ARBITRATION WORLD

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READ THIS ARTICLE

FROM THE EDITORS:

WELCOME TO THIS 33RD EDITION OF *ARBITRATION WORLD*.

Following the United Kingdom's referendum decision on 23 June 2016 to leave the EU, in this edition we examine how the potential uncertainty in the short to medium term over the prospective treatment of English court judgments by EU member state courts post-Brexit may shift the balance towards arbitration in London and consider what effect Brexit may have on investment treaty arbitration.

We review the new Singapore International Arbitration Centre (SIAC) rules which came into effect in August 2016, and comment on the Singaporean government's announcement of plans to reform the law on third-party funding of disputes, including in international arbitration. We report on the German Institution of Arbitration's (DIS) forthcoming consultation into revision of its rules and summarise its proposed guiding principles.

We compare the different approaches of the major arbitral institutions to emergency and expedited arbitration, we comment on the recent decision of a Chinese court which refused to recognise an ICC arbitration award on public policy grounds, and we examine the costs consequences of commencing court proceedings in Australia in breach of an arbitration clause.

We review four recent decisions of the Swiss Supreme Court on the annulment or enforcement of arbitration awards. We also provide our usual update on developments from around the globe in international arbitration and investment treaty arbitration.

We hope you find this edition of *Arbitration World* of interest, and we welcome any feedback.

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ARBITRATION NEWS FROM AROUND THE WORLD

By Sean Kelsey (London)

AFRICA

Angola

A resolution ratifying Angola's accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") came into force on 15 August 2016, making the West African country the 157th party to the Convention. The former Portuguese colony is Africa's second largest oil producer after Nigeria and has experienced an annual growth rate in excess of 10 per cent since the end of a long civil war in 2002. Despite falling oil prices, infrastructure projects such as a new international airport for its capital, Luanda, continue to attract inward investment from the United States, Europe, Brazil, and China. Arbitrations seated in Angola are governed by the 2003 Voluntary Arbitration Law, which applies to both domestic and international proceedings and is to some extent based on the 1985 UNCITRAL Model Law. Angola's accession to the Convention is subject to the reciprocity reservation – i.e. Angolan courts will only recognise and enforce awards from other convention states. Angola is yet to accede to the ICSID Convention.

Mauritius

By its judgment dated 19 July 2016, the Judicial Committee of the UK Privy Council (the "Privy Council") has rejected an appeal from a judgment of the Supreme Court of Mauritius (the "Supreme Court") upholding an award (the "Award") made by a Mauritian arbitrator in 2005, who was himself the master and registrar of the Supreme Court at the time (the "Arbitrator").The dispute concerned unpaid invoices issued by a property developer ("Mascareignes") to a contractor ("Chang Cheng") under a 1993 standard form JCT contract for the construction of an office building in the capital of Mauritius, Port Louis (the "Construction Contract"). The principal issue in dispute was whether under the Construction Contract Chang Cheng had been entitled to payment for works, which had been substantially redesigned during construction, on a 'lump sum' or a 'measure and value' basis. The Arbitrator held that the Construction Contract was a "measure and value" contract or (as a fall back) if it was initially a "lump-sum" contract, it was varied by the parties so that payment became due on the basis of measurement and valuation, as evidenced by the parties' behaviour in carrying out the contract. The Arbitrator awarded Chang Cheng

22.8 million Mauritian rupees (now equivalent to around US$640,000) and dismissed Mascareignes' counterclaims. The parties' arbitration agreement provided, in accordance with Mauritian law, for an appeal from an award on a point of law, and Mascareignes commenced its challenge to the Award, which then proceeded before the Mauritian courts, eventually reaching and being determined by the Supreme Court. The Privy Council held that the arbitrator had wrongly decided that the Construction Contract was not a lump-sum contract. The Privy Council held that the parties' use of measurement and value in carrying out the contract is not inconsistent with a lump-sum contract; additional or substituted work carried out within a lump-sum contract may be measured and valued. But the Privy Council found that this *"mischaracterisation"* of the contract by the Arbitrator ultimately *"had no bearing"* on his decision, as the bulk of the components of the work were properly valued by measurement and value as a consequence of changes to the building and allocation of work since signing of the Construction Contract. So, whilst the Arbitrator had erred in finding that the Construction Contract was not a lump-sum contract, that finding ultimately had no bearing on the decision that Chang Cheng was entitled to receive the sums awarded. The challenge therefore failed. The Privy Council also recorded that it was a matter of regret that the Arbitrator had not recorded in the Award the detailed findings of fact which underlay his award. In his case, however, there was sufficient intimation as to those facts to conclude that the Supreme Court had been correct in rejecting a challenge to the Award. Mascareignes had also challenged the Award in part on grounds that a transcript of an arbitral hearing had gone missing upon the file's transfer to the Supreme Court. But the Privy Council further agreed with the Supreme Court, holding that it was *"not apparent"* that a missing transcript of one sitting could violate a public order rule under the Mauritian Civil Procedure Code which applies under 1981 Mauritian legislation governing domestic arbitrations *"unless there was a demonstrable adverse consequence to the administration of justice."* Neither could it be held against the Arbitrator in any event, who was not to blame for the loss of the document.

ASIA

China

As we report **further**, a Chinese court has refused, on grounds of public policy, to enforce an arbitral award rendered by a tribunal seated in Hong Kong, under the auspices of the ICC. In its judgment given in the case *Taizhou Haopu Investment Co., Ltd. v Wicor Holding AG*, the Taizhou Court held that the award conflicted with a prior Chinese court ruling on an issue of Chinese law, allowing a challenge brought on grounds of the public policy exception provided for under Article 7 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region.

India

The Supreme Court of India (the "Supreme Court") has cleared a London-seated ICC arbitration between Indian parties to proceed, upholding, in its judgment dated 24 August 2016, the ruling of the High Court of Madhya Pradesh (the "High Court") that the dispute is international in character. The US$19 million dispute concerns the termination of an agreement to develop and operate a coal mine in Madhya Pradesh. In 2009, Sasan Power ("Sasan") entered into a contract with The North American Coal Corporation (the "Contract"), which two years later assigned its rights and obligations under the Contract to its Indian subsidiary, NACC India. The governing law of the Contract is English law. NACC India commenced arbitration. Sasan disputed jurisdiction, arguing that submitting a domestic dispute between two Indian parties to arbitration with a foreign governing law is invalid under Indian law. Sasan obtained an interim injunction without notice to NACC India, but the restraint was set aside at trial. An appeal to the High Court failed on grounds that it is the seat of the arbitration, not the nationality of the parties, which determines whether a dispute is international. The subsequent appeal to the Supreme Court failed too, but on different grounds. In particular, the Supreme Court held that NACC India's US parent remains a party to the dispute and that it was on that basis that the arbitration is properly considered to be international. The Supreme Court reasoned that the dispute is in fact *"between three parties"*, with the *"foreign element"* being the *"rights and obligations of the American [parent] company"*. The Supreme Court also applied the principle of separability in rejecting Sasan's argument that the arbitration clause of the 2009 contract became void after the assignment to NACC India, as two Indian companies were unable to meet the requirement that disputes be resolved subject to English governing law. The arbitration agreement, including the governing law requirement, was held to be a completely separate agreement from the Contract, and only the arbitral tribunal could rule on its applicability between the parties. The case has attracted the usual commentary in relation to the apparent growing "friendliness" of India towards international arbitration and because it involved just two years of litigation from start to finish.

CARIBBEAN

British Virgin Islands ("BVI")

We have reported in the **past** on a long-running dispute between Sonera Holding BV ("Sonera") and Cukurova Holding AS ("Cukurova") centring on Sonera's proposed purchase of Cukurova's shares in telecommunications company Turkcell Holding. The dispute involves both a letter agreement and a share purchase agreement (the "SPA"). After many years of proceedings, an award had been made in favour of Sonera in arbitral proceedings pursuant to the letter agreement (the "Final Award"), together with the permission of the High Court in the BVI (the "High Court") to enforce that award as a judgment (the "Enforcement Judgment"). Pursuant to those determinations, Sonera had obtained a final charging order (the "Final Charging Order"). Cukurova commenced an arbitration under the SPA (the "Second Arbitration"), initially seeking compensation equal to the sum awarded against it under the Final Award. However, Cukurova subsequently sought an order for the restraint of the Enforcement Judgment, and the unwinding of the Final Charging Order, essentially seeking to undo the outcome of the first arbitration (the "Additional Relief"). Sonera sought the restraint of the Second Arbitration. The High Court refused Sonera's application, holding that the BVI Arbitration Act 2013 took away its jurisdiction to grant the injunction sought. The Eastern Caribbean Court of Appeal held that the BVI courts retain an inherent jurisdiction to restrain arbitrations, but the tribunal in the Second Arbitration having already ruled on the extent of its jurisdiction under the SPA, it was not for the BVI courts to intervene. However, the Court of Appeal characterised the Additional Relief as *"a direct attack"* on the Enforcement Judgment, which, having been grounded in the Final Award was *"unimpeachable"* under the New York Convention. Cukurova's pursuit of such remedies was an attempt to interfere with the judgment of the BVI courts, and the orders ought not to be permitted. Cukurova was restrained accordingly from causing or seeking to cause the second tribunal to grant the Additional Relief.

EUROPE

England

In a judgment dated 15 September 2016 which has provoked considerable interest and commentary, His Honour Judge Waksman QC sitting in the English High Court (the "High Court") has rejected a challenge to an arbitral award rendered pursuant to the arbitration rules of the ICC (the "Award") allowing recovery of a sum payable to a third-party funder. In particular, the Award allowed the successful applicant ("Norscot") to recover the full sum payable to its third-party funder from the unsuccessful respondent ("Essar"). The arbitration had ended with a finding of Essar's liability for more than $12 million to Norscot for repudiatory breach of an operations management agreement relating to an offshore drilling platform. The arbitrator was critical of Essar's conduct both in respect of the agreement and the arbitration proceedings and the Award provided for Essar to pay costs on an indemnity basis. Those costs

included £1.94 million for which Norscot had become liable under the terms of an agreement with a third-party funder that had advanced litigation funding of £647,000, in return for either 300 per cent of the amount advanced or 35 per cent of the amount recovered. The arbitrator held that Essar had deliberately put Norscot in a position where it could not fund the arbitration out of its own resources. Accordingly, it had been reasonable for the respondent to obtain third-party funding, and to do so on terms which were standard terms in the market for such funding. The arbitrator indicated that, amongst other things, he was exercising his power under s.59(1)(c) of the Arbitration Act 1996 (the "Act") to award *"other costs"*. Essar claimed that *"other costs"* within s.59(1)(c) did not include the costs of third-party litigation funding and challenged the Award on the ground of serious irregularity under s.68(2)(b) of the Act because, it alleged, the arbitrator had exceeded his powers. Upon dealing with the challenge application, the Judge held that, even if the arbitrator had misconstrued *"other costs"*, that could not substantiate a challenge under s.68, which was only available in extreme cases where the tribunal had gone so wrong in its conduct of the arbitration that justice called out for it to be corrected. In any event, the arbitrator had been justified in construing *"other costs"* as he had. As a matter of language, context and logic, *"other costs"* could include third-party funding. Permission to appeal was refused by His Honour Judge Waksman QC. The decision has been hailed as a significant boost for the third-party funding sector – but also for parties who, for whatever reason, may find themselves in difficulty funding claims, including in circumstances where, as in this case, those difficulties stem at least in part from the behaviour of the adversary.

