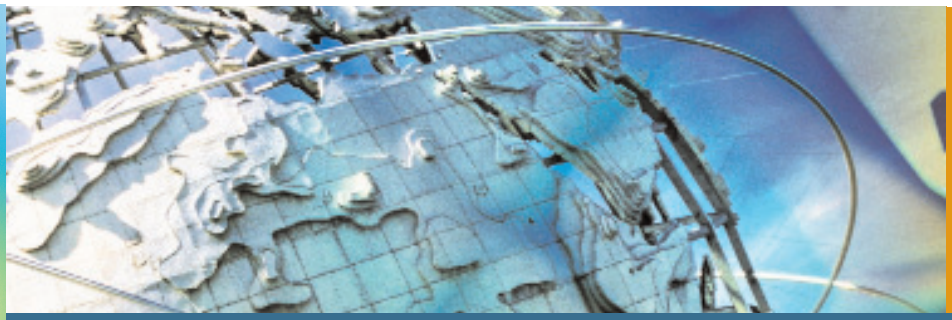

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K&L Gates' Arbitration World

Welcome to the 5th Edition of K&L Gates' Arbitration World

Welcome to the Fifth Edition of Arbitration World, a publication from K&L Gates' Arbitration Group which aims to highlight significant developments and issues in international arbitration for executives and in-house counsel with responsibility for dispute resolution.

In this edition, in terms of U.S. developments, we look at the growth of "class arbitration" in the U.S. and Canada, review the case law on challenging the scope of submission to an arbitrator in the U.S. and take an early look at an important Supreme Court case regarding the scope for Federal Courts to review arbitral awards as well as the proposed "Arbitration Fairness Act."

We consider two aspects of the continuing development of the ethical framework for arbitrators: guidelines from the Chartered Institute of Arbitrators on the interviewing of prospective arbitrators and a U.S. Court of Appeal case on the duty to investigate potential conflicts of interest.

We report on a key English House of Lords case on the construction and separability of arbitration clauses, review an interesting English tribunal decision in the sports arbitration field, and assess the evolution of Germany as a forum for international arbitration.

Contributors from our Hong Kong and London offices discuss multi-cultural influences affecting international arbitration, with an Asian element.

We also look back at our International Arbitration Symposium hosted at the City Club in San Francisco, October 2007.

Finally, we include our usual round-up of developments from around the world.

To supply feedback

on any feature in this publication please contact the editors, Peter Morton (peter.morton@klgates.com) or Ian Meredith (ian.meredith@klgates.com) in London, Jack Boos in San Francisco (jack.boos@klgates.com) or Joanna Diakos in New York (joanna.diakos@klgates.com).

Contents

K&L GATES

Recent developments from around the world

Americas

Argentina

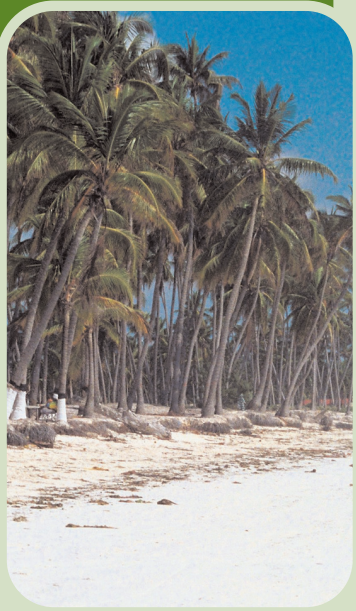
In *Sempra Energy*, one of a spate of claims by foreign investors related to the financial crisis, an ICSID tribunal has held Argentina to have breached the fair and equitable treatment standard of the U.S.-Argentina Bilateral Investment Treaty. Argentina's defence of "necessity" was rejected.

Barbados

The London Court of International Arbitration has signalled its intention to establish a branch in Barbados in the Caribbean. It is suggested that the primary driver is the LCIA's desire to attract a greater volume of South American and Caribbean arbitrations. The move will assist in Barbados' efforts to promote itself as a venue for arbitrations, although legislation to govern domestic and international arbitrations is still pending.

Canada

In *Dell Computer Corp v Union des consommateurs*, the Supreme Court of Canada affirmed the ability of companies to preclude class actions in their sales contracts by the inclusion of clauses requiring that all disputes be referred to arbitration. The Court rejected the argument that the arbitration clause in Dell's sales contract was invalid because contained in a contract of adhesion, and therefore not expressly brought to the consumer's attention. The province of Quebec has subsequently enacted legislation that prohibits mandatory arbitration clauses, but the decision in Dell remains of considerable practical importance for other provinces. For further analysis on this topic see the article on page 3.



Asia

Singapore

The Permanent Court of Arbitration ("PCA") is setting up facilities in Singapore. The agreement between the PCA and the Singapore government will lead to the creation of the first specialised forum for international and interstate arbitration in Asia. This is the second significant expansion for the PCA this year, following its announcement earlier this year of the setting up of an arbitration court in South Africa.

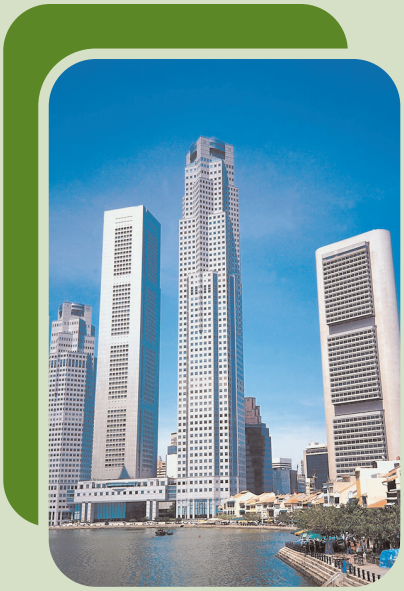
The attractiveness of Singapore as a seat for Asian arbitrations has been bolstered by a recent Singaporean Court of Appeal case. In *Soh Beng Tee*, the Court reaffirmed the principle of minimal judicial interference with the arbitral process, in the context of a challenge to an award for breach of natural justice.

Europe

England

The scope for English firms to enter into contingency fee arrangements in respect of English-seated arbitrations has been clarified in the new amended Solicitors' Code of Conduct. The new Code makes it clear that arbitration fee arrangements are only permissible to the extent permitted by the relevant legislation. Thus deals linking fees payable to a percentage of the proceeds are prohibited; the maximum return that can be provided for is a doubling of standard fees if successful.

In *Gater Assets v Nak Naftogaz*, the Court of Appeal held that an English court should not award security for costs against a claimant seeking to enforce a New York Convention award under the Arbitration Act 1996. The decision has been welcomed as ensuring equal treatment between the holders of domestic and foreign awards.



The principle according to which an arbitration is governed by the law of the seat, rather than the governing law of the contract, has been reaffirmed. In *C v D*, the Court of Appeal held that the effect of an agreement to arbitrate under English procedural laws is that the award cannot be challenged in courts other than the English Courts. If one party attempts to do so, an English court will grant an anti-suit injunction.

European Union

In *Eastern Sugar B.V. v. Czech Republic*, an UNCITRAL tribunal has held that the protection provided by the Bilateral Investment Treaty between the Netherlands and the Czech Republic are unaffected by the Czech Republic's accession to the EU. The tribunal held that Eastern Sugar, a Dutch investor, was discriminated against when Czech officials reduced its domestic sugar production quotas as part of the Republic's accession to the EU. This constituted a breach of the "fair and equitable treatment" provision imposed by the BIT. The Czech Republic's defences based on EU and domestic law were rejected by the Tribunal. The decision is valuable for investors in "accession countries." However, the EU has recently recommended that Member States formally rescind intra-EU BITs. There are over 150 of these currently in force.

Middle East

United Arab Emirates

At the time of going to press, reports suggest that the LCIA is working towards a joint venture with the Dubai International Arbitration Centre that will mean the establishment of the LCIA's first arbitration forum in the Middle East.

Recent Developments in "Class Arbitration": Will the U.S. Influence Increase?

by Jack Boos (San Francisco), Pascale-Sonia Roy, Philippe A. Toudic, and Linda L. Usoz (Palo Alto)

Introduction

North American influences on international arbitration arguably have made proceedings costlier and more like U.S.-style litigation. The importation of U.S. discovery practice is one familiar example. Another hallmark of U.S.-style litigation, the class action, may have an even greater impact on international arbitration.

Over the past quarter century, a growing number of U.S. courts have affirmed the use of a hybrid procedure known as class arbitration. The procedure also has gained acceptance, at least conceptually, in a recent decision of the Canadian Supreme Court. Some observers believe class arbitration soon will be accepted in Europe. This article will review the development of class arbitration in the U.S.

