



K&L GATES

ARBITRATION WORLD

34TH EDITION MAY 2017

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FROM THE EDITORS:

WELCOME TO THE 34TH EDITION OF *ARBITRATION WORLD*.

Welcome to this 34th edition of *Arbitration World*, a publication from K&L Gates' International Arbitration Group that highlights significant developments and issues in international and domestic arbitration for executives and in-house counsel with responsibility for dispute resolution.

In this edition, we consider the current landscape for international investment treaty arbitration against the backdrop of the election of President Trump in the United States, and the latest developments in the European Union, including 'Brexit'.

We examine the procedures for early disposal of claims/defences recently introduced in some rules of arbitration, and the potential pros and cons of such procedures. We review the new rules of arbitration of the Stockholm Chamber of Commerce (SCC), launched in January, which are amongst the new rules which include provision for summary determination of claims/defences. We also examine the increasing use of the U.S. district courts' power under 28 U.S.C. § 1782 to order the provision of information or documents for use in arbitration proceedings outside of the United States, with particular reference to recent cases in New York.

We review the proposed new legislation in Hong Kong permitting third-party funding for arbitration, and provide an introduction to maritime arbitration in Tokyo under the Japan Shipping Exchange's TOMAC rules.

We are delighted to include a guest contribution from Catya Simao (In-house Legal Counsel in Angola) regarding the likely effect of Angola's recent ratification of the New York Convention and a review of other steps Angola has taken in recent years to encourage foreign investment. We consider Saudi Arabia's recently enacted arbitration and enforcement laws and the new Saudi Center for Commercial Arbitration. We also report on a recent English court decision on whether an arbitration agreement includes assigned claims.

Additionally, we 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 (e-mail ian.meredith@klgates.com or peter.morton@klgates.com).

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INTERNATIONAL ARBITRATION K&L GATES' BENCH STRENGTH

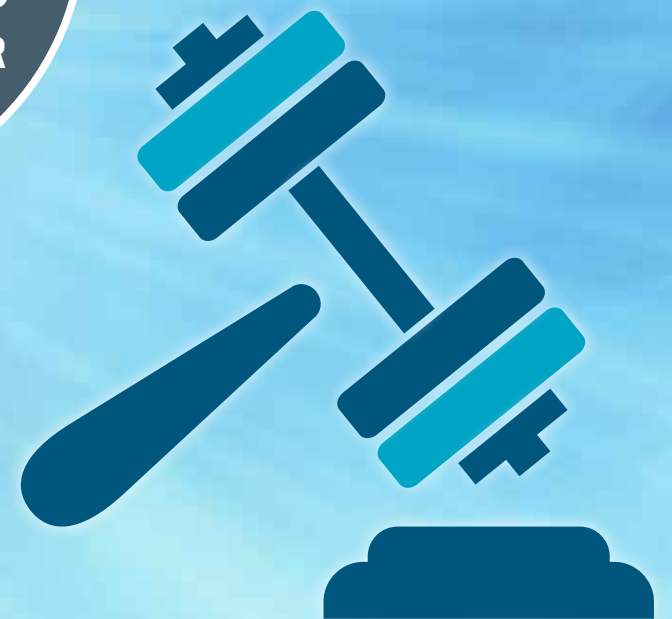
**US \$23.5
BILLION IN
DISPUTE**

**129
ARBITRATION
LAWYERS
ACROSS 36
OFFICES**

**110
ARBITRATION
DISPUTES WORKED
ON FROM
JANUARY 2016-
MARCH 2017**

**34
CURRENT
ARBITRATOR
APPOINTMENTS
(6 AS SOLE ARBITRATOR
OR CHAIR)**

**463
TIMEKEEPERS
WORKED ON
THE MATTERS**



ARBITRATION NEWS FROM AROUND THE WORLD

By Benjamin Mackinnon (London)

ASIA

India

As highlighted in the [January 2016 edition](#), the Indian Supreme Court has, in recent years, adopted a pro-arbitration stance. The Supreme Court's judgment in *Imax Corp. v M/S E-City Entertainment (I) Pvt. Ltd.* (Civil Appeal No. 3885 of 2017) dated 10 March 2017 follows this trend. The case relates to a contract, governed by Singapore Law, which contained an arbitration clause specifying that disputes be resolved under the ICC rules of arbitration, but did not specify the seat of arbitration. Upon a dispute arising, the ICC selected London as the seat and the parties agreed to hold the proceedings there. Following the arbitration, the losing party applied to the Bombay High Court to have the awards (two partial awards and a final award) set aside. The Bombay High Court held, despite the arbitration being seated in London, that it had jurisdiction to hear the application. The Supreme Court, however, overturned the judgment. It held that the *"parties chose and agreed to the arbitration being conducted outside India and the arbitration was in fact held outside*

India". The seat of the arbitration was decisive so there could be no jurisdiction to set aside the awards.

The Indian Supreme Court also recently ruled that an arbitration clause with a two-tier procedure is valid (*M/S Centrotrade Minerals & Metal Inc v Hindustan Copper Ltd* (Civil Appeals No. 2562 and 2564 of 2006)). The clause in question provided for an award by a sole arbitrator appointed by the Indian Council of Arbitration but gave either party the right to appeal the award of the sole-arbitrator to a second tribunal seated in London and under ICC Rules. Following the award of the sole arbitrator, the unsuccessful party appealed and was awarded damages in the ICC arbitration. In its December 2016 decision, the Supreme Court did not consider there to be anything *"fundamentally objectionable in the parties preferring and accepting the two-tier arbitration"* and held that there was nothing in the Arbitration and Conciliation Act, explicitly or implicitly, that prohibited parties from agreeing to a two tier procedure. The Supreme Court will now turn to whether the award, being a "foreign award", can be enforced under the Arbitration and Conciliation Act.



Malaysia

A British arbitrator resident in Malaysia has been sentenced to six months in jail for making a false statement of independence that led to his being appointed in an arbitration by the Kuala Lumpur Regional Centre for Arbitration. The case follows a recent trend in which some jurisdictions, notably the United Arab Emirates, are adopting criminal sanctions against arbitrators considered to have acted improperly.

Mongolia

Mongolia has passed a new arbitration law based on the UNCITRAL Model Law, which updates the 2003 arbitration law. Amongst the changes are that all set-aside applications will now be heard by the court of civil appeals in Ulaanbaatar, with no further appeal allowed. The new law, in contrast to the UNCITRAL Model Law, also provides that parties may challenge a tribunal's ruling as to its jurisdiction in the Mongolian court.

Singapore

In the last edition of *Arbitration World* we [reported](#) on the legislative steps being taken to enable third party funding in Singapore. On 10 January 2017, the Singapore Parliament formally passed the Civil Law (Amendment) Bill, which allows third party funding of international commercial arbitration proceedings that are seated in Singapore. Together with the Civil Law (Third Party Funding) Regulation, it will form the framework for the law on third party funding in Singapore. Under the Bill, the common law torts of maintenance and champerty are abolished and third party funding agreements are rendered legal and enforceable for international arbitration and related proceedings (e.g. court and mediation proceedings arising from or out of the international arbitration proceedings). Third party funding agreements remain unenforceable for pure litigation and domestic arbitration proceedings, but the Singapore government has indicated that the current third party funding framework may be expanded in the future after a periodic assessment.



The Supreme Court held the court has no power under sections 103(2) and (3) of the Arbitration Act 1996 to order that security be given where a party is challenging enforcement of an arbitration award.

EUROPE

England

By a judgment dated 1 March 2017, the Supreme Court has set aside a Court of Appeal order that a claimant had to provide security in order to challenge enforcement of an arbitration award (*IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2017] UKSC 16). The Supreme Court held the court has no power under sections 103(2) and (3) of the Arbitration Act 1996 to order that security be given where a party is challenging enforcement of an arbitration award. It held that security may only be ordered where a party seeks adjournment under section 103(5) which, in contrast to section 103(2) and (3), provides that the court “*may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security*”. The Supreme Court also held that the court’s general discretion to order security does not apply in respect of the New York Convention as the conditions for recognition and enforcement set out in articles V and VI of the New York Convention constitute a code and “*must have been intended to establish a common international approach*”.

The UK government has confirmed that it has no plans to introduce statutory duties upon third-party funders. In particular, the government informed Parliament that “*The market for third party litigation funding, remains at a relatively early stage in its development in*

this jurisdiction” and that the government is “*not aware of specific concerns about the activities of litigation funders*”. As a result, it has not considered it necessary to conduct a “*formal assessment of the effectiveness of the voluntary code of conduct or the membership of the Association of Litigation Funders*”.

Italy

In January 2017, the Italian Ministerial Commission led by Professor Guido Alpa submitted its proposals to reform Italy’s arbitration laws to the Ministry of Justice. Amongst the proposals are an extension of the types of dispute that can be arbitrated, giving tribunals authority to grant interim measures and limiting challenges of awards to only the Italian Supreme Court where agreed between the parties.

Spain

In *Bajoz Eólica, SL v Caixabank, SA* (Judgment No. 70/2016) the Madrid High Court of Justice set aside two partial arbitral awards issued by an arbitrator due to lack of impartiality. The court held that there were reasonable doubts as to the impartiality of the arbitrator as, in his role as a notary public, the arbitrator had authorised an increasing number of public deeds in which one of the parties involved was a party to the arbitration. However, the most notable aspect of the judgment is that the majority of the court also held that the appointing institution (the Barcelona Arbitral Tribunal) had not acted impartially. The majority of

the court held that the institution's appointment of the arbitrator was not impartial as the institution did not deal with a party's concerns regarding the arbitrator's impartiality and subsequently rejected the challenge to the appointment in reliance on the arbitrator's statement that his notary public work with the other party was of little relevance.

In a separate case, the Supreme Court of Spain has declared two arbitrators on a three-member arbitral tribunal liable for the annulment of an award. The Spanish Arbitration Act specifically provides that arbitrators must faithfully discharge their functions or they may be liable for damages caused in bad faith, wilful disregard or fraud. The award was set aside on the basis that the two arbitrators had excluded the third arbitrator from deliberations. The Supreme Court held that the arbitrators should not have excluded the third arbitrator and ordered each of them to return €750,000 in fees plus interest and costs.