Russia

On 1 September 2016, two new laws came into effect, substantially altering the regime governing arbitrations as laid down in the Russian Federation's 1993 arbitration law and other instruments. Key changes concern the issue of arbitrability of corporate disputes relating to Russian companies and the activities of international arbitral institutions in relation to such disputes.

Arbitrability of corporate disputes as a matter of Russian law had long been a source of doubt and uncertainty until a series of decisions of the Russian courts in 2011 and 2012 in the case of *Maximov v NLMK* established that corporate disputes were subject to the exclusive jurisdiction of the state *Arbitrazh* (Commercial) Courts. It has been reported that the law *"On changes to certain laws of the Russian Federation"* (the "Federal Law") specifically maintain the prohibition on arbitration of a number of categories of dispute, including insolvency cases, certain disputes over intellectual property rights, class actions, and disputes on the privatization of state or municipal property, or involving companies of significant importance to national defence and security. On the other hand, the Federal Law apparently provides for the enforceability of arbitration agreements dated not earlier than 1 February 2017, in relation to certain other categories of

Two new Russian laws concern the arbitrability of Russian corporate disputes and the institutions which can administer them.

corporate disputes. Alternative dispute resolution procedures will thus become available for the resolution of disputes related to foreign investments in Russia as well as Russian investments outside Russia, albeit subject to a number of conditions. It is being reported that such arbitrations will be required to be seated n Russia, and that they will not be amenable to ad hoc arbitration, but will be required to be administered by licensed arbitral institutions.

Commentators have welcomed this opening up of alternative dispute resolution as a means of resolving corporate disputes involving Russian companies. It has, however, been suggested that the significance of the reforms for the arbitration landscape in Russia will substantially depend on how Russian courts apply the new rules and how licensing procedures for institutions will operate. Practitioners will no doubt continue to watch with interest.

MIDDLE EAST

Dubai

Decree No. 19 of 2016 "Concerning the establishment of a Judicial Tribunal for the Dubai Courts and DIFC Courts" (the "Decree") was issued on 9 June 2016 by the Ruler of Dubai. Apparently intended to address a number of the issues that have arisen since the foundation in 2004 of the Dubai International Financial Centre ("DIFC") (a freezone within the Emirate, one of several in the wider United Arab Emirates) in relation to the demarcation and exercise of the respective jurisdictions of the courts of the DIFC (the "DIFC Courts") and of the Emirate outside the DIFC (the "Courts of Dubai"), the Decree establishes a seven-strong committee (the "Committee"), comprising representatives of both judicial systems. The principal function of the Committee is to rule in cases where there may be (as historically there often has been) some ambiguity as to whether parties have sought to confer jurisdiction over their disputes to the Courts of Dubai, or the DIFC Courts. It is not yet clear how the Decree and the Committee will operate in effect, but doubts have been expressed as to whether they may potentially, in future, damage the reputation of arbitration in the region, which had benefited for a number of years from the "friendly" stance generally adopted by the courts of the DIFC, and its expanding use as a "conduit" for enforcement of foreign arbitral awards (and judgments) within Dubai at large. In particular, it has been noted that the four representatives of the Courts of Dubai are in a majority on the Committee, a meeting of which is quorate with only four members in attendance. The President of the Dubai Court of Cassation occupies the chair, convenes meetings of the Committee, and has a casting vote. All this has been taken by some to suggest at least the possibility that the DIFC Courts could be excluded from the Committee's deliberations and, in any case, could ordinarily expect to be overruled if there is no consensus on the Committee. Practitioners, and those with awards and judgments to enforce in Dubai, will no doubt all continue to watch developments with interest.

In the meantime, one recent blot on the Emirate's pro-arbitration copy-book has at least been addressed, with the reversal of a decision of the Dubai Court of Appeal (the "Court of Appeal") dated 30 March 2016 in which the court refused, of its own motion, to enforce an arbitral award given by a London-seated ICC tribunal. The grounds of refusal were that, in the course of the enforcement hearing, no evidence had been adduced as to whether the United Kingdom had signed and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Needless to say, this had not been a matter in issue between the parties to the proceedings. Perhaps equally unsurprisingly, by its judgment dated 19 June 2016, the Dubai Court of Cassation promptly overturned the Court of Appeal's ruling, which had appeared to call into question whether the Courts of Dubai considered themselves properly bound by the Convention.

NORTH AMERICA

United States

The US Court of Appeals for the Second Circuit (the "Second Court of Appeals") has affirmed and enforced an award which had been set aside at the seat of arbitration. In 2009, at the culmination of a dispute relating to construction of oil platforms in the Gulf of Mexico, Commisa, a subsidiary of US construction company KBR, had obtained a US$300 million award against PEP, a subsidiary of Mexico's national oil company Pemex, from an ICC-appointed tribunal seated in Mexico (the "Award"). As we **reported** in 2013, Pemex eventually succeeded in obtaining annulment of the Award on the basis that, under laws which came into effect during the arbitral proceedings, an organ of the Mexican state, which PEP was held to be, could not be required to arbitrate. Commisa's attempt to enforce the Award was challenged before the US District Court of the Southern District of New York (the "District Court"). The District Court exercised its discretion to confirm the Award, and PEP appealed. In its judgment dated 2 August 2016 (the "Judgment"), the Second Court of Appeal held that the District Court had properly

This decision may impact the discretion afforded under the New York Convention to enforce awards set aside at the seat.

exercised its discretion *"because giving effect to the subsequent nullification of the award in Mexico would run counter to United States policy and would [...] be 'repugnant to fundamental notions of what is decent and just' in this country." To have done otherwise would have been "to undermine public confidence in laws and diminish rights of personal liberty and property"*.

Commentary on the decision has concentrated on the emphasis in the Judgment on the peculiar fact pattern of the case, but has indicated a number of potential future impacts, particularly in relation to the discretion afforded in particular under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as its American analogue, the Panama Convention, to enforce awards set aside at the seat, and the interaction of that discretion with the principle of judicial comity, and with the maintenance of harmony amongst contracting states. Practitioners will no doubt watch further developments with interest.

Separately, the US Court of Appeals for the Tenth Circuit in Denver, Colorado (the "Tenth Court of Appeals"), has refused recognition and enforcement of an arbitral award made in a China-seated arbitration under the rules of the Shanghai International Arbitration Centre, the breakaway body set up after a schism within the China International Economic and Trade Arbitration Commission (or CIETAC) on which we have reported extensively in the past. The claimant in the arbitration ("CEEG") is a Chinese company based in Shanghai. CEEG sold solar energy products to LUMOS, a Delaware-registered company. LUMOS made a warranty claim in respect of the products supplied and withheld payment. CEEG commenced arbitration, secured an award for damages and petitioned a District Court in the United States to enforce the award. The District Court held that CEEG's Chinese-language notice of arbitration was not reasonably calculated to alert the respondent of the arbitration proceedings because past communications between the parties were only in English, the respondent did not understand Chinese, and the agreement provided for proceedings in English. By its judgment dated 19 July, the Tenth Court of Appeals upheld the decision of the District Court.

INSTITUTIONS

CAS

In the spirit of athletic endeavour recently on display during the XXXI Modern Olympiad held in Rio de Janeiro, the Olympic ad hoc division of the Court of Arbitration for Sport ("CAS") has broken the record for cases dealt with during an Olympic Games. The 12-strong division heard 28 cases between them, as well as rejecting an appeal against a blanket ban, on grounds of alleged state-sponsored doping, on the participation of Russian athletes in the Paralympic Games imposed by the International Paralympic Committee.

Sixteen of the 28 individual cases concerned eligibility of Russians to participate, after the International Olympic Committee ruled that those implicated in doping offences in the past, or who had only been subject to testing in Russia, should be excluded from the Olympic Games, whilst leaving decisions on participation of individual Russian athletes to the governing bodies for each of the relevant sports. Other cases heard by the CAS arbitrators concerned disputes involving athletes from other nations, including Iran, Jamaica, Namibia, South Sudan and the Polynesian state of Vanuatu.

DIAC/DIFC/EMAC

On 23 August 2016, the Dubai International Arbitration Centre ("DIAC") closed a consultation on draft amended arbitration rules which, once finalised, will replace the rules that came into effect in 2007. The draft new rules cover a number of the usual topics addressed in the amendment of rules maintained by the world's leading arbitral institutions in recent years, such as expedited proceedings and emergency arbitrator procedures, whilst omitting others, such as provisions for joinder and consolidation.

In separate news, on 20 September 2016, DIAC, said to be the largest international arbitration institution in the Middle East, entered into a Memorandum of Understanding with the Dispute Resolution Authority of the DIFC (the "MOU"). It is understood that, amongst other things, the MOU seeks to facilitate and expedite the enforcement of DIAC awards by the DIFC Courts through the exchange of information concerning the laws applicable to enforcement and also by a possible amendment to the DIAC rules. In another development, the Dubai government has established, within the DIFC, the Emirates Maritime Arbitration Court ("EMAC"). Said to be the first of its type in the Middle East and North Africa ("MENA") region, it is understood that EMAC is intended to provide maritime arbitration services across the United Arab Emirates, as well as the Gulf Cooperation Council and MENA regions.

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The draft new DIAC rules cover expedited proceedings and emergency arbitrator procedures, but omit provisions for joinder and consolidation.

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 the review of the investment treaty disputes arisen from the Crimea conflict, and the novel aspects addressed by the *Rusoro v. Venezuela* damages award.

POST-CRIMEA DISPUTES

On 18 March 2014 the formerly Ukrainian territory of Crimea was annexed by the Russian Federation. The repercussions for the Russian Federation which followed the military action on the Ukrainian territory were predominantly of a political and economic nature, mainly taking the form of sanctions imposed by, among others, the European Union, the United States, Canada and Japan. However, the Russian Federation is now facing the consequences of its actions also in the legal sphere. A number of foreign investors are now bringing expropriation claims against the Russian Federation based on the Russian Federation - Ukraine BIT. On 9 January 2015 the first investors, Aerport Belbek LLC and Igor Valerievich initiated the arbitral proceedings under the Permanent Court of Arbitration auspices, PCA Case No. 2014-30 ("**Aerport Belbek**"). It was followed on 1 April 2015 by PJSC CB PrivatBank and Finance Company Finilon LLC, PCA Case No. 2015-21 ("**PJSC CB PrivatBank**"), on 3 June 2015 by PJSC Ukrnafta, UNCITRAL, PCA ("**PJSC Ukrnafta**") and by Stabil LLC and others, PCA Case No. [2015-35] ("**Stabil**") and finally on 19 June 2015 by Everest Estate LLC and others, PCA Case No. 2015-36 ("**Everest Estate**").

