualification provision explicitly allows the appointment of individuals whose professional experience of insurance was gained outside the insurance industry itself, so as to include, for example, the experience of lawyers who represent insurers and policyholders.

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LEVERAGING MACHINE TRANSLATION TECHNOLOGY FOR MULTI LINGUAL ARBITRATIONS

By Julie Anne Halter, Partner and Lori Steidl, Staff Attorney (K&L Gates' e-Discovery Analysis and Technology Practice Group), Seattle

INTRODUCTION— LANGUAGE ISSUES IN INTERNATIONAL ARBITRATION

As arbitration matters span across borders, so too do the legal teams working on those matters. This unavoidable reality of international arbitration presents a number of logistical issues. These range from mundane issues, such as standard paper/binder sizes, to schedule challenges presented by relevant participants (counsel team members, witnesses, experts, and tribunal members) residing in multiple time zones to what can be the biggest logistical challenge of all: language barriers.

If you have qualified personnel with proficiency in the languages at issue in your matter, inclusion of a few bilingual team members may be all you require to address your high-level needs in terms of planning, strategy, and day-to-day case functions. However, if the expected document volumes exceed what can comfortably be handled by bilingual team members, you will need to assess translation options.

Formal translation services are available to ensure key documents being relied upon in a matter are provided in whatever languages are required. These translations are typically completed by individuals with a very high level of proficiency in the languages both from and to which they are translating and accompanied by a certification guaranteeing the accuracy of the translation.

Procuring translations with such a high degree of accuracy comes with a steep price tag. This level of investment may be necessary for the core set of documents on which a matter hinges, but the expense is often impractical when a party is simply trying to sift through a large universe of documents in order to locate those key documents.

MACHINE TRANSLATION TECHNOLOGY

Machine translation technology can offer a viable solution to this dilemma. Admittedly, even limited use of basic online translation tools reveals that automated translation suffers from accuracy issues. Fortunately, although

machine translation is unlikely to reach the level of precision required for an official translation (at least for some considerable time), this rapidly evolving technology is already more than adequate to assist in assessing the basic relevance of most documents.

Taking advantage of machine translation can greatly expand your options for staffing a project with the appropriate resources. The ready availability of passable, working translations of your documents allows you to push work to team members with the most suitable level of subject-matter knowledge and appropriate billing rate for the specific task at hand, rather than those decisions being driven entirely by the individual's linguistic proficiency. Not only may machine translation enable you to avoid the expense of outsourcing document review, it can keep the matter running efficiently by ensuring a basic translation of documents designated by the review team as relevant is immediately available to your core team members.

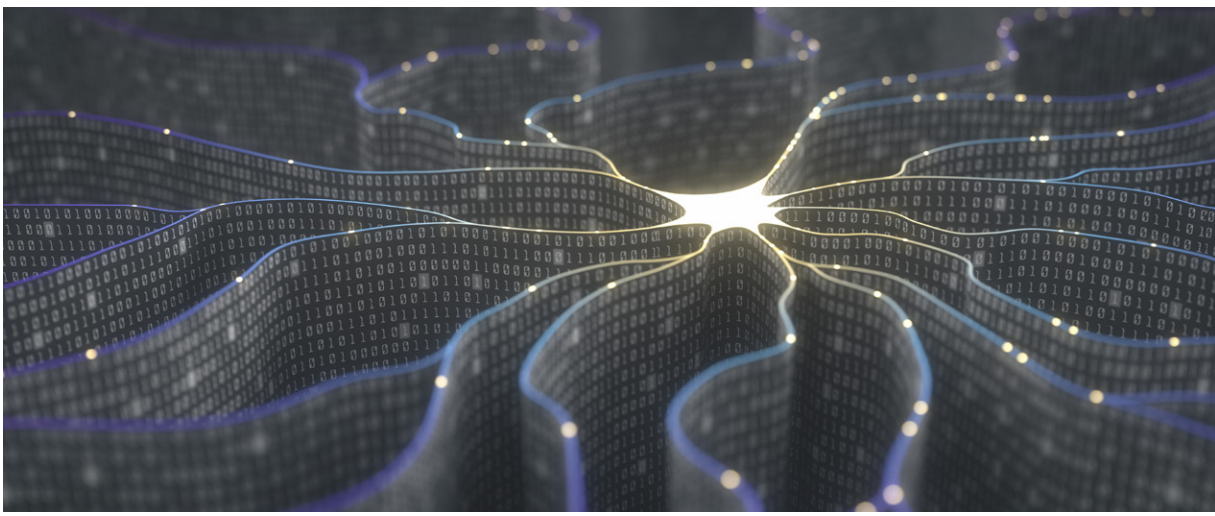
Once you have determined that machine translation is appropriate for your project, there are a number of practical considerations in selecting the correct service and setting up a sound workflow to ensure you get the best possible value and work product.

PRICING

Like most vendor services, machine translation services can vary considerably in cost—so it pays to shop around. Translation services may charge per word, per page, or per document. If available, per-document options typically afford both the best pricing and the greatest cost certainty.

INTEGRATION

The level of integration with your current document review platform is another variable to consider. Many translation services require that translation take place outside the client's litigation support platform, with the results then



being loaded back into the litigation platform and linked to the original documents. This process can add considerable time to the review process and interrupt workflow.

Another option to explore is the availability of tools that can be fully integrated into the review platform, allowing users essentially to request translation "on the fly." "On the fly" translations promote workflow efficiency: not only does the more immediate return of results lessen disruption for users, it also allows them to be more selective in what they submit for translation.

LANGUAGE SELECTION ISSUES

Consider the nature and scope of the language support that the tool provides. Does the tool cover the language(s) you need? Does the tool (or the platform it is tied to) have the ability to automatically detect the underlying language of a document? Auto-detection can be extremely valuable in allowing a more automated means of proactively identifying and queueing files for translation. Can the user specify the languages from and into which a document will be translated (both as default values and with the ability to override the default if needed)? These capabilities may be of value in completing translations in a more timely and accurate fashion.

OTHER CONSIDERATIONS

There are a number of factors that can affect the quality of the translations you receive. Awareness of these factors will enable you to tailor your workflow to account for likely errors, explore options to address anticipated shortcomings, and assess whether the expected benefits of possible remedial steps outweigh the time and cost of implementing them.

One such factor is the availability and quality of underlying text. Electronic files from which text is extracted directly will tend to yield the most accurate

translations. Scanned documents or other documents that need to undergo optical character recognition (OCR) to create text are likely to yield lower-quality translations, particularly if the original scan is of poor quality.