Class arbitration and class litigation share many attributes. Class proceedings give leverage to plaintiffs and claimants, particularly consumers, by making it economical to pursue, on a collective basis, claims often too small to advance individually. The very size and complexity of the proceedings can make them expensive to defend. As a result, many contracts now incorporate waivers prohibiting claimants from banding together with others similarly situated. However, the California Supreme Court recently held that such waivers may not always be enforceable. The balance appears to be shifting in favor of class arbitration. If Canada and Europe follow, the impact could be profound.

The Development of Class Arbitration

The California Supreme Court pioneered the modern use of class arbitration in a 1982 decision. As envisioned, the procedure was a hybrid, requiring court oversight of arbitral proceedings. In 2003, the U.S. Supreme Court endorsed and simplified the procedure, giving arbitrators greater control. The use of class proceedings in U.S. domestic arbitration has grown as a result.

The California high court addressed class arbitration in *Keating v. Superior Court*, 31 Cal.3d 584 (1982). The case involved litigation between Southland Corporation, franchisor of 7-Eleven convenience stores, and various franchisee operators. Southland was successful in its effort to compel individual arbitrations of the respective disputes based on the franchise agreements.

The California Supreme Court upheld the individual arbitrations. In doing so, however, the court declined to rule out the possibility that in appropriate circumstances individual proceedings might properly be combined into class arbitration. "Class arbitration, as Sir Winston Churchill said of democracy,

must be evaluated, not in relation to some ideal but in relation to its alternatives." The court noted that class procedures eliminate repetitious litigation and inconsistent results. They also provide a means to effectively redress claims too small to warrant individual actions. The *Keating* court held that it would be left to trial courts to decide whether to order class arbitration to certify the class of claimants and supervise other aspects of the proceedings.

Later decisions, in California and other states, advanced class arbitration concepts from the foundational concepts outlined in *Keating*.

The class issue reached the United States Supreme Court more than twenty years later in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). *Bazzle* was a South Carolina case involving contracts between a lender and individual customers. The contracts required arbitration but did not specifically prohibit class arbitration. The trial court ordered class arbitration, and a multi-million dollar award to the claimant group ensued. The South Carolina Supreme Court affirmed the proceedings and the award.

On review, the U.S. Supreme Court held that state contract law governs class arbitration. It let stand the South Carolina Court's ruling that, under state law, arbitration agreements can be enforced to allow class arbitrations unless expressly prohibited. The Court differed with the state court in other respects. Significantly, the Court held that – to give the parties the benefit of their bargain – the arbitrator must decide whether a particular agreement allows class arbitration and if so whether to certify the class.

Bazzle disapproved portions of the California Supreme Court's opinion in *Keating*, reducing the role of courts. At the same time, *Bazzle* cleared the path for greater use of class mechanisms in arbitration. The number of jurisdictions approving of class arbitration grew. Both the American Arbitration Association and JAMS/Endispute have since adopted class arbitration procedures.

The Enforceability of Class Arbitration Waivers - Recent Developments in California

Following *Bazzle*, many contracts were drafted to include express waivers of class arbitration, particularly in adhesive consumer and employment contracts. The trend toward class arbitration appeared to be in decline. Recent decisions of the California Supreme Court, however, have encouraged proponents of class arbitration.

The California Supreme Court first addressed the validity of a class arbitration waiver in *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), a consumer case. A plaintiff consumer filed a class action lawsuit to recover late fees charged by the defendant Discover Bank. The bank responded by moving to compel individual arbitration by enforcing the consumer's waiver of class procedures. The trial court found the waiver unconscionable under state law. The court of appeal then reversed on the ground that federal arbitration law preempts the state law.

The California Supreme Court reversed and reaffirmed its endorsement of class arbitration in the *Keating* case. It held that contractual waivers of class procedures (including class arbitration) may be invalid under state law at least in certain circumstances. To be deemed ineffective, (i) the waiver must be in an adhesive consumer contract (i.e, a contract where the terms are not negotiated) involving small individual damages, and (ii) the party with superior bargaining power must have been alleged to have deliberately defrauded large numbers of consumers. The court held that under such circumstances, enforcing a waiver of class treatment could have the effect of exempting the stronger party from the full measure of liability for its own wrongdoing. Such a result would be contrary to California law and public policy.

In August 2007, the California Supreme Court expanded its *Discover Bank* decision in *Gentry v. Superior Court*, 42 Cal.4th 443. *Gentry* involved an employee's claim for overtime wages under state law. The employer, Circuit City Stores, Inc., required its employees to sign a written employment agreement containing an arbitration provision expressly waiving class arbitration. The plaintiff thereafter commenced class action litigation on behalf of similarly situated employees, thereby ignoring the arbitration provision. Lower state courts ordered individual arbitration, upholding the contractual waivers.

The California Supreme Court again reversed and stated that the wage claim involved "unwaivable" statutory rights. The court concluded that waivers of class arbitration could hinder employees' ability to effectively vindicate their statutory rights. As in *Discover Bank*, the court noted that the waiver of class procedures could have the effect of insulating employers from liability for the claims of individual employees.

The court identified four factors that courts (rather than arbitrators) must consider when evaluating the validity of a waiver in the wage and hour context:

- the size of potential individual recovery,
- the potential for retaliation against individual class members,
- whether members of the class may be "ill informed" of their rights, and
- other "real world" obstacles to the vindication of statutory rights.

Applying these factors, if the court finds that class arbitration is likely a "significantly more effective practical means" of vindicating individual rights, and that disallowance of the class action "will likely lead to a less comprehensive enforcement of overtime laws," it must invalidate the class arbitration waiver.

It remains to be seen how California trial courts will apply *Gentry*, including applicability, outside of wage and hour cases. For now, both *Discover Bank* and *Gentry* represent substantial victories for claimants in the most common types of class proceedings: consumer and employment actions.

The California Supreme Court has expressed wariness that business interests may use class arbitration waivers to avoid full responsibility for deliberate wrongdoing. In both *Discover Bank* and *Gentry*, the court cited broad public policy concerns, and lower courts may well apply that reasoning to new types of claims. Presumably, the number of successful challenges to class arbitration waivers in consumer and employment cases will increase. So too will the number of class arbitration proceedings. It is also clear that, at least in California, courts will have a greater role in determining whether class arbitration is available.

Class Arbitration in Canada

Class arbitration came before the Supreme Court of Canada in *Rogers Wireless Inc. and Frederick I. Muroff*, 2007 SCC 35, decided on July 13, 2007. At issue was an arbitration clause in a consumer contract precluding class procedures. The consumer filed class action litigation, contending that the arbitration clause was abusive. The Court ruled that the enforceability of the arbitration clause involved the determination of mixed questions of law and fact. It applied the general rule of deference to arbitral jurisdiction and remanded to the arbitrator. The Court noted that where the challenge to the arbitrator's jurisdiction concerns a pure question of law, the Court retains jurisdiction.

In remanding to the arbitrator, the Canadian high court left open the possibility of class arbitration. It did not find class arbitration to be barred as a matter of law. While *Rogers* was pending, moreover, the Quebec Consumer Act was amended to provide that an arbitration clause cannot be enforced to deprive consumers of class procedures (see the news item on page 2).

The position of the Supreme Court of Canada appears roughly analogous to that of the California Supreme Court in the 1982 *Keating* decision. Neither mandated the use of class procedure, but each left open the possibility of class arbitration in appropriate circumstances. The Quebec Consumer Act may provide further authority for class arbitration, expressly invalidating waivers of class procedures.

Conclusion

Class arbitration has become well established in the U.S. over the past quarter century. Recent decisions of the California Supreme Court have given new momentum to the procedure in consumer and employment cases. The Canadian Supreme Court has now accepted class arbitration in concept, while provincial legislation appears to provide further support for the procedure. Greater use of class arbitration procedures in North America may have an influence in other parts of the world.

Tribunal's supervisory role not sharp enough for the Blades

by Martin King (London)

More than a few eyebrows were raised when West Ham United announced the signing of two of the World Cup's Argentine stars, Carlos Tevez and Javier Mascherano, in the early stages of the 2006-2007 English Premier League season. Numerous skirmishes followed: in the press, in the Courts and before an arbitral tribunal. The outcome was an affirmation of the autonomy of sports disciplinary bodies and the limited circumstances in which a court or tribunal will interfere with a sports body's decision. This article summarises what happened and why.