Switzerland

The Swiss government has proposed certain amendments to the Swiss Arbitration Act, which was last amended in 2011. The public consultation on the proposed changes finishes at the end of May 2017. Amongst the suggested amendments are permitting filings before the Swiss Federal Tribunal in English in respect of Swiss-seated arbitrations, enabling parties to approach the court direct to enforce interim relief awarded in the arbitration and to consolidate the case law on revision of awards.

MIDDLE EAST

Saudi Arabia

In October 2016, the headquarters of the Saudi Centre for Commercial Arbitration (SCCA) in Riyadh were formally opened. See our [full report](#) in this Edition regarding developments related to arbitration in Saudi Arabia.

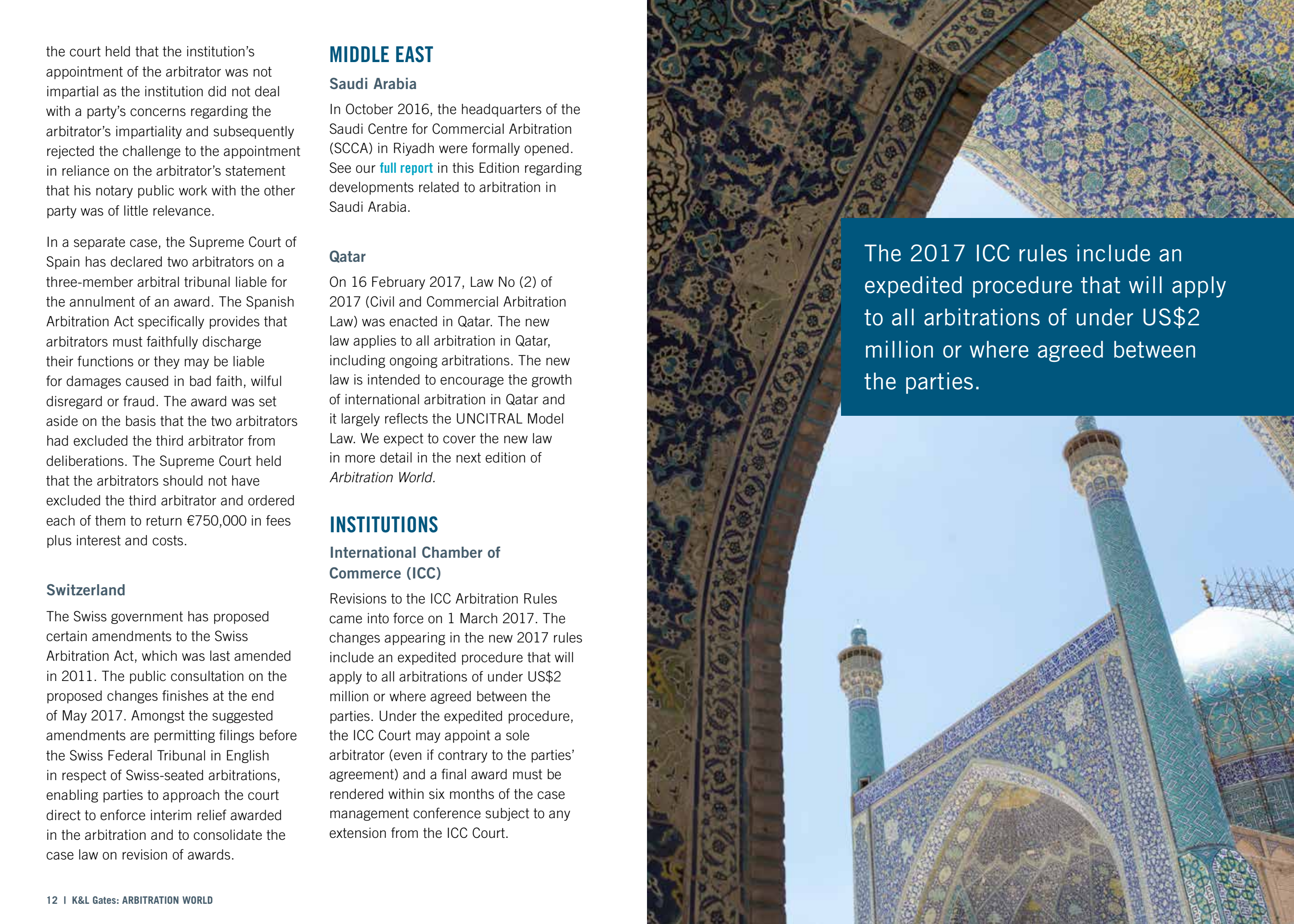
Qatar

On 16 February 2017, Law No (2) of 2017 (Civil and Commercial Arbitration Law) was enacted in Qatar. The new law applies to all arbitration in Qatar, including ongoing arbitrations. The new law is intended to encourage the growth of international arbitration in Qatar and it largely reflects the UNCITRAL Model Law. We expect to cover the new law in more detail in the next edition of *Arbitration World*.

INSTITUTIONS

International Chamber of Commerce (ICC)

Revisions to the ICC Arbitration Rules came into force on 1 March 2017. The changes appearing in the new 2017 rules include an expedited procedure that will apply to all arbitrations of under US\$2 million or where agreed between the parties. Under the expedited procedure, the ICC Court may appoint a sole arbitrator (even if contrary to the parties' agreement) and a final award must be rendered within six months of the case management conference subject to any extension from the ICC Court.



The 2017 ICC rules include an expedited procedure that will apply to all arbitrations of under US\$2 million or where agreed between the parties.

The International Commercial Arbitration Court, Russia (ICAC)

Following reform to arbitration law in Russia, the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (ICAC) updated its rules of arbitration. These new rules came into effect on 27 January 2017, with the rules in respect of corporate disputes coming into effect on 1 February 2017. The new rules contain provisions in respect of joinder and consolidation of disputes, strengthening the tribunal's power to control inappropriate party conduct and expedited proceedings for claims of less than US\$50,000.

London Maritime Arbitrators Association (LMAA)

The LMAA has published revised Terms (rules of arbitration) and a revised procedure for small claims and intermediate claims. The new LMAA Terms apply to LMAA arbitrations commenced after 1 May 2017. The Terms now provide for the President of the LMAA to appoint a sole arbitrator where the clause provides for a sole arbitrator and there has been a default by the parties in the appointment procedure. The statutory provisions (in particular, section 17 Arbitration Act 1996) allowing an appointee to continue as a sole arbitrator where the other party fails to appoint an arbitrator are also expressly reflected in the update.

The provisions on security for tribunal costs have been clarified and the normal procedure for LMAA arbitration (set out in Schedule 2 of the Terms) has been amended. In addition, the small and intermediate claims procedures have also been clarified with the procedure for small claims applying to claims of under US\$100,000 (the \$100,000 being applicable separately to claims and counterclaims) where a limit has not been agreed by the parties.

Stockholm Chamber of Commerce (SCC)

On 1 January 2017, the revised SCC Arbitration Rules and Expedited Arbitration Rules came into effect (replacing the 2010 versions). Both sets of new rules bring in a new summary procedure, available at any time during an arbitration, for the determination of factual or legal issues. There is also additional support for multi-contract arbitration, including the ability to commence a single arbitration covering more than one arbitration agreement and a broadening of the potential for consolidation. The presumption in favour of a three-member tribunal has also been changed so, in default of party agreement, the SCC Board shall decide whether one or three arbitrators would be appropriate. We report in more detail on the new SCC rules [later](#) in this Edition.



Swiss Chambers' Arbitration Institution (SCAI)

The SCAI has published a tool for customising an SCAI arbitration clause. The tool allows parties to select any, or all, of four separate options to tailor the arbitration clause to their needs. The options are (1) an award within six months, (2) documentary evidence only, (3) a faster response time for the respondent's answer, and / or (4) faster constitution of the arbitral tribunal.

Thai Arbitration Institute (TAI)

TAI has updated its rules, replacing the 2003 rules. Amongst the changes is a new power for the tribunal to grant interim measures, the ability to consolidate related arbitrations and service by electronic means. The new rules came into force on 31 January 2017.

Vietnam International Arbitration Centre

The Vietnam International Arbitration Centre has adopted new rules, which came into force on 1 March 2017. The new rules include provision for multiple references to be made under a single request for arbitration, consolidation of arbitrations and an expedited procedure that can be used with the consent of both parties.

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WORLD INVESTMENT TREATY ARBITRATION UPDATE

By Wojciech Sadowski (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 opinion of the Advocate General at the Court of Justice of the European Union in the case concerning the conclusion of the EU-Singapore trade and investment treaty, and the arbitral award on the counter-claims brought by Ecuador against Burlington Resources, Inc. in the context of an investment dispute.

ARE INVESTMENT TREATIES WITHIN THE EXCLUSIVE POWERS OF THE EU?

On 21 December 2016, Advocate General Sharpston delivered her opinion in the case *Avis 2/15* concerning the conclusion of a new Free Trade Agreement (“**FTA**”) between the EU and the Republic of Singapore (the “**EUSFTA**”). The case was initiated by the European Commission which wanted to know, following doubts expressed by the Member States of the EU, whether the EUSFTA could be signed by the EU alone, or whether it also needs to be signed by the Member States.

The Advocate General's opinion deals with various aspects of the EUSFTA and the respective powers of the EU and the Member States to conclude that treaty. The EUSFTA deals with protection of foreign investment primarily in Chapter 9,

where Section A relates to the substantive standards of investment protection (such as the provisions against expropriation or discrimination, or the imposition of the fair and equitable treatment standard). Importantly for the purpose of this note, the Advocate General concluded that:

1. The EUSFTA can be concluded only by the EU and the Member States acting jointly.
2. The EU enjoys exclusive external competence as regards the parts of the EUSFTA which comprise the provisions related to foreign direct investment (Chapter 9, Section A) of the EUSFTA and the related dispute resolution provisions (Chapter 9, Section B), to the extent they apply to foreign direct investment.
3. The EU's external competence is shared with the Member States with respect to the provisions on types of

investment other than foreign direct investment in Chapter 9, Section A; and the provisions regarding resolution of disputes concerning such other forms of investment. The sharing of competences between the EU and the Member States implies that the EU and all the Member States will need to ratify the EUSFTA.