If OCR needs to be added, the best results will be realized by having the documents OCR'ed based upon the language in which they originated to account for different characters that may be unique to that language. While this is most obvious for documents that originate in character-based languages, it is equally true for alphabet-based languages. For example, an OCR tool set with Spanish as the underlying language will recognize the character "ó" correctly, whereas an OCR tool set with English as the underlying language is likely to read the same symbol as the number "6." If the underlying text submitted for translation contains errors such as this, the word will not be recognized and/or translated correctly. Many processing tools have a language recognition feature that can aid in identifying the predominant language of a file, allowing you to select the optimal settings for OCR.

Another factor that impacts the required translation quality is the intended downstream use of the translations. Is the translation intended for a human reader, or will it be subjected to further automated processes? Minor discrepancies in a translation may be easily recognized and reconciled by a *person* reading the translation, particularly if they have a rudimentary understanding of the underlying language. However, if you plan to run searches against your machine-rendered translations, these errors may have a greater impact. You may need to take steps to correct recurrent errors prior to running searches or adjust your search strategies (e.g., employing wild cards and fuzzy searching) to work around them.

CONCLUSION

While the results may not be perfect, use of machine translation provides a practical option for handling files in multiple languages, where your resources in the underlying languages are limited. Machine translation will not replace the need for certified translations of documents to be used in legal proceedings, but the technology can be a valuable addition to your arsenal as you look to streamline the review of documents, reduce costs for clients, and optimize your staffing for international projects.

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DOCUMENTS AND DATA IN COMPLEX MULTI-ISSUE OFFSHORE ENGINEERING AND CONSTRUCTION DISPUTES—HOW TO GET AHEAD OF THE GAME AND GAIN STRATEGIC ADVANTAGE

By Jeremy Farr, Charles Lockwood, and Clare Kempkens (London)

Offshore engineering and construction disputes are usually technically complex, involve multiple issues and require the consideration of many gigabytes of electronic communications and documents (collectively referred to in this article as "documents").

There will probably be a hit rate of no more than 5 percent of documents that may actually make a difference to the outcome of the dispute. Getting to that 5 percent in an efficient and cost-effective way is critical and requires thorough planning and discipline. Without planning and a disciplined approach, document collection, review, disclosure and the associated costs can quickly run out of control. Critical probative evidence may be missed because it is buried in the morass, and the process may disrupt the orderly progress of the arbitration, causing additional costs and delay.

In this article, we consider the complexities and challenges of dealing with large, document-heavy, multi-issue disputes arising from offshore engineering and construction projects.

WHY ARE DOCUMENTS IMPORTANT?

It may be a trite question, but asking why the project documents are being reviewed is the critical first step. The answer is generally twofold. First, the review is key to the process of case assessment and case preparation. Senior management/lawyers will be presented with the project team's view of the issues. Often, the project team's perspective may contain elements of wishful thinking. An early, quick and targeted review of key documents is essential to the assessment of strengths and weaknesses in the case, which should then inform strategy and the management decision to fight or compromise. Thereafter, the focus should be upon finding, as painlessly as possible, the 5 percent of documents that may matter to ensure that the case

is put on the right basis and supported by the contemporary evidence and to ensure that there is an awareness and understanding of any potentially damaging material.

Second, the project document review is to ensure compliance with any applicable disclosure obligations laid down by the arbitral rules or by the tribunal exercising its case-management discretion.

There are a range of possibilities as to what the parties' disclosure obligations might be. For an arbitration seated in England, the Arbitration Act 1996, s.34 stipulates that it is for the arbitral tribunal to determine all procedural and evidential issues subject to any agreement between the parties. Such agreement often finds its form in a contractual reference to arbitration being conducted pursuant to certain institutional rules (e.g. ICC, LCIA, UNCITRAL). Most institutional rules provide the arbitral tribunal with considerable discretion in deciding what evidence is to be adduced in the arbitration, as part of the tribunal's case-management powers. With respect to documents, the tribunal has a broad discretion to order production of documents which it considers to be relevant. In the exercise of that discretion, the tribunal might adopt what has, until recently, been the default approach in the English Court of requiring production of all documents upon which a party relies, which support the other party's case or which adversely affect either side's case (known as "standard disclosure"). The alternative approach often adopted in international arbitration is to apply the IBA Rules of Evidence, which require each party to produce the documents on which it relies and allow the other party to request (with due explanation of relevance) categories of documents which have not been produced. The party from whom disclosure has been requested will be entitled to raise objections, and ultimately, the tribunal will rule on disputed categories.

Some tribunals take the view that an order for standard disclosure in a highly technical document-heavy offshore engineering and construction dispute will avoid a raft of applications for specific disclosure and save time and cost. In our experience, not only is that not the case, but it actually increases costs and can be highly disruptive of the arbitration timetable. This is because the standard disclosure obligation is very broad and usually results in disclosure of a massive quantity of documents from which it becomes a lengthy process to sort the wheat from the chaff and find the small number of documents which in fact have probative value. The process of working through the other party's standard disclosure can be a lengthy one, and it may therefore be some time before the receiving party is able to identify what is missing and to formulate requests for specific disclosure. Far better, in our experience, is to adopt the "reliance and request" model, as this focuses the parties on relevance at all times.

IDENTIFYING THE 5 PERCENT

Arbitration of a highly technical, document-heavy dispute arising from an offshore engineering and construction project is itself a project and is best treated like one. A focused and disciplined approach by the legal team, supported by senior management, adopting legal project management techniques pays substantial dividends. Front-end investment in a senior lawyer, experienced in these disputes, who will know what to look for and where and who can ask the right questions of the project team is vital. Just as in the days before electronic communications, the best route to the key material in the first instance is through the people who were/ are involved.

ESTABLISHING AND WORKING WITH THE WIDER POOL OF MATERIAL

Whilst hosting and processing charges can be high, the bulk of the expense in a disclosure process usually comes from the review. In an ideal world, the amount of time and money spent on a formal review exercise would be strictly limited and proportionate to the amounts at stake. However, proportionality can be difficult to achieve if the starting point is an assessment of what material *might* be relevant. There is much to be said for "reverse engineering", starting with a benchmark for the number of documents which might be appropriate and working backwards to achieve it in so far as it is reasonably possible to do so. Thereafter,

a staged approach can be adopted where various criteria are adjusted until a number closer to the benchmark is reached. The level of that benchmark and the review will ultimately depend not only on the importance of the case and the orders from the tribunal but also the client's appetite for risk.

