NORTON ROSE FULBRIGHT

International arbitration report

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Norton Rose Fulbright

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International arbitration report
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Editorial

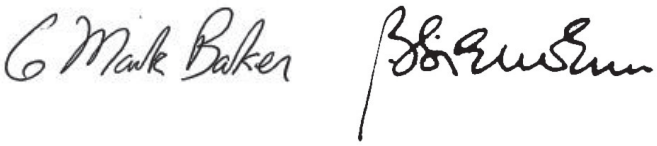
Welcome to issue 13 of Norton Rose Fulbright's *International Arbitration Report*.

In this issue, we look at the use of arbitration to resolve M&A disputes. We interview Helena Tavares Erickson, Senior Vice-President, Dispute Resolution Services & Corporate Secretary, at CPR: International Institute for Conflict Prevention and Resolution.

Continuing our series on Investor-State Dispute Settlement (ISDS), we provide an analysis of the proposed reforms to ISDS regimes around the globe. We also add to our other series; offering an update on mediation developments including the Singapore Mediation Convention; and look at legislative developments and market trends in third party funding.

We analyze the important practice topic of data protection and cyber risk in arbitration, and consider how issues of good faith changed circumstances and hardship arise and can be dealt with in arbitration.

Our case law updates discuss recent jurisprudence on challenging and enforcing awards from Singapore, Hong Kong, England and Wales. We look in detail at developments in arbitration across Africa. And, as always, our global round up summarizes "need to know" developments in arbitration law, practice and trends in other jurisdictions across the globe.



Mark Baker and Pierre Bienvenu Ad. E.
Co-heads, International arbitration
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About the cover

Our front cover for this issue features one half of the sculpture *Dialogue* by Mohand Amara, in Seoul's Olympic Sculpture Park. Amara's artwork seeks to express the value of dialogue between people overcoming barriers such as geography, language, culture and politics. Seoul is the host of the IBA Annual conference 2019.

Q&A with Helena Tavares Erickson

Senior Vice-President, Dispute Resolution Services & Corporate Secretary, at CPR

By Martin Valasek and Cara Dowling

We speak with Helena Tavares Erickson, Esq., Senior Vice-President, Dispute Resolution Services & Corporate Secretary, at CPR: International Institute for Conflict Prevention and Resolution (CPR).

Please tell us a little about the key elements of your role?

I have begun my sixteenth year with CPR. I started working with CPR's industry and practice focussed ADR committees, and on research and education, and eventually came to oversee the Dispute Resolution Services and Panels departments in administering commercial matters. I am also the liaison to the Arbitration Committee and serve as CPR's Challenge Review Officer. In addition, I oversee our Awards Program, our Brazil Initiative, and CPR's Annual Meeting.

> They are coming to someone who has been in their shoes, who understands arbitration, the types of disputes they're dealing with and, importantly, the types of neutrals appropriate to deal with those disputes

I came to this job after spending 17 years in private practice working primarily in international arbitration and litigation at major global law firms. As such, when parties and counsel bring a case to us, they know that they are coming to someone who has been in their shoes, who understands arbitration, the types of disputes they're dealing with and, importantly, the types of neutrals appropriate to deal with those disputes.

Please tell us about CPR, and what is unique about CPR's approach to arbitration?

CPR is an independent non-profit organization that helps prevent and resolve legal conflict effectively and efficiently. CPR's offices are located in New York, though parties can also file CPR cases at CEDR in London. We have a broad remit which includes mediation, arbitration and other ADR (such as mini-trials and dispute resolution boards). CPR was formed in 1977 by corporate counsel and their external lawyers who, in the face of the high costs of litigation, sought alternative mechanisms. That collaboration with corporate counsel at multinational companies and external counsel continues today.

Early on, most of our work related to raising awareness, in the US and globally, about ADR. Our board identifies regions where they see a particular need for education or training – that is how we started our Brazil Initiative, and we are currently expanding throughout Latin America. Our training materials have been translated into many languages, and used in Africa, the Middle East, across Asia, and elsewhere. In 2004, CPR developed a China business mediation centre. CPR provided input to the original EU Mediation Directive, and representatives participated in the Singapore Mediation Convention working group sessions.

In terms of arbitration, CPR's early years focussed on non-administered arbitration. Most of our members and users were parties and counsel who were sophisticated and capable of running proceedings on their own. More recently, some of our multinational members asked CPR to come up with a set of administered rules. They were finding some of their counterparties were not as comfortable with a non-administered process. That led CPR to develop Administered Arbitration Rules. We

also have a range of sector-specific rules and programmes, including a franchise mediation programme, patent and trademark rules, and construction rules.

Many cases under CPR rules or where CPR neutrals are involved, are still non-administered. For that reason, we don't have all encompassing caseload statistics available. In terms of cases where CPR is asked to assist parties in selecting a neutral (in administered proceedings or otherwise), in the last fiscal year 19 per cent of cases arose out of contractual disputes, 9 per cent construction, 13 per cent franchise, and 9 per cent corporate disputes. The remainder encompasses various different disputes, such as insurance, IT, IP, government contracts, patents, or M&A.

> Our neutrals come from all over, and over 20 per cent are located outside the US

Our panel of neutrals comprises accomplished individuals who have been acting as neutrals for some time. They come from all walks of life. 99 per cent are attorneys, with some dual qualified, for example, as engineers or accountants. All have practiced in their field for many years, many have been GCs or partners at law firms, and many were involved in ADR as a party or counsel before becoming a neutral. We have 28 speciality panels, such as our energy and construction panels.
Our neutrals come from all over, and over 20 per cent are located outside the US. We can (and do) provide local neutrals for venues right across the US and the world.

In 2019, CPR revised its CPR Rules for Administered Arbitration, for both domestic and international disputes. Can you describe a few key features?

We have introduced a threshold for cases (US $3 million) beneath which, absent party agreement otherwise, a sole arbitrator will be appointed by default. Another new feature is that where a panel of three arbitrators is to be appointed, the default selection mechanism will be CPR's award-winning screened selection process. That process provides that each party will nominate its own arbitrator, but all interface with the arbitrators is conducted through CPR with no contact between candidate and nominating party. Arbitrators do not know which party nominated them, thus strengthening neutrality (perceived and actual).

We have added and strengthened our rules on early disposition of issues. We have had guidelines for arbitrators on early disposition for many years, but our rules committee felt it time to set out in the rules how the process would work. We also now provide for cybersecurity to be discussed at the first conference. In addition, our rules encourage tribunals to suggest mediation during proceedings (though the arbitrators are prohibited from sitting as the mediators, and vice versa). In addition, as arbitrators are sometimes reluctant to suggest mediation fearing parties might think they have prejudged the case, the rules provide for CPR to reach out at an appropriate time (e.g. post-discovery) to nudge parties to consider mediation.

We have provisions dealing with timeliness of awards. According to our latest statistics, most cases are decided within 11.1 months. But efficiency remains a focus, so we added rules for adoption of a timetable in a pre-hearing conference. In most cases, the hearing is to be held within 6 months for domestic cases or 9 months for international cases after the first conference, and the final award is to be rendered 2 months after the close of proceedings. If a case is not concluded within 12 months, arbitrators and parties are expected to seek approval from CPR explaining why. We also have new rules encouraging participation by young practitioners.

Costs and duration of proceedings is an ongoing concern for parties. What is CPR's approach to managing or mitigating these concerns?

Efficiency in time and costs is at the very heart of CPR's approach. We find when these are issues for users of ADR, generally it is because they are not using CPR! Most of our neutrals are accomplished and accustomed to running proceedings; they do so very well, and are not afraid of curbing parties when it is needed. As I noted previously, most cases are decided within 11.1 months and if a case runs on more than a year then CPR will ask the parties and tribunal to explain why. CPR is not for the litigator who wishes to leave no stone unturned. That said, if the parties are seeking a procedure that is basically the equivalent of a Federal Court litigation but private (such as where trade secrets are discussed), we are able to provide that too. We do not have a cookie cutter approach; we work with parties to help them resolve their dispute in the manner they need and want.

CPR is part of a task force looking at the important issues of cybersecurity and data protection. Can you tell us about the task force's work?

My colleague Olivier André, SVP International, is CPR's designee to the cybersecurity task force. They are very hard at work. Their draft guidelines have gone through several comment

and review periods, and are due to be released in the fall. So, watch this space! We also have our own cyber panel comprising a group of neutrals who have experience in cyber breaches and insurance claims.

What other innovations has CPR been involved in recently?

We have been involved for many years in online dispute resolution (ODR). We have been working with a provider of ODR services, as well as working with corporate members on programmes in this area. CPR also participated in the UNCITRAL working group for ODR rules. In the US, we have not seen a lot of take up yet but that is not the case universally. In Brazil, some companies resolve all of their disputes online and have done so for years.

What is CPR's approach to addressing concerns about a lack of diversity in arbitral appointments?

Encouraging diversity in the widest sense of the word (encompassing gender, race and ethnicity, geographic location, age, LGBTQ, disability etc.) is very important to CPR. We address diversity issues from many angles including recruitment, nominations, and education.

We have language in our nomination letters to remind parties that diversity is important and to encourage them to consider diverse candidates. Our diversity task force is working on a model clause that can be adopted by parties which will also encourage parties to select diverse candidates. There is also a strong impetus to push forward and train young attorneys, who are most often a more diverse pool. Our rules encourage involving young lawyers as advocates in parts of proceedings, with the help of a senior lawyer as necessary. CPR and FINRA also have a programme with the Leadership Council on Legal Diversity which offers training and mentorship to candidates from diverse backgrounds over a two year period. We are involved with other organizations that promote diversity, and offer training and hold events on these issues. And we are delighted to be seeing progress – according to our FY2018 statistics, 31 per cent of our neutrals selected were diverse. That is a larger percentage than our pool of neutrals who identify as diverse – which is a testament to their quality.

CPR and CEDR recently published a report on their survey of corporate counsel on the use of ADR and arbitration. Can you share any key insights?

The corporate counsel surveyed reported significant experience with ADR processes. There was no straightforward preference for one type of ADR over another, preference was nuanced and dependent on the case; though there was a preference for arbitration in cross-border disputes. A meaningful proportion of arbitrations settled through mediation: 30 per cent of domestic cases and 20 per cent of cross-border cases. Overall mediation's overall success rate was reported to be very high on both sides of Atlantic – indeed UK mediators reported an aggregate settlement rate of 89 per cent.

Anecdotally, I have noticed that counsel and parties are increasingly looking to use local venue locations and neutrals local to the venue. They are less likely to want mediators or arbitrators from far away unless the case calls for their unique experience. I suspect this is driven by costs considerations. But it also speaks to the increase in the number and quality of local neutrals. Outside the US, there remains a tendency towards major arbitration centres but we have seen a growth in interest in new regions, such as Spain. We are also regularly fielding enquiries for collaboration from institutions across Asia and Africa. So ADR in general, and arbitration in particular, is growing everywhere.

CPR recently launched a new International Mediation Procedure, which proved timely given the Singapore Meditation Convention launched in August 2019. What are your thoughts on these developments?

CPR's International Mediation Procedure was introduced in 2017 to replace our geographic-specific procedures. The new procedure is intended to be usable in all parts of the world. The Singapore Mediation Convention is a very welcomed development. It will assist legal communities across the world, where there is not currently a robust culture of mediation, to grow their mediation centres and practices.

If the Singapore Mediation Convention can do for mediation what the New York and Panama Conventions have done for arbitration, I will be very pleased. The challenge is to get to that level of acceptance and implementation, but I am hopeful. The world is changing so significantly and rapidly, particularly technology, which is impacting relationships between counterparties. In these times, having consensual processes available for resolving disputes is so important.