The *Aerport Belbek* dispute arises out of the alleged measures taken by the Russian Federation which resulted in the deprivation of the claimants' property, contractual and other rights necessary to operate a passenger terminal for commercial flights at the Belbek International Airport in Crimea. The arbitral tribunal consists of Professor Pierre Marie-Dupuy (Presiding Arbitrator), Sir Daniel Bethlehem, KCMG, QC (claimants' nominee) and Dr. Václav Mikulka (appointed by the former appointing authority, Judge Bruno Simma, on behalf of the respondent).

In the *PJSC CB PrivatBank* dispute, the arbitral tribunal consists of the same members as the *arbitral tribunal* in the Aerport *Belbek* dispute. The factual background revolves around the measures which allegedly prevented the claimants from operating their banking business in Crimea.

In the *PJSC Ukrnafta* and *Stabil* disputes, the arbitral tribunals are composed of Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator), Daniel M. Price (the claimants' nominee) and Professor Brigit Stern (appointed by the appointing authority, Mr. Michael Hwang, on behalf of the respondent). Both disputes concern the measures taken by the Russian Federation which allegedly resulted in the interference with, and expropriation of, the claimants' respective investments in a petrol station located in Crimea.

The *Everest Estate* dispute concerns the measures taken by the Russian Federation which allegedly resulted in the interference with, and expropriation of, the claimants' investment in real estate located in Crimea. The arbitral tribunal consists of Dr. Andrés Rigo Sureda (Presiding Arbitrator), Professor W. Michael Reisman (claimants' nominee) and Professor Dr. Rolf Knieper (appointed by the appointing authority, Mr. Michael Hwang, on behalf of the respondent).

In the course of all the commenced disputes, the Russian Federation wrote letters stating that: (1) the Russian Federation - Ukraine BIT may not serve as a basis to form an arbitral tribunal to decide on the claimants' claims, (2) it does not recognise the jurisdiction of an international arbitral tribunal at the Permanent Court of Arbitration in the settlement of the claimants' claims, and (3) nothing in its letter should be interpreted as a consent of the Russian Federation to form an arbitral tribunal, to participate in the arbitral proceedings or as a procedural action undertaken in the course of the arbitral proceedings. Apart from the aforementioned letters, the Russian Federation has not participated in any phase of the arbitral proceedings. On the other hand, Ukraine has been allowed to make submissions as a non-disputing party to the Russian Federation - Ukraine BIT in all disputes with the exception of the Everest *Estate dispute*.

NET VALUE OF GOLD

On 22 August 2016 the arbitral tribunal, consisting of Professor Juan Fernández - Armesto (chairman), Professor Francisco Orrego Vicuña (claimants' nominee) and Judge Bruno Simma (respondent's nominee), rendered an award in the case of *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 (the "**Rusoro Award**"). The essence of the dispute revolved around the claim of expropriation of gold mining rights by the Chavez administration in Venezuela. However, the Rusoro Award is notable as it touches upon at least two interesting and novel issues, namely the applicability of the ICSID Additional Facility Rules and the provision in the

dispositive part of the award holding the claimant immune from the effect of Venezuelan income tax.

Rusoro Mining Ltd. is a publicly traded Canadian company present on the Canadian TSX-Venture stock exchange. Between 2006 and 2008 it acquired controlling interests in a number of Venezuelan companies which altogether held 58 mining concessions and contracts for the exploration, development and exploitation of gold and other minerals in Venezuela. A series of measures taken by Venezuela, culminating in the Nationalization Decree of 26 September 2011 allegedly deprived the claimant of its investment. Consequently, Rusoro Mining Ltd. initiated a dispute under the ICSID Additional Facility Rules against Venezuela, claiming primarily} expropriation, and additionally the violation of (i) fair and equitable treatment, (ii) full protection and security, (iii) the non-discrimination principle and (iv) the guarantee of free transfer of funds. The arbitral tribunal found expropriation due to the introduction of the Nationalization Decree of 26 September 2011 and due to the introduction of measures severely limiting the export of gold, prohibited under the Canada - Venezuela BIT restriction on exportation.

As a part of its overall considerations, the arbitral tribunal presented two interesting findings. The first concerned the applicability of the ICSID Additional Facility Rules. On 17 July 2012 Rusoro Mining Ltd. brought its dispute under the ICSID Additional Facility Rules which are applicable only when one contracting state to an investment treaty is a party to the ICSID Convention. However, on 24 January 2012 Venezuela denounced the ICSID Convention. Venezuela's denunciation took effect on 25 July 2012, after the claimant submitted its request for arbitration, but before the ICSID Secretariat registered the case on 1 August 2012. Venezuela argued that the dispute could not have been brought under the ICSID Additional Facility Rules as neither Canada nor Venezuela is a party to the ICSID Convention. The arbitral tribunal found that the expression

"*at the time*" used in the ICSID Additional Facility Rules may only be interpreted as the time when the request for arbitration is filed (not the time when the case is authorised by the ICSID Secretary General to be administered by the ICSID Additional Facility Rules) and it proceeded with the further adjudication of the dispute.

Secondly, the arbitral tribunal decided that the awarded compensation be net of taxes and held that Venezuela must indemnify Rusoro Mining Ltd. with respect to any future taxes imposed on the awarded amounts. The decision was rooted in the wording of the Canada - Venezuela BIT which requires the compensation for expropriation to be "*prompt, adequate and effective*". The arbitral tribunal held that the effectiveness requirement may only be satisfied when the awarded compensation is net of income tax. Otherwise, Venezuela, as a sovereign state, could avoid the obligation to pay the awarded compensation by subjecting the income derived by the claimant from such compensation to Venezuelan income tax. This, according to the Tribunal, would be contrary to the effectiveness requirement.

Although it has not been uncommon for claimants in investment treaty cases to request compensation net of taxes, so far Tribunals have not regarded the criterion of effective compensation as preventing the host state from imposing income taxes on the damages awarded to investors. The Rusoro Award will undoubtedly come as an important—but not uncontroversial—precedent in this regard.

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BREXIT: POTENTIAL SIGNIFICANCE FOR LONDON-SEATED INTERNATIONAL ARBITRATION

By John Magnin and Sean Kelsey (London)

The UK's Brexit decision has had a seismic political impact already. It will be some time before a number of its other consequences—including its legal consequences—become clear. For the moment, however, there is a clear consensus emerging that the vote for the UK to leave the EU is likely to have little, if any, impact on international arbitration.

Indeed, at least as far as London as a legal forum is concerned, Brexit could potentially shift the balance substantially in favour of international arbitration, and away from litigation, at least in the short- to medium-term.

The principal reason for this is the uncertainty that the 23 June 2016 vote has created, and will continue to sustain, pending clarification of the terms on which Brexit will be implemented, and a new relationship forged between the UK and the EU. As a result of that uncertainty, it remains unclear exactly how, and on what basis, judgments of the English courts will, in the future, be recognised and enforced by the courts of EU member states.

For the moment, there is no change: English judgments remain enforceable under the Brussels Regulation recast (the "**Regulation**"), and will remain so either until such time as Brexit takes effect, or such earlier date as the UK and the EU may agree. It is not currently known when that will be. It is equally unclear what will happen afterwards.

There are a number of hypothetical possibilities identifiable at present. All of them would, to some greater or lesser extent, broadly replicate the position as currently applies under the Regulation.

Whether or not the UK joins the European Free Trade Area, or participates on some other basis in the European Economic Area, it could in theory accede to the Lugano Convention, which provides for a regime of cross-border enforcement of court judgments comparable with those under the Regulation.

It is conceivably possible that the terms of Brexit result in the application of the predecessor to the Regulation, the Brussels Convention (the "**Convention**") to the question of reciprocal enforcement of UK and EU court judgments (although

relatively unlikely, given the somewhat liminal status of the Convention since implementation of the Regulation). Again, the Regulation and the Convention regimes are broadly comparable.

Another possibility is that the UK accedes (in its own right) to the Hague Convention on Choice of Court Agreements (the "**Hague Convention**"), which as previously **reported** came into effect on 1 October 2015 pursuant to its ratification by the EU. Whilst much more limited in its scope than the Regulation, the Convention or the Lugano Convention, the Hague Convention nonetheless would permit some cross-border 'passporting' of English judgments into the EU in certain circumstances.

The UK had a number of arrangements for reciprocity of enforcement of money judgments in place with a handful of EU member states in the period before the UK's participation in the Europe-wide regime for cross-border enforcement of judgments first created by the Convention. The extent (if any) to which any of those arrangements may either remain in effect, resume effect, or be reinstated, has yet to be determined.

It is of course possible that the UK and the EU may agree an entirely new reciprocal enforcement arrangement, or none at all. It is unfortunate that it is not possible to say, today, exactly how or on what basis English court judgments will be recognised or enforced in future in the EU, or exactly what limitations there may be. However, the descending cloud of uncertainty has a clear and distinct silver lining.

First, it remains tolerably clear, at this juncture, that Brexit will have no effect on the operation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Come what may, arbitration awards rendered in the UK are highly likely to remain, in future, just as enforceable in any Member State of the EU (and vice versa) as they are today.

Moreover, it is not expected that London will lose much, or perhaps even any of its attraction, as a forum for the resolution of cross-border commercial and financial disputes. The historic attractions of England as a place to resolve disputes are well known. A highly-predictable, precedent-based system of law; top-drawer, highly-experienced and ferociously independent judges; and a significant concentration

of commercially-minded legal expertise have all kept London among the world's truly 'global' jurisdictions. Supervision of English-seated arbitration by the English courts—one of the attractions, for many, of arbitration in London—is also likely to be unaffected.

Depending on how Brexit plays out, the English courts may in the future feel able to resume granting anti-suit injunctions in respect of court proceedings in EU member states commenced in breach of agreements to arbitrate. The effect of any such injunction in the courts of the relevant member state will continue to depend materially on local rules. However, any resumption of the power of the English courts to injunct breakers of arbitration agreements could lend a significant additional advantage to agreements to arbitrate in London.

To summarise, uncertainty follows in the wake of the vote for the UK to leave the EU. That uncertainty will not, however, substantially impact international arbitration, and could potentially further enhance the credentials of London-seated arbitration.

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Arbitration awards rendered in the UK are likely to remain just as enforceable in any Member State (and vice versa) as they are today.

BREXIT AND INVESTMENT TREATY ARBITRATION

By Wojciech Sadowski (Warsaw)

In this insight we consider the current and potential effects of Brexit on investment treaty arbitration. The likely implications concern the negotiations of the trade and investment agreements between the European Union and certain third countries, the approach of the European Commission (the "Commission") to intra-European bilateral investment treaties, the possible role of the United Kingdomas a potential hub for investment corporate structures and the possible emergence of treaty claims against the United Kingdom.