Even with a substantial review process, much can be done to make it more efficient. Clever techniques exist to identify concepts and clusters of documents and machine learning/ predictive coding is developing all the time (as, for example, explained by members of our e-DAT practice group in their **article** regarding predictive coding in the 30th Edition of *Arbitration World*). Alongside the use of such techniques, in these sorts of dispute there is much to be said for simply getting the basics right. These should include (i) a careful data retrieval process which preserves original file paths and folder structures for witnesses and experts to use; (ii) a more aggressive approach to de-duplication combined with email threading; (iii) carefully considered fields, codes and searches, drawn up with the considered input of the senior lawyers and engineers; and (iv) an easy-to-use and effective user interface. With those in place, not only will any review be cheaper and quicker, but the "morass" of documents should turn from a black hole into a resource and workspace that can be useful to all on the case.

CONCLUSION

By way of final comment, since the arbitral process is, despite best intentions, an adversarial one, there will always be a temptation for parties to act in a manner which does not assist their opponent. Indeed, it is not uncommon for the disclosure exercise to be used as a war of attrition by one side against the other. If that is to be managed, then there needs to be a willingness on the part of the tribunal to descend into the mundane details of the disclosure process. That is no easy task these days, but an ability to identify, and a willingness to penalise, sharp practice with a tactical aim rather than one of achieving the fair and efficient resolution of the dispute can be key to a sensibly priced resolution.

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NEW ARBITRATION RULES OF THE GERMAN INSTITUTION FOR ARBITRATION ("2018 DIS RULES")

By Johann von Pachelbel (Frankfurt)

On 1 March 2018, the revised arbitration rules of the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., or "DIS") came into effect and apply to all proceedings initiated with DIS as of 1 March 2018. In accordance with the trend in recent years among other international arbitration institutions when launching revised rules, the amendments to the replaced 1998 DIS Rules (the "Old Rules") are aimed at enhancing the efficiency and flexibility of arbitral proceedings.

THE NEW ARBITRATION COUNCIL

One prominent feature of the 2018 DIS Rules is the strengthened role of the DIS itself, particularly by the creation of the "Arbitration Council"—an independent body, exercising administrative powers to ensure that certain controversial decisions are no longer taken by arbitral tribunals or state courts. The Arbitration Council, represented by several committees of three individuals each, acting on a voluntary basis throughout the arbitral proceedings, has the following competencies (to name but a few):

- The power to decide, upon the request of any party to the DIS, that the arbitral tribunal shall be comprised of a sole arbitrator (Article 10.2).
- The power to hear challenges to arbitrators (Article 15.4). This new rule aims to enhance the acceptance of challenge decisions.
- The power to remove an arbitrator from office for not fulfilling his duties pursuant to the DIS Rules (or not being in a position to fulfill those duties in the future) (Article 16.2). This power was reserved to state courts under the Old Rules.
- The power to administer deposits paid by the parties concerning the arbitrators' fees and expenses and decisions on adjustment and payment of security amounts (Articles 34–36).
- The power to determine the arbitral tribunal's fees, taking into consideration the diligence and the efficiency of the handling of

The amendments to the replaced 1998 DIS Rules (the “Old Rules”) are aimed at enhancing the efficiency and flexibility of arbitral proceedings.

the proceedings by the arbitral tribunal when the arbitration has been terminated by an award, by consent, or prior to the making of a final award (Article 34.4).

- The power to reconsider (upon an application by a party) the amount in dispute as determined by the arbitral tribunal (Article 36.3). This rule aims to ensure the integrity of procedure.
- The power to reduce the fees of one or more arbitrators based upon the time it has taken the arbitral tribunal to render its final award (Article 37).

Moreover, the arbitral tribunal must now send the final draft award to the DIS for a formal review, typically within three months from the last hearing or the last authorized submission (Article 37). That requirement notwithstanding, the review is less detailed compared to the scrutiny of an award under the ICC rules and does not interfere with the arbitral tribunal's exclusive responsibility for the content of the award (Article 39.3).

ACCELERATION OF PROCEEDINGS

The 2018 DIS Rules contain shorter procedural deadlines than the Old Rules. For example, the 45-day time limit for filing the respondent's answer starts running from the time of receipt of the request for arbitration by the respondent (Article 7.2). This constitutes a notable change to the Old Rules, under which the deadline was set by the arbitral tribunal following its constitution. The new deadline may be extended by 30 days upon request of the respondent, and a further extension may only be granted in exceptional circumstances (Article 7.3). Other new procedural deadlines include the following:

- The respondent must notify the DIS within 21 days from receipt of the request for arbitration of its nomination of a co-arbitrator, as well as any proposals regarding the seat of the arbitration, the language of the proceedings, and the rules of law applicable to the merits (Article 7.1).
- When a tribunal comprises three arbitrators, the co-arbitrators, once appointed, jointly nominate the president of the arbitral tribunal within 21 days (Article 12.2) (a 30-day deadline applied under the Old Rules). If they fail to do so, the president shall be selected and appointed by the DIS Appointing Committee. The new rule takes into account past criticism that delays during the constitution of the arbitral tribunal provided respondents with too much time to submit answers.
- Under Article 27, the arbitral tribunal shall hold a case-management conference with the parties as soon as possible (and in principle within 21 days from the tribunal's constitution) to discuss the procedural timetable and

the application of measures for increasing procedural efficiency, as set forth in Annex 3 to the 2018 DIS Rules. This may include, *inter alia*, a limitation of rounds of submissions and the exclusion or limitation of production of documents by the parties on whom the burden of proof does not rest, as well as considering mediation or other forms of alternative dispute resolution, and an application of the rules for expedited proceedings (Annex 4).

Another new dispute resolution tool is set out in Article 2.2 of the 2018 DIS Rules: any party or all parties jointly may request the DIS to appoint a 'Dispute Manager', whose role is to assist the parties in selecting the best procedure for resolving their dispute (Annex 6). Such Dispute Manager may later attend the case management conference (with the consent of the arbitral tribunal) (Article 27.3).

MULTI-PARTY AND/OR MULTI-CONTRACT ARBITRATION

The 2018 DIS Rules contain modified rules on multi-party arbitration and new rules allowing for multi-contract claims, as well as consolidation of arbitrations, and joinder of additional parties.

Provided all parties have consented, a dispute between more than two parties may be decided in a single, multi-party arbitration (Article 18). Claims arising out of, or in connection with, multiple contracts may be decided in a single multi-contract arbitration (Article 17). Prior to the appointment of an arbitrator, and upon the request of one party (and if all parties agree), the DIS may consolidate several DIS arbitration proceedings into a single set of proceedings (Article 8), and any party wishing to join a third party to the arbitration may file with the DIS a request for arbitration against such additional party (Article 19.1). The final decision on the admissibility of any consolidation or joinder rests with the arbitral tribunal once it is constituted (Articles 8.1. and 19.5).