Background

When West Ham entered into Premier League playing contracts with Tevez and Mascherano, it also entered into agreements with third-party companies which held key rights over the players:

- the third-party companies could transfer the players to another club without the consent of West Ham or the player;
- West Ham had no right to seek the transfer of the player;
- neither West Ham nor the player could vary the terms of the playing contracts without the third-party companies' consent; and
- only the third-party companies could terminate the playing contract.

In August 2006, West Ham were told by the FA Premier League ("FAPL") that such third-party influence was not permitted under FAPL Rules.

Nevertheless, West Ham registered the players for the FAPL and did not disclose the third-party agreements. In September 2006, West Ham twice denied the existence of any third-party agreements and told the FAPL that it owned all rights in the players.

In January 2007, West Ham decided to disclose the third-party agreements to the FAPL. The FAPL launched an investigation to establish whether such arrangements were commonplace in football or whether (as it transpired) this situation was unique. West Ham were charged with breaches of FAPL Rules B13 and U18 (see below panel), and the FAPL appointed an independent disciplinary commission to determine those charges.

Rule B13: "in all matters and transactions relating to the League each Club shall behave towards each other Club and the League with the utmost good faith".

Rule U18: "no Club shall enter into a contract which enables any other party to that contract to acquire the ability materially to influence its policies or the performance of its teams in League Matches or in any of the competitions set out in Rule E10."

West Ham pleaded guilty to both charges and the disciplinary commission: (i) fined West Ham £5.5m (£3m in respect of its breach of Rule B13, and £2.5m in respect of its breach of Rule U18); (ii) ordered that Tevez' registration could be terminated by the FAPL; and (iii) did not deduct any points from West Ham. Interestingly, the FAPL had asked the independent disciplinary commission not to cancel Tevez' registration, so the FAPL still had to address Tevez' eligibility to play

in light of the offending third-party agreement. The FAPL decided to require West Ham to immediately modify the third-party agreement to the satisfaction of the FAPL, or alternatively, terminate it.

West Ham immediately purported to terminate the third-party agreement, notifying Tevez, the third-party companies and the FAPL. The third-party companies' representatives acknowledged receipt of the notice of termination but reserved their clients' rights pending further instructions.

The FAPL allowed Tevez to play that weekend against Wigan. West Ham won 3-0, with Tevez creating two goals. In response to requests from the FAPL for further assurances that third-parties could not influence the policies or performance of West Ham, West Ham agreed to: (i) copy all relevant correspondence to the FAPL; (ii) maintain that the third party agreement was invalid, unenforceable and, in any event, terminated; and (iii) not act in any manner inconsistent with its assurances in resolving any dispute with the third-party companies over West Ham's termination of the agreement.

In view of West Ham's assurances, the FAPL allowed Tevez to continue playing, scoring two and creating the third in West Ham's 3-1 win over Bolton (in West Ham's penultimate game of the season), and scoring the only goal in West Ham's 1-0 win over Manchester United at Old Trafford (in the final game of the season). West Ham narrowly avoided relegation, condemning Sheffield United, Charlton Athletic and Watford to the Championship, with the bottom of the FAPL table looking like this:

		P	W	D	L	F	A	GD	PTS
15	West Ham	38	12	5	21	35	59	-24	**41**
16	Fulham	38	8	15	15	38	60	-22	**39**
17	Wigan	38	10	8	20	37	59	-22	**38**
18	Sheffield Utd	38	10	8	20	32	55	-23	**38**
19	Charlton	38	8	10	20	34	60	-26	**34**
20	Watford	38	5	13	20	29	59	-30	**28**

The Arbitration

Sheffield United felt hard done by; had the disciplinary commission deducted three points from West Ham, Sheffield United would have stayed up and West Ham would have been relegated. In addition, Tevez, whose registration could have been cancelled by either the disciplinary commission or the FAPL, was allowed to play in West Ham's last three games of the season, making crucial contributions.

Sheffield United commenced arbitration proceedings against the FAPL, pursuant to an arbitration clause in the FAPL Rules, on the basis that West Ham's end-of-season victories and the final positions of both clubs occurred and were permitted to occur by the FAPL despite the fact that West Ham and Tevez remained parties to the offending contract and that West Ham had failed to comply with the conditions imposed by the FAPL (i.e, the modification or termination of the third-party agreement). Accordingly, the FAPL should have cancelled or suspended Tevez' registration, rendering him ineligible for those crucial matches.

Jurisdiction

The arbitral tribunal accepted that the FAPL was the appropriate defendant to a claim seeking a declaration that the disciplinary commission acted unreasonably. It held that the nature of the tribunal's jurisdiction was supervisory, much like that of a Court on judicial review. The tribunal's concern was the lawfulness of the decision taken and whether any exercise of judgment or discretion fell within the limits open to the tribunal to interfere. The tribunal found that the FAPL's Rules enabled it to rule upon its own jurisdiction pursuant to the arbitration clause in the FAPL's Rules. Since the decision of the disciplinary commission directly and vitally affected the interests of Sheffield United as a member of the FAPL, the tribunal was satisfied that the High Court would have accepted that it (the tribunal) had standing to determine Sheffield United's complaint in such circumstances, and so, in light of the arbitration agreement in the FAPL's Rules, the tribunal accepted it had such standing (performing the Court's supervisory role).

It was not for the tribunal to reassess the situation and render its own decision on West Ham's punishment. Its role was supervisory: to ensure that the disciplinary commission's decision

and the subsequent decisions of the FAPL were lawful and reasonable in the circumstances.

The Award

In rendering its award, the tribunal had sympathy for Sheffield United. The tribunal went so far as to say that, if it had been the disciplinary commission, it would in all probability have reached a different conclusion and deducted points from West Ham. It would have given far more weight to the deliberate deceit by West Ham officials who concealed the third-party agreements from the FAPL. Nevertheless, what the tribunal would have done was irrelevant. The tribunal could only test the decision on the basis of whether it was irrational or perverse when it was reached. The tribunal was not hearing an appeal from the decision of the disciplinary commission and could not substitute its view.

The tribunal considered that the disciplinary commission had a wide range of sanctions available to it under FAPL Rules. Whilst a deduction of points might have been the normal sanction, it was not obligatory. The penalty was at the discretion of the commission. The tribunal could not use hindsight (even though the outcome of the decision, in light of subsequent events, turned out to be extremely unfortunate for Sheffield United). It could only assess the decision as at the time it was made. The tribunal found that the commission's decision fell well within the parameters of sanction options available and that it was impossible for the tribunal to find that decision to be irrational or perverse or otherwise outside the margin of discretion open to the commission.

The tribunal then turned to consider Tevez' eligibility to play in West Ham's last three matches of the season. Sheffield United contended: (i) the FAPL were or should have been aware that a unilateral attempt to terminate a contract otherwise than in accordance with its terms is of no effect unless consented to by the other party and, accordingly, the FAPL should have cancelled Tevez' registration so that he was ineligible to play in the final three matches; and (ii) the FAPL acted inconsistently in the way that it dealt with Javier Mascherano's transfer to Liverpool. The tribunal considered it was impossible to decide that the FAPL was bound to terminate or suspend the registration. It was open to the FAPL to conclude that, given West Ham's assurances, a third party was not able to materially influence West Ham's policies or performance. The tribunal concluded that, whilst Tevez' eligibility to play in those final games may not have been legally watertight, it was a practical and workable solution.

When Mascherano transferred from West Ham to Liverpool and Liverpool sought to register Mascherano, Liverpool disclosed all third-party agreements to the FAPL. Liverpool's application was rejected by the FAPL because the third party agreements breached Rule U18. Accordingly, Mascherano was ineligible to play for Liverpool until that issue was resolved. Liverpool renegotiated the third-party agreements so that they did not offend Rule U18, and the FAPL accepted Mascherano's registration. Sheffield United pointed to the FAPL's failure to suspend Tevez despite the fact that, in similar circumstances, it refused to register Mascherano.

The tribunal had sympathy with Sheffield United's contention; however, the tribunal thought that, even if it could be persuaded that the fact that the FAPL reacted differently to a similar set of circumstances could amount to irrationality, the circumstances of the two registrations were insufficiently similar for Sheffield United to succeed. With regard to Tevez, the FAPL was deciding whether to cancel a registration and West Ham were seeking to resolve the issues arising from the disciplinary commission's decision. For Mascherano, the FAPL was deciding whether to accept an application for registration and, this time, had all the facts and paperwork in front of it. Even if it could be said that West Ham were treated more leniently than Liverpool, the tribunal held that fell short of the threshold for an irrationality challenge.