The analysis necessarily requires more mapping of alternatives as political decisions will have a material bearing on the possible outcomes.

BREXIT AND TRADE TREATIES

The United Kingdom's exit from the EU will undoubtedly have an impact on negotiations of trade and investment agreements that are being held between the European Union and those states that have particular business or historic ties with the United Kingdom, such as Canada (CETA), the United States (TTIP) or India. It is likely that some of the already agreed provisions would need to be renegotiated.

FUTURE OF THE INTRA-EUROPEAN BILATERAL INVESTMENT TREATIES

Following the entry into force of the Lisbon Treaty, the Commission took the stance that bilateral investment treaties concluded between Member States of the EU are generally inconsistent with the law of the European Union and should be terminated. More recently, the Commission has intensified its efforts in this area, e.g., calling on certain Member States to terminate their investment treaties with other Member States of the EU. These requests have met with various reactions from different Member States.

It is thus conceivable that Brexit would impact the dynamics between the Commission and these Member States. Faced with this unprecedented vote against the trend towards the ever-closer

Faced with this unprecedented vote, the Commission can either push for closer integration or release some pressure on areas such as investment treaty arbitration.

integration of the EU Member States, the Commission can either push for even closer integration, or release its pressure on the Member States in the more controversial areas, such as investment treaty arbitration. The future will show which of these two courses will be adopted.

Member States could also see Brexit as a development requiring them to adjust their policies towards the intra-EU investment treaty protection. The aggravating crisis of the EU, of which Brexit is one of the most prominent, but not the only, examples, may induce questions as to whether it is reasonable for those Member States to terminate their intra-EU treaties, when various EU states are becoming increasingly maverick. It may be imprudent for a state to waive the intra-EU protection for its own companies and nationals in the situation where the intra-EU trust, nor even the future of certain other states in the EU, could be taken for granted.

UK - AN INVESTMENT HUB?

In the event the Commission pushes for more integration and the prompt termination of the intra-European investment treaties, the United Kingdom, which is a party to 12 intra-European investment treaties (with Bulgaria, Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia), may become a hub for incorporation of companies, whose objective would be to offer prospective investors from EU Member States a protection under the UK bilateral investment treaties with respect to their investments made in Central and Eastern Europe.

Furthermore, the UK may become one of the most important jurisdictions from the standpoint of enforcement of investment treaty awards in intra-European disputes. This could depend on whether the UK manages to maintain its leading role in the world's financial markets, and whether the sentiment against intra-EU arbitration in the EU grows stronger.

POTENTIAL CLAIMS AGAINST THE UK

Brexit may also expose the United Kingdom to claims of foreign investors (including investors from EU Member States), e.g., for frustration of these investors' alleged legitimate expectations that the UK would remain a member state of the European Union and would continue to enjoy the benefits of EU law. This possibility will depend on the specific terms of the British exit from the EU, which is not yet known.

It is conceivable that some investors may argue that Brexit may deprive their investments of a significant part or the entirety of their value, because the operations or activities of the UK-based establishment can no longer be exported to the other Member States of the European Union.

It is also conceivable that claims will result from the acts and omissions of the British Government, resulting from the challenge created by the need to rebuild the administrative capacity in those areas, which were hitherto the domain of EU competence. The novelty of the process poses an increased risk of intentional or unintentional measures that may adversely affect foreign investors in the United Kingdom.

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THE SIAC RULES 2016 – STAYING AHEAD OF THE PACK

By Raja Bose, Ashish Chugh and Aloysius Chang (Singapore)

On 1 July 2016, the Singapore International Arbitration Centre ("**SIAC**") officially released the sixth edition of the SIAC Arbitration Rules ("**SIAC Rules 2016**") which came into effect on 1 August 2016.

This is the SIAC's third revision of the rules in the last nine years, which reflects the SIAC's commitment to stay at the forefront of international arbitration practice. The previous revision to the SIAC Rules in 2013 was mainly to reflect the SIAC's new governance structures, including the creation of the SIAC Court of Arbitration ("**SIAC Court**"). The 2016 revisions are far more significant and progressive

Some of the key highlights of the SIAC Rules 2016 include a novel procedure for the early dismissal of claims and defences, a new streamlined process for disputes arising out of multiple contracts, and enhancements to existing special procedures to improve the efficiency of the arbitral process.

NEW PROCEDURE ON EARLY DISMISSAL OF CLAIMS/ DEFENCES (RULE 29)

The SIAC has introduced a new procedure under Rule 29 for the early dismissal of a claim or a defence (akin to summary judgment procedures in civil litigation), which is the first of its kind amongst major commercial arbitration centres. The early dismissal procedure is intended to offer parties an early resolution in cases involving a claim or a defence that is wholly unmeritorious or vexatious and has the potential to provide significant savings of time or costs.

As a safeguard against any unmeritorious applications, the Tribunal retains the discretion to decide whether an early dismissal application should be allowed to proceed. The willingness of arbitrators to allow such an application to proceed, however, remains to be seen, given the looming spectre of any potential award being challenged, in particular on due process grounds.

MULTI-CONTRACT DISPUTES AND CONSOLIDATION OF ARBITRATIONS (RULES 6 AND 8)

The SIAC has introduced a "*streamlined process*" under Rules 6 and 8, which permits consolidation of multiple arbitrations (previously, the SIAC Rules were silent on the issue of consolidation). The new procedure allows a claimant to file a single Notice of Arbitration

in respect of claims under multiple contracts (Rule 6). That Notice of Arbitration will be deemed to be a commencement of multiple arbitrations (in respect of each arbitration agreement invoked) and also an application to consolidate all those arbitrations.

The SIAC Court will decide whether to allow the consolidation based on the criteria in Rule 8. While, according to Rule 8, consolidation is allowed where all parties have agreed to the consolidation or where all the claims in the arbitrations are made under the same arbitration agreement, the more significant criteria to claimants in multi-contract disputes is that of compatible arbitration agreements and related disputes (Rule 8.1(c)). Under this criterion, consolidations are allowed if the arbitration agreements are "*compatible*" and the disputes arise out of: (i) the same legal relationship(s), (ii) contracts consisting of a principal contract and its ancillary contract(s), or (iii) the same transaction or series of transactions. Parties in multi-contract transactions should therefore consider bespoke drafting to ensure that the arbitration agreements in the different contracts are compatible, or using an umbrella arbitration agreement (e.g. by means of a master dispute resolution agreement incorporated by reference in various underlying contracts). There is also a procedure for applying for consolidation of arbitrations after the arbitration proceedings have already been commenced, both before and after the constitution of the Tribunal in the arbitrations sought to be consolidated.

JOINDER IN MULTI-CONTRACT SITUATIONS AND INTERVENTION BY THIRD PARTIES (RULE 7)

The SIAC Rules 2016 enable both parties and non-parties to an SIAC arbitration to apply for a joinder of additional parties as a Claimant or Respondent. Where the additional party is not a party to the arbitration agreement, it may be joined if all parties to the arbitration and the additional party consent to the joinder; where the additional party claims to be a party to the arbitration agreement, it need only prove this on a *prima facie* basis.

Previously, only a party to the arbitration could apply for an additional party to be joined, and all such additional parties must be a party to the arbitration agreement (see Rule 24(b) SIAC Rules 2013). This new revision therefore

enables two things: (i) potential joinder in multi-contract situations, since there is no requirement that the additional party be a party to the arbitration agreement; and, perhaps more significantly, (ii) intervention in an existing arbitration by a third party.

ENHANCEMENTS TO SPECIAL PROCEDURES

Emergency Arbitrator Proceedings (Rule 30, Schedule 1 and Schedule of Fees)

The SIAC has made its emergency arbitrator procedure even quicker through a reduced timeframe and a deadline for the Emergency Arbitrator to issue his/her order or award. The timeframe for the appointment of an emergency arbitrator has been reduced to within one day of receipt by the Registrar of an application for emergency interim relief and the payment of the administration fees and deposits. The Emergency Arbitrator must thereafter issue an order or award of interim relief within a maximum of 14 days from the date of appointment. The Registrar may extend the deadline only in "*exceptional circumstances*". The reduced timeframes are likely to encourage greater use of the emergency arbitrator procedure (rather than the courts) for urgent applications.

With the aim of ensuring the cost-effectiveness of emergency arbitration proceedings, the fees of an Emergency Arbitrator are now fixed at S$25,000, unless the SIAC Court Registrar determines otherwise. Previously, the Emergency Arbitrator's fees were capped at 20% of a sole arbitrator's maximum fee.

Expedited Procedure (Rule 5)

Under Rule 5.1(a), the monetary threshold for expedited proceedings has been raised to S$6 million (up from S$5 million), thereby allowing more claimants to use the Expedited Procedure. Further, under Rule 5.2, the Tribunal now has the discretion, in consultation with the parties, to determine whether a case under the expedited procedure should be conducted on the basis of documentary evidence only (previously, the Tribunal was required to hold a hearing unless the parties agreed that the dispute should be decided on documents only).

In the event of any conflict between the terms of the arbitration agreement and the provisions under the Expedited Procedure, the SIAC Rules 2016 make clear that the latter would apply (Rule 5.3). This appears to have been inserted in response to the decision in the Singapore High Court case of *AQZ v ARA* [2015] 2 SLR 972, in which the Court held that where the arbitration agreement adopted the SIAC Rules (including the rules on expedited procedure) and provided for arbitration by a panel of three arbitrators, a purposive and "*commercially sensible*" construction

of the arbitration agreement would be to recognise that, where the expedited procedure is invoked, the SIAC Court President has the discretion to appoint a sole arbitrator notwithstanding provision for three arbitrators in the arbitration agreement. Parties should therefore note that their adoption of the SIAC Rules 2016 will mean that invoking the expedited procedure will override their choice of three arbitrators, unless the parties agree otherwise.

CHALLENGES TO ARBITRATORS: REASONED DECISIONS AND FIXED FEES (RULE 16 & SCHEDULE OF FEES)

Under Rule 16.4, the SIAC Court will now issue reasoned decisions on all challenges to arbitrators (unless otherwise agreed by the parties). Any such decision is stated to be final and not subject to appeal.

This represents a significant advancement as it introduces transparency and should facilitate the education of the parties, counsel and the arbitrators on what relationships and conduct are impermissible. Further, it may also discourage parties from attempting to use arbitrator challenges as a dilatory practice. Other major institutions that regularly issue reasoned decisions on arbitrator challenges include the ICC, LCIA and the SCC.