With this in mind, before entering contracts, parties would be well advised to consider possible future multi-party and/or multi-contract arbitrations. It may be beneficial to secure the prior consent of other parties to consolidate or join disputes into one arbitration and to ensure that arbitration clauses in different contracts are compatible with each other (for example, being consistent in terms of applicable rules, number of arbitrators, place of arbitration, language of proceedings, etc.).

APPOINTMENT AND CHALLENGE OF ARBITRATORS

Unless otherwise agreed, any party may submit a request to the DIS that the arbitral tribunal be comprised of a sole arbitrator. The Arbitration Council shall decide on such request after consultation with the other party/parties (Article 10.2).

If the request is rejected, the arbitral tribunal shall be comprised of three arbitrators. In practice, this may facilitate the adjudication of smaller disputes by a sole arbitrator without forfeiting the opportunity to have a three-member tribunal in other cases.

If a party fails to nominate a co-arbitrator (or in a multi-party arbitration, one side does not jointly appoint a co-arbitrator), such co-arbitrator shall be selected and appointed by the Appointing Committee, which has a discretionary power to appoint a co-arbitrator for the side which has failed to appoint one (or, indeed, to appoint both) (Article 20.3).

In consideration of concerns expressed by users in the past, the 2018 DIS Rules now expressly allow for co-arbitrators to consult with the parties regarding the selection of the president (Article 12.2).

SALIENT FEATURES OF PROCEDURE

Notwithstanding the intention to adjust the DIS Rules to international standards, the DIS abided by certain distinct civil law procedural features, including, for example:

- The arbitral tribunal shall, unless any party objects, encourage an amicable settlement of the dispute between the parties at every stage of the arbitration (Article 26).
- The arbitral tribunal is under a duty to discuss with the parties during the case-management conference whether it can give a preliminary legal and factual assessment of the case (Article 27.4(i) and Annex 3) by identifying disputed and relevant facts and salient legal issues at an early stage of the proceedings. To the extent the parties disagree on this, the arbitral tribunal shall decide in its discretion whether to apply such measure.

A party that fails to object promptly to the arbitral tribunal's case handling with regard to a specific question is deemed to have waived its right to object (Article 43).

INTERIM MEASURES

The 2018 DIS Rules contain new and more elaborate provisions on interim measures and entitle the arbitral tribunal, at the request of a party, to order interim or conservatory measures and also to amend, suspend, or revoke any such measures (Article 25). This may include an ex-parte decision if the purpose of the measure otherwise would risk being frustrated. However, the other party must be notified no later than when ordering the measure.

Contrary to many other recently revised arbitration rules around the globe, the 2018 DIS Rules do not address the "emergency arbitrator" topic. The DIS has decided to await the outcome of current deliberations on that topic in context with a potential revision of the German statutory arbitration rules but has indicated that it may revert to the topic in future.

COMMENT

The 20-year-old DIS Rules have been modernized and attuned to well-accepted standards in international arbitration. This harmonization has been widely welcomed by practitioners and arbitrators and will further strengthen Germany's position as a potential venue for international arbitration proceedings. With the benefit of the innovations, proceedings will become more streamlined and transparent while also being less protracted and less costly. This is underlined by the arbitral tribunal's obligation to discuss and agree with the parties on the procedure at an early stage of the arbitration by reference to the measures set forth in Annex 3 (Measures for Increasing Procedural Efficiency). Given the increasing number of complex business disputes involving more than two parties under a single contract, the new tools offered by the 2018 DIS Rules to achieve an efficient handling of multi-party and multi-contracts disputes will be welcomed by users.

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AVERAGE COSTS AND DURATION OF HKIAC ARBITRATION—NEW DATA PUBLISHED

By Sacha Cheong (Hong Kong)

On 23 January 2018, the Hong Kong International Arbitration Centre (**"HKIAC"**) published an updated report on the average costs and duration of HKIAC arbitration. The updated report compiles data from sixty-two arbitrations administered by the HKIAC under the 2013 HKIAC Administered Arbitration Rules in which a final award was issued between 1 November 2013 and 31 December 2017.

A comparison of the previous data published by the HKIAC on 15 December 2016 (which also covered arbitrations administered under the 2013 HKIAC Rules) and the newly published data is shown below:

OVERALL COSTS AND DURATION

	Previous (Dec. 2016)		Updated (Jan. 2018)	
	Median	Mean	Median	Mean
Duration of Arbitration (Months)	11.60	12.25	14.30	16.20
Costs of Arbitration (USD)	22,722.16	39,256.61	62,537.00	117,045.00

EXPEDITED ARBITRATION

	Previous (Dec. 2016)		Updated (Jan. 2018)	
	Median	Mean	Median	Mean
Duration of Arbitration (Months)	6.52	6.46	8.1	8.1
Costs of Arbitration (USD)	23,722.16	39,256.61	19,065.00	35,056.00

EMERGENCY ARBITRATOR ARBITRATION

	Previous (Dec. 2016)		Updated (Jan. 2018)	
	Median	Mean	Median	Mean
Duration of Arbitration (Months)	14 Days	14 Days	14 Days	14 Days
Costs of Arbitration (USD)	41,024.48	41,024.48	43,717.00	50,602.00

The newly published data suggests that:

- The overall cost and duration of HKIAC arbitration is tending to increase.
- The cost of expedited arbitration is trending downwards, despite these proceedings taking longer.
- The cost of emergency arbitrator arbitration is increasing, despite there being no noticeable change in duration.

Besides the HKIAC, three other prominent arbitral institutions have published data on costs and duration in recent years, namely the London Court of International Arbitration (LCIA) on 3 November 2015, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) on 24 February 2016, and the Singapore International Arbitration Centre (SIAC) on 10 October 2016.

In terms of how the HKIAC currently compares to these arbitral institutions, due to differences in data collection methodologies and sampling and only a limited pool of arbitration cases from the past several years, it is not possible to drawn any firm conclusions. Nevertheless, as a matter of general observation, the data suggests that of these four institutions, arbitration under the SIAC's Rules tends to be the cheapest and quickest.

