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K&L Gates' Arbitration World

Welcome to the 3rd edition of K&L Gates' Arbitration World

Welcome to the third edition of "Arbitration World" and the first edition, we are proud to say, following the combination of Kirkpatrick & Lockhart Nicholson Graham LLP with Preston Gates Ellis LLP, effective 1 January 2007, to form Kirkpatrick & Lockhart Preston Gates Ellis LLP - "K&L Gates".

In light of this development, page 3 of this issue includes a short commentary on arbitration in Asia and a profile of the firm's Asian offices which enable the firm to advise clients in arbitration in this increasingly strategic part of the world.

For those reading for the first time, "Arbitration World" aims to highlight significant developments and issues in international arbitration that matter to in-house counsel and company executives with responsibility for dispute resolution.

In this issue, highlights include an examination of the difficulties in the area of consolidation of related arbitrations, in particular in the context of natural disasters. We look at the implications of some recent decisions in the U.S. on the grounds upon which an arbitral award may be challenged and on the enforceability of subpoenas issued by arbitrators. We summarise the latest Judicial "Interpretation" in China, which covers a number of issues which have previously given rise to difficulties. We look at the latest developments in investment treaty arbitrations and at the emerging approach to confidentiality in the wider international sphere.

We look back at our Autumn 2006 programme of 'webinars' (web-based seminars) and look forward to the 2007 schedule of events, including our 3rd annual arbitration day in London on Thursday 19 April 2007 at The Mandarin Oriental Hyde Park Hotel, London. Further events are planned in the U.S., including an arbitration day in Washington, D.C. on Friday 4 May 2007.

We also include our usual round-up of developments in international arbitration from around the globe.

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Challenging arbitral awards in the U.S.

by Michael Napoli, Dallas

One of the perceived advantages of arbitration over litigation in the courts is that it provides for cheaper and simpler resolution of disputes. Arbitration obtains lower costs, in part, by eliminating any meaningful review of arbitration awards. So long as the arbitration process complies with basic notions of procedural fairness and arbitrator impartiality, a court should not question the arbitrator's decision – at least in theory.

The Federal Arbitration Act ("FAA"), which presumptively governs the overwhelming majority of arbitrations in the United States, provides only limited grounds on which an arbitration award can be vacated. To prevail on any of these grounds requires proof of some egregious or fundamental flaw in the arbitration process, e.g. the arbitrator had an undisclosed conflict of interest or was bribed. These grounds are strictly construed, provide little opportunity for relief to disappointed litigants and are rarely argued.

In the last ten years, however, the limitations on review of arbitration awards (and hence the cost savings of arbitration) have been eroded by federal courts' recognition of several non-statutory grounds for vacating arbitration awards. As generally stated, the non-statutory grounds are that the arbitrator's award was arbitrary and capricious, in manifest disregard of law or in violation of public policy. These grounds are also strictly construed and rarely form the basis for vacating an arbitration award. As an example, to show that an award is arbitrary and capricious, the party challenging the award must show that there is no rational basis on which the arbitrator could have based his or her decision. Notably, the test is not whether the actual rationale of the arbitrator was plausible but rather whether, looking back on the record (assuming one exists), can the court discern a plausible rationale. Manifest disregard of the law is equally difficult to establish. It is not sufficient to show that the arbitrator made an error of law. Instead, the party seeking to vacate the award must show that the arbitrator deliberately defied or ignored the governing law. To establish that an award violated public policy generally requires a showing that compliance with the award would require a party to perform an illegal act.

Although they are exceedingly difficult to establish and rarely lead to an award being vacated, the non-statutory grounds often lead to futile litigation over the enforcement of arbitration awards. Parties succeed often enough (at least in the trial courts) on these grounds that a suit to set aside an unfavorable arbitration award on the non-statutory grounds should be considered as part of a litigant's strategy in resolving the overall dispute. This leads to greater costs and complexity. The enforcement litigation itself is costly and can take a significant amount of time, particularly if an appeal is involved. The possibility of substantive litigation over enforcement of an award causes parties to create a record during the arbitration that could be used in post-award enforcement proceedings, which increases the cost and complexity of the arbitration itself.

To a very large extent, this problem is avoided in international arbitration – at least when enforcing an award in the United States. The enforcement of international arbitration awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). It is well settled that review of an arbitration award governed by the New York Convention is limited to the specific grounds set forth in the Convention and the non-statutory grounds under the FAA are inapplicable. Under the New York Convention, review of a foreign arbitral award is extremely limited. Unless the agreement to arbitrate was invalid, the dispute was beyond the scope of the arbitration or the arbitration proceeding was flawed in some grievous respect (e.g., a party did not get notice of the proceeding), a court should enforce the award.

There is, however, a growing body of law in the United States that suggests awards in international arbitrations domiciled in the United States are governed by the domestic provisions of the FAA and that the non-statutory grounds are applicable. The leading proponent of this view is the Second Circuit (covering federal courts located in New York, Vermont and Connecticut). The Second Circuit has held that the New York Convention expressly incorporates the local arbitration laws of the nation in which the arbitration is seated. As the Second Circuit explained in *Yusuf Ahmed Alghanim & Sons, WLL v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997): "In sum, we conclude that the Convention mandates very different

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Arbitration in Asia

Arbitration is increasingly selected as a mechanism for dispute resolution in Asia, particularly by non-Asian businesses investing in the Asian region. K&L Gates currently has three offices across the region (Beijing, Taipei and Hong Kong), staffed by 59 lawyers, and has an application for authority to practise in place for an office in Shanghai, which we hope will open later in 2007.

The China International Economic and Trade Arbitration Committee (CIETAC) is based in Beijing and is the administering body for most international arbitrations with their seat in China. Arbitration in China has recently been the subject of an "Interpretation" by the Supreme People's Court of the People's Republic of China, which has further increased certainty in arbitration in China. Developments in arbitration and China's economic growth mean it is expected that many more parties will turn to arbitration to resolve their disputes in the region.

As well as being a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), Hong Kong is home to the Hong Kong International Arbitration Centre (HKIAC), an important centre in this fast-developing area. The HKIAC was set up in 1985 to act as a focal point for arbitration in Asia and has been very successful, in no small part due to Hong Kong's arbitration-friendly legislation.

Taipei

Shanghai

Beijing

Hong Kong

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regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. See Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention".

In *Alghanim*, the Second Circuit held that manifest disregard of law should be considered in determining whether to enforce the award as the arbitration occurred in the United States between international parties. Although it has not expressly reached the issue of applicability of the non-statutory grounds to international arbitrations, the Fifth Circuit (covering federal courts in Texas, Louisiana and Mississippi) has adopted much of the reasoning of *Alghanim*.

The Eleventh Circuit (covering Alabama, Florida and Georgia), on the other hand, does not distinguish between international arbitrations seated in the United States and those seated elsewhere. In *International Risk Insurers v. M.A.N. Gutehoffnungshutte, GmbH,* 141 F.3d 1434 (11th Cir. 1998), the losing party argued that an award in an international arbitration domiciled in the United States should be vacated on the ground that it was arbitrary and capricious. The Eleventh Circuit rejected this argument. The *IRI* court reasoned that Chapter 2 of the FAA (which enforces the New York Convention) "explicitly requires that a federal court 'shall confirm [an international arbitral] award unless it finds one of the grounds for refusal or deferral of ... enforcement of the award specified in the [New York] Convention.'" (quoting 9 U.S.C. § 207). Because "arbitrary and capricious" was not included among the grounds listed by the New York Convention for refusing to enforce an award, the court determined that Chapter 2 of the FAA precluded the court from considering it.

The split in authority among the federal Courts of Appeals means that international arbitration awards will be treated differently depending on which court is asked to enforce them. In the Second Circuit the non-statutory grounds apply, and in the Eleventh Circuit they do not. In the other nine Circuits that have yet to decisively rule, the parties will have to litigate whether the non-statutory grounds are applicable, adding to the overall cost of the arbitration and further eroding the cost savings of arbitration.

Parties may be able to avoid this dispute by electing to have their arbitration governed by state law rather than federal law. Each state in the United States has an arbitration law. While these laws are rarely invoked because of the predominance of the FAA, they remain in force. In their agreements to arbitrate, parties are allowed to specify that the law of a particular state will control the arbitration procedure. In that case, state law rather than federal law will control the enforcement of the arbitration award. Courts in a number of states (including California, Nevada, Arizona, Texas and New Jersey) have specifically rejected the non-statutory grounds when interpreting state arbitration law. In the states which have rejected the non-statutory grounds, the arbitration laws provide for very narrow defenses to enforcement similar to those found in the New York Convention. Thus, even in a court that would look beyond the New York Convention to the non-statutory grounds, the parties can eliminate these grounds by electing to be governed by state rather than federal law.