DELOCALISED SEAT OF ARBITRATION (RULE 21)

Under Rule 21 of the SIAC Rules 2016, in cases where the arbitration agreement fails to specify the seat of arbitration, Singapore will no longer be the default seat of arbitration; instead, the determination of the seat of arbitration is left to the Tribunal. This amendment was stated by the SIAC to have been made in consideration of the increasingly international nature of SIAC cases and the diverse background of its users. Parties familiar with SIAC arbitration who wish to retain Singapore as the seat should therefore explicitly state so in any future arbitration agreement.

APPLICABILITY OF THE SIAC RULES 2016

The SIAC Rules 2016 came into effect on 1 August 2016. Under Singapore law, if the agreement provides for arbitration under the SIAC Rules without specifying the version, it is presumed that the reference is to rules as may be applicable at the date of the commencement of the arbitration. Therefore, in such an agreement, the SIAC Rules 2016 will apply if the arbitration is commenced on 1 August 2016 or later. Where the agreement specifies the exact version of the SIAC Rules, that version will apply no matter the date of the commencement of the arbitration.

CONCLUDING REMARKS

The SIAC has sought, through the SIAC Rules 2016, to introduce several new procedures in line with international best practices, with particular regard being paid to complex disputes, increased efficiency and transparency, and the international character of its user base. As stated by Gary Born, the SIAC Court President, the SIAC Rules 2016 aim to "*ensure that SIAC continues to provide world class, cost-competitive dispute resolution services and consolidate its position as the forum of choice for parties from diverse legal systems and cultures*" and also to "*provide a state-of-the-art procedural framework for efficient, expert and enforceable resolution of international disputes of all kinds, in all parts of the world*". Now that the SIAC Rules 2016 are in effect, it will be interesting to assess the practical effect of some of the biggest changes, in particular those relating to early dismissal of claims/defences, consolidation, joinder and intervention.

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The SIAC Rules 2016 introduce several new procedures in line with international best practices.

SINGAPORE: THIRD-PARTY FUNDING OF INTERNATIONAL ARBITRATION ON THE HORIZON

By Raja Bose, Ashish Chugh and Aloysius Chang (Singapore)

The Singapore government has announced that it is proposing several legislative amendments that would reform the law on third-party funding of disputes in Singapore by allowing it in certain categories of legal proceedings, including international arbitration, subject to conditions placed on the funders and new ethical obligations on the part of lawyers.

In a press release issued in July 2016, the Ministry of Law of Singapore ("**MinLaw**") said that it was launching a public consultation on third-party funding of disputes, lasting through the whole of July, during which public feedback was invited on two instruments: (i) the Civil Law (Amendment) Bill 2016 (the "**Bill**"), and (ii) the Civil Law (Third-Party Funding) Regulations 2016 (the "**Regulations**"). The proposed legal framework was stated to be a "light touch" approach and will "[give] *precedence to party autonomy and flexibility, with disclosure as the central tenet*".

LEGALISING THIRD-PARTY FUNDING FOR INTERNATIONAL ARBITRATION

Singapore law currently restricts third-party funding of proceedings, with limited exceptions, due to the operation of the torts of maintenance and champerty which render champertous agreements void as being contrary to public policy. (See *Otech Pakistan Pvt Ltd v Clough Engineering Ltd and another* [2007] 1 SLR(R) 989, which held that the rule against champerty applies in both litigation and arbitration proceedings governed by Singapore law). The amendments in the Bill are such that the restriction will no longer apply to third-party funding contracts with qualified funders pertaining to international arbitration and related court/mediation proceedings.

The Bill states that the Civil Law Act is to be amended by: (a) clarifying that the torts of maintenance and champerty are abolished in Singapore, and (b) providing that in certain prescribed categories of dispute resolution proceedings ("*prescribed dispute resolution proceedings*"), third-party funding contracts (which must be with a

"*qualifying Third-Party Funder*") are not contrary to public policy or illegal (with those categories being prescribed in the Regulations).

The Regulations define "*prescribed dispute resolution proceedings*" as meaning international arbitration proceedings and related proceedings. This might include, for example, court and mediation proceedings arising from or out of the international arbitration proceedings.

QUALIFICATIONS AND OTHER REQUIREMENTS OF FUNDERS

Along with the amendments to legalise third-party funding for international arbitration is a proposed legislative framework for the regulation of funders in order to ensure sufficient capital is held by the funders.

The Bill provides that the Civil Law Act will be amended to allow conditions to be imposed on funders (with non-compliant funders being unable to enforce their rights under the third-party funding contract, unless relief is obtained from the Singapore courts). The Bill also provides that lawyers may recommend third-party funders to their clients or advise their clients on third-party funding contracts so long as they do not receive any direct financial benefit from the recommendation or facilitation.

The Regulations stipulate the qualifications and other requirements that a "*qualifying Third-Party Funder*" must satisfy (and continue to satisfy). In particular, the third-party funder must: (a) carry on the principal business (in Singapore or elsewhere) of the funding of the costs of dispute resolution proceedings to which the funder is not a party, (b) have access to funds immediately within its control (including within a parent corporation or a subsidiary) sufficient to fund the dispute resolution proceedings in Singapore (i.e. a capital adequacy requirement), and (c) the aforementioned funds must be invested, pursuant to a third-party funding contract, to enable a funded party to meet the costs (including pre-action costs) of prescribed dispute resolution proceedings (in other words, the funder must use its funds for the purpose of funding litigants only, as opposed to some other collateral purpose).

NEW ETHICAL OBLIGATIONS ON LAWYERS

MinLaw is also proposing to make related amendments to the Legal Profession (Professional Conduct) Rules 2015 for the purpose of dealing with potential conflicts of interest. According to MinLaw, the related amendments are "*expected to draw reference from best practices and international standards reflected in the revised International Bar Association Guidelines on Conflict of Interest in International Arbitration (October 2014)*". In particular, legal practitioners will be under a duty to disclose the existence of a third-party funding contract and the identity of the third-party funder to the court or tribunal and to every other

party to the proceedings, and legal practitioners and law practices will also be prohibited from having an interest in relevant third-party funders and from receiving "*direct financial benefit*" from the recommendation or facilitation, i.e. referral fees and commissions.

POTENTIAL AREAS OF CONCERN

Some potential areas of concern have been raised regarding the proposals. First, there are concerns from some quarters regarding funders exercising excessive and undue control on the proceedings. However, such concerns may be overstated in the international arbitration context, as the litigants are usually sophisticated commercial parties with the ability to negotiate at arms' length.

Secondly, it has been suggested that it is unclear under the Regulations whether funders may assign their rights under the third-party funding agreement. There is some concern that such rights of assignment may result in funders attempting to profit from financing frivolous claims by engaging in financial engineering and claim commoditisation.

Thirdly, it has been suggested that it is currently unclear whether the duty to disclose the existence of a third-party funding contract may extend to granting access to the funding agreement or disclosing whether the funding agreement contains an adverse costs indemnity. On one hand, access to the funding agreement could give considerable tactical benefits to an opponent, and redaction of commercially-sensitive and case-sensitive details may be necessary. On the other hand, the disclosure of an adverse costs indemnity may be helpful in preventing unnecessary and costly applications for security for costs, which may be taken against funded but otherwise impecunious claimants.

Fourthly, as it is unclear whether privileged documents that are shared with the funder (or with *potential* funders) are protected by common interest privilege, there may also be a need to consider carefully issues of confidentiality and privilege as part of the terms agreed with any funder or as part of the negotiations with potential funders.

Lastly, from the funders' perspective, the reserving of a residual power to the courts to find funding agreements

unenforceable, including accrued rights, may give rise to some concerns. A funder who has been disqualified after funding a lengthy dispute may find itself having lost the right to be repaid its investment or funding commission, with the funded claimant thereby obtaining a windfall right to 100% of any award rendered in its favour. It has been suggested that a licensing regime, rather than court supervision, may serve as a better system of control.

CONCLUDING REMARKS

While the proposed amendments are likely to take effect within the year, it should be noted that there are currently no proposed amendments to legalise third-party funding of domestic arbitration proceedings and pure litigation proceedings in Singapore. MinLaw's proposed legislative amendments therefore represent an incremental approach towards the legalising of third-party funding of disputes in Singapore, with the express purpose of promoting Singapore's growth as a leading venue for international arbitration.

The most immediate impact of permitting third-party funding of international arbitration is likely to be on small and medium-sized corporations, which may lack the financial muscle to engage in protracted legal proceedings. In the context of investment treaty arbitration, a foreign investor that has yet to realise the fruits of its investment may also lack the resources to mount a claim against the entire machinery of the host state, particularly where the reason for the lack of realisation is the host state's act(s) of expropriation. However, large and multi-national corporations may also use third-party funding as a strategy to shift and apportion costs and risks; for example, a corporation facing a large number of arbitral claims may use third-party funding to shift the costs of its defence off its balance sheet and to the funder.

While third-party funding may prove to be a real game changer in the international arbitration scene, parties should take great care in negotiating the terms of their relationship with any third-party funder.

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DIS KICKS OFF RULES OVERHAUL

By Johann von Pachelbel and Tobias Kopp (Frankfurt)

BACKGROUND TO DIS AND THE RULES REVISION

The German Arbitration Institution (Deutsche Institution für Schiedsgerichtsbarkeit, or "**DIS**") has initiated a wholesale revision of its rules of arbitration. DIS will consult widely among the German and international arbitration community before publishing draft rules. The new rules are expected to come into force in the second half of 2017.

DIS is Germany's principal arbitral institution. With its heritage going back to the 1920s, it was set up in its current form in 1992. In 2015, it handled 140 cases, with a total value in dispute in excess of €2 billion. Just under a third of current DIS proceedings are international in nature. In early May 2016, DIS announced a complete revision of its rules. The existing rules have been in force since 1998—though the institution adopted supplementary rules for expedited proceedings in 2008—and are therefore among the oldest of any major arbitral institution. Amid the recent wave of revised arbitral rules, DIS has made a deliberate decision to proceed slowly. It is better, the thinking went, to wait and see what other institutions do. That way, DIS could evaluate evolving international best practice and take a considered view on which changes to adopt (and which not to). Dr. Francesca Mazza, the Secretary General of DIS, is a major driving force of the revision process. She joined DIS from the ICC, where she was closely involved in the recent revision of the ICC Rules. She described the institution's reform as part of a larger effort of modernising the DIS. Recent modernisation projects include the reform of the sports arbitration rules, including a system to provide legal aid to athletes in anti-doping disputes, and modernisation of the IT and infrastructure at DIS. Currently, the institution is working on a project which will lead to a new website and branding for the institution and the publication of a collection of awards collected in post-M&A disputes.

A WIDE RANGING CONSULTATION PROCESS

DIS wishes to consult with as broad an audience of stakeholders as possible. To do so, it has issued an open invitation to arbitration experts—practitioners and academics—both in Germany and internationally to participate in an "expert commission". This is envisaged to be a kind of plenary body that will generate a large number of diverse proposals for rule changes. These proposals are then put through a two-tier review process. A "consolidation commission"—membership by appointment only—sifts through the proposals to consolidate them, distilling a set of desirable

DIS plans to embed the revision of its rules within a wider reform of the institution.