4. The EU has no external competence to agree to be bound by Article 9.10.1 of the EUSFTA (Chapter 9, Section A), terminating bilateral agreements concluded between certain Member States and Singapore. That competence belongs exclusively to those Member States.

If this opinion is shared by the Court of Justice of the European Union, which is a likely possibility, but which cannot be taken for granted, it could have far-reaching consequences.

To begin with, the requirement that FTAs are concluded as mixed agreements (i.e. involving both the EU and the Member States) will require the ratification process to be accomplished in each and every Member State of the increasingly less cohesive union, before the FTA can enter into force. This can and will significantly hinder and delay, or even potentially block, the entry into force of any FTA involving the EU.

Secondly, to the extent the Advocate General juxtaposed foreign direct investment against other types of investment, the opinion can create a lot of confusion. This is because the distinctions drawn between various types of investments, as defined by the

Advocate General, do not easily translate into the concept of an investment as developed in the case law of investment treaty tribunals.

Thirdly, to the extent the opinion confirms the preservation of powers of the Member States with respect to investments other than direct foreign investment, this may have further implications on the fate of the intra-EU bilateral investment treaties, possibly creating new room for argument that, at least to a certain extent, the intra-EU bilateral investment treaties do not fall within the ambit of EU law.

ISDS AS A NEW BATTLEFIELD FOR ENVIRONMENTAL CLAIMS

On 7 February 2017, an ICSID Tribunal composed of Professor Brigitte Stern, Mr. Stephen Drymer and Professor Gabrielle Kaufmann-Kohler as the President issued a decision on the counterclaims of Ecuador in its arbitration against Burlington Resources, Inc. (“**Burlington**”) (ICSID Case No. ARB/08/5). It is the first time in the history of investment treaty arbitration that damages have been awarded against the investor in favour of the state. Although in the past states attempted, from time to time, to bring counterclaims against investors, those attempts were unsuccessful and tribunals typically denied jurisdiction on technicalities.

The difference with this case lies in the fact that the investor specifically consented to the jurisdiction of the tribunal with respect to the counterclaims of the state, related to the alleged

damage inflicted by the oil company to the environment. The tribunal reviewed the counterclaims on the merits and found Burlington to be liable with respect to some US\$40 million out of the total US\$2 billion claimed by Ecuador.


Despite the modest (in relative terms) size of the award, it is a landmark decision, especially due to the potential it has to shape the future of investor-state dispute settlement. No doubt, environmental issues play an ever more important role in investment treaty disputes, be it as the grounds for which investment projects are being blocked, or as a vehicle for states to mount massive counterclaims against investors. Combined with the expectation that investors should not only have rights, but also duties, e.g. to local and/or indigenous populations, there could be an expectation and/or pressure for investors to follow Burlington in consenting to the jurisdiction of treaty tribunals.

The presumed explanation why Burlington agreed to the jurisdiction of the investment treaty tribunal over the state's environmental claims based on the Ecuadorian law, was the desire to avoid responding to the same claim before the state courts of Ecuador, perhaps for the feared lack of due process or impartiality. Such an

alternative scenario could possibly lead to the oil company being condemned to multi-billion dollar damages, as has been the case for other oil majors engaged in disputes with Latin American countries. Measured against the size of such a hypothetical judgment, the size of the award rendered by the tribunal against Burlington could be considered here as a victory for Burlington.

The victory, however, comes at a price. Outside of Europe, international arbitral awards, and especially ICSID awards, are much easier to enforce than state court decisions which may often be opposed on various grounds. It is also entirely possible that in a different case featuring a similar environmental claim against a foreign investor, the size of the damages awarded by the tribunal may be significant.

This example of a state successfully suing a multinational company for environmental damage before an investment treaty tribunal may be seminal and give rise to the development of a new branch of the dispute resolution industry specializing in such claims.



It is the first time in the history of investment treaty arbitration that damages have been awarded against the investor in favour of the state.

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EARLY DISMISSAL OF CLAIMS / DEFENSES IN INTERNATIONAL ARBITRATION: THE BEGINNING OF A SHIFT IN PRACTICE?

By Martin Gusy, Matthew Weldon, and Priya Chadha (New York)

Early dismissal of claims/defenses has long been avoided in the context of international arbitration, largely because a full hearing on the merits with testimony from fact and expert witnesses has been a hallmark of the practice. But is international arbitration practice shifting to accept early dismissal? In recent years, a debate has emerged as to whether a full, final hearing needlessly protracts proceedings and causes inefficiency by allowing meritless claims or defenses that would likely be disposed of early in litigation to instead proceed to a full hearing on the merits in arbitration. Adopting this view, some have argued that arbitration should provide for an early dismissal mechanism similar to the procedures allowed in U.S. and English courts. This proposal has been realized by the Singapore International Arbitration Centre's ("**SIAC**") recently adopted Rule 29, as well as the Stockholm Chamber of Commerce's ("**SCC**") recently adopted Article 39.

THE NEW SIAC RULE 29

As reported in our [December 2016 Edition](#), in August 2016, SIAC became the first major international commercial arbitral institution to explicitly allow parties to seek the early dismissal of claims or defenses. Under the SIAC's newly adopted Rule 29, parties may seek the early dismissal of claims or

defenses on the grounds that they are either "*manifestly without legal merit*" or "*manifestly outside the jurisdiction of the Tribunal.*" Upon an application by a party, the tribunal has discretion to decide whether to allow the application to proceed, and if the application is permitted, the tribunal has sixty days to issue an order or award.

THE NEW SCC ARTICLE 39

On January 1, 2017, the new SCC Arbitration Rules ("**SCC Rules**") came into force, which similarly include explicit authorization in Article 39 for a party to request that the tribunal "*decide one or more issues of fact or law by way of summary procedure.*" Article 39(2) of the SCC Rules clarifies that such requests may "*concern issues of jurisdiction, admissibility or the merits,*" and by way of example, provides certain circumstances where such requests may be particularly suitable, such as the assertion that "*even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law,*" a clear reference to traditional summary disposal standard in litigation. Focusing on the rationale for new rule, Article 39 provides that in deciding such a request, the tribunal shall "*have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.*"

THE POTENTIAL BENEFITS AND DISADVANTAGES OF EARLY DISMISSAL

Proponents of early dismissal mechanisms in international arbitration have argued that summary procedures would increase arbitration's efficiency by disposing of meritless claims early on

rather than forcing parties to engage with them through a full proceeding, including document disclosure, submission of witness statements and expert reports, and an evidentiary hearing. These proponents argue that the failure to provide an early dismissal mechanism detracts from arbitration's claims of efficiency and cost-effectiveness because it allows parties to assert meritless claims or defenses that likely would be subject to early dismissal in court litigation. Even partial dismissal of claims or defenses would make proceedings more efficient by allowing tribunals to focus on the most important, meritorious claims/defenses.

On the other hand, opponents of early dismissal have argued that rather than making arbitration proceedings more efficient, such dismissal mechanisms will actually lead to more protracted proceedings because parties will apply for early dismissal regardless of whether such an application is likely to succeed. However, available data from investment treaty arbitration under ICSID Arbitration Rules would suggest this concern may be somewhat exaggerated. Rule 41(5) of the 2006 ICSID Arbitration Rules allows parties to file objections that claims are "*manifestly without legal merit,*" but the data indicates that such applications are only rarely filed, and ever more rarely successful. Moreover, ICSID tribunals generally have decided Rule 41(5) objections in very short timeframes to minimize delay.

Arbitral institutions can take a number of steps to further mitigate concerns that parties will make early dismissal applications despite little chance of success. First, they can provide a cost-shifting mechanism that requires the losing party to pay the other side's cost of defending an unsuccessful application, even if the losing party ultimately is successful in the arbitration. In addition, arbitral institutions can also follow SIAC's lead by allowing tribunals the discretion to reject an early dismissal application and by requiring tribunals to issue orders or awards within a set time period following an application. Lastly, arbitral institutions could adopt the approach in ICSID's Rule 41(5), which requires parties to file early dismissal applications early on in the arbitration.

Opponents of the practice also argue that allowing early dismissal applications would necessitate extensive document disclosure prior to the application. To the extent that this is true, however, it may act as a natural limit on how often parties make an early dismissal application. That is, parties may only make such applications when making an application without extensive document disclosure is possible. Indeed, this may also be a further argument for continued restraint of tribunals in regards to disclosure in arbitration, refusing to permit extensive document disclosure.

Perhaps the most important criticism opponents have made is that an award dismissing a claim or defense may be subject to challenge under Article V(1) (b) of the New York Convention, which allows courts to refuse to recognize or enforce an award if "[t]he party against whom the award is invoked . . . was otherwise unable to present his case." Awards based on the early dismissal of a defense on the basis that it is "manifestly without legal merit" (or similar) may be particularly susceptible to challenge, which is specifically recognized by SCC Rules, Article 39(6), which requires that when a request for summary procedure is granted, the tribunal "shall seek to make its order or award . . . giving each party an equal and reasonable opportunity to present its case pursuant to [SCC Rules] Article 23(2)." Such a concern is real, and although such a challenge may stand less prospect of success in courts in the United States and the United Kingdom, or other countries where early dismissal is permitted in court proceedings, it may find a more receptive audience in countries where early dismissal is not permitted, or at least rare. Further, arbitral tribunals conducting arbitrations under the new SIAC Rules or new SCC Rules may be able to shield awards from challenge by holding hearings on only the issues set out in the Rule 29 application/Article 39 request. Indeed, it could be argued that a hearing is required by Rule 29 when read in conjunction with



Rule 24 of the SIAC Rules, and Article 39 of the SCC Rules certainly does not preclude a hearing. Such a hearing of the Rule 29 application/Article 39 request could be shorter than a full hearing on the merits, but arguably would allow both parties a reasonable opportunity to present their case on the issues at hand.