Arbitrating M&A disputes

How the arbitration landscape has changed and where technology might take it next

By James Rogers and Matthew Buckle

Few Latin phrases are remembered better by law graduates than *caveat emptor*, meaning "buyer beware". It is the principle that the buyer alone is responsible for checking the quality and suitability of goods before a purchase is made. Sophisticated M&A lawyers have long since mitigated this buyer risk through expansive due diligence exercises and tight contractual controls. In particular, M&A deals feature often heavily negotiated representations and warranties, designed to provide a purchaser with a cause of action against the seller in case of skeletons in the closet. Post-acquisition price adjustment mechanisms are another means for the parties to revisit the equilibrium of the transaction after the deal has closed. This article examines the growth of arbitration as a forum for resolving disputes that arise from these contractual mitigants of risk, before considering the impact of legal technology in this area.

Getting what you pay for and paying for what you get

Representations and warranties are simply statements contained in the contractual transaction documents and made by the seller to promise that certain facts are true, usually pertaining to the target business and in particular its financial and operational health. A common example is that: "The company is not involved in any litigation". Where after closing, the statement turns out to be false, the buyer has a contractual cause of action, usually to recover monetary damages.

As corporate lawyers have sought to minimize buyer risk, so representations and warranties have become increasingly expansive, designed to provide belt and braces protection to a buyer, and plug gaps (known and unknown) in the buyer's due diligence exercise.

Lawyers on the other side look to protect the seller by including within the sale and purchase agreements terms designed to exclude, reduce or carefully delimit the seller's liability, including for example through the use of disclaimers or exclusions, contractual limitation periods and *de minimis* and *de maximis* thresholds for claims.

Price adjustment mechanisms are another important means for the buyer to ensure that it only pays for what it gets and that the seller gets fair value for what it sells. Earn-out provisions, for example, subject the purchase price to adjustment post-closing based on some future metric, normally turnover or profit performance.

Risk mitigation means disputes

Of course disputes can arise at all stages of an M&A transaction, including before the deal is signed and between signing and closing. At the pre-signing stage, these disputes commonly relate to alleged breaches of whatever agreements have been put in place at the nascent stage of the deal: memoranda of understanding, letters of intent and confidentiality agreements, for example.

In between signing and closing, it is common for disputes to arise over the non-fulfilment of conditions precedent or other contingent obligations set out in the agreement, requiring procurement of certain outcomes, for example, relevant authority approvals for the deal or putting in place appropriate escrow arrangements.

> Although designed to reduce and mitigate risk, representations and warranties and price adjustment mechanisms are themselves a common source of disputes

But post-closing disputes can often be the most difficult. Although designed to reduce and mitigate risk, representations and warranties and price adjustment mechanisms are themselves a common source of disputes, given that in essence they each provide a means for one party to challenge the quantum of the transaction consideration after the event. This can result for the other party in a significant shift away from the deal that it thought it had done, which is a recipe for a bitter fight.

Arbitration of M&A disputes

Arbitration has become a prominent forum for the resolution of corporate disputes, including those arising from M&A deals. The LCIA's 2018 Annual Casework Report records that 2018 saw a significant increase in the number of shareholder, share purchase and joint venture agreements being referred to LCIA arbitration. The proportion of total LCIA cases involving disputes arising from such agreements was 21 per cent in 2018, up from 15 per cent in 2017. By contrast over the same period there was a 3 per cent fall in the number disputes involving loan and other debt facility agreements.

One particular advantage of LCIA arbitration in the context of an M&A dispute is that the LCIA Rules (unlike some other forms of arbitration) contain an express confidentiality obligation. As a general rule, transaction parties will often prefer to address disputes over the deal in private. Particularly, for example, disputes in relation to purchase price arising potentially many months after the deal has become public knowledge or the target has been merged into the purchasing entity.

Another attraction of arbitration is the parties' ability to choose their arbitrator, thus tailoring the expertise of the tribunal to suit the particular facts at issue. Post-closing disputes in particular often centre on factual, accounting or technical issues (establishing whether the warranty was true or whether the price should be adjusted) rather than purely legal issues.

For the same reason, it is also common in an M&A context for the parties to include provision in their transaction documentation for expert determination, either as a preliminary or parallel step to pursuing claims in arbitration. Although decisions of an expert determiner might be contractually binding, they are not enforceable like a judgment or arbitration award, and so must be the subject of a separate further action in court or arbitration if not voluntarily complied with.

Evolution of arbitration

There is sometimes a sense that arbitration might have risked becoming a bit of a victim of its own success in resolving commercial disputes. Having begun life as a shorter, cheaper, alternative process for resolving disputes privately on a bi-partisan basis, its huge growth to become a predominant forum for cross-border commercial cases has meant that it has had to evolve to meet the needs of more and more complex circumstances. Big-ticket arbitrations are now likely to involve at least the same time, costs and complexities as English litigation.

Recent years have seen significant efforts by the leading arbitral institutions to ensure that arbitration remains a flexible and effective forum and to meet other challenges in relation to complex corporate disputes.

In particular, M&A deals often involve not a single bi-partisan agreement, but a suite of transaction documents between multiple parties. This might include the buyer, seller and the target company but also other shareholders, any guarantors and even any key suppliers, subsidiaries or other stakeholders. As most arbitral rules are written on a bi-partisan basis (i.e. claimant versus respondent), arbitration does not at first sight readily lend itself to disputes arising from such multi-party, multi-contract disputes, particularly where each transaction document might have its own arbitration agreement. Clearly such an arrangement runs the risk of multiple parallel proceedings relating to the same set of facts.

Many institutions, including the ICC, have therefore added clear provisions on consolidation and joinder into their procedural rules and by incorporating

such rules into their arbitration agreement, parties will normally have consented in advance to the possibility of the consolidation of proceedings and the joinder of third parties in disputes arising under compatible arbitration agreements.

> Arbitration clauses containing consolidation or joinder provisions are notoriously difficult to draft, generally requiring either something entirely bespoke and very specific, or else, something very light touch

What is a compatible arbitration agreement and whether there is clear consent from all parties for consolidation or joinder is not always straightforward of course. Although the institutional rules provide a clear procedure for consolidating proceedings or adding parties, arbitration is still a consensual process and the clear consent of all of the parties to the proceedings will need to be established following normal contractual principles. This means that arbitration clauses containing consolidation or joinder provisions are notoriously difficult to draft, generally requiring either something entirely bespoke and very specific, or else, at the complete opposite end of the spectrum, something very light touch.

Addressing time and cost concerns, many institutions have introduced or clarified rules designed to provide for expedited arbitration, with simplified procedures and restrictive time limits. The ICC expedited procedure rules for example do away with the Terms of Reference stage and foresee that a tribunal will generally determine the case on paper, on the basis of limited documents and pleadings, and without a final evidentiary hearing.

These elements can be tailored of course, and there remains in Article 22 of the ICC Rules both the duty on the tribunal to manage the case effectively and also the discretion over how the proceedings are carried out to discharge that duty. This is a duty that extends to the parties to ensure that the proceedings are carried out expeditiously but proportionately. As well as saving time in an appropriate case, the expedited procedure is cheaper. The ICC online costs calculator suggests anticipated arbitration costs are around 20 per cent lower following the expedited procedure versus the standard ICC procedure.

> M&A disputes may require interim measures on an urgent basis, in particular in those cases arising between signing and closing

Finally, M&A disputes may require interim measures on an urgent basis, in particular in those cases arising between signing and closing, for example to compel or prevent actions being taken by either party that might affect the value of the target. Although arbitral rules have long since recognized the right of parties to go to a competent local court to obtain such relief on an urgent interim basis (see for example Article 28(2) of the ICC Rules), the introduction of emergency arbitrator provisions to provide interim relief from a promptly appointed sole arbitrator (who is thereafter prevented from acting in the main dispute on the merits), has reinforced the ability of parties to obtain such urgent relief within the agreed disputes forum, that is to say within the arbitration.

The decision of the English High Court in *Gerald Metals SA v Timis Trust* [2016] EWHC 2327 (Ch) further underlines the shift. The effect of the decision in that case was that by opting the availability of emergency arbitrator relief into the scope of their arbitration agreement (by incorporating by reference institutional rules containing emergency arbitrator provisions), parties are likely to have limited the jurisdiction of the English court to grant that interim relief.

These trends underline that arbitration is a preferred forum for resolving corporate disputes.

Future trends

Like many areas of legal practice, technology is changing the way that parties approach M&A deals and disputes. For example, Norton Rose Fulbright has developed a number of legal processes that automate and add significant efficiencies to the management of satisfying conditions precedent, a key stage of completing any M&A deal. As such processes become more and more standardized in order to be capable of being better and better managed by computers, so the data relating to such matters becomes more consistent. Consistent data sets and machine learning then allow for more exciting uses of artificial intelligence, including useful and error-free data analysis and, with that, outcomes prediction.

Many M&A disputes turn on accountancy data and the purchase price ultimately paid (and any adjustment to it) is often linked to the company's accounts or other financial reporting, carefully compared to contractual reference dates. Presently this typically requires an accountancy or valuation expert witness to undertake a forensic exercise, reviewing relevant data and documents, before filtering and analyzing the information revealed in order to opine on the outcome of those data and documents in a written report upon which the expert will be cross-examined in front of a tribunal.

Numerous legal technology tools are already available and utilized by the best legal and accountancy teams to assist and streamline this traditional approach – including e-disclosure tools that utilize predictive coding to sort data sets and data visualization and analytics tools that sort and present such data to the tribunal in the most comprehensible and persuasive way. This is the advocacy of the now, rather than the advocacy of the future.

However, as the objectivization of data continues (and particularly as legal technology solutions are increasingly used at the front end of a transaction, as in the case of conditions precedent automation), we will increasingly see innovative process-led solutions being applied not merely as bolt-on tools that augment a traditional approach to the resolution of disputes arising from such transactions, but as genuine alternatives to those traditional approaches. A dispute over whether a condition precedent has been complied with, a representation was true, or a price adjustment is required will, for example, become increasingly the product of a computer's reading of the consistent and objective data at the computer's disposal in relation to those promises, and less and less about human interpretations of that data.

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Recent developments in ISDS reform

The big picture

By Martin J Valasek

Investor-State dispute settlement (ISDS) is an important feature of investment treaties. ISDS, the procedural mechanism through which an investor may claim compensation for a violation of a substantive investor-protection standard, be it included in a bilateral investment treaty (BIT) or a trade treaty with investment protections, determines the robustness of those protections. The traditional mechanism (investment arbitration between the investor and the host State, modelled on commercial arbitration) has been under attack for some time now from a range of actors and for a variety of reasons. Hostility to the traditional model, which has spread from the academic realm to the political stage, has led to changes in individual treaties and wider reform initiatives.

ISDS reform in treaties

While important changes are afoot, the vast majority of investment treaties (some 90 per cent) in force around the world were concluded before 2012 (old generation treaties) and have traditional ISDS provisions. Indeed, the majority of known ISDS cases have thus far been based on old generation treaties. The new generation of treaties concluded since 2012 (of which there are approximately 300) have incorporated many new features, albeit on an inconsistent basis given the vagaries of bilateral negotiations and individual State preferences.

Most of the changes to new treaties are to substantive provisions, for example, refined definitions of investor and investment, circumscribed fair and equitable treatment (FET) standard, clarified standard on indirect expropriation, and promotion of corporate and social responsibility. However, there have also been modifications to ISDS provisions. These range from omitting ISDS altogether (e.g. in favor of domestic courts, mediation or State-to-State dispute settlement), limiting ISDS to particular types of treaty breaches, or incorporating various enhancements to the traditional model of ISDS such as provisions bolstering impartiality of arbitrators, early dismissal opportunity for frivolous claims, or transparency provisions opening ISDS proceedings to the public and third parties.