In drafting arbitration agreements to be governed by the law of a specific state, care should be taken to review the law of that state to determine whether the state's arbitration laws impose any particular requirements on the enforceability of arbitration agreements. Also, parties should consider whether there is a sufficient connection between the contract and the state whose law is chosen to support a contractual choice of law.

Justice, proportionality and drugs

by Martin King, London

In July 2006, the Court of Arbitration for Sport ("CAS") partially upheld the appeal (CAS 2006/A/1025) filed by tennis player, Mariano Puerta, against an eight year ban imposed on him by the International Tennis Federation Anti-Doping Tribunal ("ITF Tribunal"). In so doing, it made a notable award questioning the flexibility of the ITF's Tennis Anti-Doping Programme 2005 ("the ITF Programme") and the World Anti-Doping Agency Code ("WADA Code"). Despite seemingly clear rules relating to doping offences and the applicable sanctions, the CAS Panel referred to overarching international rules of justice, fairness and proportionality in reaching its decision.

Mr Puerta was sanctioned in 2003 for a doping offence involving the inadvertent use of clenbutorol as asthma medication. Under ATP rules clenbutorol was a prohibited substance carrying a mandatory two year ban. However, the ATP Tour Anti-Doping Tribunal held that his actions were not deliberate and did not enhance performance and therefore decided against the mandatory two year ban, relying on the principle of proportionality to impose a nine month period of ineligibility, ending on 1 July 2004. This was Mr Puerta's first doping offence. A second offence, according to the ITF Programme, would mean a ban for life.

In June 2005, Mr Puerta was runner-up in the French Open Men's Singles. He failed a drug test that evening. His sample contained etilefrine. He claimed its presence in his body could only be explained by the innocent and accidental ingestion of his wife's medicine, "Effortil", and that, prior to the match, he must have drunk from a glass previously used by his wife to take her medication - her evidence confirmed this. The ITF Tribunal was not convinced by that sequence of events but did not rule it out. It concluded that the drug might have got there some other way but did not suggest how it may have done so or base that conclusion on evidence. Mr Puerta's plea of "no fault or negligence" (the effect of which, if established, would be no ban) was rejected by the ITF Tribunal but it accepted his alternative submission of "no significant fault or negligence" (the effect of which allows the Tribunal to reduce the ban - where the ban would be for life, the reduced period, under the ITF Programme and the WADA Code, can be no less than eight years). Following these rules, the ITF Tribunal, albeit reluctantly, banned Mr Puerta from competition for eight years, effectively ending his professional tennis career.

Mr Puerta appealed to CAS which upheld the ITF Tribunal's finding of the doping offence but took a different view of the appropriate sanction. Unlike the ITF Tribunal, the CAS Panel accepted Mr Puerta's version of events in relation to his inadvertent ingestion of his wife's medicine. However, the CAS Panel still agreed that Mr Puerta's plea of "no fault or negligence" must fail - upholding previous CAS decisions, placing the bar very high with regard to an athlete's personal responsibility for

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ensuring no prohibited substances enter his/her body. Whilst the CAS Panel recognised the accidental nature of the offence, in order to find "no fault or negligence" it had to find (in accordance with the ITF Programme) that the substance had entered Mr Puerta's body despite him using his "utmost caution" to prevent it. The CAS Panel found an element of negligence on the part of Mr Puerta; he knew to drink water from his own bottle to protect himself from contamination but he did not exercise utmost caution when he poured that water into a used glass (albeit he thought reasonably that it was a glass he had used minutes earlier). Therefore CAS agreed with the ITF Tribunal that Mr Puerta's alternative plea of "no significant fault or negligence" had been established.

In contrast to the ITF Tribunal, CAS entertained discussion of the circumstances of both Mr Puerta's offences. They considered that it was disproportionate to punish him for two inadvertent offences in the same way as someone who has committed a deliberate first offence and a second accidental offence. Taking the ITF Programme and the WADA Code on their face (as the ITF Tribunal did), those two scenarios would have the same result: a lifetime ban but with the possibility of a reduction to a minimum of eight years if the second offence was committed through "no significant fault or negligence".

The CAS Panel clearly felt uncomfortable implementing the strict liability rules of the ITF Programme and the WADA Code in these circumstances and sought a way to reduce Mr Puerta's ban. The Panel relied on previous CAS decisions in *Canas v. ATP Tour* (CAS 2005/A/951) and *Knauss v. FIS* (CAS 2005/A/847) to apply the principle of proportionality. The CAS Panel criticised the WADA Code for not distinguishing between the seriousness of the first offence in applying sanctions for a second offence and recognised that the rules may lead to injustice in a small number of cases. The Panel considered many previous CAS awards relating to mandatory sanctions for drug offences before it concluded that the eight year ban was unjust and disproportionate given Mr Puerta's circumstances.

The CAS Panel went to great lengths in its award to highlight that it is only in very rare cases that the proper application of the WADA Code sanctions would produce an unjust and disproportionate result. It recognised the balance to be drawn between the need to "wage remorseless war against doping in sport" and avoiding exacting unjust and disproportionate retribution.

CAS found "a lacuna" in the WADA Code which it said it hoped would be filled when the WADA Code is revised. In the meantime, the Panel filled that gap in the *Puerta* case by applying the "overarching principle of justice and proportionality on which all systems of law, and the WADA Code itself, are based". The Panel emphasised that it was not exercising a general discretion to dis-apply the ITF Programme/WADA Code (which could have significant implications for future anti-doping tribunal decisions), nor did it have any power to do so, but instead was filling the lacuna in the WADA Code in circumstances which will rarely arise, namely the absence of a Tribunal's ability to consider the seriousness of a first offence in deciding upon a sanction for a second offence. In the circumstances, eight years was disproportionate, and the Panel reduced the ban to two years.

The CAS Panel's decision was notable in a number of respects: (i) it illustrated the growing body of case law building up at CAS which Panels consider and rely upon when making decisions; (ii) it showed the CAS Panel was willing to go beyond the rules of the ITF Programme and the WADA Code to ensure a just result; and (iii) it not only filled a perceived lacuna in the rules, but indirectly suggested they ought to be reviewed and amended in future. Recently, CAS has confirmed that the British athlete, Christine Ohuruogu, has filed an appeal against a year's ban for missing three out-of-competition drug tests. The press reported her disbelief at the possibility that this may rule her out of all future Olympic Games. Whilst in different circumstances to the *Puerta* decision, one can see a similar argument of justice and proportionality in circumstances where an athlete has not actually tested positive for a prohibited substance, but has missed drugs tests allegedly through inexperience and forgetfulness. Again, the balance must be drawn between the war against doping in sport and proportionate and just punishments. The CAS Panel in *Puerta* showed it was willing both to stretch the rules and rely on CAS' own case law to achieve justice and proportionality. It remains to be seen whether future Panels will be equally willing to stretch the rules to come to such a result.

The Court's role in construction arbitration in England

by Andrew Davies, London

The extent of the court's involvement in arbitration proceedings in England is governed by the Arbitration Act 1996 ("the 1996 Act"). Essentially, the policy of the 1996 Act is one of non-intervention by the court. The parties and the Tribunal are largely free to proceed with their arbitration without court interference, subject to certain mandatory safeguards in the 1996 Act designed to ensure that the process is carried out fairly. If the parties are content to allow the arbitrator to decide all questions that may arise in the course of an arbitration and be bound by his/her decision, the court need not become involved. For example, the arbitrator may under section 30 of the 1996 Act rule on his/her own jurisdiction.

However, there are various provisions of the 1996 Act under which the court can become involved, on the application to the court by a party to the arbitration. Section 42 provides that the court, on hearing an application by a party to an arbitration, can make an order requiring a party to comply with a peremptory order of the tribunal. Under section 43 the parties may request that the court secures the attendance of witnesses before the tribunal. Under section 44 the court may make orders in relation to witness evidence and the preservation of physical evidence. Section 45 provides that a party may apply to the court for determination of a question of law arising in an arbitration. Under section 67 parties can raise a challenge to the arbitrator's jurisdiction with the court. Section 68 allows parties to ask the court to remove the arbitrator if there is serious irregularity. Finally, section 69 provides for appeals on points of law arising from an award.

Two recent decisions of Jackson J, the judge in charge of the Technology and Construction Court ('TCC'), have clarified the extent to which the courts of England can and will interfere in construction arbitrations both during the process, under section 45 of the 1996 Act, and after the award has been published, under section 69.