Arbitral Institution	Median duration for all types of tribunals (months)	Median total costs of arbitration for all types of tribunals (USD)
HKIAC	14.3	62,537
SIAC	11.7	29,567
SCC	13.5	No information available
LCIA	16	99,000

The average duration of arbitrations under a particular institution's rules and the average cost of the arbitration institution are, of course, only two of a number of factors that are relevant to consider at the outset when drafting an arbitration clause in a contract, and (for example) deciding upon the proposed seat of the arbitration and deciding whether the arbitration is to be administered by an arbitration institution and, if so, which institution to specify.

Nevertheless, the willingness of the HKIAC to release this updated report and provide greater transparency regarding the arbitral process is a positive development and is to be encouraged. This can only assist the users of arbitration to make better-informed decisions when it comes to drafting arbitration clauses providing for institutionally administered arbitration.

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"Besides the HKIAC, three other prominent arbitral institutions have published data on costs and duration in recent years."

ARBITRABILITY IN THE UNITED STATES: TO DECIDE OR NOT TO DECIDE, THAT IS THE QUESTION

by Carolyn Branthoover and Max Gelernter (Pittsburgh)

INTRODUCTION—GATEWAY ISSUES OF ARBITRABILITY IN THE UNITED STATES

There is a split among the circuit courts regarding the issue of arbitrability. On January 10, 2018, the Supreme Court received a petition for writ of certiorari in a case presenting this question: Whether a court must grant a motion to compel arbitration of the gateway question of arbitrability even where a contract containing an arbitration clause is unrelated to the parties' instant dispute or whether the court should deny the motion where the arbitrability argument is "wholly groundless." However, on June 11, 2018, the Supreme Court denied certiorari. Thus, for the immediate future, the split among the circuits regarding the "wholly groundless" test and the uncertainty that arises from it will remain.

Many arbitration agreements contain a delegation provision giving arbitrators the authority to decide gateway questions of arbitrability, including the enforceability, scope, applicability, and interpretation of the arbitration agreement. *See Rent–A–Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010). The Supreme Court has instructed lower courts that "when courts decide whether a party has agreed that arbitrators should decide arbitrability," they "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chi. Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Accordingly, courts must first determine whether there is a clear and unmistakable intent to delegate this authority to the arbitrator(s).

THE "WHOLLY GROUNDLESS" TEST AND THE CURRENT CIRCUIT SPLIT

As courts around the United States have addressed this issue, a division in their analytical approach has arisen. In particular, courts in the Fifth, Sixth, and Federal Circuit Courts of Appeal add an additional step to the analysis: application of the "wholly groundless" test. As the Federal Circuit explained in *Qualcomm Inc.*, after a court concludes that the parties to an agreement clearly and unmistakably intended to delegate power to decide arbitrability to an arbitrator, "the court should perform a second, more limited inquiry to determine whether the assertion of arbitrability is wholly groundless." 466 F.3d 1366, 1371 (Fed. Cir. 2006). If

the trial court finds that the assertion of arbitrability is not wholly groundless, the court should "stay the trial of the action pending a ruling on arbitrability by an arbitrator." Conversely, if the court finds the assertion to be wholly groundless, it may "deny the moving party's request for a stay."

The Fifth and Sixth Circuits subsequently followed suit to the Federal Circuit. *See Douglas v. Regions Bank*, 757 F.3d 460, 462 (5th Cir. 2014) ("The mere existence of a delegation provision... cannot possibly bind [the plaintiff] to arbitrate gateway questions of arbitrability in all future disputes with the other party, no matter their origin.") (emphasis in original); *Turi v. Main St. Adoption Servs, LLP*, 633 F.3d 496, 511 (6th Cir. 2011) ("[E]ven where the parties expressly delegate to the arbitrator the authority to decide the arbitrability of the claims related to the parties' arbitration agreement, this delegation applies only to claims that are at least arguably covered by the agreement."). In July 2017, the Federal Circuit affirmed a finding of non-arbitrability under the "wholly groundless" test. *Evans v. Bldg. Materials Corp. of Am.*, 858 F.3d 1377, 1380 (Fed. Cir. 2017). Most recently, in September 2017, the Fifth Circuit reaffirmed the "wholly groundless" test, requiring only a plausible argument of arbitrability. *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344, 348–50 (5th Cir. 2017). On January 2018, *IQ Prods.* was appealed to the Supreme Court but on June 11, 2018 the Court denied certiorari.

The additional inquiry into whether a claim is wholly groundless was gaining traction until the Tenth Circuit expressly rejected it in *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017). In *Belnap*, the plaintiff attempted to avoid arbitration and urged the court to adopt the "wholly groundless" test. The Tenth Circuit, however, "decline[d] to adopt the 'wholly groundless' approach" and held that once a court finds "clear and unmistakable intent to arbitrate arbitrability," a court "must compel the arbitration of arbitrability issues in *all* instances in order to effectuate the parties' intent regarding arbitration." (emphasis in original). The Tenth Circuit further explained that the Supreme Court gave "express instruction that when parties have agreed to submit an issue to arbitration, courts must compel that issue to arbitration without regard to its merits."

In August 2017, the Eleventh Circuit joined the Tenth Circuit in expressly rejecting the "wholly groundless" test in *Jones v. Waffle House, Inc.*, 866 F.3d 1257 (11th Cir. 2017). From a policy perspective, the Eleventh Circuit explained that rejecting the "wholly groundless" test is consistent with the Federal Arbitration Act's "liberal policy favoring arbitration agreements."

Following the Eleventh Circuit's strongly worded decision, a slight trend away from the "wholly groundless" test was developing, but then, in December 2017, the Fourth Circuit in *Simply Wireless Inc.* appeared to reaffirm the applicability of the test. 877 F.3d 522 (4th Cir. 2017). After holding that the explicit incorporation of the Arbitration Rules of Judicial Arbitration and Mediation Services (**"JAMS"**) served as clear and unmistakable evidence of the parties' intent to arbitrate arbitrability, the court disagreed with the appellant's argument that, by allowing an arbitrator to resolve whether its claims are subject to arbitration under an agreement that is arguably unrelated to the claims in the complaint, "every arbitration demand, no matter how frivolous, [would] automatically be submitted to arbitration."

In reaching its conclusion, the Fourth Circuit relied upon a 1975 case for the proposition that a district court must give effect to a contractual provision clearly and unmistakably delegating questions of arbitrability to an arbitrator "unless it is clear that the claim of arbitrability is wholly groundless." *Local No. 358, Bakery & Confectionary Workers Union v. Nolde Bros., Inc.*, 530 F.2d 548, 553 (4th Cir. 1975) *aff'd*, 430 U.S. 243 (1977). Additionally, in a footnote, the court stated that "[s]everal of our sister circuits also have adopted the 'wholly groundless' exception."