> Reform has also come to some old generation treaties, in the form of amendments or wholesale replacement

Reform has also come to some old generation treaties, in the form of amendments or wholesale replacement. For example, in 2018 the Republic of Korea and the US signed an amendment to their 2007 treaty. The amendment includes clarifications on the meaning of the minimum standard of treatment and excludes ISDS procedures from the scope of the most-favored-nation (MFN) clause. It also forms a joint committee to explore improvements to the ISDS provision that meet both countries' objectives.

In North America, the best known system for ISDS is set out in Chapter 11 of NAFTA. In 2018, following President Trump's election based in part of his promise to scrap NAFTA, Mexico, Canada and the US signed a new NAFTA – the United States-Mexico-Canada Agreement (USMCA) – after months of intense negotiations on many substantive issues. ISDS did not escape the negotiators' scrutiny. Under the new treaty, which has yet to be ratified by all the three countries, Canada would withdraw from ISDS entirely, leaving ISDS in place only between the US and Mexico, albeit for a narrower set of disputes.

What's new in the EU?

The EU has seen the most vociferous opposition to ISDS. The European bloc has also been at the forefront of the most direct challenge to the traditional model of ISDS. In recent treaties concluded by the EU – with Canada (CETA), Singapore and Vietnam – the traditional model has been replaced by a so-called Investment Court System (ICS), whereby investment disputes may be submitted to a permanent and institutionalized court yet to be established. The members of the court are appointed in advance by the States that are parties to the treaty, subject to independence and impartiality requirements. And the court's decisions are subject to review by an appellate body. The EU's ultimate objective is to replace the bilateral investment courts of each treaty by a single Multilateral Investment Court (MIC). The MIC envisioned by the EU would be a permanent international institution to adjudicate disputes under both existing and future investment treaties.

> The EU's ultimate objective is to replace the bilateral investment courts of each treaty by a single Multilateral Investment Court

Progress towards the MIC is slow, although some initial steps have been taken. On March 20, 2018, the Council of the European Union adopted negotiating directives authorizing the European Commission to negotiate a convention establishing the MIC. The Commission intends to start negotiations within UNCITRAL.

ISDS has also been challenged within the European courts. In 2018, in the *Achmea* decision, the Court of Justice of the EU (CJEU) invalidated traditional ISDS in intra-EU treaties on the basis that the traditional system incorporated into a treaty between Member States was incompatible with the autonomy and supremacy of EU law and the requirement that EU law be effective. By contrast, in April 2019, the CJEU sided with ICS, holding that this new form of ISDS was compatible with (i) the autonomy of the EU legal order, (ii) the general principle of equal treatment, (iii) the requirement that EU law be effective, and (iv) the right of access to an independent and impartial judiciary.

Multilateral reform initiatives

In addition to these changes in specific jurisdictions, there are reform initiatives taking place on a number of fronts, including the OECD, the WTO, UNCITRAL and ICSID.

UNCITRAL, for example, is overseeing a State-driven ISDS reform initiative, through Working Group III (the Group). The mandate of the Group is the following: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. The Group has identified concerns that fall into four categories

- Consistency, coherence, predictability and correctness of arbitral awards.
- Arbitrators and decision-makers.
- Cost and duration of ISDS cases (with focus on arbitration proceedings)
- Third party funding.

The Group's work now turns to identifying relevant solutions. The Group is following a three-step workplan for developing solutions

- Delegations submitted solutions to be developed to UNCITRAL in July 2019.

- The submitted proposals are being discussed and a project schedule will be developed at the next session in October 2019 in Vienna.

- Once the project schedule is created, the Group will begin to substantively discuss and develop potential solutions for recommendation to the Commission.

States have acknowledged that a distinction must be maintained between well-founded concerns, which are supported by facts and empirical research, and unfounded concerns, which are based on perceptions. Further, States have also acknowledged that some of the concerns raised with respect to ISDS can be resolved within the framework of international investment treaties, through amendments or interpretive statements.

As the leading arbitral institution for ISDS, ICSID is also focused on reform. While amendment of the ICSID Convention itself is not on the table – or not yet anyway – the ICSID Secretariat has been busy leading extensive consultations about the ICSID Arbitration Rules to

- Modernize the rules based on case experience

- Make the process increasingly time and cost effective while maintaining due process and a balance between investors and States.

- Make the procedure less paper-intensive, with greater use of technology for transmission of documents and case procedures.

In March 2019, the ICSID Secretariat published its second working paper on proposals for rule amendments, building on proposals that were originally published in August 2018.

The jury is out whether these reform initiatives will achieve meaningful improvements. At a recent event in London, a leading practitioner is reported to have lamented a "collective failure of imagination" when it comes to procedural improvements of ISDS. Nor is it clear that the posited reforms will appease die-hard opponents of ISDS, many of whom appear focused on eliminating ISDS altogether in any of its current forms.

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The Singapore Mediation Convention

An update on developments in enforcing mediated settlement agreements

By Alison FitzGerald and Thomas Hatfield

The United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) opened for signature in Singapore on August 7, 2019, and will come into force six months after being ratified by at least three State Parties. So far, 46 States have signed, including China, India and the US. The Singapore Convention responds to the demand from a growing body of mediation users for an enforcement mechanism applicable to mediated settlement agreements in cross-border disputes.

The Singapore Convention

Currently, in the absence of an international regime, mediated settlement agreements are generally only enforceable as any other contract. The exception is where mediation is undertaken within arbitration or litigation proceedings and the settlement agreement is recorded within, and is therefore enforceable as, an arbitral award or court judgment. (See our prior article The Med-Arb Q&A in issue 6 of the *International Arbitration Report*). However, that requires parties to participate in formal dispute resolution processes in parallel to mediation, which some argue undermines the consensual nature of mediation and adds additional layers of time and cost. The Singapore Convention and corresponding Model Law is intended to provide a solution – a legal framework within which settlement agreements resulting from the mediation of international commercial disputes may be enforced. In this respect, it purports to play a role similar to that of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention), and the influence of the New York Convention is apparent in the structure and language throughout the Singapore Convention.

The Singapore Convention applies only to mediated settlements of international commercial disputes, namely where at least two parties to the settlement agreement have their places of business in different States; or the State in which the parties have their places of business is different from either the State in which a substantial part of the obligations under the settlement agreement is performed or the State with which the subject matter of the settlement agreement is most closely connected.

Certain types of settlement agreements are excluded from the scope of the Singapore Convention, namely settlement agreements that have been approved by a court or concluded in court proceedings, and that are enforceable as a judgment in the State of such a court, or those that have been recorded and are enforceable as part of an arbitral award. Settlement agreements pertaining to certain subject matters are also excluded, namely family, inheritance or employment law, and disputes arising from transactions engaged in by a consumer for personal, family or household purposes.

State Parties to the Singapore Convention are required to enforce applicable settlement agreements in accordance with their national rules of procedure and the conditions set out in the Convention. In addition, if a dispute arises concerning a matter alleged to

have already been resolved by a settlement agreement, State Parties must allow the parties to invoke the settlement agreement to prove the matter has already been resolved – i.e. allowing parties to invoke a settlement agreement as a defence against a claim. Again, this must be done in accordance with national rules of procedure and the conditions in the Convention. A party seeking relief must produce the signed settlement agreement along with evidence that the agreement resulted from mediation. Such evidence may take the form of a mediator's signature on the settlement agreement, a separate signed confirmation document from the mediator, an attestation by the institution administering the mediation, or any other evidence acceptable to the State's competent authority. Requests for relief must be handled "expeditiously" by the State's competent authorities.

Grounds for refusing to grant relief

Like the New York Convention, there are limited grounds under the Singapore Convention on which a State Party may refuse to grant relief requested by a party to a settlement agreement.

Article 5(1) of the Singapore Convention provides that relief may be refused if the party opposing relief furnishes proof that

- A party to the settlement agreement was under some incapacity.
- The settlement agreement is null and void, inoperative or incapable of being performed under the applicable law.
- The settlement agreement is not binding or final according to its terms; it has been subsequently modified; the obligations in the settlement agreement have either already been performed or are not clear or comprehensible; or granting relief would be contrary to the terms of the agreement.
- There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the agreement.
- There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the agreement.

Further, Article 5(2) provides that relief may be refused if the competent authority where relief is sought finds that

- Granting relief would be contrary to public policy
- The subject matter of the dispute is not capable of settlement by mediation under the law where the relief is sought.

Will the Singapore Convention provide greater certainty of enforcement?

The Singapore Convention is a positive development for mediation of cross-border disputes, and one which should enable easier enforcement of international mediated settlement agreements around the world.

> The language of the Singapore Convention does allow for some uncertainties which (as with the New York Convention) will likely need to be clarified in domestic implementing legislation or procedural rules, in practice by national courts, and/or by users of the Convention

However, the language of the Singapore Convention does allow for some uncertainties which will likely need to be clarified in domestic implementing legislation or procedural rules, in practice by national courts, and/or by users of the Convention. To give just a couple of examples: Article 3(1) provides that "each Party to the Convention shall enforce a settlement agreement …"; and Article 5(1)(e) provides that relief may be refused if "[t]here was a serious breach by the mediator of standards applicable to the mediator or the mediation …;". Each of these provisions leave open important questions. First, what does it mean for a mediated settlement agreement to be "enforced"? Second, what "standards" apply to mediators and mediation?

With respect to the first question, while arbitral awards define the remedies available to the parties on the basis of which enforcement is sought, in practice mediated settlements generally do not. Therefore what relief would be available to a party seeking enforcement of a settlement agreement under the Singapore Convention? The answer

is far from certain. In many common law jurisdictions, the enforcement of a contractual right normally takes the form of an order for damages reflecting the value of the right to the aggrieved party. In exceptional cases, the enforcement of a contractual right may take the form of an order requiring that the breaching party perform the contractual obligation. Such an order is often reserved for circumstances where damages would be unsuitable to compensate the aggrieved party for the breach. It is unclear under the Singapore Convention whether enforcement of a mediated settlement agreement would take the form of damages, specific performance; or another remedy called for under the law of the jurisdiction in which enforcement is sought.

Any party contemplating the enforcement of an international mediated settlement agreement through the Singapore Convention would be wise to define the remedies for breach of the settlement agreement in the agreement itself. In so doing, parties must be aware that certain remedies may not be enforceable under the laws of some jurisdictions. Therefore, when defining remedies, the parties should be mindful of the most likely enforcement jurisdiction/s and what remedies are available in each. These steps, taken at the outset, will provide greater certainty that the remedy a party is seeking will in fact be attainable should it prove necessary to pursue enforcement.

Turning to the second question, it is not entirely clear what standards are contemplated to apply to mediators or mediation, let alone what might constitute a breach of such standards for purposes of grounding a refusal to enforce a mediated settlement agreement. While international standards have been developed to guide certain aspects of international arbitrations, such as the IBA Rules on the Taking of Evidence in International Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration, there are no equivalent international standards to guide international mediation. The International Mediation Institute's Code of Professional Conduct is perhaps the closest to a global standard on mediator conduct, although it is not known how widely used it is. Local standards in enforcement jurisdictions differ across the globe, and may be applied to assess mediator conduct with varying enforcement outcomes across multiple jurisdictions.