Taylor Woodrow Holdings Ltd. v. Barnes & Elliott Ltd. (3 July 2006) gives a helpful analysis of the court's powers under section 45 of the 1996 Act.

A dispute between the parties had been referred to arbitration during which Taylor Woodrow Holdings Limited ("Taylor") considered a preliminary issue of law had arisen and applied to the court. The contract provided that issues of law arising during an arbitration would be dealt with by the court. Pursuant to section 45(2)(b) of the 1996 Act, ordinarily (in the absence of contractual provision) the court will only rule on a preliminary point of law where the tribunal had given its permission for the application, the determination is likely to produce substantial savings in costs, and the application is made without delay. Despite the contractual agreement, Barnes & Elliott Limited ('Barnes') raised an objection to Taylor's use of the process. Jackson J had to decide whether to allow the proceedings to go forward in the light of Barnes's objection and, if so, determine the preliminary (substantive) legal issue.

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Taylor argued that, as the parties had agreed in their contract to refer questions of law to the court, the court was bound to determine the question raised. Barnes contended that the court should not exercise its discretion as the question raised was better suited to the experienced construction arbitrator the parties had nominated.

Jackson J held that the word "may" in section 45 was a clear indication of the court's discretion. Although the arbitrator was experienced in construction law and had been chosen by the parties, the parties had also agreed that the court was the parties' chosen tribunal for deciding questions of law. Jackson J stated that party autonomy is the cornerstone of modern arbitration and that great weight should therefore be given to the parties' agreement to refer questions of law to the court. Accordingly, Jackson J upheld the parties' agreement (without the need to consider whether the requirements of Section 45(2)(b), referred to above, were satisfied), dismissed Barnes' objection and proceeded to decide the question of law.

In *Kershaw Mechanical Services Ltd. v. Kendrick Construction Ltd.* (2 March 2006), Kershaw issued proceedings to appeal the arbitrator's decision on a construction dispute on a point of law. The permission of the court, which is normally required for such an appeal, was not required here as the parties had agreed in their contract that no permission would be required.

Jackson J considered the correct approach the court should take to an appeal on a point of law under section 69(2) of 1996 Act by asking: 1. What evidence can the court receive in such an appeal? 2. What degree of deference should be shown to the arbitrator's findings on law? 3. How should the court identify questions of law arising from the award? Jackson J answered as follows:

1. The previously accepted position is that only the arbitrator's award should be put before the court; pleadings and submissions have been considered extraneous (a position reflected in the recent second edition of the TCC Guide). Jackson J held that this was too restrictive as the court should be able to construe the award in its context. Whilst the principal document in any appeal under section 69(2) is the award, the court should also consider any document necessary to determine a question of law arising out of the award.

2. The court, Jackson J said, should read an award fairly and as a whole, and defer to an arbitrator's expertise and experience, only reversing a decision if he or she has obviously come to a wrong answer.

3. Jackson J adopted the reasoning of Mustill J in *The 'Chrysalis' 1983*, which divided the arbitrator's reasoning into three stages: ascertaining the facts, ascertaining the law, then, in the light of the facts and the law, reaching his/her decision. Mustill J said that the second stage is the proper subject of an appeal. Jackson J endorsed these comments.

Whilst there is a general policy of non-intervention under the 1996 Act, it is clear from these two decisions that if either party to the arbitration wishes, there are means by which the court can become involved in the arbitration procedure.

Natural disasters and the consolidation of related arbitrations

by Doug Simmons, Pittsburgh

Introduction

Historically, arbitration tribunals convened pursuant to The Bermuda International Conciliation and Arbitration Act 1993 or the English Arbitration Act 1996 have had little authority, and have taken little initiative, to consolidate multiple arbitrations involving the same underlying circumstances or dispute, unless the arbitrations involved the identical parties and those parties all consented to the consolidation. But the unprecedented damage caused by the recent spate of natural disasters, and the myriad of insurance-related arbitrations they have spawned, highlight the inefficiencies of piecemeal arbitrations and suggest that commercial policyholders may hesitate in the future before purchasing property insurance policies with mandatory arbitration provisions.

The catastrophic losses of 2005 and the deluge of insurance disputes

2005 was a year of unmatched catastrophic losses in United States history. A record 27 "named storms" (i.e. tropical storms and hurricanes) were tracked in North America, including Hurricanes Katrina and Rita, which devastated homes, businesses, and infra-structure across eight southern U.S. states. Estimates of the property damage and business interruption losses

resulting from Katrina and Rita approach $140 billion (U.S.), of which $40-67 billion purportedly was covered by insurance. All told, Hurricanes Katrina and Rita rank as the first and sixth most costly insurance loss events worldwide since 1970. (See III Web site Catastrophe Tables, "The Ten Most Costly World Insurance Losses, 1970-2005", citing Swiss Re, sigma, No. 2/2006).

Where property losses occur, insurance claims – and legal disputes – are sure to follow. It has been reported that Hurricanes Katrina and Rita spawned four million property insurance claims. While many of those claims were amicably resolved before the first anniversary of the hurricanes' landfall, many were not, leaving policyholders to pursue their insurers through any appropriate forum.

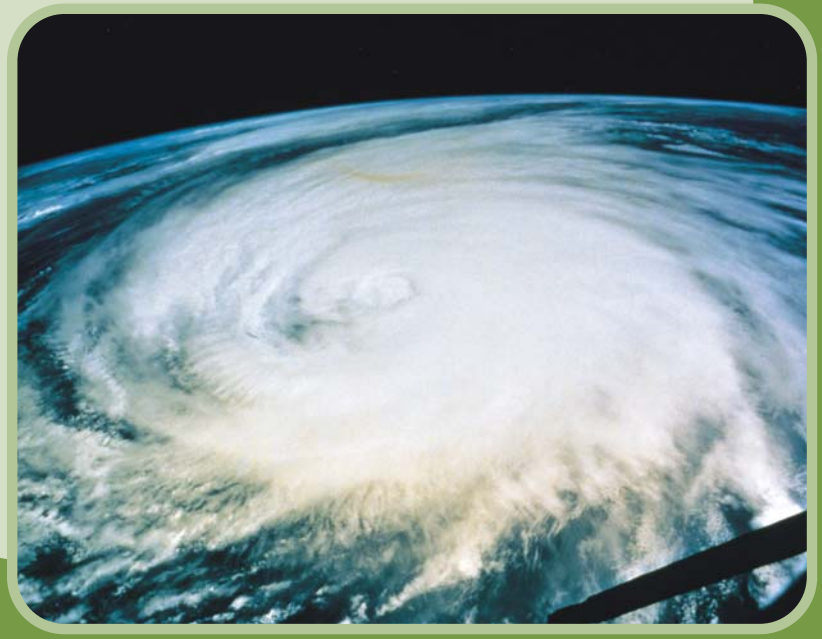
Anticipating an avalanche of lawsuits that would further clog an already overtaxed legal system, certain U.S. states took steps to lessen the pressure to sue by extending the statutes of limitations applicable to such hurricane-related property insurance claims. The State of Louisiana, one of the hardest hit by Hurricane Katrina, amended its laws to provide that any property policies calling for the filing of suit within one year of a loss would be retroactively amended to allow two years to file hurricane-related suits.

Notwithstanding these efforts, a deluge of lawsuits was filed before the one-year anniversary of these hurricanes. In the Louisiana city of New Orleans, 1,134 lawsuits reportedly were filed in just the last week preceding the first anniversary of Katrina, many times the number of suits typically filed there in any given week. Many of the lawsuit filers cited lingering concerns that the statute of limitations modifications would later be found to be unenforceable, and many others cited simple frustration with what they perceived to be slow insurer response times to their claims. In parallel to these lawsuit filings, many arbitration demands were also issued in the days leading up to the hurricanes' anniversaries, because many European-based and Bermuda-based insurers routinely include arbitration clauses in their property insurance policies.

In fact, numerous large, commercial policyholders have been put in the unenviable position of having to pursue their hurricane-related claims through multiple proceedings in multiple forums, due to the nature of their property insurance programs. The challenges posed by operating such a multi-front war, and what guidance it gives to commercial entities looking to purchase property insurance in the future, are discussed next.

The inefficiencies of pursuing multiple proceedings

Rational parties could disagree on the question of whether it is preferable to resolve a commercial dispute through arbitration or litigation. Over the last twenty years, arbitration clauses have appeared with increasing frequency in commercial property insurance policies, as they also have in other types of contracts. The reasons parties select arbitration as their dispute resolution method are several and quite familiar: reduced time to reach resolution, reduced costs (due to less discovery, relaxed evidentiary rules, less chance for appeals of the award), confidentiality, worldwide enforceability of the award, the ability to select decision-makers who are knowledgeable about the subject matter, and control over the forum for the proceedings. Nonetheless, arbitration as a dispute resolution method is receiving greater criticism of late, for several reasons.