Whilst the events which followed the decision of the disciplinary commission both on and off the pitch resulted in a spectacularly unfortunate end to the season for Sheffield United, it was just that: unfortunate, not unlawful or unreasonable. The award confirms and illustrates (i) the supervisory jurisdiction of an arbitral tribunal constituted under FAPL Rules; and (ii) the limited circumstances in which a court or arbitral tribunal can interfere with a decision of a sports disciplinary body. The sympathy expressed towards Sheffield United's predicament by the tribunal (going so far as to say it would have deducted points from West Ham) illustrates the restricted role of the tribunal; to supervise the fairness of procedures and the decision-making process but not to review or substitute a decision, even if it disagrees with it.

Germany: an Emerging Forum for International Arbitration?

by Eberhardt Kühne (Berlin), Moritz Dietel (Berlin) and Alexander Bottenheim (London, currently seconded to Berlin)

With the exception of Hamburg Friendly Arbitration, maritime arbitration and sports arbitration, international arbitration has not played a significant role in Germany in the past 60 years. Paris, Zürich, Geneva and Vienna are still more widely regarded as pre-eminent arbitral centres in Continental Europe. The success of Stockholm's Institute of Arbitration shows that other centres can gain importance.

In recent years, the number of German parties involved in international arbitrations has increased. Over a period of more than 25 years, Germany has consistently provided the third largest number of parties to ICC arbitration, following only the U.S. and France. Also, the number of German arbitrators appointed in international cases has increased steadily. However, the number of cases with a German seat still remains disproportionately low.

A significant step to promote Germany as a forum for international arbitration was taken by the adoption in 1998 of the UNICITRAL Model Law on International Arbitration. This was followed by the co-operation agreement signed in 2005 between the German Institute of Arbitration ("DIS") and ICSID. This article reviews the operation of arbitrations under DIS Rules and ICSID Rules.

The German Institute of Arbitration (DIS)

DIS was founded in 1974 by a consortium of trade associations, scientists and practitioners of arbitration. In 1992, it merged with DAS (Deutscher Ausschuss für Schiedswesen), which had been founded in 1920 by a group of trade associations, with the aim of developing a standard procedure in arbitration matters. DIS is a registered association, with approximately 800 members from around Germany and abroad, with the aim of promoting national and international arbitration. The increase in foreign interest is no doubt linked in part to the abundance of agreements with arbitration clauses stipulating a German seat and the English language. International contracts are now commonplace, and it has been estimated that four-fifths of German companies´ export contracts for plant and engineering equipment contain arbitration clauses. In addition to acting as an institutional arbitral court, the association issues a number of publications on national and international arbitration law issues.

The current DIS Arbitration Rules came into force on 1 July 1998 and increased the appeal of recourse to DIS arbitration. In 2002, 77 new cases were initiated with DIS, 42% of which had a value of over 500,000.00 EUR. Foreign parties were involved in 19 of those. To commence a proceeding with DIS, the claimant must first file its statement of claim at one of the three branch-offices of DIS (Berlin, Cologne and Munich) and pay the required administrative charge as well as an advance on the costs.

The statement of claim must identify the parties to the dispute and contain a brief account of the facts and

circumstances surrounding the dispute and the specific relief sought in the arbitration. The claim must also contain a "reproduction" of the parties' agreement, which wording covers the situation that an actual copy of the parties' agreement is no longer available. The claim is then served on the respondent by DIS, but the DIS's rules do not set a time limit for the respondent to file an answer to the statement of claim, and DIS itself does not request the respondent to file an answer. In fact, DIS only invites the respondent to select an arbitrator (where a three-member tribunal is to be appointed) or to agree on an arbitrator jointly with the claimant (where the panel is to consist of a sole arbitrator) within 30 days. As a result, the arbitral tribunal could be constituted without necessarily knowing the respondent's answer or whether there will be a counterclaim.

Only after the tribunal has been formed will it then ask the respondent to file its answer. However, when fixing the time that the respondent will have to answer, the tribunal will take into account the time that has elapsed since the respondent was notified of the statement of claim. Counterclaims may also be filed at any time during the course of the arbitration.

Unless otherwise determined by the parties, three arbitrators sit on the arbitration panel. In the majority of cases, each party names one arbitrator and the two arbitrators then appoint a third to act as chairman. If the parties agree that the arbitration panel is only to consist of one arbitrator, that arbitrator is appointed by the parties together. Where the parties cannot agree on the sole arbitrator within 30 days, DIS will appoint one. The DIS rules require that the tribunal chairman or sole arbitrator be legally qualified, unless the parties agree otherwise. Where foreign parties are involved, DIS will not normally appoint a chair or sole arbitrator of the same nationality as one of the parties, except where the parties do not object.

Where there are multiple claimants, the DIS rules require that they act jointly in the nomination of the claimants' arbitrator on a three-member tribunal. If they fail to appoint one, the arbitration will not go forward because the statement of claim will not be in compliance with the formal requirements of the DIS rules.

Where there are multiple respondents, and they fail to agree between themselves on their arbitrator, the DIS Appointing Committee will appoint two arbitrators. The two DIS-appointed arbitrators will then appoint a third to act as chair. Should they fail to agree on a nomination within 30 days, any party may request that the DIS Appointing Committee appoint the tribunal chair. This procedure has the effect that the respondents' joint failure to appoint an arbitrator will render the claimant's nomination ineffective, which allows a respondent to automatically defeat the claimant's nomination without any room for the exercise of discretion by DIS.

DIS aims to provide as much autonomy as possible to the parties, but they are assisted by the relevant branch office of DIS throughout the whole process. One advantage of the DIS arbitration process is that because the arbitration fees depend on the amount in dispute, the parties are better able to accurately estimate their costs upfront. The process comes to an end when the DIS tribunal delivers its final award. Where the claimant withdraws its claim, the DIS rules require the arbitral tribunal to issue a special order formally terminating the proceedings (unless the respondent objects to the withdrawal on legitimate grounds to be assessed by the tribunal). The ability of the tribunal to issue a termination order allows the parties to be in no doubt about the matter and provides an official record of termination.

Unlike in the ordinary courts, where the parties are responsible for providing evidence to support their claims, the DIS rules give the tribunal the discretion to give directions and, in particular, to hear witnesses and experts and order the production of documents. The arbitral tribunal is therefore not bound by the parties' applications for the admission of evidence as in the ordinary courts. Although, as with the ordinary courts in Germany, there are no discovery rules which would require the parties to produce all relevant evidence whether helpful or unhelpful to their case, the DIS rules do take a step in this direction in allowing the tribunal itself to ensure that all relevant evidence is placed before it.

The DIS rules further require that the confidentiality of the arbitral proceedings be observed by the parties to the claim, the arbitrators and all DIS employees. Furthermore, the parties must ensure that third parties who participate in the proceedings, (e.g. parties' counsel, translators and experts) give an undertaking of confidentiality.

Co-operation Agreement with ICSID

International arbitration in Germany took another step forward with the signing in 2005 of a cooperation agreement between ICSID, the Frankfurt International Arbitration Center of DIS and the Frankfurt Chamber of Industry and Commerce.

Pursuant to Art. 63 sub. 1 ICSID Convention, proceedings, in principle, take place at the seat of ICSID. If parties wish proceedings to be conducted at any other place, approval of ICSID is required. The cooperation agreement with DIS makes it possible for the proceedings to be conducted at the Frankfurt International Arbitration Center of DIS and the Frankfurt Chamber of Industry and Commerce, without requiring specific approval.

Conclusion

The merger of DIS and DAS in 1992, modernisation of German arbitration law by adoption of the UNCITRAL Model Law on International Arbitration in 1998, the foundation of the Frankfurt International Arbitration Center, and the cooperation between ICSID and DIS have produced a stronger platform for arbitration disputes in Germany, which now constitutes an efficient and viable alternative to the ordinary courts in Germany.

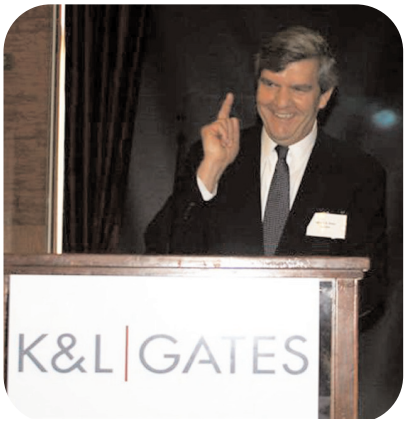
K&L Gates' International Arbitration Symposium

The City Club, San Francisco

October 2007

The sun shone on K&L Gates' first International Arbitration Symposium on the West Coast of the U.S. Over two days in early October, leading arbitrators, representatives of the world's leading arbitral institutions and corporate counsel came together in San Francisco to debate and discuss the thorny topic of "Managing Cross-Cultural Factors in International Arbitration."