The role of mediators in hybrid dispute processes, such as med-arb, arb-med, arb-med-arb or MEDALOA (mediation followed by last offer arbitration), also potentially complicate matters. In hybrid dispute processes, parties may shift between dispute phases and the same person may conduct the different phases of the dispute, potentially raising procedural integrity concerns. Proponents of hybrid processes argue such concerns are offset by efficiencies gained in such processes as compared to traditional dispute processes which proceed sequentially through escalating procedures with separate persons serving as mediator and arbitrator. In many instances, where a dispute process concludes in arbitration or with a mediated settlement agreement recorded in a consent award, the Singapore Convention will not apply. Any procedural integrity issues are therefore likely to be dealt with within the framework of the New York Convention. However, for those cases concluding in a settlement agreement to which the Singapore Convention applies, there may be uncertainty around the standards applicable to those involved in hybrid processes.

Again, forward planning is essential to an enforceable result, including an understanding of the requirements of jurisdictions where enforcement is sought, and express agreement by the parties to the approach to be adopted and implemented by the mediator.

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Challenges to awards

Recent jurisprudential and legislative developments

By Andrew Battisson, Dylan McKimmie, Sherina Petit, Alfred Wu, Philip Nunn, Tamlyn Mills and Marina Kofman

This article offers a cross-border update of recent jurisprudential and legislative developments on challenges to arbitral awards in Singapore, Hong Kong, and England and Wales.

Questions of jurisdiction

Does non-participation bar a subsequent claim to set aside?

Recent jurisprudence in Singapore has continued to explore the relationship between Article 16(3) and Article 34 of the Model Law.

Article 16(3) allows a party, where a tribunal has made a preliminary ruling that it has jurisdiction to hear the dispute, to challenge that ruling before the courts of the seat within 30 days of receiving notice of the ruling. Article 34 provides for the remedy of setting aside an award on grounds including that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.

In *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] SGCA 33 (Rakna) the Singapore Court of Appeal had to consider whether a respondent who fails to participate in an arbitration and therefore does not avail itself of its rights pursuant to Article 16(3) to challenge a tribunal's determination that it has jurisdiction, can nevertheless raise the jurisdictional objection before the supervisory court in set-aside proceedings.

In the earlier case of *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 (Astro) the Court of Appeal held that properly construed, the Model Law provides for the system of "choice of remedies", and parties who do not actively attack an award remain able to passively rely on defences to enforcement absent any issues of waiver. The Court concluded that the "preclusive effect" of Article 16(3) does not apply where what is sought to be achieved is a defence to enforcement, rather than the active remedy of set-aside. In dealing with the relationship between the active remedy in Article 16(3) and the active remedy of set-aside under Article 34, the Court held obiter that Article 16(3) was not intended to be a "one-shot remedy".

In *Rakna*, the Court of Appeal was concerned not only with the "preclusive effect" of Article 16(3) on subsequent set-aside applications, but also whether the preclusive effect operates in all circumstances. The Appellant argued that even if Article 16(3) operates to preclude a set-aside application on jurisdictional grounds in circumstances where a party has not availed itself of the appeal grounds in Article 16(3), this preclusive effect does not apply to a party that has not participated in the arbitral proceedings. On the basis of the *travaux préparatoires* including the Analytical Commentary to the Model Law, the Court held that "It is clear that the drafters intended Art 16(2) to have a preclusive effect and, in all likelihood, intended the same effect for Art 16(3)."

The Court then went on to analyze the effect of non-compliance with Article 16(3) on a non-participating party. The Court found the policy objective underlying Article 16(3) was to "effect a compromise between the policy consideration of avoiding wastage of resources ... and the policy consideration of preventing parties from trying to delay arbitral proceedings by bringing challenges before the court". In the Court's view, the claimant who insists on proceeding in the face of a non-participating respondent who has indicated its objection to the tribunal's jurisdiction, must take the risk of wasted costs. In the absence of a clear duty on the respondent to participate in the arbitration proceedings imposed either by the Model law or the International Arbitration Act, a non-participating respondent should not necessarily be bound by the award no matter the validity of its reasons for believing that the arbitration was wrongly undertaken. The Court concluded that Article 16(3) should not be construed as having a preclusive effect to prevent a

non-participating respondent from seeking set-aside of the award.

As a result, it is possible to now articulate two exceptions in Singapore to the "preclusive effect" of Article 16(3) of the Model Law, stemming from the jurisprudence. The first is where a respondent exercises its "choice of remedies" and relies on its jurisdictional objection to resist enforcement of an award (rather than seeking to have the award set-aside). The second is in circumstances where the respondent elects not to participate in the arbitration, having made known its objection to the tribunal's jurisdiction, it is not precluded from seeking a set-aside of the award at the courts of the seat.

What power does a court have to review a tribunal's finding of no jurisdiction?

There has been a rare but notable example of the English court's exercise of its power to review negative jurisdictional findings of an arbitral tribunal under Section 67 of the Arbitration Act 1996. In *GPF GP Sàrl v The Republic of Poland* [2018] EWHC 409 (Comm), the Commercial Court set aside a tribunal's ruling that it lacked jurisdiction to hear Fair and Equitable Treatment (FET) claims and examine creeping expropriation claims arising under the Bilateral Investment Treaty (BIT) between Belgium/Luxembourg and Poland.
Mr Justice Bryan granted the application, and set aside part of the tribunal's award, substituting wording to the effect that the tribunal did have jurisdiction over all measures relied on by the applicant under the BIT. On the expropriation claim, the Court held that it was possible to have regard to alleged creeping expropriation even in circumstances that also allege a directly expropriatory act. On the FET claim, the Court held that the wording of the relevant clause was concerned with consequences rather than measures, such that the tribunal has jurisdiction to hear claims concerning measures other than expropriation that could cause consequences similar to expropriation, as alleged in the FET claim.

Questions of time

Does a court have a discretion to amend the time limit for a set-aside application?

In its first arbitration-related judgment to date, the Singapore International Commercial Court has held in *BXS v BXT* [2019] SGHC(I) 10 that it has no power under Singapore law to extend the time limit in Article 34(3) of the Model Law for filing an application to set aside an arbitral award. Anselmo Reyes IJ held that on its face, Article 34(3) is a written law that appears to impose a mandatory limit, which therefore circumscribed the court's power to amend time limits. The Plaintiff's application to set aside was accordingly struck out as being out of time.

Does a court have a discretion to extend the time limit for enforcing an award?

In *CL v SCG*, an award creditor who was unsuccessful in enforcing an award in China sought to enforce the same in Hong Kong. However, whilst the enforcement efforts were ongoing in China, no action had been taken to enforce the award in Hong Kong. In the judgment, it was held that the limitation period for enforcement of an award in Hong Kong (based on an implied contractual obligation to honor the award) is six years from when the cause of action accrued. The time when the cause of action accrued was when the award debtor failed to honor the implied obligation which the court held to be 21 days from the date of the award creditor's demand based on the facts of the case. The court further noted that this limitation period is not changed in any way by reason of the agreement for mutual enforcement of arbitral awards between Hong Kong and China, which prohibits the taking of enforcement actions in the two jurisdictions at the same time. Accordingly the award creditor was time barred.
This case is a useful reminder for award creditors, that where assets might be held in multiple jurisdictions, a comprehensive global enforcement strategy must be devised. A thorough investigation is needed as to the whereabouts of assets, and enforcement efforts across jurisdiction/s must be chosen strategically.

Questions of fraud, corruption and public policy

When is conduct fraud upon the tribunal or just a forensic decision as to evidence?

Public policy arguments made to set aside awards and resist enforcement of awards can coalesce around allegations of fraud or corruption, including fraud upon the tribunal. Allegations of this kind recently emerged in *BVU v BVX* [2019] SGHC 69 in which the Singapore High Court refused to set aside an ICC award (that concerned a food supply agreement in favor of a South Korean state-owned entity) alleged to have been procured by fraud or that it offended public policy; in this case because of the decision not to call upon a particular witness. The purchaser decided in the arbitration to only call one factual witness and not to call three other individuals involved in negotiations for the supply agreement. Following the award, the supplier reached out to one of these three witnesses who agreed to provide evidence attesting to the purchaser's understanding of the nature of the agreement. The supplier submitted that the decision not to call this witness constituted the "withholding and suppressing [of] crucial evidence."

The Court noted three requirements for a finding of this kind (1) deliberate concealment aimed at deceiving the tribunal; (2) an absence of a good reason for the non-disclosure and; (3) a causative link between the concealment and the decision favoring the concealing party.

On the facts, the Court rejected the suggestion that there was deliberate concealment, and strongly rejected any causative link between the purchaser's alleged concealment and the award in its favor. The Court held instead that the decision not to call factual witnesses was a legitimate forensic judgment as to the evidential requirements in the

arbitration. The Court made a distinction between the exigencies of the adversarial process and unconscionable conduct, finding that the decision not to call upon a particular witness, while deliberate, did not constitute the fraudulent suppression of evidence in the absence of a positive obligation to do so. The Court noted that the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) do not create a general obligation to disclose all potentially relevant materials; Article 3.1 requiring only that parties disclose documents "available to it on which it relies". The decision once again affirms the high threshold for setting aside an award on these grounds.

Similar issues concerning alleged fraud upon the tribunal were considered in the English case of *Carpatsky Petroleum Corporations v PJSC Ukrnafta* [2018] EWHC 2516 (Comm). In resisting enforcement of the SCC award in England under Section 103 of the Arbitration Act 1996, the defendant argued that the award had been obtained by fraud because a witness, who had been cross-examined in the arbitration, had deliberately misrepresented the claimant's financial position. This allegation was said to be supported on the basis of documents the defendant had obtained subsequent to the arbitration. CPC successfully applied to strike out the fraud allegations on the basis that the documents did not satisfy the conditions in *Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd* [2000] Q.B. 288, which required that (1) the documents were not available before the arbitrators or could not with reasonable diligence have been available in time to be raised before the tribunal and; (2) would have been decisive where the fraud alleged was that the witness was being dishonest before the arbitrators.

Both cases point to a need for parties and their counsel to take care to obtain documentary evidence that they feel may be important to their case in adequate time to allow argument on the material before the tribunal.

Questions of serious irregularity

When can an award be aside or remitted for reconsideration due to a serious irregularity?

In England and Wales there have been three recent successful challenges on the ground of serious irregularity under Section 68 of the Arbitration Act 1996. In *Oldham v QBE Insurance (Europe) Ltd* [2017] EWHC 3045 (Comm), the Commercial Court allowed a challenge to an arbitral award on costs where the applicant had not been given a reasonable opportunity to make submissions as to costs. In *P v D* [2017] EWHC 3273 (Comm), the Commercial Court upheld a challenge to an LCIA award on the basis that the tribunal failed to deal with all the issues that were put to it; in particular, it failed to consider the claimant's contribution claim in the proceedings. Finally, in *RJ and another v HB* [2018] EWHC 2833 (Comm), the Commercial Court set aside an arbitral award for serious irregularity due to the tribunal's failure to give the parties notice and a proper opportunity to consider and respond to a new point that ultimately affected the arbitrator's reasoning in the award.

A series of recent decisions in Hong Kong have also considered questions of serious irregularity. The contracts that were the subject of the arbitration were construction contracts wherein certain claims advanced by contractors were subject to contractual requirements for notices to be given. Such notices are often said to be conditions precedent for claims being advanced and must be strictly followed. In an unpublished judgment of a Hong Kong court, it was held that an arbitrator's finding that the notice requirements were satisfied instead by letters and emails issued by the contractor, without hearing full submissions from the parties on the issue, amounted to a serious irregularity warranting remittance of the award back to the arbitrator for reconsideration. The approach of the Court was similar to that in the 2018 decision in *Maeda Corporation v Bauer Hong Kong Ltd* where the Court held that the arbitrator's broad interpretation of notice provisions for making a claim under a sub-contract, that was a "like right" claim under the main contract which was said to have to be strictly complied with, was open to serious doubt.