(and feasible) changes. A drafting commission then formulates the new rules. Membership of the drafting body will be made up of work horses—or, as a DIS strategy paper rather endearingly terms them, "work monsters"—who are expected to devote a significant amount of time to the task. The process is not sequential, however—all three commissions will be working in parallel.

THE SHAPE OF THE NEW RULES

The DIS board and secretariat do not wish to pre-judge the outcome of the consultative process, and so have been careful not to speculate publically about the shape of the new rules. DIS has, however, adopted a set of ten principles that will guide the revision exercise. In particular, the new rules should:

- facilitate the un-bureaucratic and flexible resolution of disputes, being mindful of party autonomy;
- contain only reasonable and necessary changes;
- be suitable for both domestic and international arbitration;
- reflect the needs of users;
- ensure that the institution is run transparently and with a high degree of predictability;
- reflect the evolution of case management practices at DIS over the years;
- increase efficiency and quality assurance;
- incentivise parties and tribunals to act time and cost efficiently;
- be available in authoritative German and English versions (and may be informally translated into other languages); and
- be concise.

Judging by the relative success and failure of changes other institutions have made to their rules in recent years, it would seem likely—although this is purely speculative—that DIS will adopt, among other things, the following:

- an emergency arbitrator provision or conceivably (but this is less likely) a mechanism for expedited tribunal formation, but probably not both;
- a comprehensive consolidation and joinder provision;
- electronic filing of submissions; and
- tribunal powers to make awards ordering payments of shares of deposits.

Practitioners hope that the new rules will also include a robust mechanism for ensuring that tribunals render awards in a timely fashion. The current rules merely require awards to be made "within a reasonable period of time". Professor Stefan Kröll, member of the DIS advisory board, said on the desired outcome of the revision exercise that he hopes that a "number of the recent developments in other rules are adopted, perhaps in a modified way, without giving up some of the features which make the DIS Arbitration Rules distinct".

INSTITUTIONAL REFORM

DIS plans to embed the revision of its rules within a wider reform of the institution. DIS is throwing considerable resources at this exercise, with some staff dealing with rules revision and institutional reform full-time. As with the revamped rules, it is, as yet, hard to gauge the thrust and extent of institutional reform. It is imaginable, at least, that DIS will look at its statutes—specifically the appointments procedure for positions on boards and committees—and staffing structure.

CONCLUDING REMARKS

It will be interesting to see what the 'grassroots democracy approach' of the DIS will bring up, in particular, whether any further innovative features may be implemented into the DIS' rules. In any case, there is reason to believe that the rules revision will support the DIS' efforts to promote and expand the German arbitration platform with regard to both domestic and international proceedings.

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EMERGENCY AND EXPEDITED ARBITRATION – AN INTRODUCTION TO THE PROCEDURES OFFERED BY MAJOR ARBITRAL INSTITUTIONS

By John Gilbert (London)

In recent years, the options available for emergency or expedited arbitration in major institutions' rules have increased significantly. Demonstrating the ability to move quickly when necessary has been one of the characteristics which institutions have been eager to offer.

The institutions have taken different approaches to this. Consequently, understanding what is available may assist in choosing which form of arbitration to include in an arbitration agreement, particularly when it is anticipated that a speedy resolution may be required. Options include procedures for expedited arbitration, the expedited formation of the Tribunal and the appointment of an emergency arbitrator to deal with applications for interim measures.

In this article, approaches adopted under the current rules of the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC) and Singapore International Arbitration Centre (SIAC) are considered with the aim of highlighting the options offered by each. These are, of course, all forms of institutional arbitration. It is possible to put in place arrangements in ad hoc (non-administered) arbitrations for proceedings to progress on an expedited basis. These require careful drafting to give them the best chance of being effective.

EMERGENCY ARBITRATOR

The most widely used approach within institutional rules of arbitration for providing urgent interim relief is the appointment of an emergency arbitrator. Emergency arbitrators may now be appointed under each of the ICC, ICDR, LCIA, SCC and SIAC rules. These provisions supplement the ability to seek emergency relief through the national courts.

The precise rules regarding emergency arbitrators vary between the institutions. However, behind these differences the fundamental approach is the same. In each case, the rules provide that an application (with notice to the other

party) can be made for the appointment of an emergency arbitrator where urgent, interim relief is required before the tribunal is constituted. Following the appointment of the emergency arbitrator, submissions are made regarding the relief sought and he/she will determine whether to grant such relief. The emergency arbitrator does not resolve the substantive dispute, just whether interim relief should be granted. If relief is granted, it will be on the basis that it will bind the parties until the tribunal addresses the issue or the arbitration is withdrawn. Specifically under the SIAC Rules, any interim relief granted by an emergency arbitrator will lapse if a tribunal is not appointed within 90 days.

In all cases, in drafting the arbitration agreement, parties may expressly opt out of the emergency arbitration regime.

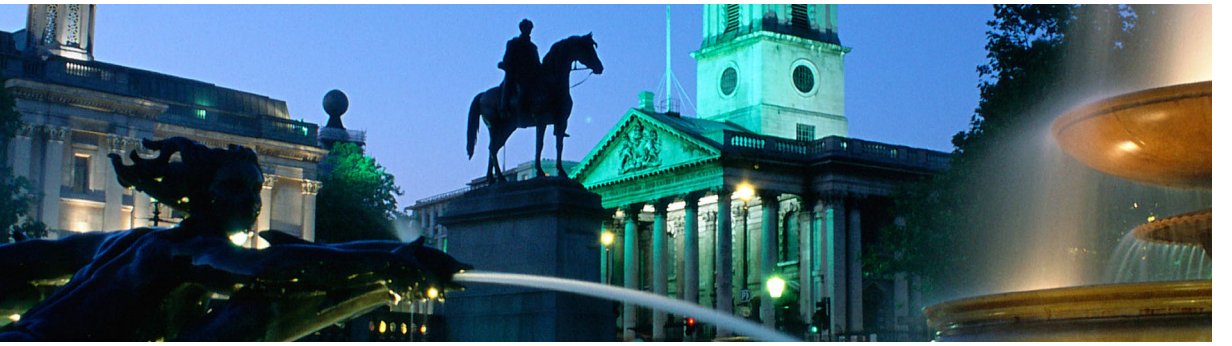
The key differences between the approaches adopted by the various institutions include the following:

1. Appointment - Under the ICC, ICDR and SCC rules, an emergency arbitrator will be appointed when an application is made without any judgment being made by the institution on whether urgent relief is required. Under the SIAC and LCIA rules, an emergency arbitrator will only be appointed if the SIAC President or LCIA Court respectively decides to grant the application.

2. Timing of decision – All of the rules require the emergency arbitrator to be appointed quickly. The amount of time allowed for the emergency arbitrator to make his/her decision varies a little (subject to an extension being allowed). The shortest period is allowed by the SCC, with a decision being required within five days. The LCIA and SIAC both allow 14 days, and the ICC allows 15 days. No deadline is set by the ICDR.

3. Arbitrator and administrative fees – The fees charged for emergency arbitrator decisions also vary quite widely. A summary of the fees is set out below. For the LCIA, SCC and SIAC, the fees charged may be changed with approval from the institution.

Institution	Administrative Feel	Arbitrator's Fee	Total	Total in US$ (at current exchange rates)
ICC	US$10,000	US$30,000	US$10,000	US$30,563
ICDR	No extra fee	Fixed by the artbitrator	No fixed amount	No fixed amount
LCIA	£8,000	£20,000	£28,000	£37,000
SCC	£3,000	£12,000	£15,000	£16,850
SIAC	S$5,000	S$25,000	S$30,000	S$22,000



Each of the institutions' rules expressly preserves the parties' rights to seek interim relief in appropriate national courts. This may be preferred if, for example, an order is sought without giving notice to the other party to the dispute, there are concerns about whether the party against which interim relief is sought will voluntarily comply with it (see below) or third parties are involved.

There are questions over whether decisions made by emergency arbitrators are enforceable through the national courts. In some countries, such as Singapore and Hong Kong, legislation expressly provides that they are enforceable. However, there remains uncertainty over whether an emergency arbitrator's decision amounts to an award or decision which is sufficiently final and binding to be enforced.

EXPEDITED FORMATION OF THE TRIBUNAL

Only the LCIA Rules expressly provide a mechanism for the expedited formation of the arbitral tribunal. If the application is granted, the LCIA Court is given the power to abridge any period of time under the arbitration agreement for the purpose of forming the arbitral tribunal.

This mechanism allows the arbitration to get up and running more quickly. Once the tribunal has been appointed, the parties can seek interim relief from the tribunal or to put in place an expedited timetable for the resolution of the substantive dispute.

However, the LCIA Court will only grant the application in cases of "exceptional urgency". These words are not defined in the rules, but the LCIA has published a guidance note (see the "**LCIA Notes on Emergency Procedures**") which provides case studies which illustrate when applications have been successful or failed.

EXPEDITED ARBITRATION

The ICDR, SCC and SIAC rules each contain procedures for expedited arbitration. The three institutions take different approaches to when expedited arbitration will be available, how long it will take and the process involved. In summary, the key characteristics are as follows:

ICDR – The expedited procedure will apply in cases where no claim exceeds US$250,000 or by agreement between the parties. In cases where no claim exceeds US$100,000, it is presumed that the dispute will be resolved on documents alone without any hearing. A sole arbitrator will be appointed from a pool of arbitrators prepared to serve on an expedited basis. The whole procedure should take no more than 104 days from the appointment of the arbitrator (unless the timetable is extended through agreement of the parties or decision of the arbitrator or ICDR).

SCC – The Rules for Expedited Arbitrations will apply where the parties have agreed to apply them. A sole arbitrator will be appointed. The rules require an award to be issued within three months unless the timetable is extended by the SCC's board of directors. It is also possible for interim measures to be sought from an emergency arbitrator when the expedited rules apply.

SIAC – A party may apply for the expedited procedure to be used if: (i) the aggregate amount in dispute does not exceed S$6 million (approximately US$4.4 million at current exchange rates), (ii) the parties have agreed, or (iii) it is a case of exceptional urgency. The SIAC President will determine whether to grant the application. A sole arbitrator or three-member tribunal may be appointed. An award is required within six months of appointment of the arbitrator/tribunal unless the period is extended by the SIAC Registrar.

CONCLUSION

In drafting an arbitration agreement, consideration should be given to the nature of disputes that may arise. In particular, if it is likely that urgent relief or expedited resolution may be needed, a form of arbitration should be selected that allows for that. Many institutions offer the ability to appoint an emergency arbitrator so that urgent, interim relief may be sought. The difference between the institutions is in the precise details of the emergency arbitrator process and in the other options offered for the expedited resolution of the substantive dispute.