Corporate Counsel speakers included David Burt of DuPont, Laura Stein of Clorox, Brian Rudick of Honeywell, Paul Sandman of Boston Scientific Corporation and Joe Moore of URS Corporation.



The HKIAC was represented by its Secretary General, Christopher To, the ICC by its Deputy Director for North America, Nancy Thevanin, and the ICDR (international division of AAA) by its Senior Vice President, Richard Naimark.

Challenging the Scope of the Submission to an Arbitrator in the U.S.

by Jeff Vitek (Pittsburgh)

Review of arbitration awards in the United States is extremely limited. Often, review is confined to the grounds set forth in the Federal Arbitration Act ("FAA") or similar provisions in state arbitration acts. One of the grounds for vacating an arbitration award is where "the arbitrators exceeded their powers. . . ." See FAA § 10(a)(4). Similarly, a court may modify an arbitration award where "the arbitrators have awarded upon a matter not submitted to them. . . ." See FAA § 11(b). When challenging an award on these grounds – or when opposing such a challenge – it is important to distinguish between issues of arbitrability and issues regarding the scope of the submission to the arbitrator because many courts apply a different standard of review to these issues.

Whether a dispute is arbitrable generally refers to whether the parties agreed to arbitrate such a dispute or to litigate the dispute in court. Courts in the United States typically review issues of arbitrability de novo by looking to the parties' arbitration clause and determining whether the parties agreed to submit the dispute to arbitration. Thus, if at arbitration the arbitrator determined that the parties had agreed to submit this type of dispute to arbitration – or proceeded under the assumption that they had – a court reviewing that decision will not give deference to the arbitrator but, rather, will make its own determination.

On the other hand, if a dispute is arbitrable but there is a question about whether the parties submitted the particular question or dispute to the arbitrator, many courts in the United States grant great deference to the arbitrator's determination of the issues before him or her. See, e.g., *Madison Hotel v. Hotel & Rest. Employees, Local 25, AFL-CIO*, 144 F.3d 855 (D.C. Cir. 1998); *Am. Postal Workers Union v. Runyon*, 185 F.3d 832 (7th Cir. 1999). The level of deference is often said to be the same as that given to an arbitrator's determination on the merits. The United States Court of Appeals for the Third Circuit (covering federal courts located in Pennsylvania, New Jersey, Delaware, and the Virgin Islands) has said that an arbitrator's determination of the scope of the submission to him will be upheld as long as it is not "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Mobil Oil Corp. v. Indep. Oil Workers Union*, 679 F.2d 299, 303 (3d Cir. 1982).

A party has even less room to challenge the scope of the submission to the arbitrator, or, for that matter, arbitrability issues, when the parties have agreed to abide by the American Arbitration Association's ("AAA") Commercial Arbitration Rules. Rule R-7(a) grants the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Several courts in the United States have held that incorporation of the AAA's Commercial Arbitration Rules into an arbitration clause evidences the parties' agreement to allow the arbitrator, and not the courts, to determine the scope of his own jurisdiction.

For example, in the decision of *Sunoco, Inc. v. Honeywell International, Inc.*, No. 05CIV7984 (DLC), 2006 WL 709202 (S.D.N.Y. Mar. 21, 2006), Honeywell moved to confirm an arbitration award and Sunoco moved to vacate the award on the basis that the arbitrator did not have the authority to award particular relief. The court noted that the parties had incorporated into the arbitration clause of their agreement the AAA's Commercial Arbitration Rules granting the arbitrator authority to decide his own jurisdiction. Thus, the court held that the arbitrator had not exceeded his authority in deciding the scope of the issues to be arbitrated before him, and the court confirmed the arbitration award.

Parties that are arbitrating disputes should be aware of the deference courts will grant to the arbitrator's interpretation of the scope of the issues before him or her. If the parties have a broad arbitration clause such that most or all disputes relating to their contract are subject to arbitration, i.e., are arbitrable, then the arbitrator's determination that a particular issue is before him will be very difficult to challenge after the arbitration. Moreover, parties that choose to incorporate the AAA's Commercial Arbitration Rules should be aware of

the broad grant of power those rules provide to the arbitrator to decide his or her own jurisdiction.

In a recent insurance coverage arbitration where K&L Gates represented a large corporate policyholder, the arbitrator issued a final award granting relief to the insurers on one issue and the policyholder on a related issue. The insurers subsequently filed an application in state court to modify the award on the basis that the related issue was not before the arbitrator – a scope of the submission argument. The arbitrator had ruled that the issue was properly before him for decision. Further, the arbitration was conducted under the AAA's Commercial Arbitration Rules pursuant to the arbitration clause in the parties' contract. Thus, the policyholder argued in opposition to the application that the arbitrator's decision should be confirmed because 1) his decision with respect to the scope of the submission must be granted great deference and 2) the parties agreed to allow the arbitrator to determine his own jurisdiction by incorporating the Commercial Arbitration Rules. The court denied the insurers' application and confirmed the award in its entirety without an opinion. The insurers have appealed that decision.

New Arrivals

K&L Gates' Arbitration Group has been bolstered by two recent partner hires. Andrew Morrison joins our New York office, bringing strong experience in securities and financial services disputes. Jerome Zaucha joins our Washington, D.C office with experience of trade disputes, including in the context of NAFTA.

New Guidelines from the Chartered Institute of Arbitrators for Interviewing Prospective Arbitrators

by Peter Morton (London) and Michael Gaetani (Pittsburgh)

Introduction and Background

The London-based Chartered Institute of Arbitrators (CIArb) has recently published guidelines for interviewing prospective arbitrators. While the guidelines serve as recommendations only, members of the CIArb are expected to follow the guidelines whether in the capacity of interviewer or arbitrator. Parties and arbitrators in general are invited to jointly agree that the guidelines are applicable when conducting pre-appointment interviews.

The guidelines, prepared following wide international consultation, aim to clarify what has remained a grey, and sometimes controversial, area. Pre-appointment interviewing of prospective party-nominated arbitrators is becoming increasingly common, particularly in larger disputes with significant sums at stake. This is at least partly explained by the importance of getting the 'right' party-nominated arbitrator, given their role in (a) selecting the Chairman of the Tribunal (under certain procedures), and (b) ensuring that both parties' cases and legal cultures are given appropriate consideration, both in the procedural stages of the arbitration and when deciding the case on the merits.

Summary of CIArb Guidelines

The Guidelines provide a useful framework to guide parties and arbitrators through the interview process. A full copy of the Guidelines is available from the CIArb. By way of a sample of the guidance provided:

- When a panel is to be composed of three arbitrators, the parties may interview prospective arbitrators without the participation of the opposing party. However, if only selecting a sole arbitrator, then the opposing party should participate in the interview or, at the very least, send a representative to observe. Parties are also permitted to interview prospective chairmen, who are usually chosen by the two party-appointed arbitrators. In this scenario, the interview should be conducted by both parties. If one party does not want to participate, it should send a representative.

- Regardless of the size of the panel, the mere fact of there having been an interview should not, by itself, be grounds for a challenge.

- The interviewing team should inform the prospective arbitrator of the makeup of the team in advance, as well as make clear who will lead the interview and how it will be conducted.

- The prospective arbitrator may be accompanied by a secretary, pupil or other assistant. The proceedings should be taped or a detailed arbitrator's file note should be created, and the tape or file note

should be disclosed to the opposing party and the appointing body.

- The interview should always be conducted in a professional manner in a business location, rather than over drinks or a meal. A time limit should also be agreed upon.

- The interview may cover topics such as the names of the parties and the general nature of the dispute, the timetable and governing law of the proceedings, and the prospective arbitrator's qualifications and experience, subject to the overarching rule that the specific facts and circumstances giving rise to the dispute, the merits of the case, and the arguments of the parties may not be discussed.

- Questions may be asked to test the prospective arbitrator's knowledge and understanding of the nature and type of project in question, of the particular area of law applicable to the dispute, and of arbitration practice in general. However, details may only be discussed to the extent necessary to determine if the prospective arbitrator is suitable for the position. These questions should be general in nature and neutrally put in order to test the interviewee, and they should not be asked in order to ascertain the prospective arbitrator's views or opinions on matters which may form part of the case.