THE IMMEDIATE FUTURE OF EARLY DISMISSALS IN INTERNATIONAL ARBITRATION

There is no doubt that with the recent SIAC and SCC rules revisions which include provisions for summary dismissal, the topic will no doubt continue to receive ample debate. However, with the ICC changing its Rules of Arbitration with effect from March 1, 2017 (which will not provide for early dismissal of claims), and both the ICDR and the LCIA having amended their international arbitration rules in 2014, it is unlikely that these institutions will further amend their rules to explicitly allow for early dismissal in the immediate future. If, however, SIAC's and SCC's adoption of

an early dismissal mechanism proves to be popular with businesses and can withstand enforcement challenges, other institutions may follow their lead. In the meantime, tribunals wishing to issue early dismissal awards should take care to exercise their case management authority provided in the rules wisely, such as providing for limited hearings as to the summary procedure, to protect against an arguably higher risk that the award be unenforceable under the New York Convention.

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THE FOREIGN INVESTMENT PROTECTION PUZZLE

By Wojciech Sadowski and Patrycja Treder (Warsaw)

The world landscape of early 2017 does not offer a clear view as to the direction in which international investment treaty law will unfold. What can be seen, at best, are conflicting approaches and values which are pursued by various players on the field. One of the most controversial proposals for the reform of international investment law is championed by the European Commission and concerns the substitution of the traditionally decentralized investor-state dispute resolution mechanism based on the arbitral tribunals formed ad hoc for each case with a more permanent concept of an investment court (or courts) with tenured judges. Simultaneously, the Trump administration is reviewing the approach taken so far by the United States with respect to such important trade and investment treaties as the North American Free Trade Agreement (“**NAFTA**”), the Trans-Pacific Partnership Agreement (“**TPP**”), or the Transatlantic Trade and Investment Partnership Agreement between the European Union (“**EU**”) and the United States (“**TTIP**”), which may strengthen the global position of China. Finally, there is a noticeable movement in some Asian countries in favour of foreign investment protection.

Since the election of Donald Trump as president, the United States is drifting away from the multilateral free trade agreements which include chapters on foreign investment protection. Throughout his presidential election campaign, Donald Trump continuously attacked NAFTA, indicating the need to renegotiate its terms or to renounce U.S. participation. The U.S. president softened his position on NAFTA after he

met with the Canadian Prime Minister, Justin Trudeau, on 13 February 2017. Referring to NAFTA, he said at the press conference, “*We’ll be tweaking it*”. It seems that the United States will attempt to agree on a bilateral auxiliary agreement separately with Canada and with Mexico, modifying the NAFTA provisions.

In the same vein, on 23 January 2017, Donald Trump signed an executive order formally withdrawing the United

A civic movement is growing in strength across Europe, which opposes the conclusion by the EU of trade and investment treaties with arbitration clauses.



States from the TPP. The TPP is a free trade agreement, including a chapter on foreign investment protection, between now eleven countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. Simultaneously, the U.S. president has advocated instead for the conclusion of separate bilateral free trade agreements. Due to the stance taken by Donald Trump towards NAFTA and TPP, it is highly likely that TTIP will suffer the same fate in favour of preserving the bilateral investment treaty system partially already in place, especially as the information on TTIP has been recently removed from the White House website. Thus, it seems that the U.S.-EU Joint Report on TTIP Progress to Date, published only on 17 January 2017, is now out-dated.

In Europe, inconsistent trends may be observed. At the EU-level, the European Commission has advocated the termination of the intra-EU bilateral investment treaties and some states such as Italy and Ireland decided to renounce them voluntarily. As a consequence, the intra-EU bilateral investment treaties will cease to operate at the end of the respective sunset clauses which they contain. However, some other EU Member States believe the intra-EU bilateral investment treaties do not infringe the law of the EU and have refused to conform. As a result, infringement proceedings were initiated by the European Commission against Austria, the Netherlands, Romania, Slovakia and Sweden. This dispute between the European Commission

and the EU Member States in respect of the intra-EU bilateral investment treaties may be soon resolved by the Court of Justice of the European Union. In 2016, the German Federal Court of Justice requested a preliminary ruling on the validity of arbitration agreements concluded under the intra-EU bilateral investment agreements (*see Slovak Republic v. Achmea B.V., Case C-284/16*).

Up until recently, the expectation could be that the Court of Justice would rather side with the European Commission, which would foster even closer integration among the Member States within the EU. However, the impact of Brexit and the strengthening of nationalist tendencies in certain EU Member States such as France, the Netherlands, Poland or Slovakia could be a strong deterrent for the EU institutions against pushing the matter of the intra-EU treaties more aggressively. The EU already backed down in the matter of the free trade agreements. Originally, the European Commission was of a view that the conclusion of free trade agreements with third party states (i.e. non-members of the EU) is the exclusive competence of the EU. However, on 21 December 2016, in the opinion procedure 2/15, Advocate General Sharpston concluded that it is a shared competence between the EU and the EU Member States.

Simultaneously, the EU is engaged in intensive efforts towards conclusion of free trade agreements, including the chapters on foreign investment protection, which were supposed to

replace the bilateral investment treaties concluded between the EU Member States and third party states. On 15 February 2017, the European Parliament approved the Comprehensive Economic and Trade Agreement between the EU and Canada ("**CETA**"), after the green light from all the EU Member States. CETA will now apply provisionally from April 2017 until it is ratified by all the EU Member States. It is the first free trade agreement, including the chapters on the foreign investment protection, negotiated by the EU which reached such an advanced level. It is also the first free trade agreement which replaced the traditional investor-state dispute settlement mechanism with an investment court system.

Irrespective of the fact that the EU managed to secure the approval for the conclusion of CETA, it still faces resistance against the conclusion of further free trade agreements, including the provisions on foreign investment protection, from two sources. First, the governments of the EU Member States, in the current geopolitical setting, focus mainly on the operations which benefit their national interests, whereas the investment agreements are believed to limit the power of states to regulate. Second, a civic movement is growing in strength across Europe, which opposes the conclusion by the EU of trade and investment treaties with arbitration clauses. The anti-liberal, anti-globalisation protests have already affected the process of the ratification of CETA and were the primary reason why the European Commission proposed

the permanent investment court, which is a political idea with a low prospect of implementation.

Outside of the United States and the EU, no clear trend can be seen either. Some states will insist on negotiating new investment treaty agreements, while others will proceed to terminate them, because of the belief that in the increasingly turbulent times they should have more powers to protect their national interests without the need to pay compensation. This, in turn, provokes two comments.

First, the existing web of international investment agreements will be changing and investors need to carefully plan their investment structures so as not to become unprotected as a result of some political shift.

Second, increasing political instability around the world can prompt the taking of action by states that eventually affect the interests of foreign investors, thus making proper investment planning a prudent necessity.

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AN ADDITIONAL COST OF DOING BUSINESS IN NEW YORK: THIRD-PARTY DISCOVERY RISKS UNDER SECTION 1782

By Carolyn Branthoover (Pittsburgh) and Tara Pehush (New York)

28 U.S.C. § 1782 (titled “Assistance to foreign and international tribunals and to litigants before such tribunals”) (“**Section 1782**”) is a powerful U.S. statute that authorizes a U.S. district court, upon application by a foreign tribunal or any interested party, to order a person found or resident in the district to provide information or documents “for use in a proceeding in a foreign or international tribunal.” While the statute was infrequently invoked for many years, with the continuing globalization of litigation and arbitration, counsel engaged in proceedings outside of the United States are increasingly employing Section 1782 in U.S. district courts to obtain court-ordered discovery for use in foreign proceedings.

In a landmark case in 2004, the U.S. Supreme Court recognized that “Section 1782(a) authorizes, but does not require, the District Court to provide discovery aid.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 242 (2004). In addition to the statutory requirements of Section 1782, the Intel court set forth four factors for the consideration of U.S. district courts in the exercise of their discretionary authority under the statute. Accordingly, district courts are to consider whether: “(1) the person from whom discovery is sought is a participant in the foreign proceeding; (2) the foreign tribunal might be receptive to U.S. federal court judicial assistance; (3) the § 1782(a) request conceals an

attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or of the United States; and (4) the request is unduly intrusive or burdensome.” *In re Auto-Guadeloupe Investissement S.A.*, 2012 WL 4841945 at *4 (SDNY Oct. 10, 2012) (citing *Intel Corp.*, 542 U.S. at 264-65).

While the Supreme Court’s *Intel* decision provided the framework for district courts analyzing subpoena challenges under Section 1782, it also left it “to the courts below, applying closer scrutiny, to assure an airing adequate to determine what, if any, assistance is appropriate.” *Intel*, 542 U.S. at 245. Thus, in the exercise of their discretionary authority, and faced with a wide variety of foreign proceedings,

tribunals, interested persons, and subpoena requests, district courts are continually interpreting and applying the requirements of Section 1782 and the *Intel* factors. As a consequence, some district courts have emerged as more receptive to Section 1782 applications than others.

New York courts in particular have led the way in aiding international arbitration by routinely granting requests for discovery in support of arbitrations abroad pursuant to Section 1782. Notably, this practice is not limited in application to parties to the arbitration and applies to third parties as well. In fact, a majority of Section 1782 requests seek discovery from persons or entities who are parties neither to the arbitration nor to the underlying arbitration agreement. Thus, while parties to the arbitration enjoy the financial and other benefits of limited discovery common in arbitration conducted under the rules of virtually all arbitral institutions, a third party may be subjected to costly and burdensome discovery in connection with an arbitration to which it never consented. Moreover, applications

for discovery under Section 1782 are generally made *ex parte* so that the targeted third party has no opportunity to be heard on the application and, assuming the discovery order is granted, is faced with a difficult choice between complying with the subpoena or moving to quash it—and undertaking the expense of doing so.