Unlike the Fifth, Sixth, and Federal Circuits, the Fourth Circuit additionally reasoned that a court determining whether a claim has merit before enforcing the delegation provision is in line with Federal Rule of Civil Procedure 11(b). Under Rule 11(b), the court explained that parties should not file a motion to compel arbitration that is "'being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation,' or that is based on frivolous claims, defenses, or other legal contentions." Accordingly, the Fourth Circuit concluded that a district court should not enforce a delegation provision when the party asserting that the claim falls within the arbitration clause's ambit is either frivolous or illegitimate. In compelling arbitration, the Fourth Circuit determined that the district court "necessarily had to find that [the party's] assertion of arbitrability was not frivolous or otherwise illegitimate." (emphasis in original).

In summary, the Fifth, Sixth, and Federal Circuits have expressly adopted the "wholly groundless" test, the Fourth Circuit appears to follow it while not expressly saying so, and the Tenth and

Eleventh Circuits have expressly rejected it. That leaves the First, Second, Third, Seventh, Eighth, Ninth, and D.C. Circuits without clear authority on the matter.

What makes this gateway arbitrability issue further perplexing is that there appears to be no rhyme or reason as to why circuits are adopting or rejecting the "wholly groundless" test. The only consistent pattern among these decisions is that the circuits rejecting the "wholly groundless" test consistently do so on the basis that the test "is in tension with the language of the Supreme Court's arbitration decisions." *Belnap*, 844 F.3d at 1286.

PRACTICAL IMPLICATIONS

As a practical matter, given the circuit split and the uncertainty that it creates, parties drafting arbitration agreements should consider the arbitrability issue. In a typical contract negotiation when arbitration is designated as the dispute resolution mechanism, the parties often give little thought to the gateway issue of arbitrability, and the delegation of the authority to decide arbitrability often arises by virtue of the parties' incorporation by reference of the arbitration rules of a particular institution, such as the American Arbitration Association or JAMS. It is in the rules of those institutions that delegation provisions will often appear. Parties should consider carefully whether they want arbitrability to be decided by the arbitral tribunal—who may have a financial incentive to conclude that a claim is arbitrable—or by a court. If the preference is that arbitrability not be delegated to the arbitrators, then the arbitration agreement should contain an "anti-delegation" clause that specifically gives a court the authority to determine the scope and applicability of the arbitration clause.

Also, if the parties want additional assurance that a court will not allow a "wholly groundless" claim to proceed to an arbitrator, the parties might consider including a forum selection clause specifying a court within the Fifth or Sixth Circuit.

Due to the circuit split regarding the "wholly groundless" test and the uncertainty that arises from it, in order to save a client from higher costs and frustration, drafters of an arbitration agreement should consider including an anti-delegation provision in their agreement.

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A ROUNDUP OF RECENT ARBITRATION DECISIONS OF THE SWISS FEDERAL SUPREME COURT

By John Magnin and Matthew Gibbon (London)

Switzerland has long been a popular venue for international arbitration. The framework for arbitrations in Switzerland is set out in the Private International Law Act ("**PILA**"), which includes, at section 190, grounds for the setting aside of Swiss-seated arbitral awards.

Appeals brought under section 190 of PILA are frequently heard in the Swiss Federal Supreme Court (the "**Court**") and are a subject of international scrutiny and interest. As demonstrated by the three cases set out below, the Court tends to take a narrow and restrictive approach to these applications to set aside awards.

The Court's decisions are available in French, German or Italian. A private initiative of Swiss lawyers compiles unofficial English translations of arbitration-related judgments. Below we consider the Court's approach to (1) penalty clauses and punitive damages, (2) an appellant's right to be heard and the principle of equal treatment and (3) appeals against procedural orders.

CASE NO. 4A_536/2016 AND NO. 4A_540/2016: PENALTY CLAUSES, PUNITIVE DAMAGES AND PUBLIC POLICY

Background

This case involved a contract for the transfer of a professional footballer in July 2012. The contract provided for the purchase price of €5,800,000 payable in six instalments. In case of late payment or failure to pay, a contractual "penalty" of 10 per cent of the sum due and contractual "penalty interest" of 12 per cent per annum was applicable. The purchasing club was late in making some of the payments. In 2015, the Single Judge of the FIFA Players' Status Committee made two separate awards that the purchasing club make the payments, pay the 10 per cent contractual penalty and 12 per cent contractual penalty interest, and, additionally, pay 5 per cent per annum in statutory interest on the contractual penalty until paid. The purchasing club

appealed both decisions to the Court of Arbitration for Sport (the "**CAS**"). The CAS rejected both appeals. The purchasing club filed civil law appeals to the Court in respect of both decisions. Those appeals were consolidated and considered together.

The purchasing club submitted that the combined application of the contractual penalty of 10 per cent, the contractual penalty interest of 12 per cent per annum and the statutory interest of 5 per cent on the penalty were tantamount to punitive damages. That, the purchasing club argued, amounted to a violation of substantive public policy within the meaning of section 190(2)(e) of PILA.

Decision

The Court rejected both appeals. The purchasing club had agreed a contractual mechanism that provided for interest for late payment and a penalty clause. That could not be said to be tantamount to punitive damages which are, by definition, imposed upon the debtor, without any consent of the debtor. Nor could the statutory interest, which is the usual consequence under Swiss law when a debtor is in default, be said to be punitive damages.

In addition, although the Court did not expressly rule on the point, *dicta* in the judgment suggests that, in any event, it would have rejected the notion that an award would be contrary to substantive public policy under section 190(2)(e) of PILA simply on the grounds that it ordered a party to pay punitive damages.

CASE NO. 4A_80/2017: DUE PROCESS

Background

This case involved an appeal from an international weightlifter against the International Weightlifting Federation (the "**IWF**") in respect of a failed drug test that was carried out in 2015. Shortly after the 2015 World Championships

of Weightlifting, the IWF tested a urine sample from the appellant. This sample was found to include a very small concentration of the prohibited substance, ipamorelin. This finding was then confirmed at a hearing before the IWF Committee on 26 April 2016, and sanctions were imposed on the appellant. The appellant appealed the IWF decision to the CAS, which rejected the appeal and confirmed the decision in an arbitral award rendered on 1 December 2016.