Questions of common law actions vs enforcement proceedings

Does the range of remedies differ under common law actions?

Xiamen v Eton Properties is a 12-year running case to do with the enforcement in Hong Kong of a CIETAC award, not under the Arbitration Ordinance but by way of a common law action. The arbitration concerned enforcement of an agreement to sell the right to develop a plot of land. The seller had breached an agreement to sell the development right for the land, and restructured the project vehicle so as to render the purchaser's right in the vehicle to be substantially diluted thereby frustrating the purchaser's control over the vehicle. The seller was unsuccessful in the arbitration, and subsequently failed to honor the award against it. The purchaser therefore initiated an action against the seller in the Hong Kong courts seeking damages under common law, in lieu of seeking specific performance of the award. The purchaser failed at first instance. On appeal, the Court of Appeal held that whenever parties submit a dispute to arbitration there is an implied contract to the effect that the losing party will honor the award. The seller was therefore in breach of this implied contract and was ordered to pay the purchaser damages for breach of contract. The Court of Appeal dismissed both parties' applications for leave to appeal further. In the dismissal judgment, the Court held that the loss and damage arising from a breach of the underlying commercial contract and those arising from breach of the implied contract to honor the award could be different, and in the enforcement action brought by the

purchaser, the court was concerned with the latter. One interesting observation arising from this decision is that it has the potential of opening up a whole range of remedies against third parties who may have procured or assisted in the award debtor's effort to frustrate the award creditor's ability to enforce an award. This is particularly relevant in situations where shareholders or affiliates of the award debtor have taken steps to interfere with the implied agreement to make the award debtor somehow judgment proof.

Questions of multi-parties and multi-contracts

Rights of non-signatory third parties

A recent Hong Kong case has demonstrated that an arbitration agreement may well be binding on a third party even though they are not signatory thereto, particularly in circumstances where a benefit is conferred on a third party under the original contract (here, a shareholder agreement) containing the arbitration agreement. In *Dickson Valora Group v Fan Ji Qian*, a Hong Kong court granted Fan an anti-suit injunction against a mainland individual restraining him from commencing Chinese court proceedings to claim a success fee based on an addendum to a shareholder agreement among three joint venture partners for the development of a property project in China. Fan was successful in obtaining a freezing order against the assets of the joint venture vehicle and resisting the joint venture vehicle's challenge of the jurisdiction of the Chinese court. The injunction was granted on the basis that the addendum was to do with Fan's enforcement of a contractual right under the shareholder agreement even though he was not a signatory thereto. The Court further held that the judgment of the Chinese court was not enforceable in Hong Kong and did not bar the Hong Kong court from deciding any of the issues before it.

Award involving multiple contracts

In *Buda Pipe Rehabilitation Engineering v CPC*, a Hong Kong court dismissed an application to challenge an award (on grounds of an error of law) on the basis that Schedule 2 of the Arbitration Ordinance did not apply to the award as there was insufficient indication that the award was a domestic award. The Court rejected the contention that the arbitration provisions in the main contract between the Water Services Department and an affiliate of CPC (i.e. Lam Woo) could be carried down into the sub-contract between Buda and CPC pursuant to Section 101(1) of the Arbitration Ordinance. It reasoned that there was a break in the contractual chain between the employer and Lam Woo, the agreement between Lam Woo and CPC (which was only an oral contract), and the sub-contract between CPC and Buda with there being no arbitration agreement in the agreement between Lam Woo and CPC. By way of obiter, the Court held that even if it was wrong on the contractual chain issue, the decision of the arbitrator in the Buda/CPC arbitration was not obviously wrong to warrant the court's interference.

Questions of error of law

When is the obviously wrong test the right test?

In the case of *Chun Wo Construction & Engineering v The Hong Kong Housing Authority*, the Court of Appeal has confirmed the correct test for deciding a leave to appeal application under Schedule 2 of the Arbitration Ordinance in respect of an error of law. The Court held the test to be the "obviously wrong test" in a one-off question of contractual interpretation, as opposed to the "serious doubt" test in respect of a question of general importance. As to the "obviously wrong" test, the Court of Appeal said that the same will not be satisfied if the arbitrator "might be right". The judgment also noted that the interpretation of a non-standard contractual provision will likely be considered as not one of general importance. The applicable test in an appeal proper was stated by the Court in a recent decision in *Maeda Corporation v Bauer Hong Kong Ltd* to be whether the arbitrator's decision was one which "no reasonable arbitrator could reach" or "outside the permissible range of solutions open to him" – i.e. the "obviously wrong" and "serious doubt" tests no longer being applicable.

Should Singapore amend its International Arbitration Act to allow an appeal on a point of law?

The law concerning challenge to awards has recently been considered in the legislative sphere in Singapore. The Singapore Ministry of Law's public consultation on proposed amendments to the International Arbitration Act includes new proposals in this area. Of particular interest is the proposal to allow parties engaged in international arbitration seated in Singapore to appeal to the High Court on a point of law, provided they have agreed to opt-in to this mechanism. (Parties engaged in domestic arbitration in Singapore already have the ability to appeal to the High Court on a point of law but may opt-out of this option by agreement.) There is also a proposal to allow parties to agree to waive or limit by agreement, after the award has been rendered, the annulment grounds under the Article 34(2)(a) of the Model Law and Section 24 of the International Arbitration Act. A third proposal suggests empowering Singapore courts to make an order in respect of the costs of the arbitral proceedings when a party is successful in its application to set aside the arbitral award. The consultation period closes on August 21, 2019.

Data protection and cyber risk issues in arbitration

Dealing with regulation, cyber-attacks and hacked evidence

By Pierre Bienvenu and Benjamin Grant

Data protection and cyber security are hot topics in international arbitration. A majority of respondents in the 2018 Queen Mary International Arbitration Survey listed "security of electronic communications and information" as an issue which should be addressed in arbitration rules. This demonstrates that users of arbitration are concerned about data security.

While there are signs that the market is listening, users seem to think that institutions, counsel and tribunals could do more to address cybersecurity.

This article examines three areas of data protection and cyber security in arbitration

- The European Union's General Data Protection Regulation (GDPR) and how it bears on international arbitration.
- Data breaches in arbitral proceedings and cyberattacks on institutions, and how institutions are responding; and
- How hacked evidence might appear in arbitration, and how tribunals have dealt with this issue.

GDPR and arbitration

The GDPR has significantly altered the landscape of data protection. Its broad scope and potentially severe penalties have forced those who hold and process data to take note of its provisions. The international arbitration community must be aware of the terms of the GDPR and how it impacts the arbitral process.

> A witness based in the EU may import GDPR obligations into an arbitration, even if the arbitration is otherwise completely independent of the EU

The GDPR applies to "personal data". This concept is defined extremely broadly to include any information relating to an identified or identifiable natural person, and would include things such as an individual's name, address and any online identifier (such as an email address). The GDPR also has a broad scope of application, reaching entities in the EU as well as entities outside the EU processing data of EU-based individuals in some contexts. For example, a witness based in the EU may in some circumstances import GDPR obligations into an arbitration, even if the arbitration is otherwise completely independent of the EU.

This wide scope of application is coupled with potentially severe penalties of up to €20 million or 4% of an entity's total worldwide annual turnover of the preceding financial year (whichever is higher) for certain contraventions of the GDPR. It is important to note that these penalties can be imposed per breach – meaning that penalties potentially could quickly reach a significant level.

If the GDPR is engaged, entities which process personal data will be subject to a number of obligations. If an entity is deemed to be a data controller for the purposes of the GDPR, these obligations would include the need to identify a lawful basis to process data, a requirement to ensure appropriate technical and organizational measures are in place in order to safeguard the security of processing (including to prevent data breaches to the extent possible), and a requirement that data is not transferred outside the EU other than in certain specified circumstances. If an entity is deemed to be a data processor rather than a controller, the GDPR contains detailed provisions as to how the processor should only process data on the basis of documented instructions from the controller.

The detail of how the GDPR operates is complex. The key point for international arbitration practitioners is to be aware that the GDPR may be relevant to their arbitration, regardless of whether they are, or the arbitration is seated, in Europe.

Cyber-attacks and institutional responses

In July 2015, the website of the Permanent Court of Arbitration (PCA) was hacked in the midst of an ongoing maritime border dispute between China and the Philippines. Malware was implanted on the PCA's website which infected the computers of visitors, potentially exposing them to data theft.

> While in many jurisdictions, it is assumed that the arbitration will be cloaked in confidentiality, cyber-attacks have the potential to seriously undermine the confidentiality of the arbitral process

The attack on the PCA illustrates the risk faced by arbitral institutions. Parties in arbitration can be called upon to disclose sensitive material to prove their case. While in many jurisdictions, it is assumed that the arbitration will be cloaked in confidentiality, cyber-attacks have the potential to seriously undermine the confidentiality of the arbitral process.

The arbitral community is responding to this risk. The most prominent example is the draft Cybersecurity Protocol for International Arbitration published by the ICCA, the New York City Bar Association and the CPR Institute last year. The Protocol is intended to apply in particular cases, either by agreement of the parties or order of the tribunal. Once adopted, the Protocol gives the tribunal the power to determine what security measures are reasonable for the case, taking into account the views of the parties. Such measures should account for, among other things, the transmission of materials, communication between arbitrators, storage of information and security of data. Importantly, the Protocol makes clear that cybersecurity is the shared responsibility of all participants in the arbitration, who must ensure all personnel involved in the arbitration are aware of, and follow, any cybersecurity measures adopted.

ICCA and the IBA have also established a Joint Task Force on Data Protection in International Arbitration with the view to producing a guide providing practical guidance on the potential impact of data protection principles, including the GDPR.

At an institutional level, arbitral institutions are also addressing the risk posed by cyberattacks. The Hong Kong International Arbitration Centre (HKIAC) Rules which entered force on 1 November 2018 specifically include as a recognized means of communications "any secured online repository that the parties have agreed to use". The London Court of International Arbitration (LCIA) is also aiming to revise its 2014 Arbitration Rules this year, and is considering adding new provisions on data protection and cybersecurity.

Data protection is an area ripe for reform in the arbitration context and users expect arbitral institutions to be at the centre of the effort.

Hacked evidence in arbitration

A related issue which is appearing more regularly in arbitration is the attempted use of evidence obtained through cyberattacks or data breaches. This issue has arisen most predominantly in investment arbitration. For example, in both the *Yukos* disputes and *ConocoPhilips v Venezuela* the parties sought to rely on evidence obtained from WikiLeaks.

Arbitration rules typically afford broad discretion to the tribunal to decide evidentiary issues. For example, Article 27(4) of the UNCITRAL Rules provides that the "arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered". Article 9(2) of the IBA Rules of on the Taking of Evidence in International Arbitrations permits the tribunal to exclude evidence on grounds of either "legal impediment or privilege under ... legal or ethical rules" or "special political or institutional sensitivity".

In *ConocoPhilips*, the tribunal was asked to reopen its earlier decision on jurisdiction in light of information contained in hacked emails published by WikiLeaks. The majority did not expressly address whether that evidence was admissible, finding instead that it simply did not have the power to reopen its earlier findings. A dissenting opinion in that case relied on the emails' contents as a basis for reopening the decision, without expressly addressing whether the emails were admissible in the first place. However, in *Caratube International v Kazakhstan*, the tribunal expressly admitted emails which had been published on WikiLeaks to the extent such material was not covered by legal professional privilege.