Indeed, a recent decision demonstrates the willingness of New York courts to aid arbitration at the cost of third parties. In *In re Ex Parte Application of Kleimar N.V.*, No. 16-mc-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016), the district court denied third-party Vale S.A.’s (“**Vale**”) request for relief from the court’s order allowing Kleimar N.V. (“**Kleimar**”), a party to several arbitrations pending before the London Maritime Arbitration Association, to seek discovery from Vale. The court ruled that Vale did not meet its burden to quash or modify the subpoena served on it. Moreover, the court found that Kleimar’s underlying application for the discovery satisfied the statutory and discretionary factors set forth in Section 1782 and *Intel*, respectively.



Importantly for third parties, the *Kleimar* court ruled that Vale, a Brazilian corporation, could be “found” in New York—thus subjecting itself to Section 1782—because it traded American Depository Receipts on the New York Stock Exchange; listed Vale Americas, a wholly-owned subsidiary of another of Vale’s wholly-owned subsidiaries, for service and as an importer of one of Vale’s products; registered to do business in New York and in fact conducted business in New York; and did not contest jurisdiction in another matter venued in the Southern District of New York. While the court appeared to employ an analysis similar to that used to determine personal jurisdiction, the language of Section 1782 is arguably broader and therefore provides greater latitude to reach third parties.

Continued routine use of Section 1782 to obtain discovery, coupled with the broad jurisdictional language of the statute, may create an uptick in discovery obligations for third parties residing or “found” in New York State—and potentially elsewhere in the United States—and thereby introduce an additional litigation cost risk to their undertakings. *See, e.g., In re the Petition of Helena S.A.*, No. 16-cv-6628 (S.D.N.Y. Dec. 13, 2016) (granting an arbitration party’s petition to obtain discovery from third-party Barclays Bank PLC for use in aid of a London maritime arbitration proceeding that was merely “contemplated”). Of further note, the costs to third parties of complying

with discovery ordered pursuant to Section 1782, and absent truly compelling circumstances, are typically not reimbursable by the arbitration party who seeks the discovery. Some might argue that this adds insult to injury since the parties to the arbitration themselves benefit from the cost-shifting regimes of most arbitral rules which routinely provide for costs awards to the prevailing party.

It remains to be seen whether other district courts will follow New York’s seemingly expansive lead in the application of Section 1782, or whether New York district courts may retrench and heighten their scrutiny around issues of a party’s presence in New York or the burdensomeness of a particular discovery request. It certainly remains the case, however, that Section 1782 is a potentially powerful weapon available to parties involved in foreign litigation or arbitration and one which applies not only to parties to the foreign proceeding but to third parties as well.

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A third party may be subjected to costly and burdensome discovery in connection with an arbitration to which it never consented.

THIRD PARTY FUNDING OF ARBITRATION IN HONG KONG

By Sacha Cheong and Dominic Lau (Hong Kong)

Many jurisdictions such as the United Kingdom, and more recently Singapore, already permit third party funding of arbitration.

The Hong Kong government is in the process of introducing similar legislation in Hong Kong. In particular, it is proposed that third party funding of arbitration should be allowed for arbitrations seated in Hong Kong, and also for services provided in Hong Kong for arbitrations taking place outside of Hong Kong. Alongside those proposed changes, it is expected that various safeguards will be introduced to ensure ethical standards are maintained and to prevent abuse. The law relating to maintenance and champerty (regarding the support of litigation by a stranger), which are still punishable as a criminal offence, will no longer be applicable to Hong Kong arbitration.

In October 2015, the Law Reform Commission of Hong Kong (“LRC”) issued a consultation paper on the subject. The responses showed that there was overwhelming support for the proposal.

On 12 October 2016, the LRC released its final report, setting out its recommendations with respect to the implementation of the legislation and its regulation. The recommendations include that:

- Statutory law and professional conduct rules be amended to permit third party funding for arbitration. The proposed amendment to the Arbitration Ordinance (Cap. 609) be applicable to any arbitration conducted in or outside Hong Kong so long as the third party funded legal services are provided in Hong Kong. The professional code of conduct for legal practitioners be amended to specify the terms and conditions under which they may represent parties being funded.
- A body be set up under the Arbitration Ordinance with authority to issue a code of practice laying down clear ethical and financial standards for third party funders.



- A “light touch” approach be adopted for the first three years of its implementation, during which failure to strictly comply with the new law/regulations would not, of itself, lead to criminal or civil liability. An advisory body nominated under the Arbitration Ordinance will monitor the conduct of third party funding for arbitration and implementation of the code of practice, liaise with stakeholders and suggest revisions to the code of practice at the end of the period.
- Arbitral tribunals be given the power to award costs against third party funders (subject to further consultation), who may have corresponding rights to be heard by the tribunal with respect to any such proposed award of costs.

It is anticipated that the Hong Kong government will put the amendment bill before the Legislative Council in early 2017.

The expected imminent implementation of the third party funding legislation ought to bolster Hong Kong’s position as an important regional centre in Asia for legal services and dispute resolution, and as one of the most popular venues selected by business parties for the conduct of arbitration proceedings.

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STOCKHOLM CHAMBER OF COMMERCE LAUNCHES NEW ARBITRATION RULES

By Johann von Pachelbel and Tobias Kopp (Frankfurt)

The Arbitration Institute of the Stockholm Chamber of Commerce (the “**SCC**”) launched revised sets of its well-recognised Arbitration Rules and Rules for Expedited Arbitrations on January 1, 2017 (available at www.sccinstitute.com). The previous rules from 2010 have been reviewed by a committee of international experts within the arbitration community. Most amendments to the Arbitration Rules (the “**Arbitration Rules**”) are also reflected in Rules for Expedited Arbitration (the “**Expedited Rules**”) (together, the “**New SCC Rules**”). As previously, the Expedited Rules are mainly designed for disputes of a lesser complexity, with a decision by a sole arbitrator, the application of shorter procedural deadlines and the award to be rendered within three (3) months from the referral of the case to the arbitrator. The ambition of the SCC regarding the New SCC Rules is expressed in Article 2 of both sets of rules: *“Throughout the proceedings, the SCC, the Arbitral Tribunal and the parties shall act in an efficient and expeditious manner”*.

SUMMARY PROCEDURE

An innovation in the New SCC Rules is the introduction of a summary procedure for the determination of factual or legal issues *“without necessarily undertaking every procedural step that may otherwise be adopted for the arbitration”* (Article 39 Arbitration Rules/Article 40 Expedited Rules). A request for summary procedure may be filed in cases such as when a party has made an allegation that is manifestly unsustainable, or when a claim/defence is unfounded as a matter of law, i.e. even when assuming

the facts to be true, no award could be rendered in favour of a party. The application shall indicate the grounds for the party’s request and the form in which it proposes to proceed summarily and shall demonstrate that such procedure is efficient and appropriate for that particular case. The opposing party shall be given the opportunity to comment on the request.

In order to ensure that due process is observed, the summary procedure needs to be balanced against the need of each party to be given sufficient opportunity to



An innovation in the new SCC Rules is the introduction of a summary procedure for the determination of factual or legal issues.

present its case. We comment elsewhere in this [edition](#) on the introduction of this provision and those in other arbitration rules (e.g. the SIAC Rules of Arbitration) providing for early/summary dismissal of claims/defences.

JOINDER AND CONSOLIDATION

The New SCC Rules contain revised rules on consolidation and – in line with other leading international arbitral institutions – novel provisions on joinder of proceedings. A party to the arbitration may at an early stage of the proceedings request that one or more additional parties are joined to the arbitration if certain requirements are met (Article 13 Arbitration Rules/Article 14 Expedited Rules). Alternatively, a party may request that a newly commenced arbitration be consolidated into an existing SCC arbitration. This may apply in cases where claims have been made under more than one arbitration agreement, provided that the relief sought arises out of the same transaction or series of

transactions, and the SCC Board deems that the arbitration agreements are compatible (Article 15 Arbitration Rules/Article 16 Expedited Rules). Important factors to consider for the SCC Board are, for example, the stage of the arbitrations, the efficiency and the expeditiousness of the proceedings. Where the SCC Board decides to grant a request for joinder, any decision as to the Arbitral Tribunal's jurisdiction over any party joined to the arbitration shall still be made by the Arbitral Tribunal.

MULTIPLE CONTRACTS IN A SINGLE ARBITRATION

A new provision entitles a party to bring several claims arising from different contracts under more than one arbitration agreement in a single arbitration (Article 14 Arbitration Rules/Article 15 Expedited Rules). Unless the other party agrees, in order for the claims to proceed in a single arbitration the New SCC Rules require that the SCC does not manifestly lack jurisdiction over the

dispute and, in reaching its decision, the SCC Board shall have regard to (i) whether the arbitration agreements under which the claims are made are compatible, (ii) whether the relief sought arises out of the same transaction or series of transactions, (iii) the efficiency and expeditiousness of the proceedings and (iv) any other relevant circumstances regarding whether the various claims should be dealt with in a single arbitration. Again, and provided that the SCC Board determines that the claims may proceed in a single arbitration, it is still for the Arbitral Tribunal to finally decide on its jurisdiction over each of the claims submitted. For the applicant the obvious advantages are time and cost savings if it achieves the resolution of several claims arising from different contracts in a single arbitration without having to initiate parallel proceedings.

ADMINISTRATIVE SECRETARY

A further novelty is the introduction of rules on the permissibility and role of an administrative secretary to the Arbitral Tribunal (Article 24 Arbitration Rules/Article 25 Expedited Rules) – a topic that has become relevant in prominent challenges against international arbitral awards and has been widely discussed in the recent past. The appointment of an administrative secretary is subject to the parties' consent and the Arbitral Tribunal shall consult with the parties regarding the secretary's tasks. No decision-making authority may be delegated to him/her. The secretary shall be – and the Arbitral

Tribunal shall ensure that he/she remains – impartial and independent and he/she may be removed if this requirement is breached. The fee payable to the administrative secretary shall be paid from the Arbitral Tribunal's fees.