- Prospective arbitrators may decline questions that go beyond the permissible scope laid out above, and such a response must be accepted by the interviewer; this power is also given to interviewers responding to questions from prospective arbitrators. If the prospective arbitrator determines that the interviewing party is merely looking for a partisan advocate, he should terminate the interview immediately and decline the appointment, if made.

Other Ethical Rules and Guidance

The CIArb interviewing guidelines are intended to assist in maintaining the independence and impartiality of arbitrators, consistent with the principles embodied in the rules of arbitral institutions.

By way of example, the AAA's International Arbitration Rules prohibit ex parte communication with candidates for appointment as party-appointed arbitrator except "to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection" (Rule 7.2). There is, however, an express prohibition in those Rules on any ex parte communication relating to the case with any candidate for presiding arbitrator.

The IBA Rules of Ethics for International Arbitrators (1986) permit a potential arbitrator to respond to questions about his/her availability and suitability for the arbitration, but disallow any discussion of the merits of the case with the appointing party or counsel (Rule 5.1). The ABA Code of Ethics for Arbitrators in Commercial Disputes (2004) contains very similar guidance (Canon III, Para B(1)).

However, none of these prior codes/rules provide the sort of detailed guidance given in the CIArb interviewing guidelines as to how such discussions between potential arbitrators and the nominating parties/counsel should be conducted.

Impact on Arbitration Proceedings

The CIArb Guidelines provide clarity in a potentially difficult and sensitive area of the arbitration process, with a particular emphasis on transparency between parties, and should help to reduce challenges to arbitrators later in the arbitral proceedings. Potential conflicts of interest stand a greater chance of being flushed out, and there is less risk of impropriety in the interview process itself.

Overall, the new CIArb guidelines are to be welcomed as the first set of guidelines concerning the increasingly prevalent practice of interviewing prospective arbitrators, which ought to lead parties and arbitrators alike to have greater comfort with the interview process and greater confidence in the arbitral process in general.

Focus on Asia: Multi-cultural factors affecting international arbitration

by Wing L Cheung (Hong Kong) and Martin King (London)

"Asia"

Asia comprises a multitude of countries, regions, sub-regions, religions, ethnicities, classes, educational standards and political ideals across approximately 50 million square kilometres. There is no single homogeneous Asian culture. There are numerous geographical and political contours which force parties to arbitration to confront Asia's social and legal diversity. Books have been dedicated solely to analyses of the cultures of dispute resolution in Asia. In this short article we highlight aspects of Asia's historical and cultural background to illustrate its potential effects on any international arbitration with an Asian element.

Origins of Asian legal systems and key influences

Asia's legal systems are heterogeneous. They comprise civil, common and Islamic law systems as well as systems influenced by political ideals: socialist systems, Hindu/Buddhist influenced systems and democratic systems. These diverse systems are in turn influenced by decolonisation, economic development and regional integration. The local cultural values and accepted society norms have shaped legal institutions and Asian business practices over time. Asian dispute resolution culture has been influenced by a number of factors:

- dispute resolution practices inherited from colonial practices;
- aspirations to become global dispute resolution centres;
- strong ideals and reliance upon national courts;
- increasing foreign investment and transactions, particularly involving the U.S.; and
- Confucian ideals.

There has traditionally been quite a stark contrast between "Eastern" and "Western" approaches to business relationships, the law, and dispute resolution: Western parties rely on the strict rule of law and hold dear the comfort of their rights and liabilities being enshrined in a binding written contract, whereas business agreements in the East might be considered a more fluid concept, relying less on the written word and placing far greater emphasis on the evolving relationship between the parties and the concept of fairness. In certain Asian legal systems, particularly those of former colonies, that contract is decreasing as international transactions, investments and disputes increase and a more coherent 'global' model emerges.

Taking a couple of examples: Japanese businesses have long been associated in the West with a reluctance to litigate. In Japan, much emphasis has been placed on traditional values and social rules such as "kyojun" (a concept of respectful obedience, prevalent in Japanese transactions where one party is usually regarded as the "superior" party), ken-l (a concept of authority), giri (a duty or obligation arising from a social interaction with another person giving rise to duties to act in good faith and in a counter-party's interest before even being asked or required by a contract to do so) and sekentei (how a party is perceived within its community). These values coupled with a desire to avoid disputes or resolve them by consensual methods to "save face" promoted a culture of subservience of the inferior party to the superior and/or consensual resolution of disputes without resort to litigation.

Businesses in the People's Republic of China ("PRC") traditionally consider a concept of fairness as superior to the rule of law and the written contract. The legal and dispute resolution systems have been influenced by the trinity of lianmian (a party's social status and moral identity), renqing (accommodation of others; a supportive communication to show or maintain empathy, respect and modesty) and guanxi (the evolving relationship between parties and their respective interdependence upon each other in a mutually supportive relationship). This concept of the fair and evolving relationship does not sit easily alongside a reliance on the strict "black letters" of a written contract.

Whilst recent economic developments and increased foreign investment in Asia have resulted in modernisation and evolution of Asian transactions and

legal and dispute resolution systems, local factors and sophisticated cultural sensitivity must be recognised in formulating any dispute resolution strategy with an Asian element.

Potential pitfalls for unwary parties to Asian dispute resolution

Characteristics of Asian disputes can include:

- a greater tendency to rely on oral communications and transactions rather than written contracts which can create uncertainty and scope for problems if a dispute arises;
- "Black letter" written contracts and even the black letter of local laws might be subordinated to executive and bureaucratic practices;
- Political and religious ideology can be extremely influential in some areas; and
- National courts in some areas may not provide efficient or reliable dispute resolution services, with the potential risks of an inexperienced, inconsistent or partial judiciary, or even corruption or state interference.

As a result of some or a combination of these factors, the default choice for a method of dispute resolution in transactions involving Asian entities is arbitration. Even then, there can be no guarantee that the above factors might not have an impact since public policy considerations in national courts may cause problems for the enforceability of arbitral awards. Furthermore, state involvement in arbitration, as in, for example, the PRC, may mean that arbitration does not generate as a separate and distinct private route for the resolution of commercial disputes.

The changing face of Asian dispute resolution

Developments in Japan over the past 20 years serve to illustrate the developing nature of both Asian legal systems and culture. The collapse of the Japanese "bubble economy" in the late 1990s and the subsequent bankruptcy of many Japanese businesses led to both an upturn in civil litigation and an evolution of government policy. A new Civil Procedure Code was introduced in 1996, followed by the 2001 Justice Reform Agenda to increase capacity for commercial litigation and the passage of new arbitration legislation. The result was a new litigation culture, evidenced by waves of insolvency suits, shareholder derivative actions, taxpayer suits against government and tort liability claims (see Mr Pryles (ed.) Dispute Resolution in Asia, 3rd edition pages 2-3 para 1.1 et seq).

A number of Asian countries have enacted modern arbitration laws (Australia, Bangladesh, Hong Kong, India, South Korea, Macau, Japan, Malaysia, New Zealand, Philipinnes, Singapore, Sri Lanka and Thailand). Furthermore, some of these countries, notably Hong Kong and Singapore, are vying for positions as global arbitration centres.

Large flows of western money through international transactions and investments into South Eastern Asia have prompted governments to try to evolve their legislation to keep up with the changing nature of those transacting within the jurisdiction, and new schemes and rules for western investors have been created.

The increase in the numbers of lawyers and multi-jurisdictional law firms in areas of Asia has assisted to create a convergence of thinking and, to some extent, a certain uniformity to the structure of cross-border transactions involving Asian entities and, with it, a uniformity in dispute resolution methods, most commonly arbitration. Nevertheless, despite such developments, the cultural impacts cannot be ignored.

Some examples of the potential impact of local culture on arbitration

The traditional local social rules and values, whilst perhaps gradually disappearing from the prescription of the legal systems themselves, are still likely to affect and influence individuals involved in arbitration, for example, Asian arbitrators or Asian witnesses.

A classic example of a cultural impact is the perception of Asian witnesses in arbitration. Whilst western cultures uphold individualism and self-assertiveness, certain Asian cultures promote collectivism, group harmony and self-deprecation.

In western culture, not making eye contact when communicating can be seen as a sign of weakness or even deception. But in some Eastern cultures, looking into a person's eyes directly whilst speaking to them can be considered disrespectful. In some cultures it is taken as an offence if you do not stand up every time your senior stands up, but in other cultures this might be seen as an old-fashioned nuisance rather than a sign of respect. In some cultures, it is completely acceptable and expected that someone should shout or raise their voice to communicate something clearly; in others, this might be perceived as offensive or aggressive. Westerners might smile whenever they feel like it, and they might smile at strangers to be polite and friendly, whereas in certain Asian cultures they might smile only if it will not offend others, and they may not want to smile at a stranger for fear of the stranger thinking they are asking for a favour or trying to sell something. All such differences in culture can create very different impressions to different tribunals and are crucial to bear in mind in international arbitration hearings with an Asian element, whether it be Asian arbitrators or Asian witnesses.