> As data breaches become more common, tribunals will be called on more frequently to rule on the admissibility of such evidence

Given the paucity of authority, there is little evidence as yet that a consistent approach to dealing with these issues is emerging. As data breaches become more common, tribunals will be called on more frequently to rule on the admissibility of such evidence. It is hoped that as tribunals engage with this issue, some guidance will be available to parties as to how it might be dealt with.

Conclusion

Data protection and cyber risk are emerging as an important considerations in arbitration. The arbitral community, and the arbitral institutions, are taking steps to address this concern, but more needs to be done. As these issues are experienced more frequently, it is to be hoped that consistent practices will emerge, which will offer users comfort that their data will be secure.

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Developments in third party funding in arbitration

A comparative analysis

By Sherina Petit and Ewelina Kajkowska

This article examines recent Asian developments in legalization of third party funding and contrasts these with the approach in England and Wales where the market is more established. It also looks at the emergence of portfolio funding and how that may impact on disclosure of conflicts of interest in London seated arbitrations.

Recent Asian developments in legalization of third party funding

In England and Wales, the passing of the Criminal Law Act 1967 formally eliminated the archaic legal bars of maintenance and champerty to third party funding in England, which paved the way for the development of the funding industry in the London arbitration market. Since this time, the approach to third party funding in arbitration has been a combination of an *ad hoc*, market- and case law-driven one. Nowadays the industry is predominantly self-regulating, with some funders volunteering to be members of the Association of Litigation Funders which sets out for its members certain minimum requirements for third party funding. A substantial proportion of the market, however, is unregulated.

By contrast to England, however, these jurisdictions have also introduced laws which provide for oversight of the industry

The arbitral hubs of Singapore and Hong Kong have recently followed the English approach by abolishing the traditional doctrines of maintenance and champerty for third party funding in arbitration. By contrast to England, however, these jurisdictions have also introduced laws which provide for oversight of the industry.

In February 2019, Hong Kong implemented legislative amendments to provide for the legality of third party funding of Hong Kong seated arbitrations. The amendments will require third party funders to submit to Hong Kong's Code of Practice for Third Party Funding in Arbitration which prescribes *inter alia* capital adequacy requirements; processes and procedures required for identifying and disclosing conflicts of interest; and terms that must be included in the funding agreement regarding termination, control and liability for costs, including adverse costs. Notably, there is an advisory body overseeing the compliance with the Hong Kong Code. This can be contrasted with the position of the litigation funders in England who voluntarily elect to membership of the self-regulating Association of Litigation Funders.

Another important point to consider when examining the new Hong Kong Code is the requirement of systematic disclosure of the participation of a third party funder. This is in contrast to England and Wales where disclosure is a voluntary process, moderated only by the tribunals' power to order disclosure.

The Hong Kong developments followed shortly after similar amendments in Singapore which has also now opened up to third party funding of arbitrations seated in the jurisdiction. The introduction of new laws in Singapore included a comprehensive suite of legislation addressing issues ranging from minimum eligibility requirements of paid-up share capital for third party funders to counsels' duties in respect of disclosure of the existence of a third party funding agreement. Interestingly, the latter strikes a different position to the one in Hong Kong, where the duty to disclose is imposed on the parties themselves.

These moves by Singapore and Hong Kong come at an important time with the roll out of the Belt and Road Initiative by China

These moves by Singapore and Hong Kong come at an important time with the roll out of the Belt and Road Initiative by China. This ambitious cross-border infrastructure project will no doubt generate disputes and Hong Kong and Singapore are seeking to position themselves as leading jurisdictions for the resolution of such disputes.

Third party portfolio funding

The recent decision of Snowden J in *Davey v Money* [2019] EWHC 997 (Ch) has rocked the English litigation funding market, eroding the certainty the *Arkin* cap (where a funder's liability for adverse costs was limited to the amount of funding provided to the Claimant) had provided as to the exposure of litigation funders to adverse cost orders in English litigation. These changes, although significant, have had a limited impact on the third party funding market for arbitration – third party funders are neither party to the arbitration agreement nor the arbitral proceedings and so are not subject to the tribunal's jurisdiction, and risk for adverse costs awards is therefore a matter for the funding agreement.

In the arbitration space, however, the general trend of increasing costs of initiating and running international commercial and investment treaty arbitration has led to an increase in the number of funded cases. With the growth of the industry, third party funding options are increasingly creative as the market seeks to expand beyond impecunious claimants to sophisticated commercial clients who are willing to pay the costs of third party funding in return for spreading their legal risk and move arbitration expenses off their balance sheet.

One interesting trend is the development of portfolio funding, where funders provide a monetary package which can be deployed across multiple matters

One interesting trend is the development of portfolio funding, where funders provide a monetary package which can be deployed across multiple matters. According to Burford Capital's 2018 Litigation Financing Annual Report, over half of its committed capital was deployed under portfolio arrangements rather than funding on a matter by matter basis.

Portfolio funding generally operates in two ways

- Multiple disputes of a single party with various risk profiles are packaged together and funding is provided across all the matters on a cross-collateralization basis. For the most part, these will be claims but there is the potential to fund the costs of defending cases within a portfolio arrangement. Third party funders promote this type of financing as benefiting corporate entities due to the differing accounting treatment of legal costs and debts when supported by a third party funder.

- The funder directly contracts with a law firm, providing funding of matters it is pursuing on a conditional fee arrangement basis. This latter type is also known as law firm financing. Third party funders promote this type of funding as beneficial to firms which are unable to take on high-risk but also high-value work.

Portfolio funding gives rise to additional conflict of interest challenges. The ICCA-QMUL Report into Third Party Financing identified a gap in the IBA Guidelines on Conflicts of Interest in International Arbitration as conflicts of interest are framed in terms of direct and indirect economic interests in the outcome of arbitrations. The cross-collateralization of claims means that the economic interest is spread across the portfolio as a whole and is not tied directly to the outcome of one claim which ultimately fails to capture portfolio funding and law firm financing.

Potentially, the conflict of interest concerns would be mitigated by systematic disclosure where a claim is funded. Opponents to systematic disclosure argue, however, that there can be procedural and strategic impacts flowing from disclosure of funding, such as where respondents drive up the costs of the case through frivolous applications and challenges, prolonging the arbitration. It is not clear how substantial such risks are. However, these considerations would have to be assessed against the risks to enforcement and challenge of arbitral awards where an undisclosed conflict surfaces following the issuance of an award.

One thing is certain though, with third party funding available now in Singapore and Hong Kong, the global market will only continue to grow and as funding becomes more prevalent its use, and the demands of the market, will evolve. This is an interesting time for the funding market.

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A comparative look at good faith and changed circumstances, hardship and more

The Canadian Supreme Court's decision in Churchill Falls (Labrador) Corporation Limited v Hydro-Québec

By Pierre Bienvenu Ad. E.

This article focuses on the Supreme Court of Canada decision in *Churchill Falls (Labrador) Corporation Limited v Hydro-Québec* 2018 SCC 46[1]. To most Canadians, the mere mention of Hydro-Québec and Churchill Falls in the same sentence spontaneously evokes the long-term contract at issue in this case. That contract has been a very public bone of contention between the Province of Québec and the Province of Newfoundland for more than 40 years. The Supreme Court's decision is used here as a launch pad for a broader discussion of good faith, changed circumstances and hardship, and the circumstances in which an arbitrator or judge may be called upon to alter the terms of a contract. These issues frequently arise in international arbitration.

The facts of the case

Background

The Churchill River is the longest river in Atlantic Canada. It flows toward the Atlantic in Labrador, in the easternmost province of Canada, Newfoundland-and-Labrador. The Churchill River basin has long been known as one of the areas with the greatest hydroelectric potential in the world. Among several locations with potential was Churchill Falls, in the Upper Churchill River. Until the 1960s, there were two obstacles to developing these water resources: the technical challenge of transporting electricity the great distance to the nearest markets in Southern Québec and the US without undue loss of power; and financing. To finance the project, its sponsors, Churchill Falls (Labrador) Corporation Limited (CF(L)Co) and its majority shareholder, had to find one or more creditworthy purchasers that would commit, on a take-or-pay basis, to purchase substantially all of the electricity generated by the plant.

Hydro-Québec (H-Q) was one such potential purchaser. Moreover, in the 1960s, H-Q's engineers had developed high-voltage transmission lines that enabled electricity transportation over long distances without substantial loss of power. However, H-Q had alternatives: The Province of Québec also has huge hydroelectric potential, which in the 1960s remained largely untapped. At the time, H-Q had several major hydroelectric projects underway and so required convincing that it would make sense to support the construction of

1 Pierre Bienvenu Ad. E. represented Hydro-Québec in the appeal, as well as before the courts below; so in his own words, he offers the "proverbial disclaimer" that he "comes with that baggage to the issues discussed".

a plant owned by a third party and to purchase its electricity, rather than build its own additional hydroelectric facility.

The Contract

After nearly five years of negotiation, CF(L)Co convinced H-Q to defer its own hydroelectric projects and support Churchill Falls. In 1969, CF(L)Co and H-Q signed a contract providing the legal and financial framework for the Churchill Falls hydroelectric project (the Contract). It was a huge project, involving issuance of what was then the largest ever bond offering, construction of the largest hydroelectric plant in the world at the time, and transmission lines to transport electricity some 1,300km.

In addition to investing capital and providing an unlimited completion guarantee, H-Q undertook to purchase, over a 65-year period, virtually all of the electricity the plant would produce, whether it needed it or not. That take-or-pay commitment allowed CF(L)Co to use debt financing to cover construction costs. In exchange, H-Q obtained the right to purchase electricity at fixed prices for the 65-year Contract term. Those prices reflected the project's construction costs.

To assist CF(L)Co with servicing its massive debt in the early years of the Contract, revenues from the sale of electricity to H-Q were front-loaded, using a price schedule that declined over time, roughly tracking the reimbursement of the project debt. The last price reduction took effect in 2016, once the debt was retired, and the Contract provides for this price to remain fixed for the last 25 years of the Contract. This gave H-Q the kind of price stability and protection from inflation that it enjoys with its own projects, the key difference being that, at the end of the term, the Churchill Falls plant would remain the property of CF(L)Co.

The changed circumstances

Shortly after the Contract was signed, the oil price shocks of the 1970s brought major changes in the North American energy market. Then came the decline in public confidence in nuclear energy, following the Three Mile Island accident, in 1979. Beginning in the 1990s, there was a gradual deregulation of transmission systems in North America that liberalized access to the US market. These changes led to a substantial increase in the market price for electricity, which quickly far surpassed the Contract's pricing terms. This allowed, and continues to allow, H-Q to purchase electricity from Churchill Falls at a very low price while selling electricity to third parties at a substantially higher price.

In 2010, CF(L)Co commenced court proceedings seeking a declaration that H-Q has a duty to renegotiate the Contract pricing terms. CF(L)Co also asked that, as H-Q refused to renegotiate, the court itself modify the Contract by imposing a price formula designed to share the unanticipated profits flowing from the Contract.

CF(L)Co's case was that the fundamental changes in the energy market were unforeseeable and disrupted the equilibrium of the Contract. CF(L)Co argued that the benefits generated by the sale of Churchill Falls energy were so much greater than the parties could have foreseen when signing the Contract that H-Q's windfall profits had to be reallocated and shared more equitably. CF(L)Co based its claim on a general duty of good faith recognized in Québec civil law, and on what it described as an implied duty to renegotiate, based on equity.

