DEBEVOISE & PLIMPTON LLP

Arbitration Quarterly

Issue No 5 – April 2014

Editors' Remarks

Welcome to this fifth edition of the Arbitration Quarterly, Debevoise's review of significant developments in international arbitration over the last few months.

In the first quarter of 2014, we have seen numerous jurisdictions across the globe re-affirm their commitment to arbitration as an important mechanism for resolving international disputes, with a series of judgments and legislative developments that promote and strengthen international arbitration.

The US Supreme Court, in its highly anticipated ruling in *BG Group v. Argentina*, deferred to an international arbitral tribunal by holding that a local litigation requirement contained in the US-Argentina BIT was a procedural condition to be considered by the arbitrators and not the courts. The Indian Supreme Court also announced a series of arbitration-friendly judgments, consistent with a pro-arbitration trend that has been evident in the wake of the much-discussed *BALCO* decision of 2012.

Elsewhere, Daewoo Motor Co. Ltd. – represented by a team of Debevoise lawyers led by Lord Goldsmith QC and Antoine Kirry – secured an important victory before the Paris Court of Appeal, which rejected an application to partially set aside an ICC award, consistent with its policy of refusing to reconsider the merits of the dispute underlying an arbitral award. And with a view to encouraging arbitration and enhancing their potential as arbitral seats, Russia published a new draft arbitration law and the British Virgin Islands has revamped its arbitration laws and procedures.

In the world of international investment arbitration, in addition to *BG Group*, we review a series of recent ICSID decisions on arbitrator disqualification applications. Such applications reflect a growing practice of parties challenging sitting arbitrators not only on the basis of the arbitrators' prior relationship with the parties but also on the basis of prior statements on legal questions at issue in the dispute. We also report on an ICSID tribunal's order to a third-party funded claimant to pay the entirety of the advance on costs in an arbitration. The order was a first of its kind, and it provides

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If there are additional individuals within your organization who would like to receive Arbitration Quarterly, please email Deborah Enix-Ross at **denixross@debevoise.com**.

In This Issue

an important insight into how at least one tribunal has approached issues presented by the relatively new practice of litigation funding.

These important developments will be of interest to businesses operating in a range of jurisdictions. If you wish to discuss any of the issues raised in this edition of the Arbitration Quarterly or any other international arbitration and dispute resolution matters, we would be delighted to hear from you.

Very best wishes,
Christopher K. Tahbaz
Dietmar W. Prager
Jessica Gladstone
and the International Dispute Resolution Group
of Debevoise & Plimpton LLP

Arbitrator Challenges in Investment Arbitration: Recent Developments

A spate of recent requests to disqualify arbitrators in investor-State proceedings suggest that such challenges are becoming a common feature of investor-State arbitration. Recent decisions indicate that the grounds for challenge are expanding beyond traditional arguments based on an arbitrator's prior relationship with the parties, and challenges to multiple members of a tribunal are becoming more frequent.

Standards for Arbitrator Disqualification in ICSID Proceedings

Article 57 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") allows arbitrators to be challenged and disqualified based on "any fact indicating a manifest lack" of qualities required in an arbitrator. These qualities are set forth in Article 14(1) of the ICSID Convention, which requires ICSID arbitrators to be persons of "high moral character and recognized competence … who may be relied upon to exercise independent judgment."

Pursuant to Article 58 of the ICSID Convention, a challenge to an arbitrator is to be decided by the two unchallenged members of the tribunal. If the unchallenged members of the tribunal are unable to agree, the decision on the challenge falls to the Chairman of the ICSID Administrative Council, who is the President of the World Bank. The ICSID Chairman also decides challenges in the event of proposals to disqualify a majority of the members of a tribunal. Every request for disqualification triggers a suspension of the proceedings until a decision has been taken, pursuant to ICSID Arbitration Rule 9(6).

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Arbitration Quarterly is a publication of Debevoise & Plimpton LLP

New York
919 Third Avenue
New York, NY 10022
+1 212 909 6000

London
65 Gresham Street
London, EC2V 7NQ
+44 20 7786 9000

Washington, D.C.
555 13th Street, N.W.
Washington, D.C. 20004
+1 202 383 8000

Paris
4 place de l'Opéra
75002 Paris
+33 1 40 73 12 12

Frankfurt
Taubenstrasse 7-9
60313 Frankfurt am Main
+49 69 2097 5000

Moscow
Business Center Mokhovaya
Ulitsa Vozdvizhenka, 4/7
Stroyeniye 2
Moscow, 125009
+7 495 956 3858

Hong Kong
21/F AIA Central
1 Connaught Road Central
Hong Kong
+852 2160 9800

Shanghai
22/F Jin Mao Tower
88 Century Boulevard
Pudong New District
Shanghai 200121
+86 21 5047 1800

www.debevoise.com

Edition Editors


Christopher K. Tahbaz
cktahbaz@debevoise.com
New York, +1 212 909 6543
Hong Kong, +1 852 2160 9839


Dietmar W. Prager
dwprager@debevoise.com
New York, +1 212 909 6243


Jessica Gladstone
jgladstone@debevoise.com
London, +44 20 7786 9166

Assistant Editors


Nwamaka Genevieve Ejebe
nejebe@debevoise.com
New York, +1 212 909 6837


Ciara Murphy
cmurphy@debevoise.com
London, +44 20 7786 5508


Gavin Chesney
gchesney@debevoise.com
London, +44 20 7786 5494

ArbitrationQuarterly@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors or to the article authors.