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CHINESE COURT REFUSES TO RECOGNIZE AND ENFORCE AN ICC ARBITRAL AWARD ON GROUNDS OF PUBLIC POLICY

By Christopher Tung, Sacha Cheong and Daniel Shum (Hong Kong)

In a recent ruling in China issued by the Taizhou Intermediate People's Court on 2 June 2016, *Taizhou Haopu Investment Co., Ltd v. Wicor Holding AG* (Docket No.: [2015] Tai Zhong Shang Zhong Shen Zi, No. 00004), an application brought by Wicor before the Chinese court for recognition and enforcement of an ICC arbitral award made in Hong Kong was refused on the grounds of public policy.

BY WAY OF BACKGROUND:

- Taizhou Haopu (a Chinese company) and Wicor (a Swiss company) entered into a joint venture contract dated 6 July 1997. The contract contained an arbitration agreement which stipulated that the parties should attempt to settle any disputes through amicable negotiations, failing which the disputes would be subject to arbitration under the ICC Rules. On 4 November 2011, Wicor filed a Request for Arbitration with the ICC regarding a dispute under the contract. The ICC accepted the case and decided on 20 January 2012 that the place of arbitration be Hong Kong. The ICC rendered its award and addendum on 18 July 2014 and 27 November 2014 respectively.
- Meanwhile, on 11 December 2012, another Chinese court (Docket No.: [2012] *Su Shang Wai Xia Zhong Zi*, No. 0012)—dealing with a different dispute but arising out of the same contract and involving the same parties—issued its ruling declaring the arbitration

agreement to be invalid according to Chinese law. The court held that the parties had only agreed to arbitrate under the ICC Rules, but had failed to stipulate a specific arbitration institution and this could not be inferred from the ICC Rules as then in use. Those rules pre-dated the amendments made to the ICC Rules in 2012 which state under Article 1(2) that the ICC Court is the only body authorised to administer arbitrations under the ICC Rules. Under Chinese law, ad hoc arbitration is prohibited.

On the application by Wicor to enforce the ICC award, the Taizhou Intermediate People's Court ruled that the ICC award in this case was a Hong Kong award and subject to the Arrangements of the Supreme People's Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (the "**Arrangements**"). The court held that the ICC arbitral tribunal had rendered its award on the assumption that the arbitration clause was valid and thus it had jurisdiction over the case. However, before the ICC arbitral tribunal rendered its final award, a Chinese court had already made its ruling that the arbitration clause in the contract was invalid. The Taizhou Intermediate People's Court held that the court ruling was effective and binding. Accordingly, enforcement of the ICC award would violate Chinese judicial sovereignty because the ICC award conflicted with an effective and binding Chinese ruling. The court held that according to Article 7(3) of the Arrangements, as well as Article 154(1)(k) of the Civil Procedure Law of China, the arbitral award could not be recognized or enforced because it violated public policy.

This case is a stark reminder that problems can sometimes arise when the award creditor attempts to enforce an arbitral award within the home jurisdiction of the award debtor and of the special considerations that can apply with respect to ad hoc/institutional arbitrations under Chinese law.

Some arbitration practitioners have reacted with surprise and disappointment, in particular to the narrow interpretation of the parties' agreement to arbitrate under the ICC Rules. Nevertheless, looking at the broader trends in China, Chinese arbitration law has developed rapidly over the last couple of decades. While there may have been a perception in the early years that the law, and the courts' application of the law, was highly protectionist in favour of Chinese parties, the picture has changed considerably in recent years. The general attitude of the Chinese courts, and more recent legal rulings, is supportive of international arbitration, such that the enforcement of

foreign arbitral awards in China is now common. It remains to be seen whether this case will encourage more parallel proceedings, with parties seeking to pre-empt a claim subject to arbitration by rushing off to the Chinese courts to attack the validity of the arbitration clause to create a basis to oppose enforcement in China on "public policy" grounds. While the Taizhou case turns on specific facts that are unlikely to be frequently repeated, there may be other risks to the validity of an arbitration agreement (such as the non-arbitrability of domestic disputes in China under institutional arbitration rules outside China (including Hong Kong)). Where there are no other assets elsewhere against which to enforce, the risk of ending up with an unsatisfied award is a matter that requires careful consideration at the outset before parties embark on the arbitration process.

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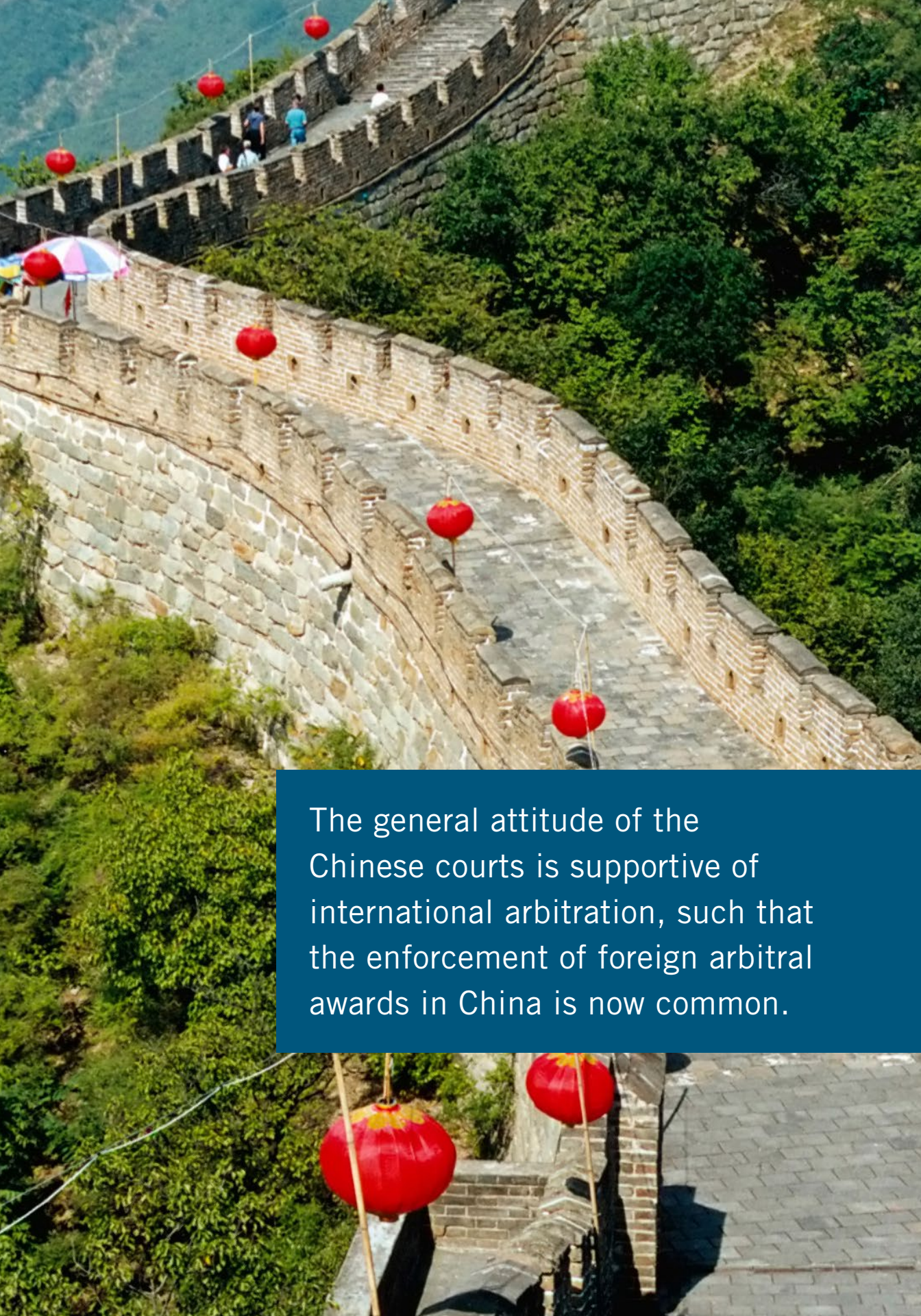

The general attitude of the Chinese courts is supportive of international arbitration, such that the enforcement of foreign arbitral awards in China is now common.

COSTS CONSEQUENCES OF BREACHING ARBITRATION CLAUSES

By John Kelly, William KQ Ho and Jonathan Chan (Melbourne)

What happens when a party breaches an arbitration clause and decides, instead, to commence a court proceeding? In Australia, the courts will almost certainly refer the parties' dispute to arbitration and stay the court proceedings. That is consistent with the "pro-arbitration" approach that has been adopted by the Australian courts. However, in recent times, there has been a debate as to the costs consequences of any such stay application.

Generally speaking, a successful party to an interlocutory application (such as a stay application) will only be awarded costs on a standard basis (also known as "costs on an ordinary basis" or "party and party costs"). It represents a partial indemnity for those costs reasonably incurred for the attainment of justice. In other words, the successful party will generally only be indemnified to the extent of 50 to 70 per cent of its actual legal costs incurred in connection with the application.

However, the courts have discretion to order costs on an indemnity basis in special circumstances (i.e., the successful party is able to recover between 85 to 100 per cent of its legal costs). In that context, it has been debated whether a costs order in respect of a stay application in relation to an arbitration clause should be made on an indemnity basis, and whether that should be a general rule. We now consider the competing approaches.

INDEMNITY COSTS SHOULD BE THE GENERAL APPROACH

In the English court decision of *A v B* [2007] 2 CLC 203, Colman J held that if a party is successful in its application for a stay or anti-suit injunction as a remedy for a breach of an arbitration clause that has caused the innocent party reasonably to incur legal costs, those costs should be recovered on an indemnity basis. Colman J compared the legal costs incurred in the stay application to damages and held (at 208 [10]) that:

> *"…to be placed in a position where the balance of the recoverable damages could not be quantified until after the costs had been formally assessed would involve delay in obtaining compensation properly due and a formalistic and cumbersome procedure which would in itself involve more costs and judicial time".*

It was held that indemnity costs should be the ordinary position in circumstances where a party commences proceedings in breach of an arbitration clause. That said, Colman J also said that whilst a party who ignores an arbitration clause will normally be characterised as engaging in conduct justifying an indemnity costs order, there will be circumstances in which this approach is not appropriate—though it will be up to that party to demonstrate that such circumstances apply.

Chief Justice Martin of the Supreme Court of Western Australia approved of and applied the reasoning in *A v B* in the cases of *Pipeline Services WA Pty Ltd v Atco Gas Australia Pty Ltd* [2014] WASC 10 (S) **(Pipeline Services)** and *KNM Process Systems SDN BHD v Mission New Energy Ltd formerly known as Mission Biofuels Ltd* [2014] WASC 437 (S) (**KNM Process Systems**). In *Pipeline Services*, the Chief Justice held that the court's discretion to award indemnity costs will most often be exercised when the conduct of the party ordered to pay costs involves an element of improper or unreasonable conduct. In applying Colman J's reasoning in *A v B*, Chief Justice Martin held (at [18]) that:

> *"the legal costs incurred by the innocent party in enforcing the arbitration agreement (at least so far as those costs are reasonably incurred), will ordinarily be the direct consequence of the breach of the arbitration agreement and would therefore be recoverable as damages for breach of contract in accordance with ordinary principle"*

"PARTY AND PARTY" COSTS SHOULD BE THE GENERAL APPROACH

However, a number of decisions cast doubt on the approach taken in *A v B* and as adopted in *Pipeline Services* and *KNM Process Systems*.