FURTHER CHANGES ENHANCING EFFICIENCY

The New SCC Rules further contain a number of changes streamlining the proceedings. Examples are:

- (i) The general rule that the number of arbitrators under the Arbitration Rules shall be three unless otherwise agreed is abandoned. Similar to the ICC arbitration rules the SCC Board shall decide the number of arbitrators having regard to the complexity of the case, the amount in dispute and other relevant circumstances (Article 16 Arbitration Rules);
- (ii) An arbitrator shall not only confirm his/her impartiality and independence but also his/her availability (Article 18 Arbitration Rules/Article 19 Expedited Rules);
- (iii) The Arbitral Tribunal shall, after referral of the case, “promptly” hold a case management conference and – “*during or immediately following the case management conference*” – establish a procedural timetable including the date for making the award (Article 28 Arbitration Rules/Article 29 Expedited Rules);



- (iv) The Arbitral Tribunal may, in exceptional circumstances and at the request of a party, order any claimant or counter-claimant to provide security for costs in any manner it deems appropriate and stay or dismiss the party's claims in whole or in part if the party fails to provide the security (Article 38 Arbitration Rules/Article 39 Expedited Rules);
- (v) The SCC Board shall, when finally determining the arbitrators' fees, have regard to, *inter alia*, the extent to which the Arbitral Tribunal has acted in an efficient and expeditious manner (Article 49 Arbitration Rules and Expedited Rules);
- (vi) The Arbitral Tribunal shall, when apportioning the costs of the arbitration between the parties, have regard to, *inter alia*, each party's contribution to the efficiency and expeditiousness of the arbitration (Articles 49 and 50 Arbitration Rules and Expedited Rules).

submission the Arbitral Tribunal will, *inter alia*, consider the nature and significance of the interest of the third party in the arbitration and whether the submission assists the Arbitral Tribunal in determining an issue by bringing a perspective or knowledge distinct from that of the disputing parties without disrupting the arbitration.

SUMMARY

The New SCC Rules contain a number of innovative provisions and form a modern set of arbitration rules which should assist arbitral tribunals and parties in streamlining the proceedings in a manner consistent with international best practices. In this respect the New SCC Rules meet many of the users' expectations and are in line with the SCC Arbitration Institute's intention to encourage arbitrators to be more hands-on in achieving an efficient dispute resolution. It will be interesting to see the effect of the New SCC Rules on flexibility, duration and costs when applied in future SCC arbitrations.

INVESTMENT TREATY DISPUTES

The Arbitration Rules further contain a new Appendix III including four provisions relating to investor-state treaty arbitrations and entitling third parties to request or to be invited by the Arbitral Tribunal to make a written submission in the arbitration (Articles 3 and 4, Appendix III). When deciding on a request to allow a written third-party

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The new SCC Rules form a modern set of arbitration rules which should assist arbitral tribunals and parties in streamlining the proceedings.

ARBITRATION UNDER THE RULES OF THE TOKYO MARITIME ARBITRATION COMMISSION (TOMAC) OF THE JAPAN SHIPPING EXCHANGE

By Eiji Yamahara and Kyle R. de Neve (Tokyo)

Japan has, since 1961, been a signatory to the Convention of the Recognition and Enforcement of Foreign Arbitration Awards (1958) (known colloquially as the *New York Convention*) which has helped to foster the growth of international arbitration institutions in Japan. Among them is the [Tokyo Maritime Arbitration Commission \(“TOMAC”\)](#) of the Japan Shipping Exchange Inc. (“**JSE**”). The JSE was founded in 1921 and, in addition to offering services in conciliation of maritime disputes and administering maritime arbitration (through TOMAC), the JSE publishes maritime contract forms and in-depth analysis on shipping and logistics, and provides electronic shipping databases. The JSE’s membership is currently around 400 strong and includes ship operators, cargo owners, insurance companies, and law firms (including K&L Gates). TOMAC is one of the JSE’s primary tools in administering its mission.

TOMAC was founded in 1926 and, whilst its rules do not limit the type of dispute which may be dealt with, the disputes referred to arbitration under the TOMAC rules are commonly maritime disputes under bills of lading, charterparties, contracts relating to the sale and purchase of ships, shipbuilding, ship financing, manning, and the like.

TOMAC is essentially the Japanese equivalent of the London Maritime Arbitration Association (“**LMAA**”), and,

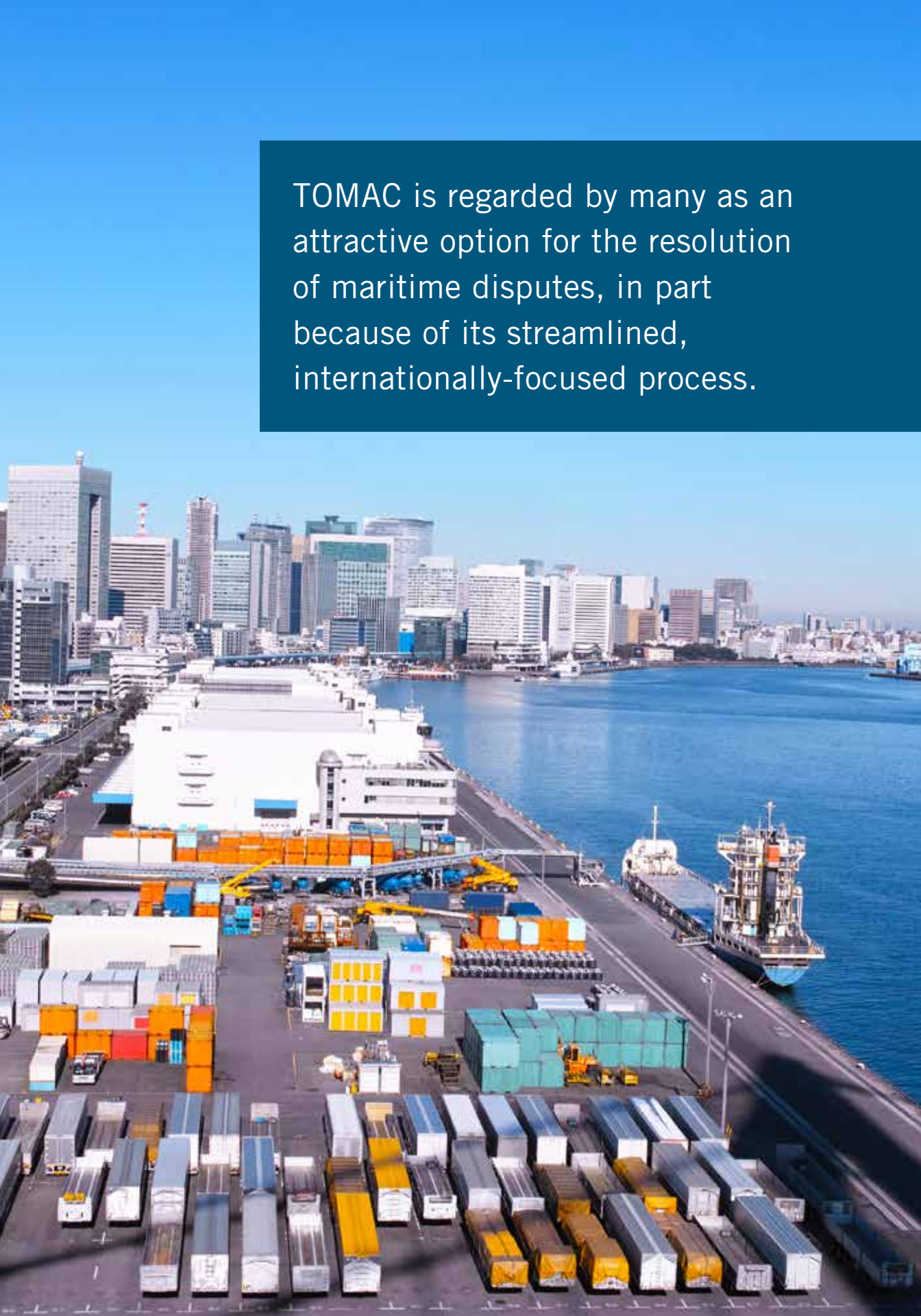
accordingly, the two associations share many similarities. For example, TOMAC employs three types of procedures, just as LMAA does. In the case of TOMAC, these are (i) ordinary arbitration, (ii) simplified arbitration for claims of JPY20 million or less (approx. US\$181,000, at current rates), and (iii) small claim arbitration for claims of JPY5 million or less (approx. US\$45,500). However, TOMAC and LMAA differ in several key respects. Unlike many LMAA arbitrators, TOMAC’s listed arbitrators for nomination

are not full-time arbitrators; rather, they are professionals such as academics, lawyers, and company employees engaged in maritime businesses. Perhaps due in part to this approach, one of the perceived advantages of TOMAC arbitration is its reasonable arbitrator fees. Each party in a dispute pays a charge for the procedure, which includes the said arbitrator fees. The charge increases according to the sum in dispute; for example, under current formulations, JPY1.25 million (approx. US\$11,400) is charged to each party in the case of a JPY100 million claim (approx. US\$910,000).

TOMAC is regarded by many as an attractive option for the resolution of maritime disputes, in part because of its streamlined, internationally-focused process. For example, TOMAC accepts English documents without Japanese

translation, potentially saving on heavy translation costs. Hearings are also principally held in English, at least in the case of international disputes. As a special feature, the TOMAC rules provide that when multiple arbitral proceedings are commenced regarding multiple contracts involving the same ship, the same charterparty, shipbuilding contract, ship sale and purchase agreement etc., or the issues of law or fact are mutually related to each other, TOMAC may decide to consolidate such multiple proceedings into one single proceeding on the application of any party or at its discretion, regardless of whether the involved parties consent to such consolidation (Article 27 of TOMAC rules for ordinary arbitration). This power is particularly effective for disputes involving a vessel in complex charterparty chains and can be of great assistance in obtaining rapid and definitive results.



An aerial photograph of a port area. In the foreground, there are numerous stacks of shipping containers in various colors (orange, blue, green, white) and several semi-trailers parked. A large white building, likely a terminal or warehouse, is situated along the waterfront. A large cargo ship is docked at the pier. In the background, a dense city skyline with various skyscrapers is visible under a clear blue sky.

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It is worth noting that no TOMAC award has been overturned by a Japanese court since TOMAC's establishment.