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First, a party must pay not only its own attorneys, but also the rates – sometimes significant hourly rates – charged by one or more arbitrators. As one official for a commercial entity recently stated, "With arbitration, you're paying a lot of mouths – you have to pay three guys to think about it. But a judge [in the court system] is already paid for." (See "Clause for Alarm," by Leslie Gordon, ABA Journal, November 2006, at p. 19 (quoting David Vigilante, head of litigation at Turner Broadcasting System and chief editorial counsel at CNN)). Second, certain arbitrators have become more "westernized" and allow broad discovery activities, which can increase the cost of the arbitrtion. Third, as certain court systems have worked to reduce the number of mass tort cases glutting their courthouses, through tort reform and other measures, it no longer is a certainty that arbitrating will provide a quicker resolution than litigating. Fourth, as a greater number of commercial entities are repeat participants in the world of arbitration, the natural result is a greater number of criticisms; as the old maxim says, "Familiarity breeds contempt."

It would be difficult for a rational party to disagree with the proposition that it is preferable to resolve a complex commercial dispute through one consolidated proceeding than through multiple, piecemeal proceedings – be they arbitrations, litigations, or a combination of the two. Indeed, it appears self-evident that fighting a multi-front war increases one's costs substantially.

Unfortunately, many policyholders are being required to fight a multi-front war in connection with their large property insurance claims stemming from the recent catastrophes. For various reasons, including a desire to diversify their risk, large commercial entities often carry complex property insurance programs comprised of several "layers" of coverage, with individual layers containing multiple policies participating on a quota-share basis. While many property policies allow for suits to be filed in any court of competent jurisdiction, policies issued by certain European or Bermuda-based insurers often require arbitration in either London or Bermuda in lieu of lawsuits. As a result, when the policyholder suffers a large property loss implicating the policies in multiple layers of coverage, it may be required to pursue some of its insurers in court and others in arbitration.

Does a commercial policyholder have any recourse when it suffers a substantial property loss that implicates multiple insurers' policies requiring a multi-front war? Can the policyholder somehow consolidate its actions against the various insurers into one proceeding? At present, there is little opportunity where multiple arbitrations are involved.

Consolidations are not favored typically under the prevalent arbitration regimes

Policyholders facing multiple arbitrations in London or Bermuda will find little authority for consolidation under the prevalent Bermuda and London arbitration regimes.

The Bermuda International Conciliation and Arbitration Act 1993 – which is based on the UNCITRAL Model Law on International Commercial Arbitration and is a frequently chosen arbitration framework in commercial property insurance policies issued by Bermuda-based insurers – contains no explicit provision for the consolidation of multiple arbitrations. Although someone looking to support a request for consolidation under the Act could point to article 19(2), which provides that "the arbitral tribunal may…conduct the arbitration in such manner as it considers appropriate", a party opposing the consolidation could argue that a consolidation against its wishes would violate article 18, which requires that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

The Bermuda Arbitration Act 1986 is somewhat more liberal on the consolidation issue, but it still contains substantial limitations. First, it applies only to domestic arbitrations, i.e. arbitrations outside the scope of the Model Law, such as arbitrations between Bermuda parties. As a result, policyholders such as those U.S.-based companies that suffered catastrophic losses from Hurricanes Katrina or Rita would not be subject to the 1986 Act. Second, that Act provides that two or more domestic arbitrations may be consolidated only if they share identical parties and: (a) they share common questions of law or fact, (b) the claimed rights to relief arise out of the same transactions or series of transactions, or (c) for some other reason it is desirable. Therefore, the Act would not allow consolidation where a policyholder is pursuing arbitrations against two of its insurers for a catastrophic property loss.

The English Arbitration Act 1996 explicitly authorizes consolidation, but only in the most limited circumstance. Section 35 of the Act provides that,

although the parties are "free to agree" to consolidate arbitral proceedings or hold concurrent hearings, "unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation of proceedings or concurrent hearings." Thus, even where two arbitrations share a party (such as a policyholder), share common questions of law (such as the interpretation of an identical policy provision) and arise out of the identical event or transaction (such as a catastrophic property loss caused by a hurricane), there is little authority for consolidating these arbitrations unless the opponents in those arbitrations (i.e. the two property insurers) agree.

As a result of these severe limitations on policyholders' power to obtain consolidation of their insurance arbitrations, policyholders must be prepared to endure the added expense and inconvenience of fighting the multi-front war. Policyholders must bear the expense of educating multiple arbitration panels about the identical loss. Policyholders must bear the expense of presenting the requisite evidence on multiple occasions, which often means transporting witnesses and documents thousands of miles to the arbitration location. Furthermore, because of the long-standing tradition of the relative confidentiality of arbitration submissions, proceedings, and results, the policyholder runs the real risk of receiving conflicting decisions between its tribunals – including having the same insurance policy language interpreted and applied differently.

Avoiding the multi-front war

Unless and until the prevalent arbitration statutes frequently specified in commercial property insurance policies are modified to enlarge the situations in which they empower – if not encourage – tribunals to consolidate related arbitrations, policyholders may begin to resist the placement of their property risks with insurers who demand the inclusion of arbitration provisions. To be sure, certain policyholders may decide that the benefits of access to the Bermuda and London insurance markets outweighs the risk of having to prosecute multiple proceedings in the event of a catastrophic loss. Nonetheless, chastened by the ongoing experiences with the recent spate of catastrophic property losses in the U.S. and the multiple proceedings that many policyholders have been required to pursue, some policyholders may place greater emphasis in the future on avoiding mandatory arbitration clauses.

Insurance coverage arbitrations - who decides your dispute?

by Ben Morgan, London

Insurers are increasingly using standard wordings for the policies they offer which impose the insurer's choice of law and dispute resolution mechanism on the policyholder. In England this is in fact an essential requirement of the Financial Services Authority's "contract certainty" initiative which imposes on insurers an express obligation to identify choice of law and jurisdiction at the pre-inception stage. There is no doubt that recent years have shown a sharp increase in the popularity of arbitration among insurers as the dispute resolution mechanism of choice. This is driven primarily by insurers' perception that their interests are better served by arbitration than by court proceedings.

It is also worth noting that, in addition to single arbitration clauses, some insurers are adopting "selective" dispute resolution clauses whereby a policy may contain three, four or more different dispute resolution mechanisms, involving, for example, mediation, expert determination, court proceedings or arbitration, depending on the nature of the dispute.

Coverage disputes tend to arise for a number of reasons, and the following sorts of issues could potentially be the subject of the arbitration:

- where there is ambiguity over the meaning of a particular clause, in whose favour should that ambiguity be resolved?

- where coverage is denied on the basis of breach of a policy provision (e.g. claims notification), should that clause be construed as a condition precedent to the insurer's liability (such that cover may be denied in full)?

- where coverage is declined on the basis of an alleged breach of the duty of utmost good faith, was the alleged non-disclosure or misrepresentation material and did it induce the underwriter to accept the risk?

- where the quantum of the claim is disputed, in whose favour should the "grey areas" be resolved?

One of the most important factors a policyholder should seek to influence is who will be the arbitrator or arbitral panel making these decisions.

One of the reasons insurers consider arbitration to be preferable to court proceedings is that the dispute will be heard by someone with experience of the insurance industry. There is, however, an inherent danger in this from the policyholder's perspective, namely that in practice the people who have experience of the insurance industry and who are prepared to sit as arbitrators are frequently former underwriters. In fact, some arbitration clauses specifically provide that at least one of the arbitrators should be a practising underwriter. While this presents difficulties of its own, simply due to availability, the more fundamental concern from the insured's perspective is: what skill sets are being applied to determine the dispute?
It is only natural, where insurance industry personnel are considering whether a policy provides cover, that they seek to resolve any ambiguity in a way consistent with their understanding and experience. While there is a lot to be said for this approach in disputes between insurers and reinsurers, where both parties are familiar with the consequences of certain standard market clauses, the same is not necessarily true from the point of view of the corporate insured. Where one or more arbitrators has spent 20, 30 or even 40 years in the insurance business, obvious insurer-friendly meanings may present themselves, no doubt arrived at in good faith, but also no doubt unhelpful to the insured.