Concepts like those of kyojun, ken-l, giri or sekentei from Japan or lianmian, renqing and guanxi from the PRC could influence how an arbitrator approaches questions of arbitration procedure. Take the discovery of documents for example, a key stage in any arbitration. In the PRC, there is no power to compel discovery of documents under the CIETAC's Rules (although there is a general power to examine a case in any way the tribunal deems appropriate, thus permitting procedural directions as to document production). In Japan, there is an express power to compel discovery under Rule 37 of the JCAA Rules and a party can request that a tribunal order discovery. However, in both cases, the parties are reliant on the tribunal using its discretion to order discovery. Notions of confidentiality, perception within society, evolving relationships, social status and respect might affect how a panel dominated by Asian arbitrators deals with discovery and could result in difficulties ascertaining documents which have not been volunteered by the opposing party.

All of the above serves to illustrate the importance of local knowledge and experience in international arbitration.

Landmark ruling reinforces London's position as "one-stop" arbitral seat

by Dr. Sean Kelsey (London)

Historically, the arbitration of disputes relating to English law contracts has often been complicated by court actions seeking to restrain arbitral proceedings on the grounds that the dispute in question is of a type which does not fall to be decided under the arbitration clause in the contract. English courts have frequently been called upon to consider whether or not a dispute about the validity or enforceability of the contract may be resolved by an arbitrator. Cases have turned on the semantic differences between a dispute "arising out of" and "arising under" the contract. At a stroke, the House of Lords has now called time on subtle semantic distinctions which, in the words of Lord Hoffman, "reflect no credit upon English commercial law."

Their Lordships' unanimous ruling in the case of *Premium Nafta v Fili Shipping*, [2007] UKHL 40, upheld the decision of the Court of Appeal in the case from which *Premium Nafta* arose, namely *Fiona Trust* v *Yuri Privalov* [2007], EWCA Civ 20. That case concerned English law charterparties (contracts for the hire of shipping). The shipowners purported to rescind the charterparties on the grounds that they had been induced by bribery and sought a declaration as to the validity of their rescission. When the charterers sought to settle the question of rescission through arbitration under the terms of the contractual arbitration clause, the shipowners obtained a court judgment to have the arbitration restrained on the grounds that it fell to the courts to establish whether or not the contracts had been validly rescinded. The charterers appealed to the Court of Appeal for a stay of the shipowners' proceedings. The Court of Appeal rejected the shipowners' arguments on the construction and validity of the arbitration clause and upheld the validity and application of the clause. Some of the shipowners appealed. The House of Lords, the U.K.'s highest appellate court, dismissed their appeal on two grounds.

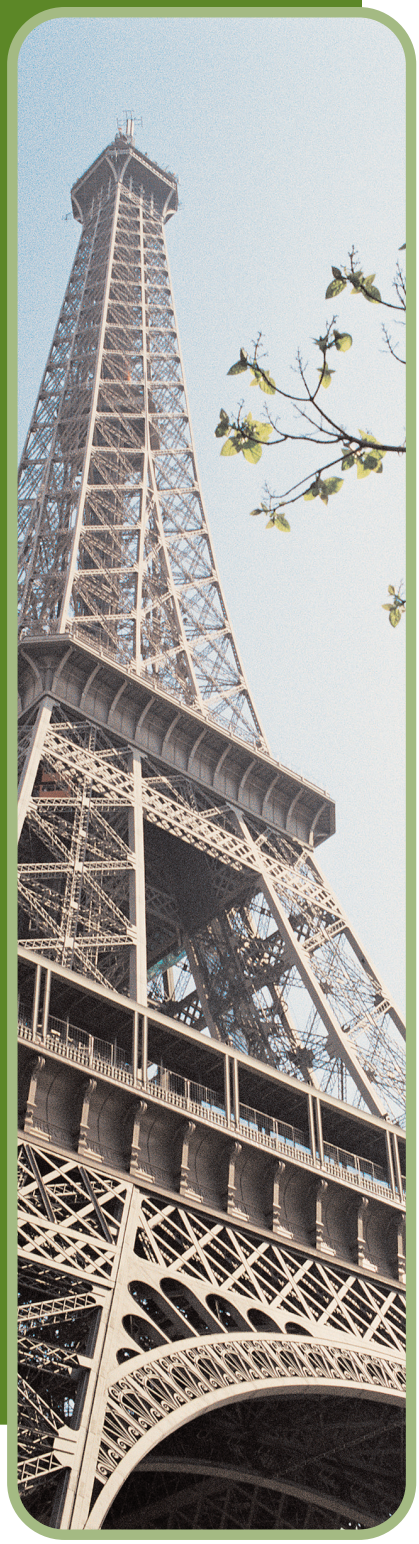
First, their Lordships held that the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. This aspect of the ruling expressly approved the finding in the Court of Appeal that the time had come to draw a line under the existing authorities regarding semantic distinctions in the construction of arbitration clauses, and to make what both courts have called a "fresh start."

Second, their Lordships staunchly upheld the principle of separability, which effectively fireproofs an arbitration clause against even the fundamental invalidity of the contract of which it forms a part. It was held that an arbitration clause must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration clause itself. In other words a contract with an arbitration clause may be invalidated on grounds of bribery, but unless it can be shown that the arbitration clause itself was invalid, then the clause will survive the invalidation of the contract. In a non-binding portion of his opinion, Lord Hoffman went even further, stating that even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remain to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

On the principle of separability, the judgment of the House of Lords calls to mind an old debate in which the doctrine is questioned on the grounds that it is often the case that the first that a party to a dispute knows of an arbitration clause in a contract is when it receives notice from the other side of an intention to arbitrate. The Lords found that if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration

agreement. It seems reasonable, therefore, that if a party alleges that someone who purported to sign as agent on his behalf had no authority to conclude an arbitration agreement as part of a wider contract, then that too would be an attack on the validity of the arbitration agreement. Nevertheless, the basic principle of separability is comprehensively reinforced by the judgment in *Premium Nafta*.

The decision ultimately says little that is either new or indeed terribly controversial. Much hinges on a straightforward application of provisions in the Arbitration Act 1996. Not the least of the judgment's virtues lies in the fact that England is now brought in line with competitor jurisdictions in the United States and elsewhere in Europe. (Notably, it offers a parallel to the position recently adopted by the Supreme Court of the United States in the *Prima Paint* case discussed in a previous edition of Arbitration World.) However there is considerable significance even in this modest achievement. Following on from the helpful *Lesotho Highlands* judgment, *Premium Nafta* can safely be said to have reinforced the policy objective of ensuring that arbitrations conducted subject to English law will less frequently face jurisdictional challenges posing procedural obstacles. These decisions enhance London's position as a "one-stop" arbitral seat for the efficient resolution of international commercial disputes.



K&L Gates Office News

In January 2008, we announced two significant developments to our U.S. and European presence: the merger with Texas firm Hughes & Luce, and the launch of a Paris office.

The merger with Hughes & Luce, a 150-lawyer firm based in Dallas, Fort Worth and Austin, increases our presence in the Lone Star State, now home to more than 10 percent of Fortune 1000 companies. It adds a number of respected Texas practitioners - including a former Texas Supreme Court Justice, the former Chair of the Litigation Section of the American Bar Association, and a former U.S. Supreme Court Law Clerk - to the firm's already impressive roster of distinguished firm members.

With the establishment of the Paris office, the firm is now situated in the three largest economies of Europe: Germany, the United Kingdom, and France. Paris is also home to the ICC Court of Arbitration. The firm's Paris-based partners are qualified in the U.S. and France, are members of both the New York and Paris bars, and have impressive experience in working with international clients.

With these developments, the firm now boasts over 1,500 lawyers in 24 offices in the U.S., Europe and Asia.

U.S. Court of Appeals Imposes Duty to Investigate Potential Conflicts of Interest

by Michael Napoli (Dallas)

In *Applied Industrial Metals Corp. ("AIMCOR") v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, (2d Cir. 2007), the Second Circuit (covering federal courts located in New York, Vermont and Connecticut) imposed a duty on arbitrators either to investigate potential conflicts of interest or to inform the parties of the potential conflict and the decision not to investigate.