H-Q's position was that CF(L)Co was seeking to introduce, through the back door of contractual good faith, the civil law doctrine of unforeseeability (*la théorie de l'imprévision*) which was never part of the law of Québec. H-Q maintained that CF(L)Co was receiving exactly what it bargained for, and that it was seeking to appropriate part of the benefits that rightfully belonged to H-Q under the Contract.

Before examining how the Supreme Court resolved the question, it is instructive to consider how other jurisdictions and soft law instruments deal with the issue of changed circumstances.

Changed circumstances: a comparative overview

Civil law jurisdictions

German courts developed the possibility for a party to request adaptation of a contract upon changed circumstances on the basis of contractual good faith. The German law doctrine known today as "Interference with the Basis of the Transaction" can be traced back to the aftermath of World War I, when the German economy was devastated by the Deutsche Mark's fall to one-trillionth of its former value. This had a catastrophic effect on fixed-price contracts. At the time, the German Civil Code only provided for relief in cases of absolute impossibility of performance. Nevertheless, German courts relied on the duty of good faith to develop a theory of unforeseeability that was later codified. Article 313 of the German Civil Code provides that if a change in circumstances that were foundational to the contract render its performance unsupportable for one of the parties, then the court may adapt the contract or, if not possible, terminate it. In assessing the changed circumstances, the court must consider whether the disadvantaged party can reasonably be expected to perform, taking into account the contractual allocation of risk.

Swiss courts also relied on the duty of good faith as the foundation for possible judicial alteration of a contract in the event of changed circumstances. Switzerland has however not codified this principle, which is sometimes referred to as "*l'exorbitance*". Two basic conditions must be met to open this door under Swiss law: (1) occurrence of new, inevitable and unforeseeable circumstances; and (2) consequent imposition of an excessive burden on the debtor. If these are satisfied, the court will order renegotiation of the contract and, if renegotiation fails, the court may adapt the contract and impose the solution that the parties in good faith would have adopted had they foreseen the changed circumstances when the contract was negotiated.

In France, judicial intervention in the event of changed circumstances is possible under the *théorie de l'imprévision* (the doctrine of unforeseeability). The effect of this doctrine, which is recognized in a number of other civil law jurisdictions, is that parties can be required to renegotiate a contract if, as a result of unforeseen circumstances, performance of contractual obligations would be excessively onerous for one of them. Until recently, the theory applied to contracts with the State and state parties (administrative contracts) which, in France, are governed by principles distinct to those governing private law contracts and subject to the jurisdiction of a court system distinct from civil courts. However, under French private law, the doctrine of unforeseeability had been rejected. The leading authority was the *Canal de Craponne* case, decided in 1876, in which a company exploiting irrigation canals sought an increase in the usage rates originally fixed in a contract concluded in the 16th century. In rejecting the claim, the *Cour de Cassation* held that in no event may courts alter the parties' agreement on account of time or changed circumstances. Attempts were made to rely on contractual good faith as a ground for a duty to renegotiate, but the French Supreme Court closed the door to that possibility in 2007, in the *Les Maréchaux* case, holding that the duty of good faith can be relied upon to control the conduct of a party under a contract, but never entitles a judge to modify the parties' contractual rights and obligations. The position only changed in 2016, when, as part of a major revision of the law of obligations, the doctrine was incorporated into French private law.

Article 1195 of the French Civil Code now provides that if an unforeseeable change of circumstances makes the contract excessively onerous for a party, that party may ask for its renegotiation, and if the renegotiation fails, it may terminate the contract or ask a judge to alter it, provided the party had not accepted to assume that risk under the contract. A similar evolution is currently taking place in Belgium.

Soft law instruments

Hardship provisions in the *Unidroit Principles of International Commercial Contracts* entitle a party to ask for the renegotiation of the contract when unforeseeable events "fundamentally alte[r] the equilibrium of the contract". If renegotiation fails, the arbitral tribunal or court applying the *Unidroit Principles* may terminate the contract or adapt it to restore the equilibrium. Other soft law instruments contain similar hardship provisions, most prominently the Principles of European Contract Law which include a provision on Change of Circumstances.

Common law jurisdictions

> The position is markedly different under the common law

The position is markedly different under the common law. Under English law, the doctrine of frustration of contract allows for termination of a contract when an unforeseeable event fundamentally changes the nature of the obligations, or if the contractual obligation has become incapable of being performed. But this doctrine does not give rise to a duty to renegotiate the contract, nor provide for its alteration by the court. Moreover, hardship, inconvenience or material loss are not grounds for the principle of frustration to apply. In *Canary Wharf (BP4) TI Ltd. v European Medicines Agency* [2019] EWHC 335 (Ch), the English High Court decided that Brexit did not constitute a frustrating event for the purpose of a long-term commercial lease, even if Brexit resulted in the forced relocation of an agency of the EU outside of the UK. Slightly different principles apply in the US under the doctrines of frustration of purpose and impracticability of performance.

The law of Québec

When CF(L)Co commenced proceedings in 2010, the case law was clear: the doctrine of unforeseeability was not part of Québec civil law, even though a number of authors had argued that it should be and that a duty to renegotiate may arise from contractual good faith. In the early 1990s, Québec had modernized its civil code and the Revision Office in charge of the draft revised code had expressly recommended that the doctrine of unforeseeability be incorporated into the law of Québec.

The Québec legislature rejected that recommendation. Québec courts relied on that rejection to reaffirm that the doctrine of unforeseeability did not form part of the law of Québec. (This explains why CF(L)Co based its case on contractual good faith rather than the doctrine of unforeseeability.)

The Supreme Court decision in the *Churchill Falls* case

CF(L)Co's appeal was dismissed by a majority (7:1). The Court held that H-Q did not have a duty to renegotiate a contract that provided it with substantial unanticipated benefits. The majority reasoned that it was not the Court's role to second-guess the Québec legislature's deliberate decision not to incorporate the doctrine of unforeseeability into the law of Québec, which turned on social policy considerations best left to the legislature. Further, the Court noted that even in jurisdictions where the doctrine of unforeseeability is available, it cannot be applied when the aggrieved party has accepted the risk of unforeseeable events, nor when the effect of the changed circumstances is merely to make the contract more beneficial for one party without making it more onerous for the other. Here, the parties had intentionally allocated the risk of price fluctuation to H-Q. The trial judge had found that the risk of future price fluctuations was a "known unknown" and that the parties had specifically contemplated and rejected the inclusion of a price escalator in the Contract. Moreover, the changed circumstances did not increase CF(L)Co's cost of performing the Contract nor diminish the value of what it receives. On the contrary, CF(L)Co has continued to receive exactly what it bargained for.

Addressing the duty of good faith, the Court held that while it may serve to protect the equilibrium of a contract, it cannot be used to change that equilibrium and impose a new bargain. Like the Court of Appeal, the Supreme Court refused to rule out the possibility that good faith may be the source of duties in the event of true hardship, but all indications are that this would likely be restricted to instances of bad faith or abuse of right.

Relevance in international arbitration

> Contracts must be seen for what they are: instruments to allocate risks and rewards in respect of an uncertain future

Except for contracts that call for instantaneous performance (such as tanking at a gas station) most contracts involve commitments in relation to the future, which by definition is uncertain. Although special challenges obviously arise in the case of long-term contracts, contracts must be seen for what they are: instruments to allocate risks and rewards in respect of an uncertain future. The Churchill Falls Contract has a 65-year term. To get a sense of how uncertain the future was for the parties when signing the Contract, consider the economic and technological changes that had taken place in the preceding 65 years (1904 to 1969): the Wright brothers took their pioneering flight; Neil Armstrong took man's first step on the moon; there were two world wars and the Great Depression. Surely these inform the scale of changes CF(L)Co and H Q could have reasonably anticipated during the Contract term.

In international commercial contracts, hardship is often addressed through hardship clauses, which are an important tool to deal with unforeseen circumstances. But different options exist as to the role to be played by arbitrators in responding to hardship. The 2003 ICC model clause on hardship, for example, provides that in the event the parties are unable to negotiate alternative contract terms in response to changed circumstances resulting in hardship, the aggrieved party is only entitled to obtain that the contract be terminated. The model clause does not empower the arbitrator to adapt the contract. Indeed, it seems that the alteration of the contract by an arbitrator is only admitted if: (i) parties expressly provide for it in the contract, (ii) the applicable legal provisions governing hardship provide for it; or (iii) the arbitrators are specifically empowered to act as *amiables compositeurs*.

Common principles that can be derived from the above comparative review

Beginning with hardship, the following criteria are generally recognized as essential prerequisites for the exercise of arbitral or judicial power to order renegotiation or modify contract terms in the event of changed circumstances: (1) the change must be unforeseeable and beyond the parties' control; (2) it must fundamentally alter the contractual equilibrium, either by: (i) rendering performance excessively onerous for a party, or (ii) diminishing the value of the consideration received by a party; and

(3) the risk of the change must not have been contractually allocated to one of the parties.

As regards the duty of good faith, it is, in civil law, a standard that relates to the conduct of the parties under the contract, not one that can generally be used to evaluate the fairness of the contract itself, nor to change the parties' substantive rights and obligations thereunder. The purpose underlying the duty of good faith is to ensure that each of the contracting parties receives the benefit to which it is contractually entitled. It serves to protect the negotiated contractual equilibrium, and to provide a remedy when the conduct of a party disrupts that equilibrium.

Conclusion

Properly understood, the principle of good faith is an instrument of corrective justice that allows a tribunal or court to remedy breaches of the contractual equilibrium agreed by the parties. Corrective justice is also what is dispensed by a tribunal or court when asked, pursuant to a hardship clause or by applying a law that recognizes the doctrine of unforeseeability, to adapt a contract to restore the original equilibrium.

In contrast, asking an arbitrator or judge to modify the allocation of risks and benefits that flow from a contract in order to redistribute them between the parties improperly seeks to transform the principle of good faith from a corrective justice mechanism into one of distributive justice. Unless specifically empowered to do so by the parties, courts and arbitrators have in common to dispense corrective justice, and they should be wary to venture into the realm of distributive justice.

This article has been adapted from a Keynote Address given by Pierre Bienvenu, Ad. E. at the LCIA North American Users' Symposium on March 16, 2019. Read the full address here.

Properly understood, the principle of good faith is an instrument of corrective justice

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Arbitration in Africa

A review of recent regional initiatives

By Malcolm Hartwell

Traditionally, Africa's civil and common law jurisdictions have relied on court litigation to resolve disputes. However, arbitration has gained a real foothold in Africa, and in the last few years there has been continued growth in the acceptance of arbitration as a viable option for settling disputes, not only between private parties but also disputes involving States. A number of regional initiatives, discussed below, have given impetus to this growth.

Recent regional initiatives

The African Continental Free Trade Area Agreement (AfCFTA) has now been ratified by 22 of the 49 signatories and accordingly came into effect in April 2019. The AfCFTA seeks, amongst other things, to create the world's largest free trade area covering the entire African continent. The AfCFTA includes dispute settlement mechanisms for any disputes that arise between member States. It provides that a dispute settlement body will hold consultations between the parties and, if consultations fail, a dispute settlement panel will be set up to hear the dispute and issue a binding decision. That decision is subject only to an appeal to the AfCFTA disputes settlement appeal body whose decision is final. No rules are yet in place regarding the process to be followed, but it is anticipated that it will include both mediation and arbitration phases.

> Approximately 22 per cent of cases registered under the ICSID Convention and Additional Facility Rules involved an African State party, of which 21 per cent were Intra-Africa disputes

Many African countries are parties to bilateral investment treaties (BITs), most of which provide for arbitration to resolve investment disputes between foreign investors and host States. In addition, 49 of the 54 African States are contracted to or signatories of the International Convention on the Settlement of Investment Disputes (ICSID Convention) which provides for conciliation and arbitration procedures.