The appellant then lodged a civil law appeal to the Court, requesting that the CAS award be set aside and that the case be sent back to the CAS for a new decision. The appellant's arguments for the appeal included that:

1. the CAS had violated the appellant's right to be heard and the principle of equal treatment (under section 190(2)(d) of PILA) by using the wrong concentration of ipamorelin (1ng/ml instead of 0.1ng/ml) when making its decision; and

2. the CAS had violated the right to be heard by refusing the appellant's request for an expert report on limits of detection and measurement uncertainty.

The Court dismissed the first point, noting that a manifestly false or conflicting finding alone is not sufficient to annul an arbitral award on grounds of a violation of the appellant's right to be heard and the principle of equal treatment. Rather, the appellant would have needed to show that the arbitral tribunal had not given both parties an equal opportunity to present their case. The Court noted that the right to be heard does not include the right to a materially correct decision. Clearly, this is a restrictive interpretation of the provision.

With regards to the appellant's second submission, the Court noted that the appellant had not requested an expert report, but had merely requested that the respondent disclose information on limits of detection and measurement uncertainty for ipamorelin. To argue that the right to be heard has been violated on this ground, the appellant should have clearly and officially requested the expert report before the tribunal. The Court stated that, in any event, an arbitral tribunal can refuse to hear a piece of evidence without violating the right to be heard.

CASE NO. 4A_524/2016: NO APPEAL AGAINST PROCEDURAL ORDERS

Background

This case originally concerned alternative dispute resolution ("**ADR**") proceedings between a British Virgin Islands (BVI) company (the appellant) and an Algerian state entity (the respondent). The parties had signed two contracts of association, as well as two contracts of formation of

a group, for oil exploration in Algeria. When a dispute arose between the two parties, arbitration clauses in the contracts of formation required that the parties attempt conciliation pursuant to the ICC ADR Rules. The respondent felt that the conciliation was not practically possible (the parties had been unable to organise an appropriate meeting or conference call involving all parties) and so filed a request for arbitration with the ICC seated in Geneva. The appellant objected to this request on the grounds that the conciliation had not taken place and, thus, that the arbitral tribunal lacked jurisdiction. The arbitral tribunal itself rejected this objection and ordered that the arbitration proceed, rendering an award, albeit one that was limited to this jurisdictional issue. The appellant appealed the arbitral tribunal's decision to the Court, who annulled the award and stayed the arbitration, setting a time limit for completing the conciliation process.

ADR proceedings were completed by way of conciliation, but this failed to resolve the dispute. As such, the arbitral tribunal resumed the arbitration and issued two procedural orders: (i) that the arbitration was to resume where it had stopped without the need for a procedural hearing and (ii) that the appellant's request that the first order be reconsidered was rejected. The appellant responded by filing a civil law appeal, requesting that the procedural orders be annulled on the basis that they directly impacted its "legally protected interests".

Decision

The Court held that the procedural decisions of the arbitral tribunal were not capable of appeal under the provisions of sections 190 to 192 of PILA. Whilst final awards, partial awards and interlocutory awards are all capable of appeal, a procedural order which can be modified or withdrawn during the proceedings is not.

The Court dismissed the appellant's argument that its "legally protected interests" had been violated. The Court noted that the only discernible interest was a desire to delay resolution of the arbitral process, which was not worthy of protection in any event.

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THE NEW YORK CONVENTION—RECENT DECISIONS HIGHLIGHT APPROACH OF THE ENGLISH COURT TO THE PUBLIC POLICY EXCEPTION

By Clarissa Coleman and Jonathan Graham (London)

INTRODUCTION—THE NEW YORK CONVENTION AND THE PUBLIC POLICY EXCEPTION

Obtaining a favourable award from an arbitral tribunal may be gratifying, but if the losing party fails to pay up, the award may be of little value. A significant advantage of international arbitration over litigation is the existence of a far-reaching enforcement regime for arbitration awards—the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. There are currently over 150 countries which are signatories to the New York Convention.

Article III of the New York Convention provides that "*Each Contracting State shall recognize arbitral awards as binding and enforce them….*". Article V New York Convention sets out the limited grounds available to contracting states for refusal to recognise or enforce an award, including under Article V(2)(b), where the recognition or enforcement of the award would be contrary to the public policy of the enforcing state.

The notion of public policy is not defined in the New York Convention, and the interpretation and application of the public policy exception can vary substantially from one signatory state to another. In this article, we review the approach of the English courts to the public policy exception by reference to two recent decisions.

THE APPROACH OF THE ENGLISH COURTS TO ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

The English court generally takes a pro-enforcement stance to foreign arbitration awards. For example, in *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [1998] 3 W.L.R. 770, the English court set a high standard for the claimant to avail themselves of the public policy defence. At [775] Colman J stated:

> *"Outside the field of such universally-condemned international activities as terrorism, drug-trafficking, prostitution and paedophilia, it is difficult to see why anything short of corruption or fraud in international commerce should invite the attention of English*

public policy in relation to contracts which are not performed within the jurisdiction of the English courts."

Two recent judgments of the English court, whilst emphasising the court's pro-enforcement stance, have highlighted situations in which the English court may be prepared to refuse enforcement on public policy grounds and how the interpretation of the public policy exception can differ across enforcing states. Notably, in the more recent of the two cases considered below, the court refused to enforce the award without a full trial of the corruption issues. Is this a sign that the English court is taking a more interventionist approach to arbitration and the enforcement of foreign awards?

ENFORCEMENT DESPITE FORGERY: THE APPROACH IN SINOCORE

Sinocore International Co Ltd v RBRG Trading (UK) Ltd [2017] EWHC 251 (Comm) concerned a contract to sell and ship steel coils. Pursuant to the sale contract, the buyer obtained a letter of credit providing that the latest date for shipment was 31 July 2010. Without the seller's consent, the buyer later instructed its bank to change the shipment period in the letter of credit. On 22 July 2010, the seller requested payment from the buyer's bank under the letter of credit. The bills of lading that were used by the collecting bank were forged, with the shipment date amended to conform to the amended shipment period appearing in the amended letter of credit. The buyer obtained an injunction from a Dutch court, restraining its bank from releasing payment under the letter of credit. The seller terminated the contract and arbitration in China ensued. The arbitral tribunal, applying Chinese law, found in favour of the seller, determining that it was the buyer's wrongful instruction to the bank to amend the shipment period in the letter of credit (making it inconsistent with the terms of the sale contract) which was the operative breach of contract. The buyer attempted to resist an application to the English Commercial Court for enforcement of the award. It argued that the award would give effect to fraud because the collecting bank, on behalf of the seller, had presented forged bills. The Commercial Court rejected this argument because the tribunal had found that it was the buyer's breach of its obligation under the sale contract to provide a conforming letter of credit which was the real cause of the seller being unable to obtain payment.