What, then, should policyholders be looking for in an ideal arbitrator/panel? It is no understatement to say that the choice of sole or party-appointed co-arbitrator is among the most important decisions a party can make when involved in an arbitration. There is no substitute for thorough consultation and research into any proposed individual to get as clear an understanding as possible of how they will react to the arguments you will be advancing. There are, however, some basic key attributes that may assist the policyholder's position:

Experience of arbitration

While it may be beneficial to appoint an arbitrator with experience of the subject matter of the dispute, his/her experience of managing the arbitral process may be integral to an effective dispute resolution. The flexibility associated with the arbitral process, as compared to litigation, can have real benefits, particularly in terms of cost. In circumstances where an insurer has substantial resources to defend a claim, a pro-active arbitrator can be a great ally

of the insured when it comes to cutting out tactical pressure exerted by insurers intent on spinning out the process. The arbitrator should be able to take steps to prevent this, for example, by truncating the procedural timetable or dispensing with or limiting certain steps that could prolong it.

Experience of insurance disputes

Having someone familiar with the idiosyncrasies of the insurance market is genuinely helpful, but experience with the insurance industry may not in itself be sufficient. What is important is that he/she has had experience of resolving disputes arising from it. Whereas, for the policyholder, pursuing an insurance claim may be a one-off event, for an insurer, defending claims is a daily occurrence. An arbitrator who has experience of these matters should be better equipped to quickly spot tactical, as opposed to substantive, defences raised by insurers. Equally, the insurer ought to recognise that and may be deterred from running such arguments in the first place.

Knowledge of the substantive law of the contract

Insurance coverage disputes are frequently international in scope, and so an arbitrator's familiarity with the substantive law governing the insurance policy is obviously important. In addition to that, and bearing in mind that the law and general attitudes towards the construction of insurance policies varies broadly from one jurisdiction to another, an arbitrator's familiarity with a range of jurisdictions can be an additional benefit.

If the arbitration is to be conducted by a panel, rather than a single arbitrator, a combination of these attributes may be easier to find. Typically, from an insured's perspective, a desirable panel might include:

(i) an English QC or former Judge (judges have recently demonstrated an increasingly sympathetic approach to policyholders despite English law being generally more favourable to insurers);

(ii) someone with insurance expertise (for a useful practical perspective, provided that it is complemented by the other two arbitrators and that he/she is likely to take an objective approach to an insurer's arguments, for example, regarding "market practice"); and

(iii) a former U.S. Judge or experienced U.S. legal practitioner (for a contrasting legal perspective - while English law does not favour the insured as a matter of course, the law of certain States in the U.S. does, particularly where there is bad faith on the part of the insurer).

The message for policyholders is three-fold. Firstly, policyholders should take a critical approach to the dispute resolution clause in any policy and actively consider whether arbitration is in their best interests. Secondly, if an arbitration clause is the agreed method of dispute resolution, make sure it gives both parties an equal right to select the arbitrator/arbitral tribunal. Thirdly, if a dispute does arise, consider very carefully and exert your influence over the choice of arbitrator(s) - it may be the most important decision you make in the whole arbitration.

Our recent webinars

by Clare Tanner, London

Zachary Douglas

Our recent series of webinars addressed three topics of potential relevance to all of those whose business takes them beyond national boundaries. For those not familiar with the format, a webinar enables participants to listen to a presentation, view the presentation slides, read any associated materials, make comments and ask questions, all from the comfort of their own desk.

The first webinar in the series addressed how businesses involved in international investment can manage political risk.

Zachary Douglas (Matrix Chambers, London), a leading Public International lawyer and a lecturer at the Law Faculty of University College London with extensive experience of Investor-State claims, highlighted the key elements of Treaty protection. He also considered the role of OPIC (The Overseas Private Investment Corporation), which offers political risk insurance to U.S. investors involved in international transactions. Shamali de Silva of the World Bank legal team outlined the core elements of MIGA (Multilateral Investment Guarantee Agency) cover which is available to limit risk in relation to projects in challenging regions of the world and described the process involved in obtaining such cover. Tom Birsic, a partner in this firm's Pittsburgh office, concluded by providing an analysis of the commercial market for political risk insurance and some of its prominent players and outlined some of the key differences between commercial risk insurance and MIGA cover.

The second webinar in our series looked at what happens when state courts refuse to play by the rules.

Claus Von Wobeser

Ciccu Mukhopadhaya

During this session, our speakers considered specific problems that can arise when a state court intervenes in an international arbitration. The webinar focussed on practical steps that those trading and/or investing in countries whose courts are known to take a more interventionist stance can take to limit their exposure. The session had particular focus on Latin America and India.

Our first speaker was Claus Von Wobeser, the current Co-Chair of the Arbitration Committee of the IBA's Dispute Resolution Section from Mexican law firm Von Wobeser y Sierra S.C., whose presentation focused on recent developments across Latin America. He concentrated on some of the reasons for negative intervention by the courts in an arbitration, including the possibilities of political involvement,

ignorance of the arbitration or corruption, mentioning relevant cases on these topics and demonstrating frequent "danger areas" and how to avoid them.

Ciccu Mukhopadhaya, a leading Indian Arbitrator from the law firm Amarchand & Mangaldas & Suresh A Shroff & Co., discussed some of the disturbing recent experiences before the Courts of India. He divided his presentation into three stages, looking at problems that can occur before, during and after an arbitration takes place. Mr Mukhopadhaya considered the area of the court's jurisdiction and pointed to some cases where Indian courts have intervened at various stages of the arbitral process.

The third webinar in our series looked at the implications for parties involved in document production in international arbitration.

The purpose of this session was to assist participants in navigating their way through the staggering volume of electronically stored and accessible data and the myriad of issues this presents.

Our first speaker was David Cohen, a partner in the firm's Pittsburgh office, who has counselled clients on electronic document management. He addressed the U.S. experience and its portents for the wider international arbitration practice. He also looked at common sources of electronic evidence under U.S. discovery rules and offered some cautionary tales together with details of how companies can seek to protect themselves.

Hans Van Houtte

The session then included a presentation from Tracey Stretton, a Legal Consultant with Kroll Ontrack. She outlined a number of technological developments relevant to the management of electronically stored data in arbitrations. As someone who is involved with these issues for clients on a day-to-day basis, she discussed her experience of the current business climate and provided examples of how clients can respond to challenges in maintaining and collating electronic evidence.

The third speaker was Professor Hans Van Houtte, Professor of Law at Leuven University and an experienced arbitrator. He looked at the Continental European context, and was able to offer a fascinating insight into the different approach to disclosure in this jurisdiction. His presentation considered the different approaches taken to disclosure, including the effects of document retention policies, and the implications of a civil law approach to document production. He also offered his thoughts on the IBA Rules of Evidence, an important consideration for the arbitration community.

The session ended with a lively discussion on this area, which is obviously of great importance to many of our clients across the world.

Recordings of the first and second webinars, which include slides and audio presentations, can be accessed from the Newsstand section of our Web site (www.klgates.com). More specifically, go to: www.klgates.com/newsstand/search.aspx and choose "Arbitration - International and Domestic" from the drop-down list and press "search". Scroll down until you reach the list of webinars and follow the instructions on the page.

We plan to run further webinars in 2007, the first of which is expected to address arbitration in sport.