In *John Holland Pty Ltd v Kellogg Brown & Root Pty Ltd* (No 2) [2015] NSWSC 564, Hammerschlag J of the Supreme Court of New South Wales declined to follow the approach in *A v B* and found that:

- the reasoning in *A v B* was contrary to the usual presumption that costs are awarded on an ordinary basis and operated as an unwarranted fetter on the court's discretion;
- there is no basis to create a special category of costs orders restricted to the breach of arbitration agreements;
- in an ordinary case for breach of contract, the successful party is left uncompensated for the difference between costs assessed on an ordinary basis and the full indemnity basis; and
- characterising costs as damages gives rise to the question of mitigation and encourages collateral disputes on causation.

His Honour ultimately held that costs should be awarded on an ordinary basis unless a party could prove that indemnity costs were justified in the circumstances.

In *Sino Dragon Trading Ltd v Noble Resources International Pty Ltd* (No 2) [2015] FCA 1046, Edelman J of the Federal Court of Australia also disagreed with the reasoning in *A v B* and stated:

> *"With respect, it is a surprising course for a court to award indemnity costs as a proxy for damages where:*
>
> *i. those damages for breach of the arbitration agreement have not been pleaded;*
>
> *ii. the party liable has not been given the opportunity to lead any evidence on the issue; and*
>
> *iii. the party liable has not made submissions, potentially based on evidence, concerning remoteness of damage, mitigation, or the scope of its liability for damage".*

More recently, in *Australian Maritime Systems Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2016] WASC 52 (S) (**Australian Maritime Systems**), Mitchell J of the Supreme Court of Western Australia summarised the arguments of both lines of authority. His Honour identified (at [19]) that the argument in favour of a general approach of indemnity costs was that "*…if costs are awarded on a party-party basis, a defendant may not be able to recover the difference between costs incurred and costs awarded in subsequent proceedings*". However, his Honour found that this is the usual position and concluded that a breach of an arbitration clause was not distinguishable from any other case in which a breach of contract caused a party to incur irrecoverable legal costs.

In the case of *Roy Hill Holdings Pty Ltd v Samsung C&T Corporation* [2016] WASC 458 (S), Le Miere J conducted a review of the authorities and identified the two competing lines of authority. His Honour found Mitchell J's reasoning in *Australian Maritime Systems* persuasive and held that (at [7]) "*the preponderance of authority is against the general approach advocated in A v B and Pipeline Services*".

CONCLUSION

Although all authorities referred to are single-judge decisions of various Australian jurisdictions, it appears that the trend in Australia is towards courts ordinarily awarding costs for breach of an arbitration clause on a party and party basis. They will only exercise discretion to award indemnity costs if the circumstances require. It remains to be seen whether an appellate court favours the indemnity costs general approach or the party and party costs general approach.

The issue of costs and arbitration is an important one, and in continuing with that theme we will, in a future edition, be looking at the topic of orders that an arbitral tribunal can make to ensure that arbitration costs do not escalate.

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A ROUNDUP OF RECENT ARBITRATION DECISIONS OF THE SWISS SUPREME COURT, PART II

By John Magnin and Hendrik Puschmann (London)

The Swiss Federal Supreme Court (the "**Court**") frequently considers applications under the Private International Law Act (the "**Act**") for the annulment of Swiss-seated arbitral awards or enforcement of foreign awards. The Court's decisions are relevant beyond Switzerland; they can inform the approach of courts elsewhere. This is part two of our series of summaries of recent rulings of the Court. **Part one** appeared in the June 2016 edition of *Arbitration World*.

A PARTY'S RIGHT TO BE HEARD/ RIGHT TO A FAIR TRIAL – CASE NO. 4A_246/2014, 15 JULY 2015

Background

A dispute arose between nine football players and their club over certain conditions of their contracts. FIFA's Dispute Resolution Chamber ("**DRC**") found broadly in the players' favour. The club's appeal to the Court of Arbitration for Sport ("**CAS**") was dismissed by the sole arbitrator.

The club asked the Court to annul the CAS award. It was claimed that the award had not addressed some of the club's submissions, which the club argued violated its right to be heard under s. 190(2)(d) of the Act. Moreover, the arbitrator had ruled himself unable, as a matter of Swiss law, to accept evidence that should have been produced in the DRC proceedings. The club asserted that the absence of full powers of review violated its right to a fair trial under art. 6(1) ECHR. The Court should therefore annul the award for public policy reasons under s. 190(2)(e) of the Act.

Ruling

On the right to be heard, the Court reaffirmed its restrictive reading of s. 190(2)(d), which "*imposes on the arbitrators a minimal duty to examine and handle the pertinent issues*" (emphasis added). A tribunal breaches this duty only if (i) it fails "*to take into consideration some statements, arguments, evidence and offers of evidence submitted by one of the parties*", which (ii) are "*important to the decision*". It remains to be seen what the threshold is for the second limb of the test. In the case at hand, the CAS arbitrator failed to consider submissions

made by the club that "*challenged the very existence*" of some players' claims. The Court annulled the CAS award in relation to those players.

On the right to a fair trial, the Court found no breach of art. 6(1) ECHR. As long as the parties' choice to arbitrate "*is free, legal and unequivocal*", they cannot complain if the institutional rules or law of the seat to which they sign up limit the tribunal's powers of review.

One argument the footballers did not raise is competition law. This contrasts with another important recent CAS dispute, the 2015 *Pechstein* case. In that case, Claudia Pechstein, a German ice skater, appealed against a doping ban imposed by the International Skating Union (ISU). CAS and the Court both dismissed the application. However, a German court subsequently held the arbitration agreement between Ms Pechstein and the ISU void based on competition law. It found that the ISU had abused its dominant bargaining position to force Ms Pechstein to consent to CAS arbitration. However, the German court rejected Ms Pechstein's submission that the arbitration agreement contravened art. 6(1) ECHR. Between the Pechstein case and the Court's decision in the case at hand, this question now appears to be settled.

VALIDITY OF ARBITRATION AGREEMENT – CASE NOS. 4A_84/2015 (18 FEBRUARY 2016) AND 4A_441/2015 (4 FEBRUARY 2016)

The Court recently considered two cases revolving around the alleged invalidity of an arbitration agreement. In both instances, it reaffirmed its stance of inferring validity wherever possible:

Case No. 4A_84/2015

Z commenced a Swiss-seated arbitration under a contract it had negotiated with X by exchanging drafts, but had not executed. Though challenged by X, the tribunal accepted jurisdiction. X applied for the jurisdiction award to be set aside under s. 190(2)(b) of the Act. X alleged that: (i) the contract had not been concluded, so neither had the arbitration clause; and (ii) the arbitration clause could not be valid, as X's negotiator lacked authority to contract.

The Court dismissed the application, noting that the validity of an arbitration clause is a separate issue from the validity of the overall agreement. Swiss-seated arbitration agreements need not be signed (see s. 178 of the Act). In the exchange of drafts, the wording of the arbitration clause had never changed. This sufficed to conclude that the parties had agreed to arbitration.

As far as authority to contract is concerned, Z was "*entitled to assume in good faith, and according to the principle of reliance, that the individuals dealing with it in [X's] name had the authority to validly consent to arbitration*". In other words, as it was never indicated to Z (and nor was it otherwise obvious) that X's representative lacked authority, Z could assume that he did have authority.

Case No. 4A_441/2015

This case concerned the enforcement of a foreign award under the New York Convention. B and C were parties to a commodities trade agreement with a GAFTA (Grain and Free Trade Association) arbitration clause, which brokers had arranged and signed on their behalf. A dispute arose. B raised no jurisdictional objections during the arbitration. C obtained an award and sought to enforce it in Switzerland. B objected and argued, relying on art. V(1)(a) of the New York Convention, that there was no valid written arbitration agreement as the parties *themselves* had never consented to arbitration.

The Court held that it was irrelevant whether there was, in fact, a formally valid arbitration agreement. The fact that B had pleaded on the merits in the arbitration without raising a jurisdictional objection meant it was now estopped from relying on a jurisdictional bar to enforcement. To do so would be bad faith and a manifest abuse of right.

ANNULMENT FOR FAILURE TO COMPLY WITH CONCILIATION CLAUSE – CASE NO. 4A_628/2015, 16 MARCH 2016

Background

X and Y entered into several oil-and-gas contracts providing for UNCITRAL arbitration in Switzerland. Arbitration could only be commenced once the parties had attempted conciliation under the 2001 ICC ADR Rules. Y commenced conciliation. Several months later, after both parties were unable to agree to ground rules for an initial call or meeting, Y declared the conciliation had failed and commenced arbitration. X disagreed that the conciliation had failed. The conciliator found herself unable to close the conciliation, as a substantive discussion of the dispute, required by the ICC rules, had not taken place. X challenged the jurisdiction of the arbitral tribunal, submitting that the mandatory conciliation procedure had not been complied with. The tribunal issued a partial award accepting jurisdiction, which X then asked the Court to annul under s. 190(2)(e) of the Act, arguing that non-compliance with the conciliation procedure contravened public policy.

The respondent, having pleaded on the merits without raising a jurisdictional objection, was estopped from pleading a jurisdictional bar to enforcement.

Ruling

In what is widely considered a landmark judgment, the Court found in favour of X. It held that the parties' failure to comply with an agreed pre-arbitration procedure such as conciliation, mediation or negotiation, runs contrary to Swiss public policy if the following conditions are met.

1. The procedure is mandatory, as opposed to optional.
2. The parties do not comply with it (or do not comply with it in the correct way or in good faith).
3. The party relying on this is not thereby committing a "*manifest abuse of right*". It would, for instance, be an abuse if the party itself had not participated in the pre-arbitration procedure in good faith or had not raised its jurisdictional objection in the arbitration proceedings.

The question of abuse of right is likely to be the most difficult to answer in future cases. For example, the case at hand can be contrasted with another recent judgment of the Court summarised in the **June 2016** edition of *Arbitration World*. In that case, the Court found that while the parties had failed to complete a mandatory expert determination procedure, the applicant had itself in bad faith contributed to this failure.

Incidentally, the Court did not annul the tribunal's award on jurisdiction. Instead, it interpreted its powers under s. 190 of the Act creatively: it ordered a stay of the arbitration and instructed the tribunal to set a deadline for the parties to comply with the conciliation requirement.

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In a landmark judgment, the Court held that failure to comply with an agreed pre-arbitration procedure runs contrary to Swiss public policy.


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