Resolution of maritime disputes under TOMAC arbitration is not without its limitations, however. In the maritime sector, ship-arrest remains a hot topic among parties in dispute, and it is here where solutions beyond TOMAC may be needed. For example, in such cases claimants must usually apply first to a Japanese court in order to preserve the counterparty's assets in Japan before a TOMAC award, as TOMAC rules do not include any provisions regarding provisional attachments. In this respect, it should be noted that the Tokyo District Court decided in an August 28, 2007, case that, if the parties to a contract have agreed to a place outside of Japan as the seat of arbitration (in this particular case the chosen seat of arbitration was Seoul, Korea), Japanese courts shall not have jurisdiction to issue court orders providing for provisional remedies. Thankfully, Article 13 of the TOMAC ordinary rules state that the place of arbitration shall be Tokyo or Kobe, and, where no place of arbitration is designated in the arbitration agreement or the arbitration clause, Tokyo shall be the place of arbitration.

Every year around 10 to 20 disputes are referred to arbitration under TOMAC rules. Around 10 awards per year are issued, with around five cases every year settled or withdrawn. The nationalities of disputing parties are myriad, but the majority are Panamanian and Liberian given that disputes are normally formally brought by special purpose companies registered in such jurisdictions. In any event, as market rates for freight remain at the historically low levels reached following the financial crisis of 2008, there are certain to be many more potential disputes for TOMAC to arbitrate in the near future.

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ANGOLA'S RATIFICATION OF THE NEW YORK CONVENTION. WHAT DOES IT MEAN FOR FOREIGN INVESTMENT?

By Catya Simao, In-house Legal Counsel (Angola)

The uncertainties faced by foreign investors regarding the process of enforcing an international arbitration award in Angola might just come to rest now that Angola has, since August 15, 2016, become a signatory of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **"New York Convention"**).

Angola's ratification of the New York Convention means the courts of Angola are required to give effect to agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states, subject only to the limited exceptions in the New York Convention, including where the courts in Angola find that the subject matter is not arbitrable, or when the recognition or enforcement would be contrary to the country's public policy.

Previously, Angola did not have an international dispute treaty available under which the courts of Angola were required to give effect to the enforcement of foreign arbitral awards. In fact, the country's Voluntary Arbitration Law (**"VAL"**), law number 16/03 of July 25, 2003, is silent in this respect and there are no published cases evidencing the successful enforcement of a foreign arbitration award under that 'old'

regime, pre-ratification of the New York Convention. On the other hand, pursuant to the VAL, domestic arbitral awards in Angola have the same effect as judicial court decisions. In particular, in the event of noncompliance with a domestic arbitration award by the losing party, the winning party may seek direct enforcement in a state court through judicial enforcement proceedings.

DEVELOPMENT

Angola offers many investment opportunities and incentives as a nation rebuilding itself after 27 years of civil war (1975–2002), which caused tremendous destruction and hindered economic growth at a number of levels. Today more than ever, Angola needs to attract foreign investment. Its economy is currently being adversely affected by low oil prices, climbing inflation, and increasing public debt. Against that background,

the ratification by Angola of the New York Convention, a key instrument in international arbitration with respect to the enforcement of foreign arbitral awards, is an important development which ought to give foreign investors greater comfort in doing business with entities in Angola. It therefore represents a significant step forward and ought to provide a welcome boost to foreign investment in Angola.

With that said, how the New York Convention will be applied in practice by the courts in Angola remains to be seen, considering that "public policy" is one of the grounds under which the courts may refuse the enforcement of foreign arbitral awards. Experience has shown that the courts in some jurisdictions take a very broad view of the public policy exception which is not specifically defined in the New York Convention.

The ratification of the New York Convention represents just one of a number of positive steps taken by Angola in recent years to seek to attract more foreign investment.

- Angola has entered into a number of Bilateral Investment Treaties (**"BITs"**) in recent years, with the aim of attracting further foreign investment. These treaties generally contain an expropriation clause, intended to protect foreign investments against government expropriation except in the public interest. Examples include the BIT with Germany signed on October 30, 2003, and in force since March 1, 2007, and the BITs with Italy and with Cape Verde.
- Angola is also a member of the Multilateral Investment Guarantee Agency (**"MIGA"**), which provides political risk insurance guarantees




to private sector investors and lenders. In practice, this means that people looking to invest in Angola (amongst other benefits) will have the assurance that losses relating to breach of contract, expropriation, nonhonoring of financial obligations, currency inconvertibility and transfer restriction, war, terrorism, and civil disturbance ought to be recoverable through MIGA's insurance on eligible projects.

- On August 11, 2015, the Angolan government passed the country's Private Investment Law No. 14/15, which is aimed at both national and foreign investors and provides investment incentives in the sectors of: (i) media, tourism, and hospitality; (ii) electricity and water; (iii) transportation and logistics; (iv) telecommunications and information technology; and (v) construction. In passing such legislation, the government is seeking to promote the diversification and development of the economy while reducing the country's over dependence on the oil sector.

CONCLUSION

Angola's ratification of the New York Convention is likely to mean that foreign investors will look more closely at Angola for investment opportunities given the greater comfort it should bring to foreign parties when contracting with entities in Angola. Opening the country up to such an important international dispute treaty ought unquestionably to be seen as a positive development which, along with attractive investment policies, fiscal incentives, and political stability, should provide a good investment climate and help promote social and economic development in a country with immense potential for economic growth.



The ratification of the New York Convention represents just one of a number of positive steps taken by Angola in recent years to seek to attract more foreign investment.

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ARBITRATION IN SAUDI ARABIA, AND THE ESTABLISHMENT OF THE NEW ARBITRATION CENTRE

By Matthew Walker and Leanie van de Merwe (Doha)

THE NEW SAUDI ARBITRATION LAW

Although arbitration has not been particularly popular with the government of Saudi Arabia for some time, ever since the well-known *Saudi Arabia v. ARAMCO* disputes, the recent launch of a new centre for commercial arbitration in Riyadh in late 2016 has reinforced earlier legal developments relating to arbitration in Saudi Arabia. Between 2012 and 2013, Saudi Arabia enacted two new laws: the **"New Arbitration Law"** issued by Royal Decree No. M/34, and the **"New Enforcement Law"** issued by Royal Decree No. M/53. The New Arbitration and Enforcement Laws aim to create a more comprehensive and autonomous arbitration environment than had previously existed. Instead of enforcement proceedings being referred to the Saudi Board of Grievances (as supervising court), an execution judge will be appointed under the New Enforcement Law to deal with all arbitral enforcement issues. This law affects the enforcement of both domestic and international arbitral awards and is intended to provide an expeditious means for the settling of all enforcement-related

issues. Although still in their early days, it is expected that these two laws will lead to an improved climate for arbitration in the Kingdom, in line with Saudi Arabia's vision to become the preferred alternative dispute resolution (**"ADR"**) jurisdiction in the region by 2030.

The New Arbitration Law was published in the Official Gazette (or *Umm al-Qura*) on 8 June 2012 and became effective 30 days after publication, on 8 July 2012. The New Arbitration Law is largely based on the UNCITRAL Model Law on International Commercial Arbitration, subject to a number of amendments to ensure that the new law remains *Shari'ah* compliant. The New Arbitration Law contains several important improvements on the previous arbitration law, contained in the Arbitration Regulation of 1983 (Royal Decree No. M/46) and the Rules for the Implementation of the Arbitration Regulation of 1985 (Ministerial Resolution No. 7/2021/M) (the **"Old Arbitration Law"**):

- a) It limits judicial intervention and oversight in the overall arbitration process and provides the parties with greater discretion to choose the procedure that suits their

needs. As an example, under the Old Arbitration Law, the parties had to get the approval of the court to arbitrate their matter. This requirement fell away with the adoption of the New Arbitration Law.

- b) It provides that all awards are final. This provision, together with the adoption of the New Enforcement Law, will hopefully result in fewer challenges to the enforcement of awards in Saudi Arabia in the future, since a specialist execution judge (instead of the Board of Grievances) will now decide on the enforceability of all arbitral awards. It should be noted, however, that the Enforcement Court will still have to ensure that all awards are *Shari'ah* compliant and there are currently no clear guidelines as to what factors the courts will take into account in order to determine compliance.

- c) It provides proper guidelines for the appointment (or recusal) of the arbitrators. The New Arbitration Law is also silent on the nationality, experience, gender and religion of the arbitrators. Under the Old Arbitration Law, only experienced, male arbitrators of the Islamic faith could be appointed as an arbitrator.

- d) It provides parties with the freedom to choose the applicable law (i.e. the law of the contract). The Old Arbitration Law was not as specific about this issue and simply stated that government entities had to

obtain the approval of the Prime Minister in order to settle their disputes through arbitration.

- e) It provides the parties with the freedom to choose the language and the seat of the arbitration. Under the Old Arbitration Law, the parties could only arbitrate in the Arabic language.

Additionally, this new arbitration regime is likely to provide users with a much speedier dispute resolution mechanism because proceedings in the Saudi court system are notoriously slow. Arbitration under the New Arbitration Law should also be more predictable than litigating via the Saudi court system, and arbitral panels will likely have more familiarity with modern commercial transactions than some Saudi Arabian judges.

THE SAUDI CENTER FOR COMMERCIAL ARBITRATION

Alongside the New Arbitration Law, and with the aim of enhancing and entrenching local and foreign investment in Saudi Arabia, the Saudi Center For Commercial Arbitration (**"SCCA"**) was established in 2014 by Ministerial Decree no. 257 dated 14/6/1435 H. - 15/03/2014 G. The SCCA underwent what it called a "soft launch" on 2 October 2016, already with its first reference under administration by then. The SCCA is an independent body that administers arbitration procedures and offers ADR services to parties who have



agreed to have their disputes settled by the SCCA. The services are provided in English and Arabic by expertly trained staff. The centre, based in Riyadh, offers the latest ADR technology and facilities ensuring a professional and efficient set-up for the settlement of disputes in the Kingdom. The operations of the SCCA are overseen by an independent Board of Directors made up of members from the private sector. Board members are not allowed to hold a government position at the time of serving.