The Commercial Court's decision may seem surprising because the seller had presented forged bills of lading in an attempt to obtain payment from the buyer. The Court stressed the tribunal had decided that the presentation of forged bills of lading was not the operative breach and held that it was not appropriate to re-examine the tribunal's analysis of the issues. The Court also stated that the authorities did not support

the much wider proposition that a party who presented forged documents could not obtain relief from the court in respect of the transaction more generally, even if its claim was for damages for a prior breach of contract. The public interest in the finality of arbitration awards, particularly an international award determined as a matter of foreign law, clearly and distinctly outweighed any broad objection on the grounds that the transaction was "tainted" by fraud.

However, the Commercial Court noted that enforcement would be refused where the award upheld a fraudulent claim to payment based on the presentation of documents which were admitted (or found by the tribunal) to be forgeries. It is submitted that there may be a fine line between this scenario and the facts in *Sinocore International*, where the court found that the transaction was only "tainted" by fraud.

The case subsequently went to appeal ([2018] EWCA Civ 838), and the Court of Appeal upheld the Commercial Court's decision. The Court of Appeal agreed that the tribunal had expressly considered the issue of causation and found that the cause of the termination of the sale contract and of the seller's failure to obtain payment for the goods and resulting losses was the non-conforming letter of credit tendered by the buyer. Further, the Court of Appeal held that neither the buyer nor its bank was deceived and so, at most, this was a case of attempted fraud. Lord Justice Hamblen made clear that there is no public policy to refuse to enforce an award based on a contract, during the course of the performance of which there has been an attempt at fraud. Interestingly, the Court of Appeal held that even if public policy considerations were engaged, they would be outweighed by the interests of finality.

THE STATI EXCEPTION: SIGNALLING A NEW APPROACH?

In Stati and others v Republic of Kazakhstan [2017] EWHC 1348 (Comm), the English court held that the defendant's application to set aside permission granted to the claimants to enforce an arbitral award should proceed to trial. This case related to the exploration and extraction of hydrocarbons. The claimants had invested in a liquefied petroleum gas plant in Kazakhstan (the "**LPG Plant**"). The claimants claimed to have spent more than US$245 million on the plant's development and construction, which had come to nothing because of certain actions taken by the State of Kazakhstan (the "**State**"). In support of the figure they claimed to have spent on the LPG Plant, the claimants submitted evidence of bids they had received for its acquisition. The tribunal decided that the best source of information for valuing the LPG Plant was a particular offer of US$199 million (the "**KMG Bid**"). Permission was initially granted by the English court to enforce the award in England, and the State applied to set this aside. Shortly thereafter, the State obtained documents

"The [*Stati*] case suggests that there may be value in continuing efforts to evidence fraud even after a tribunal has dismissed such claims."

from a subpoena of a third party in the United States, which it claimed revealed fraud by the claimants. The State sought to amend their application to resist enforcement of the award in England on public policy grounds.

It was alleged that the value of the KMG Bid, on which the tribunal based its assessment of damages, was the result of the claimants' dishonest misrepresentation of the costs of construction and development of the LPG Plant, such that the claimants had fraudulently inflated the bid figure. Whilst the court only gave approval for the fraud allegations to be examined at trial (and did not at this hearing consider whether to refuse enforcement on public policy grounds), the judgment adopted a different tone to that in *Sinocore International*, perhaps explained by the fact that the details of the alleged fraud only emerged after the award in the arbitration proceeding. Mr Justice Knowles stated:

> *"[I]t will do nothing for the integrity of arbitration as a process or its supervision by the Courts…if the fraud allegations in the present case are not examined at a trial and decided on their merits, including the question of the effect of the fraud where found. The interests of justice require that examination."*

For the English court to permit a party to pursue to a trial of the issues an allegation that an arbitration award was obtained by fraud, it is usually necessary to establish that evidence of the fraud was not available to the party alleging the fraud at the time of the hearing before the tribunal, and the available evidence must be of sufficient strength to establish a prima facie case. The authorities suggest that it is not necessary to turn over "every stone" but rather that evidence of the fraud could not with reasonable diligence have been discovered at the time of the arbitral hearing. In *Stati v Kazakhstan*, the fresh evidence comprised new documents to suggest that the costs claimed to have been incurred on the LPG Plant were dishonest, such evidence coming to light only after the award was issued, following a subpoena against a third party in the United States compelling the production of documents. This case suggests that there may be value in continuing efforts to evidence fraud even after a tribunal has dismissed such claims, as evidence which is obtained after the hearing may be helpful (certainly with respect to the English court) to refuse enforcement, if a sufficiently strong prima facie case of fraud can be established.

This decision of the English court in *Stati v Kazakhstan* highlights the fact that there can be differences in how the public policy exemption is applied across New York Convention states. The State had made applications resisting enforcement on public policy grounds in Sweden and the United States, both of whose courts rejected the application. The Swedish court (the supervisory court as the seat of the arbitration was

in Sweden) adopted a very narrow application of the public policy provision, stating that the KMG Bid was not to be regarded per se as false evidence, even though the incorrect information regarding the amount invested in the LPG Plant was among the factors the offeror took into account when calculating the size of the offer. The Swedish court therefore concluded that the allegedly false information in the annual reports did not directly constitute any basis for the tribunal's assessment of the value of the LPG Plant and that the bid did not constitute "false evidence". The English court thought this approach unduly restrictive and held that if the powers of the Swedish court were so limited it was "*important to record that the powers of the English Court, and the requirements of English public policy, are not so limited*". The US court rejected a motion by the defendant to amend its application to resist enforcement to include grounds of fraud. The US court adopted similar reasoning to that of the Swedish court, holding that the arbitrators did not rely upon the allegedly fraudulent evidence (being the claimants' evidence of the costs incurred on the LPG Plant). The English court interpreted the US court's reading narrowly, noting that the US court had not concluded the question of the tribunal's reliance on the KMG Bid.

CONCLUSION

The English courts have a strong predisposition to favour enforcement of New York Convention Awards and are reluctant to interfere with arbitrators' decisions as the recent Court of Appeal decision in *Sinocore International* has confirmed, but may do so if new evidence of misconduct arises which was not put before the tribunal. As *Stati v Kazakhstan* has shown, the English court can be a willing international policeman when it comes to corrupt behaviour. Each New York Convention state may interpret the public policy exception to enforcement differently. It is therefore important to obtain local law advice as to the approach of the court in the jurisdiction in which enforcement is sought.

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