In AIMCOR, the arbitrator, who was the Chariman and CEO of Seacor Holdings, disclosed to the parties that a subsidiary of Seacor, SCF, was negotiating toward a carriage contract with Oxbow Industries, AIMCOR's parent company. The arbitrator informed the parties he would not be involved with this particular transaction. Unknown to the arbitrator and the parties, however, SCF and Oxbow were parties to another carriage contract, which ultimately generated $275,000 in revenue for SCF.

The panel found in favor of AIMCOR. Following the award, Ovalar discovered the carriage contract and moved to set aside the award, arguing that the failure to disclose the contract demonstrated that the arbitrator was biased in favor of AIMCOR.

The Second Circuit held that the award was properly vacated. The court noted the standard for determining whether an arbitrator was biased, as initially set out in *Morelite Const. v. N.Y.C. Dist. Council Carpenters*, 748 F.2d. 79 (2d Cir. 1984), was whether a reasonable person would have to conclude that an arbitrator was partial to one party. The court reasoned that an arbitrator who knows of, but fails to disclose, a material relationship meets this standard. Because the trial court did not find that the arbitrator actually knew of the carriage contract, the Second Circuit could not affirm on that basis.

Instead, the Second Circuit extended *Morelite* to require that an arbitrator who becomes aware of a potential conflict must either (i) investigate the conflict (which may reveal information which must be disclosed) or (ii) inform the parties of the potential conflict and the arbitrator's decision not to investigate that conflict. Because the arbitrator did neither, the court concluded that a reasonable person would find that he was partial to AIMCOR.

This decision may well have ramifications beyond the U.S., resulting in a higher standard for arbitrators who become aware of a potential conflict of interest across the board.

U.S. Arbitration Fairness Act

By Marcus Birch (London) and Jeremy Mercer (Pittsburgh)

Legislation under consideration in the U.S. Congress (the Arbitration Fairness Act) proposes significant amendments to the U.S. Federal Arbitration Act, S.1782. The new Act would limit recourse to arbitration where the parties are in unequal bargaining positions and make significant inroads into the doctrines of severability (according to which the validity of an arbitration clause or agreement is assessed separately from that of the main contract) and competence-competence (the arbitral tribunal's power to rule on its own jurisdiction) as they are applied in U.S. arbitrations.

The first section of the proposed Act would render unenforceable any pre-dispute arbitration agreement relating to a dispute in any of the following fields :

- employment disputes (other than in the context of a dispute concerning a collective bargaining agreement),
- consumer disputes,
- franchise disputes,
- disputes under any civil rights statute, and
- disputes under any statute regulating transactions between parties of “unequal bargaining power.”

Congressional hearings on the proposed act have focused on this part of the Act, notably the live issue of the alleged "one-sidedness" of consumer arbitration. The AAA argued that the legislation should proceed not by amendment of the FAA, but rather by making mandatory its own standards on the handling of consumer disputes.

The Act's second section has attracted less political attention, but is of potentially great significance to practitioners. Under this section, the arbitrability of any dispute falling under the FAA would be determined by the competent court rather than the arbitral tribunal, even if the issue was the validity of the contract rather than that of the arbitration agreement. This would constitute a serious inroad into the doctrines of severability and competence-competence.

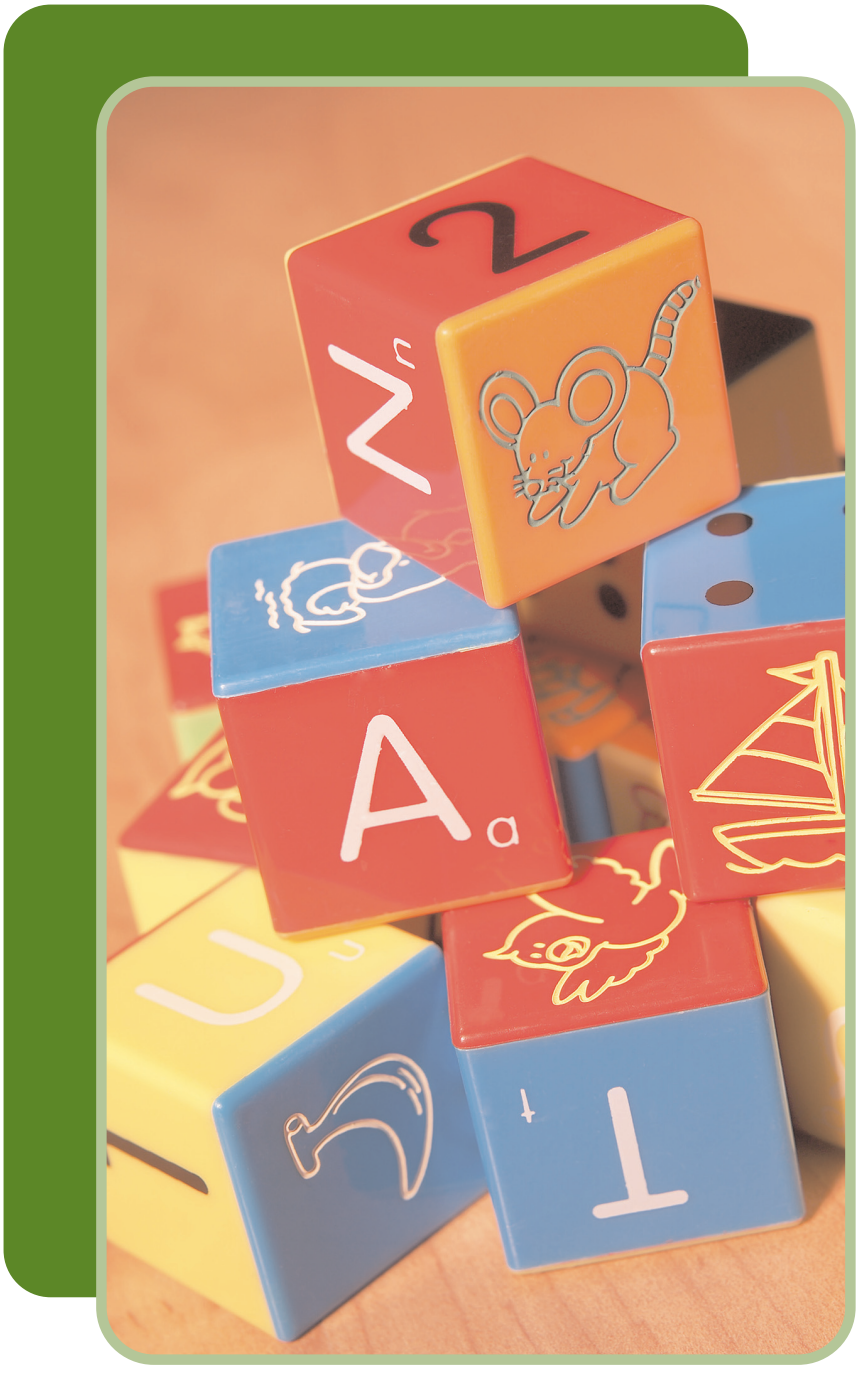
If passed, the proposed legislation would not distinguish between international and domestic U.S. arbitration. While the first section would distinguish between business-to-business disputes and disputes involving parties of "unequal bargaining power," that distinction would not apply to the second section.

The Act would apply to any "dispute or claim" that arises on or after the date of passage, regardless of when the parties entered into the agreement to arbitrate.

Federal Arbitration Act - Are Changes Afoot in the Manner in Which United States Federal Courts Review Arbitral Decisions?

By Jeremy Mercer (Pittsburgh)

On Wednesday, November 7, 2007, the United States Supreme Court heard oral argument in an arbitration-related case that Justice Breyer labeled as possibly being the "case of the century." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, No. 06-989. At issue before the Court is the question of whether parties to an agreement to arbitrate can expand the scope of a United States district court's authority to review, modify, vacate, or affirm an arbitration decision or whether the statutorily provided grounds in the Federal Arbitration Act ("FAA") for modification or vacation of an arbitral award are the sole and exclusive grounds for such action.



After oral argument, the Court has ordered the parties to submit additional briefs on three issues, summarized as (1) whether a party can enforce judicial review provisions under an authority other than the FAA, (2) if the authority exists, whether the parties to the litigation relied in whole or in part on that authority, and (3) whether, in the course of the litigation, the petitioner waived its reliance on that authority. How will the Court rule? As anyone with any appellate experience knows, predicting a court's decision based upon oral argument is like trying to predict the weather using a dice roll. The same holds true for predicting decisions by the U.S. Supreme Court. But no matter what they decide, the Justices will have to make that decision before the end of June 2008, which marks the end of the Court's current term.

Who to Contact

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