Third party intervention in and access to international treaty arbitration

by Clare Tanner, London

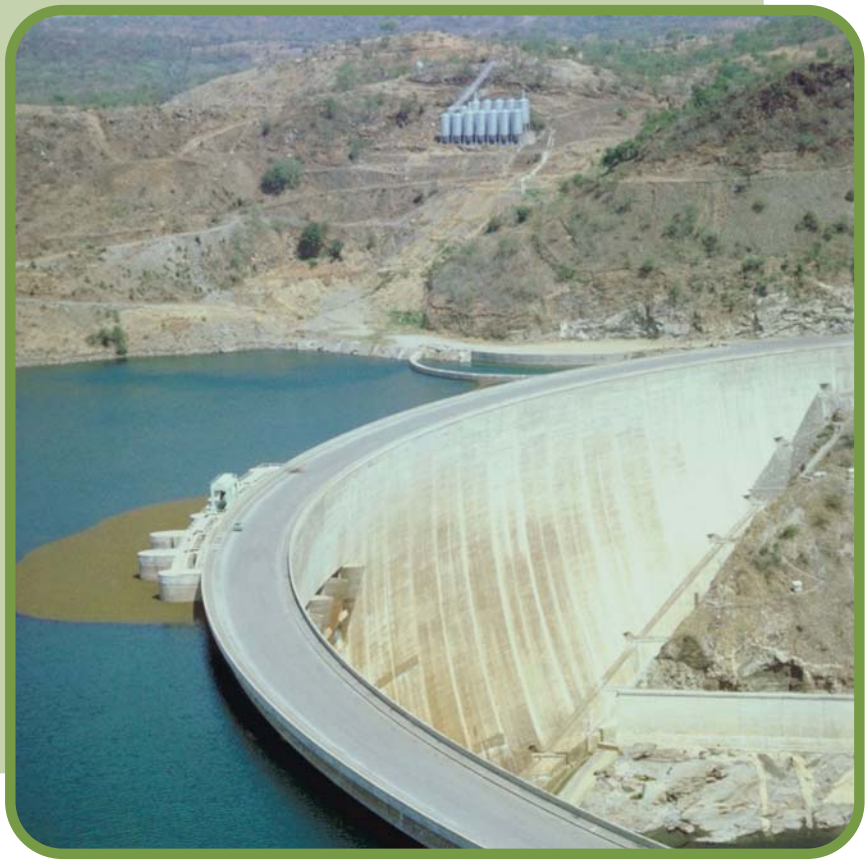
This year has seen the introduction of changes to the rules of procedure of the International Centre for the Settlement of Investment Disputes ("ICSID") relating to the ability of third parties to intervene in investment treaty arbitration. These changes may have been influenced by a view that where decisions in the arena of investor-state arbitrations have public impact, there should be public access to the arbitration. A recent procedural order in *Biwater Gauff (Tanzania) Limited v. Tanzania* was the first published order on this issue since the amended rules came into effect. The order was expressly made public and can be found at: www.worldbank.org/icsid/cases/awards.htm#awardARB0522.

The ability of non-parties to intervene in arbitration proceedings and attend hearings

An "amicus curiae" or "friend of the court" is not a party to the proceedings but invites the tribunal to allow it to make submissions by reason of its strong interest in the subject matter. The types of bodies likely to make amicus curiae submissions include non-governmental organisations, trade unions and public interest groups.

ICSID rule 37 now gives the tribunal the power to decide whether to allow amicus curiae submissions. The parties must be consulted but do not have a right of veto. In considering whether to allow an amicus curiae submission the tribunal must assess whether: (i) the submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (ii) the submission would address a matter within the scope of the dispute; and (iii) the non-party has a significant interest in the proceeding. The tribunal must also ensure that the amicus curiae submission does not disrupt the proceedings or unduly burden or unfairly prejudice either party. Further, both parties must be given an opportunity to present their observations on the amicus curiae submission.

The new rules do not go so far when it comes to attendance at hearings. Prior to the amendment of the rules, non-parties were able to attend hearings with the parties' consent. ICSID rule 32 now enables non-parties to attend unless either party objects. The tribunal is also required to consult with the Secretary-General of ICSID before allowing non-party attendance.



The publication of ICSID awards

ICSID rule 48 still requires the consent of the parties before the award is published in full. However, it is now mandatory for ICSID to promptly include in its publications excerpts of the legal reasoning of the tribunal.

Biwater Gauff (Tanzania) Limited v. Tanzania ICSID case No: ARB 05/22

Although allowing for third party intervention, as described above, the amended rules do not deal with which documents, if any, non-parties should have access to during the course of the arbitral proceedings. In *Biwater Gauff*, the Claimant sought provisional relief to protect the confidentiality of the pleadings, documents disclosed in the arbitration, decisions made by the tribunal and correspondence between the parties and/or the tribunal in respect of the proceedings. Tanzania resisted the Claimant's application arguing that the case concerned the provision of a public service in a developing country. It also involved larger and often controversial questions of international development policy. The state therefore had an obligation to make information about the case available to the public.

The tribunal found that, in the absence of any general agreement between the parties on the issue of confidentiality or any relevant provision in the applicable investment treaty, there is no general duty of confidentiality in ICSID arbitration. Equally, there is no general rule of transparency or non-confidentiality. However, the tribunal drew a distinction between international commercial arbitration and investment arbitration. The tribunal found that in the latter case, there was a marked tendency towards transparency. As the tribunal noted, memorials, procedural orders and other decisions and awards in tribunals proceeding under NAFTA Chapter 11 (the Multilateral Investment Treaty within the North American Free Trade Agreement) are made public on a routine basis. The tendency towards transparency did, however, have to be balanced against the need to maintain procedural integrity and to prevent exacerbation of the dispute.

Having drawn these conclusions, the tribunal then ordered that the parties should not be restricted in engaging in general discussion about the case as long as such discussion was necessary and not used to antagonise or pressure the other party. Publication of pleadings, witness statements and experts' reports was restricted pending the conclusion of the proceedings, agreement between the parties or further order. Publication of correspondence between the parties and/or the tribunal was restricted. Documents disclosed in the proceedings by the opposite party for the purposes of the dispute were only to be used for that purpose. Minutes or records of hearings were not to be disclosed absent agreement between the parties or further order. The presumption was that the decisions, orders and directions of the Tribunal would be published subject to consideration by the tribunal on a case by case basis. In relation to awards, the parties agreed that ICSID could publish awards at such time and in such manner as it sees fit. It is notable that the tribunal in this case chose to take a pragmatic approach and apply different arrangements to different categories of documents.

Revision to the UNCITRAL rules

Investment treaties quite commonly make not only the ICSID rules but also the UNCITRAL rules available to investors when arbitrating investment disputes. Revisions to the UNCITRAL rules are currently under discussion. The changes proposed include clarification of confidentiality provisions and the ability of third parties to submit amicus curiae submissions. However, some non-governmental organisations are lobbying for the rule changes to go further and include special provisions for investor-state arbitration. These provisions might include mandatory requirements: that the existence of investor-state arbitration is disclosed to the public at the outset; that the arbitration should be open to the public; that there should be express provision for third party intervention; and that documents such as pleadings and awards should be made available to the public.

Conclusion

The robust approach taken by the tribunal in *Biwater Gauff* may not be welcome to the public interest groups and other bodies who lobby for increased public access to investment arbitrations. However, arguably, the approach taken by the tribunal is simply a pragmatic response to the need to protect the procedural integrity of arbitration. It remains to be seen whether, despite *Biwater Gauff*, concern about the scope for third party intervention in investment arbitration may influence investors to opt for UNCITRAL rules where possible.

Recent arbitration developments from around the world

by Rachel Stephens, London

Europe

Austria

Following the enactment of a new Arbitration law in Austria (reported in the Summer 2006 edition of Arbitration World), claims for arbitration filed with the International Arbitration Centre of the Austrian Federal Economic Chamber after 30 June 2006 will be subject to the Chamber's new rules (the Vienna Rules) which have been adopted in response to the new law.

France

The French Cour de Cassation has recently held three arbitrators personally liable for the losses incurred by parties to an arbitration. The losses occurred as a result of the arbitrators having failed to render their award within the time of their mandate or seeking an extension from the court and the award, as a result, having been annulled.

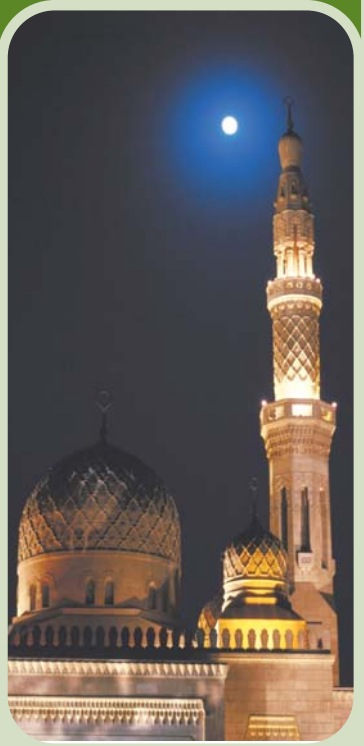
Sweden

The Stockholm Chamber of Commerce has introduced new rules which came into force on 1 January 2007. The SCC Board can now consolidate proceedings where they concern the same parties and legal relationship. Tribunals are given specific power to make an award ordering a party to reimburse the other for its share of the advance on costs.

Middle East

United Arab Emirates

The UAE signed up to the New York Convention on the Recognition and Enforcement of Awards, effective from 19 November 2006. This is a welcome development for the UAE as a seat of choice for international arbitration.



Asia

Cambodia

Cambodia's executive has adopted a new Commercial Arbitration Law of the Kingdom of Cambodia which provides for the setting up of a National Arbitration Centre. The aim of the Centre will be to promote arbitration as a means of dispute resolution in the country. Implementation has begun in Cambodia, including the drawing up of new rules for the Centre and a training programme for new arbitrators. It is hoped this will also provide a better framework for enforcement of foreign arbitral awards using the New York Convention, which has been in force in Cambodia since 1960.