The SCCA is authorized to hear all domestic and international civil and commercial disputes that are referred to it, subject to an agreement by the parties to have their dispute(s) settled by the SCCA. Disputes of an administrative, criminal or personal-status nature fall outside of the jurisdiction of the SCCA as these are matters that are not arbitrable under the New Arbitration Law. The SCCA has also published its own set of rules of arbitration (the “**SCCA Rules**”) modelled on the UNCITRAL Arbitration

Rules and came into force in May 2016. The SCCA Rules aim to make dispute resolution proceedings clear, fair and efficient in order to boost user-confidence and bring it in line with international best practice while at the same time balancing it with the expectations of the local market.

Information regarding the arbitration procedure can be found on the SCCA’s website together with an online Request for Arbitration Form, which has to be completed in order to initiate any arbitration proceedings. Fee Schedules for the SCCA administrative fee and for the Arbitrator’s fee can also be found on the SCCA’s website and provide for different fee structures based on the sum in dispute. Upon filing of the notice of arbitration, a non-refundable filing fee is payable by the Claimant to the SCCA. The filing fee is dependent on the amount in dispute and ranges from SAR 5,000–SAR 10,000 (approximately US\$1,300 to US\$2,600 at current rates). In order to assist parties to work out an estimate for their arbitration, the SCCA provides an arbitration fee calculator on its website which is available in both English and Arabic. Where costs are concerned, the SCCA Rules provide that the cost of the arbitration will initially be shared between the parties. The tribunal has the final say on the allocation of costs when it issues its award.

CONCLUSION

The establishment of the SCCA and the adoption of the two new laws governing arbitration in Saudi Arabia is a positive change to dispute resolution within the Kingdom. These steps all form part of the government’s continuing efforts to reform the Saudi Arabian judicial system to make it more modern and efficient, as part of a wider effort to facilitate Saudi Arabia’s ability to encourage foreign investment. The recent opening of new arbitration centres in the Kingdom is a welcome development and one which may give rise to some healthy competition between the Gulf Cooperation Council (GCC) countries in their attempts to establish themselves as the most efficient, “go-to” arbitration centre in the region.

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ENGLISH COURT CONSTRUES ARBITRATION AGREEMENT TO INCLUDE ASSIGNED CLAIMS IN CONTINUING ANTI-SUIT INJUNCTION

By John Gilbert (London)

In a recent ruling of the Commercial Court in *John Forster Emmott v Michael Wilson & Partners* [2016] EWHC 3010 (Comm), Mrs Justice O’Farrell held that an arbitration agreement was sufficiently broad to include claims assigned to one of the parties by third parties and so continued an anti-suit injunction to restrain litigation in Australia.

BACKGROUND

These proceedings are one of the latest developments in the long-running dispute between Michael Wilson & Partners (“MWP”) and a former director and shareholder, John Emmott.

The dispute arose out of an agreement between Mr Emmott and MWP in 2001 (the “MWP Agreement”). MWP is a legal practice in Kazakhstan and Mr Emmott a senior lawyer. Under the MWP Agreement, Mr Emmott joined MWP as a director and received one third of its shares. Four years later, Mr Emmott agreed with three other lawyers: Mr Nicholls and Mr Slater (Australian lawyers) and Mr Shalkenov (a Kazakh lawyer) that they would establish a rival firm, Temujin, and they signed a Cooperation Agreement in December

2005 (the “Cooperation Agreement”). Messrs Slater, Nicholls and Emmott left MWP during late 2005 and 2006 to join Temujin.

MWP commenced arbitration in London against Mr Emmott under the MWP Agreement in August 2006 and commenced court proceedings in New South Wales, Australia (“NSW”) against Messrs Slater and Nicholls and Temujin (the “First NSW Proceedings”). Both proceedings concerned allegations that Messrs Emmott, Slater and Nicholls diverted (the same) clients and business opportunities away from MWP to their new firm.

Judgment was given against Messrs Slater and Nicholls and Temujin in the First NSW Proceedings. In the London arbitration, the tribunal issued an award with a net sum payable to Mr Emmott.

ANTI-SUIT INJUNCTION

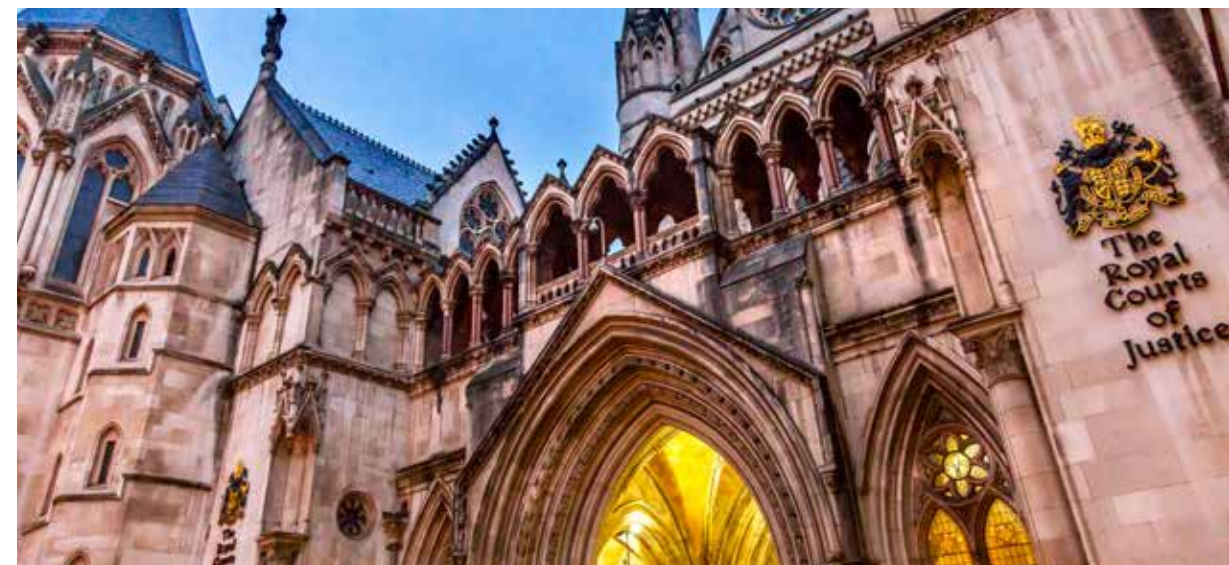
After judgment was given in the First NSW Proceedings, Messrs Slater and Nicholls were declared bankrupt and Temujin insolvent. MWP obtained assignments from each of them of their rights to seek contributions from Mr Emmott in respect of their liabilities to MWP. MWP (as assignee of the claims) then commenced proceedings in NSW against Mr Emmott seeking such contributions and an account of benefits of Temujin’s business received by Mr Emmott (the “Second NSW Proceedings”).

Mr Emmott applied to the English Commercial Court for an anti-suit injunction to restrain MWP from pursuing the Second NSW Proceedings. The injunction was awarded on a without notice basis and this judgment was given on the return date.

The key issues that the court considered were: (i) whether the Second NSW Proceedings were in breach of the

arbitration agreements in the MWP Agreement and/or the Cooperation Agreement; and (ii) if so, whether it was in the interests of justice to exercise the court’s discretion to continue the anti-suit injunction.

The judge concluded that the claims made in the Second NSW Proceedings fell within the ambit of the arbitration agreement in the MWP Agreement. The arbitration agreement was broadly drafted to catch “any dispute arising out of or connected with” the arrangements between Mr Emmott and MWP. MWP argued that the claims: (i) were brought as assignee and that the assignors were not parties to the MWP Agreement; and (ii) did not arise out of the MWP Agreement and so did not fall within the scope of the arbitration agreement in the MWP Agreement on its terms. However, the judge rejected these arguments. On the first point, she held that the effect of the assignments was that MWP was entitled to bring the assigned claim in its own name and so it was a claim made



by MWP to enforce its own rights. On the second point, the judge decided that the arbitration agreement in the MWP Agreement was sufficiently broad to include the claims.

In considering whether the court should exercise its discretion to continue the injunction, the judge referred to Lord Bingham's speech in *Donohue v Armco Inc* [2001] UKHL 64 in which he stated that where foreign proceedings have been brought in breach of an arbitration agreement, the court will ordinarily grant an anti-suit injunction to restrain them, unless there are strong reasons not to do so. The judge also referred to the principles discussed in Toulson LJ's judgment in *Deutsche Bank AG v Highland Crusader Partners LP* [2009] EWCA Civ 725, noting that each case turns on its own facts and the court must exercise its discretion taking into account all material factors in the case.

The judge considered a number of factors in deciding how the court should exercise its discretion. She found that, while there was no cause of action estoppel between the claims in the arbitration and the Second NSW Proceedings, there was issue estoppel because there were necessary common ingredients between the claims in each. Those issues had been decided on a final basis in the arbitration. Most significantly, the judge concluded that the Second NSW Proceedings amounted to an abuse of process because the key issues in dispute had been determined in the arbitration and the use of assigned rights to bring further claims against

Mr Emmott was *"an attempt by MWP to obtain further compensation in respect of the same wrongdoing and damage"*. Consequently, the judge concluded that it was in the interests of justice to continue the anti-suit injunction because *"there have been final and binding proceedings under the dispute resolution procedure agreed by the parties"* and it would be *"unfair and contrary to the policy of finality of proceedings to permit Mr Emmott to be vexed by further proceedings"*.

CONCLUSION

This judgment follows hard fought and extensive proceedings over many years which have included several appeals. It is a reminder of the supportive approach that the English courts take to arbitration in starting from the presumption that, if parties choose arbitration as the dispute resolution mechanism for their relationship, their intention is that any dispute arising out of the relationship will be determined by the same tribunal (see the *Fiona Trust case: Premium Nafta Products Ltd v Fili Shipping Company Ltd* [2007] UKHL 40). It also emphasizes that the court will be very reluctant to see issues re-opened once determined by an arbitral tribunal.

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