According to ICSID's recent caseload statistics focussed on Africa, as of May 31, 2017 approximately 22 per cent of cases registered under the ICSID Convention and Additional Facility Rules involved an African State party, of which 21 per cent were Intra-Africa disputes (i.e. also involving African investors). However, of all ICSID cases, only 5 per cent involved African investors.

In addition to BITs, a significant proportion of ICSID cases involving African State parties or investors were based on investment contracts between foreign investor and host-state, or investments law of a host-state.

17 African countries are not signatories to the New York Convention, including the active economies of Ethiopia, Namibia, and the Seychelles.

Turning to commercial arbitration, in the last five years alone, an additional seven African States have acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which reflects the growing importance that African States attach to upholding international commercial arbitration agreements and the enforcement of foreign arbitral awards. This leaves 17 African countries that are not signatories to the New York Convention, including the active economies of Ethiopia, Namibia, and the Seychelles.

The Mauritian International Arbitration Centre, launched in late July 2018, competes with a number of other regional international arbitration centres, including the Lagos Court of Arbitration, the Cairo Regional Centre for International Commercial Arbitration and the Common Court of Justice and Arbitration in the Ivory Coast. These initiatives are driven in part by the Organisation for the Harmonisation of Business Law in Africa which adopted a uniform law on arbitration applicable to its 17 member States. Statistics are not currently published by these centres, but, anecdotally, they seem to be attracting more disputes.

The Arbitration Foundation of South Africa established in 1996 is the leading facilitator of ADR in South Africa with branches in most major centres. AFSA has a number of specialist divisions including one for cross border disputes and for domain name disputes. They have also established, in conjunction with the Shanghai International Arbitration Centre, a China Africa Joint Arbitration Centre (CAJAC) in Johannesburg and in Shanghai to provide arbitration services to China/Africa disputants.

The Maritime Law Association of South Africa is in the final stages of establishing a maritime law arbitration centre which is anticipated to be modelled on the London Maritime Arbitration Association (LMAA). It will initially seek to attract domestic maritime disputes, but it ultimately intends to target disputes that occur in South Africa's massive commodity export and transport sectors.

South Africa's International Arbitration Act which incorporates most of the UNCITRAL Model Law came into force on December 20, 2017. A South African court of first instance has already refused an application to join a foreign party to South African court proceedings on the basis that the parties had agreed to refer disputes to arbitration in London (*Atakas Ticaret Ve Nakliyat AS v Glencore International AG and Others* KZD 20-04-2018 case no A42/2014). It is anticipated that this decision will be confirmed on appeal.

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A global round-up

Developments in international arbitration rules and laws

By Andrew Battisson, Katie Chung, Cara Dowling, Matthew Buckle, Tamlyn Mills and Marina Kofman

In recent months there have been a number of new arbitration related developments across the globe. In this article, we look at a few of the most significant and highlight key points of interest.

New CIArb Witness Conferencing Guidelines

In April 2019, the Chartered Institute of Arbitrators (CIArb) launched new Guidelines for Witness Conferencing in International Arbitration. Witness conferencing, a process for presenting evidence concurrently from multiple witnesses – most commonly, expert witnesses – has become increasingly popular in international arbitration. CIArb's new Guidelines are intended to assist parties, arbitrators and witnesses to decide whether conferencing is appropriate in the circumstances and, if so, to decide the most suitable procedures. The Guidelines comprise a Checklist, Standard Directions and Specific Directions, supported by Explanatory Notes.

The Checklist provides a list of matters to consider when deciding whether to hold a witness conference and if so, in what form. It includes the matters in issue, the number of witnesses, the relationship between witnesses and cultural considerations, and logistical arrangements of the conference.

The Standard Directions provide, at an early stage of proceedings, a general framework for witness conferencing which may be adopted in an early procedural order. They generally preserve both consecutive and concurrent evidence, and allow the tribunal to vary the procedures to take concurrent evidence at any time during the proceedings. Examples of Directions as to conferencing include joint preparation of a schedule by witnesses of areas where they agree and disagree, and joint production by parties of supporting material (e.g. joint chronologies of agreed facts).

The Specific Directions delve into more detail such as administering oaths/affirmations, how and what oral evidence will be given, the order of witnesses, by whom and how questions may be put. There are three possible frameworks depending on who will be leading the conference (the witnesses, the tribunal, or parties' counsel). A combination of the three frameworks may be adopted. The Specific Directions can be used to create a standalone procedural order specific to the witness conference, or included in a general procedural order.

The Explanatory Notes provide discussion on items covered in the Checklist and Directions.

LCIA and SCC caseload statistics

The LCIA and SCC recently published caseload statistics from cases administered in 2018.

> These statistics support the LCIA's credentials and efforts to be a global dispute forum, with a remit extending far beyond London

A record number of 317 arbitrations were referred to the LCIA in 2018, of which 271 were referred under the LCIA Rules and the remainder were administrative services provided under UNCITRAL Rules or ad hoc arbitrations. A significant proportion of parties were domiciled in the UK (20.6 per cent), Western Europe (15.8 per cent, down from 19.3 per cent) and CIS (9.5 per cent, down from 10.4 per cent). However, 2018 saw an increasing number of users from Asia (14.4 per cent) and MENA (13.2 per cent), as well as India (8 per cent). The LCIA also saw a decrease by 9 per cent in the number of arbitrations governed by English law (76 per cent). The number of arbitrations seated outside England and Wales increased from 6 per cent to 12 per cent. These statistics support the LCIA's credentials and efforts to be a global dispute forum, with a remit extending far beyond London.

The LCIA's caseload was made up predominately of disputes in the banking and finance, energy and resources, and transport and commodities. The number of banking and finance arbitrations increased to 29 per cent of all cases from 24 per cent in 2017. Transport and commodities cases also grew, to 14 per cent of cases from 11 per cent in 2017. Energy and resources disputes dropped from 24 per cent in 2017 to 19 per cent in 2018. Construction and professional services disputes also represented a notable proportion of cases (respectively 10 per cent and 7 per cent). Overall, claimants and respondents were most likely to be from the energy and resources sector (22 per cent and 24 per cent respectively). Interestingly, the LCIA notes that parties from banking and finance sectors are significantly more often claimants (21 per cent of claimants) than respondents (12 per cent of respondents).

Disputes arose under a number of different types of agreements, but the most common were loan or other facility agreements (21 per cent), shareholders' agreements, share purchase agreements and joint venture agreements (21 per cent, up from 15 per cent), services agreements (19 per cent), and sales of goods agreements (18 per cent). 11 per cent of arbitrations referred had a sum in dispute exceeding US $100 million.

A total of 152 cases were registered with the SCC. Of these, 89 were filed under the SCC Arbitration Rules and 52 under the SCC Rules for Expedited Arbitrations. The SCC also registered four Emergency Arbitrator proceedings. There was an almost even split between cases involving Swedish parties only and international disputes. International users came from 43 countries, with the majority from Russia, Germany and Ukraine. Seats outside of Sweden remain relatively rare: 69 per cent of cases were seated in Stockholm, followed by Gothenburg then Malmö.

Disputes arose under many different types of agreements, though a significant proportion arose out of service agreements, delivery agreements, business acquisitions and shareholder agreements. Disputes were most commonly governed by Swedish law (55 per cent) followed by English law and the UN Convention on Contracts for the International Sale of Goods.

Some positive developments in gender diversity were reported by both institutions, though continued efforts are still needed to reach parity

Some positive developments in gender diversity were reported by both institutions, though continued efforts are still needed to reach parity. Of all arbitrators appointed in LCIA arbitrations in 2018, women represented only 23 per cent. However, of arbitrators selected by the LCIA Court, women represented 43 per cent – an increase of 9 per cent from 2017.

Similarly an increase was seen in SCC arbitrations, where the proportion of women arbitrators grew from 18 per cent in 2017 to 27 per cent in 2018. Notably, 24 per cent of party-appointed arbitrators were women, compared to only 8 per cent in 2017 and 11 per cent in 2016. There was an almost even gender representation in arbitrators appointed by co-arbitrators.

Developments in Singapore

Proposed amendments to Singapore's International Arbitration Act

On June 26, 2019, the Ministry of Law published a consultation paper proposing six new amendments to the International Arbitration Act (Cap. 143A) (IAA). One of the most significant proposals is to allow parties to arbitration proceedings to appeal to the Singapore High Court on a question of law arising out of an award made in the proceedings, provided the parties have opted in to this mechanism.

> Apart from England and Singapore's domestic arbitration regime, only four other jurisdictions allow for an appeal on a question of law arising out of an award – France, Hong Kong, India and Switzerland

The draft provision for an appeal on a question of law is similar to the rubric for appeals on a question of law arising out of an award which governs domestic (as opposed to international) arbitration under the Arbitration Act (Cap. 10), which is almost in *pari materia* with section 69 of the English Arbitration Act 1996. This is an important development, as apart from England and Singapore's domestic arbitration regime, only four other jurisdictions allow for an appeal on a question of law arising out of an award – France, Hong Kong, India and Switzerland.

Other notable proposals to amend the IAA include

- A mode of appointment of arbitrators where there are more than two parties to an arbitration agreement.
- Allowing parties to, by agreement, request the arbitral tribunal to decide on jurisdiction at a preliminary stage.
- Recognize that an arbitral tribunal and the Singapore High Court has powers to enforce obligations of confidentiality in an arbitration.
- Allowing parties to agree to waive or limit the annulment grounds under the Model Law and IAA.

Singapore Convention on Mediation

The United Nations Convention on International Settlement Agreements Resulting from Mediation is a new multilateral treaty developed by UNCITRAL. Named the Singapore Convention on Mediation, the Convention opened for signature in Singapore on August 7,2019, two days before Singapore's National Day on August 9. The Convention will apply only to international commercial settlement agreements resulting from mediation. The Convention makes it clear that it does not apply to international settlement agreements that are concluded in the course of judicial or arbitral proceedings, and which are enforceable as a court judgment or arbitral award. For further information on the Singapore Convention, please see the separate article in this issue.

Developments in Australia

Interpreting the scope of an arbitration agreement under Article 8 of the Model Law

> The High Court's decision touches on the proper approach to determining an application under Article 8 of the Model Law

In the recent decision of *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13, handed down by the High Court of Australia, the Court was asked to determine whether an arbitration clause in an agreement that is expressed to deal with disputes "under this deed", also applies to disputes as to the deed's validity. The answer to this question would determine whether or not the resolution of the same dispute should be bifurcated into two separate proceedings; one before the court to deal with the question of the validity of the arbitration agreement; and one before the arbitral tribunal to deal with the underlying dispute arising "under this deed". Given that Australia has adopted the Model Law for both international and domestic arbitrations, the High Court's decision touches on the proper approach to determining an application under Article 8 of the Model Law.

The High Court agreed with the full Federal Court decision below in concluding that the validity claims fell within the scope of the arbitral clauses. Interestingly, the High Court felt it unnecessary to engage in the jurisprudential debate in the lower courts as to whether arbitration clauses should be liberally interpreted in line with the widely cited decision in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40. Instead, the High Court held unanimously that the issue could be resolved in the application of orthodox principles of interpretation, which required consideration of the context and purpose of the deeds in issue.

The High Court concluded that the background to and purposes of the deeds in question pointed clearly to arbitral clauses of wide coverage with respect to what was to be the subject of confidential processes of dispute resolution. As such, the High Court dismissed the appeal, finding that it was inconceivable that a party to the deed could have thought that any challenge to it would be determined publicly, in court.

With thanks to Laura McKellar, trainee solicitor, for her contribution to this article.

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