China

The Supreme People's Court has issued an "Interpretation" on a number of arbitration issues which were causing difficulties in China for practitioners. Please see separate report on page 21.

Malaysia

The Malaysia Arbitration Act 2005 (a replacement of Malaysia's 1952 Arbitration Act) came into force earlier this year, modelled on the UNCITRAL Model Law. There are two regimes under the new legislation, one for domestic and one for international arbitration. Amongst other embellishments on the UNCITRAL Model Law, under the new Malaysian legislation, parties can agree, or the Tribunal can give permission, for applications to be made to the court for decisions on questions of law. The Kuala Lumpur Regional Centre for Arbitration is confident that having an arbitration law modelled more closely on the UNCITRAL Model Law will draw further arbitrations to the Centre.

Vietnam

It is expected that Vietnam will shortly sign up to the Convention on the Settlement of Investment Disputes (the ICSID Convention). Vietnam is already a party to many bilateral investment treaties, giving investors the right to take disputes with Vietnam to international arbitration. Vietnam's accession to the ICSID Convention will give investors a wider framework in which to bring their disputes.

Latin America

Peru

The Justice Department of Peru has appointed a Commission to review and revise Peru's arbitration legislation, in an effort to bring it more into line with the UNCITRAL Model Law.

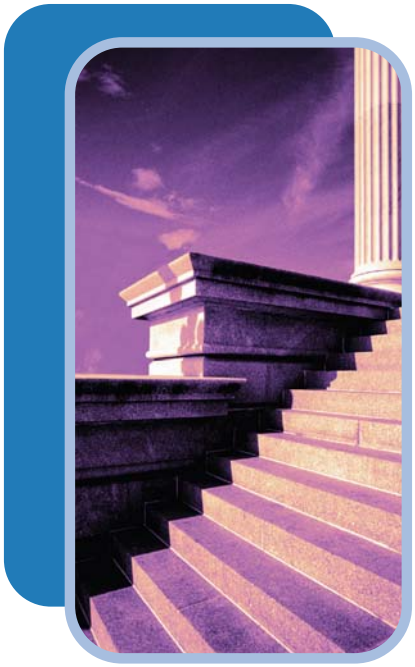
North America

United States of America

Parties to arbitrations being conducted through the American Arbitration Association or the International Centre for Dispute Resolution ("ICDR"), brought under arbitration agreements entered into after 1 May 2006, will be able to take advantage of the new Article 37 of the AAA/ICDR International Arbitration Rules. Article 37 provides parties with an alternative to seeking interim measures from national courts. Under Article 37, parties can seek emergency relief from an emergency arbitrator, even before the formation of the tribunal. Parties not wanting to incorporate Article 37 into their arbitration agreement will need to specifically opt out.

Service of subpoenas in U.S. arbitrations

by Brian Davidson & Kari Horner, Pittsburgh



In a recent decision, *Dynegy Midstream Services, L.P. v. Trammochem*, 451 F.3d 89 (2d Cir. 2006), the United States Court of Appeals for the Second Circuit, the Circuit that covers New York City, held that the United States Federal Arbitration Act ("FAA") does not authorize nationwide service of process of a subpoena on a non-party without an independent basis for jurisdiction. Chapter 2 of the FAA is the United States implementing legislation for the New York Convention. Chapter 3 of the FAA is the United States implementing legislation for the Panama Convention.

The arbitrators in the *Dynegy* case issued a subpoena to a non-party to the arbitration to produce documents related to an arbitral dispute seated in New York City. The non-party was located in Houston, Texas. After the non-party refused to comply, one of the arbitral parties filed a motion to compel with the United States District Court for the Southern District of New York. The District Court granted the motion to compel. The Second Circuit reversed that decision on the grounds that the FAA does not authorize nationwide service of process and therefore the district court lacked personal jurisdiction over the non-party.

The *Dynegy* court began its analysis with section 7 of the FAA, which states that an arbitrator's summons "shall be served in the same manner as subpoenas to appear and testify before the court." Section 7 also provides that the district court for the district in which the arbitrators are sitting may enforce the arbitrator's summons in the same manner that it would a court summons from the courts of the United States. The Second Circuit then evaluated section 7 in the context of Rules 37 and 45 of the Federal Rules of Civil Procedure, which govern subpoenas in the United States Federal Courts. The Second Circuit determined that these federal rules "do not contemplate nationwide service of process or enforcement; instead, both service and enforcement proceedings have clear territorial limitations." These "clear territorial limitations" for proper service of a subpoena include the district of the court issuing the subpoena or any place outside of the district, within 100 miles of the place where the production of documents is to take place.

The court noted that the subpoena at issue would have normally been issued and enforced by the Southern District of Texas, but any enforcement action must be brought where the arbitrators were sitting, in the Southern District of New York. However, the court in New York could not enforce the subpoena because it lacked jurisdiction over the non-party located in Texas. The court emphasized that the parties chose New York as the seat of arbitration even though "the underlying contract had nothing to do with New York; they could have easily chosen to arbitrate in Texas, where [the non-party] would have been subject to an arbitration subpoena and a Texas district court's enforcement of it." In sum, the *Dynegy* court declined to extend the subpoena power of arbitrators beyond its interpretations of section 7 and Rule 45 to inconvenience a witness outside of New York when the parties chose New York jurisdiction "for their own convenience."

The *Dynegy* decision is inconsistent with a number of other United States federal circuit and district courts that have held that Rule 45 did not necessarily limit the territory in which an arbitration subpoena may be enforced. See *Hay v E.B.S. Acquisition Corp.*, 360 F.3d 404, 412-13 (3d Cir. 2004). This inconsistency leaves open the possibility that this matter may eventually appear before the United States Supreme Court for a final determination of whether an arbitration subpoena may be enforced nationwide. Another possibility is the one mentioned by the *Dynegy* court; namely, that the United States Congress write a new rule to clarify and expand the subpoena powers of arbitrators.

Developments

Svenska v. Government of Lithuania [2006] EWCA Civ 1529

The English Court of Appeal interpreted a JV agreement between Svenska and Lithuania as including an agreement to refer disputes to ICC arbitration. The final version of the JV agreement did not contain an arbitration agreement, but previous drafts of the JV agreement had, and the Court of Appeal, whilst recognising that it was effectively rectifying the contract, relied on Lithuanian law (which was the law of the contract) to show that it had in fact been the intention of the parties that any disputes arising out of the JV agreement should be submitted to ICC arbitration.

Decision of the Mexican Supreme Court

Early this year, the Mexican Supreme Court took a step back from standard international arbitration practice and dealt a blow to the *kompetenz-kompetenz* principle (whereby arbitration tribunals can reach a decision on their own jurisdiction) for Mexican arbitration tribunals. The defendant had challenged the validity of the arbitration agreement itself, rather than the whole contract in which it was embodied, and the Mexican Supreme Court, in a decision binding on the lower courts, refused to refer the parties to arbitration to determine the question.

ICSID Tribunal endorses "structuring" of investments

In an award issued on 2 October 2006, an ICSID Tribunal has held that Hungary's treatment of ADC Affiliate Limited and ADC & ADMC Management Limited violated several obligations contained in the Cyprus-Hungary Bilateral Investment Treaty ("BIT"). In essence, the Tribunal found that the investors' interest had been expropriated without payment of full market value compensation when the investors' contracts to build a new terminal at Budapest airport were terminated in early 2002.

Of particular note to investors is that the Hungarian government's jurisdictional challenge to the claim, based around the fact that the investors were in substance Canadian nationals who had taken advantage of the Hungary-Cyprus BIT by the way they had structured their investment through Cypriot companies, was rejected.

Whilst there is no strict doctrine of precedent in Investor-State Arbitration, this decision is an important endorsement for the developing practice of structuring investments in such a manner as to create scope for subsequently claiming "nationality" within one or more States that are parties to BITs with the Host State. "Structuring" is an increasingly important aspect of a prudent political risk management strategy.

Judicial 'Interpretation' on arbitration in China

by Rachel Stephens, London

In September 2006, the Supreme People's Court of the People's Republic of China issued a Judicial Interpretation, covering some of the issues which had been giving difficulties to arbitration practitioners. In practice, Judicial Interpretations in China are authoritative texts clarifying issues arising from case law, particularly in the lower courts, and from legislation.

This Judicial Interpretation clarified the law relating to the interpretation of arbitration agreements, procedural points on challenges to arbitration awards made in China, and the law applicable to foreign arbitrations.

Arbitration in China draws an important distinction between foreign and domestic arbitration. Arbitrations are considered domestic if they are between two Chinese entities, or partly Chinese entities. Otherwise, arbitrations are classed as foreign. Domestic arbitrations can have only a Chinese seat, whereas parties to foreign arbitrations are free to choose the seat of their arbitration.

The seat of an arbitration is important for determining the procedural law that will apply to that arbitration. One of the issues which the Supreme People's Court did not clarify in the Judicial Interpretation was whether Hong Kong counts as part of China for the purposes of allowing domestic arbitrations to have their seat in Hong Kong. This would be of significance as Hong Kong has an arbitration law based on the UNCITRAL Model Law.

Chinese arbitration law requires an arbitration agreement to be in writing. The Judicial Interpretation confirms, at Article 1, that for an arbitration agreement to comply with this provision, it can be confirmed in writing by an exchange of letters or some form of electronic communication. Chinese arbitration law also requires parties to designate a particular arbitration institution in order for their arbitration agreement to be valid. In a further widening of the scope for Chinese courts and tribunals to find a valid arbitration agreement, Article 4 of the Judicial Interpretation suggests that this requirement may in the future be relaxed somewhat, so that if it is apparent from the parties' choice of arbitration rules what institution they selected, that will constitute a valid arbitration agreement. Similarly, if there is a small defect in the name of the institution selected by the parties, this will not prevent the tribunal or court from finding a valid arbitration agreement.

An issue which the Judicial Interpretation fails to address, however, is whether institutions, particularly the ICC, can hold arbitrations in China. The validity of an arbitration agreement providing for an ICC arbitration with its seat in China remains unclear. As referred to above, Chinese arbitration law requires parties to select an arbitration institution in their arbitration agreement, and this requirement is usually interpreted by Chinese courts as meaning an arbitration institution in mainland China (i.e. CIETAC). For this reason, ad hoc arbitrations are still unrecognised in China, as they do not comply with the legal requirement that parties nominate an arbitration institution. Article 7 of the Judicial Interpretation provides that where a dispute resolution clause in a contract provides for disputes to be referred to both arbitration and the Chinese court, the clause is invalid unless one party starts an arbitration to which the other does not object promptly. There had been previous uncertainty over the question of the ultimate arbiter of the validity of the arbitration agreement. Most international arbitral tribunals have the power to consider and determine the validity of the arbitration agreement on which their jurisdiction is founded. In China, however, the question is decided by either CIETAC or by the courts. The new Judicial Interpretation provides, at Article 13, that once an arbitral institution has made a decision on the validity of an arbitration agreement, the Chinese courts will not hear an application challenging that decision. Another restriction on a party's right to challenge an arbitration award is found in Article 27 of the Judicial Interpretation which provides that a party who fails to argue, during the arbitration process, that the arbitration agreement is invalid waives its right to do so when defending enforcement proceedings following the making of an award. Helpfully, the Judicial Interpretation confirms the severability of an arbitration agreement. The validity of an arbitration agreement is not affected by the termination of the agreement in which it is contained, as is standard in international arbitration practice. Whilst it is unfortunate that the opportunity was not taken in this Judicial Interpretation to address questions on the status of arbitration institutions such as the ICC in mainland China and the possibility of a domestic arbitration being seated in Hong Kong, the Judicial Interpretation does provide a much greater level of certainty in many areas of concern to businesses and practitioners in China.

Confidentiality in the wider international sphere

by Sarah Munro, London

In the Summer 2006 edition of Arbitration World, we looked at confidentiality in English arbitration and the possibility that the picture was not as clear as it seemed. We concluded that, although confidentiality was not absolute in England, it remains the process of choice for parties who are keen to retain privacy when seeking to resolve their disputes. In this article, we widen our scope to consider the impact of changes to the perception of confidentiality in international arbitration, looking at decisions of courts abroad and how these affect general trends.

The position is more complicated in foreign jurisdictions, where attitudes to an expectation of privacy vary widely. As long ago as 1995, the Australian High Court, in the case of *Esso Australia Resources Limited & Others v. Plowman* (1995) 128 A.L.R. 391, rejected the notion of a general duty of confidence in arbitration. This caused much debate and, some commentators consider, contributed to the inclusion in the New Zealand Arbitration Act 1996 of a general rule of confidentiality, albeit with an opt out provision. Since then, the debate has rumbled on, with courts and tribunals displaying widely varied attitudes to the importance of privacy in international arbitration.

In 2004, a Canadian court in the case of *Adesa Corporation v. Bob Dickenson Auction Services Ltd*, Case No. [2004] O.J. No. 4925, ruled that a confidentiality order in respect of evidence and transcripts in a private arbitration should be set aside by a court when a decision to uphold the confidentiality order would place a party to litigation at a material disadvantage. The issues in the litigation were identical to some of the issues raised in a previous arbitration and the defendant wanted access to the transcripts. The court disagreed that confidentiality was "essential" to the arbitration process and held that the confidentiality of arbitration proceedings did not warrant elevation to the status of litigation and legal advice privileges. The U.S. Federal Court has taken a similar line in *United States v. Panhandle Eastern Corp*, 118 F.R.D. 346, declining to acknowledge an overriding duty of confidentiality in international arbitration.

More recently, the Privy Council considered an appeal from the Bermudan Court of Appeal in *Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Company of Zurich* [2003] UKPC 11, and held that an award from a previous arbitration could be used in subsequent proceedings between the same parties, when both arbitrations concerned the same set of facts. This seemed like another blow to the notion of confidentiality in arbitration and is in stark contrast to the English position we considered in the last issue.

Conclusion

It is still reasonable for parties in international arbitration who find themselves before English courts to have an expectation of confidentiality. However, the decisions mentioned above demonstrate that this principle is gradually being eroded, particularly in foreign jurisdictions. In tandem with the not insignificant attack on confidentiality that arises as a result of the rules of public markets, it is apparent that parties to international arbitration need to think carefully about the issue of confidentiality when including arbitration clauses in their commercial contracts and to make express provision where appropriate. The days of choosing arbitration as a means of keeping commercially sensitive matters out of the public domain are fast disappearing, and parties should bear in mind that obligations to disclose such information may be imposed upon them from a number of angles, and draft accordingly.

Meet the Construction team

John Dingess
Partner (Pittsburgh)

John Dingess has extensive experience of acting in large, complex trials and arbitrations arising out of construction and energy projects, as well as negotiating and drafting complex construction contracts.

James Hudson
Partner (London)

James Hudson has extensive experience of construction disputes, having practiced for over 25 years representing building owners, contractors and subcontractors in relation to domestic and international disputes arising in all sectors of the construction industry. James also sits as an adjudicator in U.K. adjudications.

Richard Paciaroni
Partner (Pittsburgh)

Richard Paciaroni's practice concentrates on representing owners, engineers and contractors in construction and energy disputes in the USA and internationally.

Brian Davidson
Partner (Pittsburgh)

Brian Davidson practises in the area of complex commercial litigation and arbitration in the construction industry. He has wide experience of international arbitration for construction industry and energy clients.

William Shook
Partner (Washington, D.C.)

William Shook concentrates his practice on government contracts and federal procurement policy and was head of Preston Gates Ellis' government contracts practice.

Jesse Franklin IV
Partner (Seattle)

Jesse Franklin has experience acting for owners, architects, engineers and contractors in disputes in all areas of the construction industry and has negotiated hundreds of construction contracts.

Joseph Chang
Partner (Taipei)

Joseph Chang has more than 15 years' experience in international arbitrations and dispute resolutions. His practice includes litigation, arbitration and mediation of cases involving construction, insurance, international trade, government procurement, banking and finance.

Yu-Chang Fu
Partner (Taipei)

Yu–Chang Fu's practice concentrates on petroleum and power, including the arbitration of power purchase agreements and government procurements.

Forthcoming events

Our 3rd annual arbitration day in London is scheduled to take place on Thursday 19 April 2007 at The Mandarin Oriental Hyde Park Hotel, London. We will also be hosting a similar event at our office in Washingon, D.C. on Friday 4 May 2007.

The theme for both events is "*International Arbitration as a tool in effective commercial and political risk management*". Our panels will be composed of leading figures from the world of international arbitratrion including several well known in-house counsel able to offer the client perspective.

Highlights will include panel sessions on the case for international arbitration as against other forms of dispute resolution, means of reducing cost and delay in international arbitration, the role of mediation in arbitration and a session directed towards arbitration in Asia.

As a result of the success of our first series of 'Webinars' back in October 2006, we plan to run further webinars in 2007, the first of which is expected to cover the topic of "Arbitration in Sport".

To register for these forthcoming events, please contact:
Annmarie Hayford, Events, London
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To supply feedback

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