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Recent Disqualifications of ICSID Arbitrators

In recent months, there have been several decisions disqualifying arbitrators. On March 20, 2014, the majority of the tribunal in *Caratube v. Kazakhstan* granted claimants' request for disqualification of respondent's nominated arbitrator, Mr. Bruno Boesch. This appears to be the first time that an ICSID majority has disqualified the third challenged arbitrator. Claimants had sought to disqualify Mr. Boesch because he had served as Kazakhstan's appointed arbitrator in another case that had "obvious similarities [with] the present arbitration." *Caratube International Oil Company & Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision dated March 20, 2014, ¶ 71.

Presiding arbitrator Dr. Laurent Lévy and claimants' appointee Professor Laurent Aynès upheld claimants' challenge, finding that the "significant" factual overlap between the two cases made Mr. Boesch "privy to information that would possibly permit a judgment based on elements not in the record in the present arbitration," such that a "reasonable and informed third party would find it highly likely that Mr. Boesch would pre-judge legal issues in the present arbitration based on the facts underlying the [other] case." *Id.* ¶¶ 89-90. Dr. Lévy and Professor Aynès further concluded that Mr. Boesch's involvement in the prior case created a "manifest imbalance within the Tribunal to the disadvantage of the Claimants" because he had knowledge of facts from the previous case that may not be available to the other two arbitrators in the present proceedings. *Id.* ¶ 93.

The ICSID Chairman also has recently issued two decisions disqualifying arbitrators. In November 2013, the ICSID Chairman disqualified José María Alonso from acting as arbitrator in *Blue Bank v. Venezuela*. In that case, Venezuela had challenged Mr. Alonso on two main grounds: (1) he was a partner in Baker & McKenzie's Madrid office, while Baker & McKenzie's offices in New York and Caracas were representing the claimant in another ICSID case against Venezuela; and (2) in *Blue Bank*, Mr. Alonso would be deciding issues similar or identical to those that his colleagues would be arguing in the other case. In disqualifying Mr. Alonso, the ICSID Chairman held that "a third party would find an evident or obvious appearance of lack of impartiality on a reasonable evaluation of the facts," because there was a "degree of connection or overall coordination" between the relevant Baker & McKenzie offices and because it was "highly probable that Mr. Alonso would be in a position to decide issues that are relevant in [the other case] if he remained an arbitrator" in the case. *Blue Bank International & Trust (Barbados) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision dated November 12, 2013, ¶¶ 67-69.

Just one month later, the ICSID Chairman disqualified Professor Francisco Orrego Vicuña as arbitrator in *Burlington v. Ecuador*. Ecuador argued, among other things, that Professor Orrego Vicuña had disclosed certain repeat appointments by Burlington's counsel in another case in which Ecuador's counsel was acting for the State, but had not made the same disclosure in the *Burlington* proceedings. In responding to Ecuador's challenge, Professor Orrego Vicuña remarked that "it [did] not seem appropriate or ethically justified" for Ecuador's counsel to use confidential information from a different case involving different parties for Ecuador's benefit in this case. *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision dated December 13, 2013, ¶ 61. The ICSID Chairman rejected as untimely Ecuador's challenge to the extent it was based on matters – including the "repeat appointments" issue - arising before Professor Orrego Vicuña's response; however, he did disqualify Professor Orrego Vicuña on the basis of that response. The ICSID Chairman found that Professor Orrego Vicuña's comments regarding the ethics of Ecuador's counsel "[did] not serve any purpose in addressing the proposal for disqualification" and

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Chambers Global 2014 has listed Debevoise in the top band in its Public International Law (Global), International Arbitration (United States) and Arbitration (Latin America) categories. Partners Donald Francis Donovan and David W. Rivkin were also ranked in the top band for Arbitration (Global), Public International Law (Global), Arbitration (Latin America and United States) and Arbitrators.

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"manifestly evidence[d] an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel." *Id.* ¶¶ 79-80. Professor Orrego Vicuña was also disqualified in September 2013 in an UNCITRAL arbitration, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*. The decision on the challenge (which was issued by Judge Peter Tomka, the President of the International Court of Justice) is not public, but Investment Arbitration Reporter has reported that the basis for the disqualification was Professor Orrego Vicuña's prior statements regarding a legal question at issue in that case.

Challenges to the Majority of an Arbitral Tribunal

Challenges to a majority of the tribunal have also become more common, although they have been less successful. In December 2013, the ICSID Chairman denied Argentina's request to disqualify Professor Orrego Vicuña and Dr. Claus von Wobeser from the tribunal in *Repsol v. Argentina. Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision dated December 13, 2013. Argentina's challenge was based in part on the arbitrators' participation in prior cases involving allegedly similar issues and on Dr. von Wobeser's relationship with the claimants' counsel.

Similarly, in *Abaclat v. Argentina*, the ICSID Chairman rejected Argentina's second challenge against the claimants' appointed arbitrator Professor Albert Jan van den Berg and the presiding arbitrator Professor Pierre Tercier. In 2011, Argentina had already tried to disqualify the same members of the tribunal following their rejection of Argentina's request for provisional measures and their unfavorable decision on jurisdiction. That request was denied because Argentina had proffered "no objective evidence" supporting an inference of lack of independence or impartiality, other than its "subjective perception of the challenged arbitrators." *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Recommendation dated December 19, 2011, ¶ 157.

> In recent months, there have been several decisions disqualifying arbitrators.

In December 2013, Argentina again challenged Professor Tercier and Professor van den Berg, after they issued a procedural ruling with which (as the ICSID Chairman noted) Argentina was "clearly dissatisfied." *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision dated February 4, 2014, ¶ 81. Argentina contended that the majority's procedural decisions on the briefing calendar demonstrated unfair and unequal treatment accorded to the parties. The ICSID Chairman rejected Argentina's second attempt at disqualification in a decision dated February 4, 2014, stating that "[t]he mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence" under the ICSID Convention. *Id.* ¶ 80. The ICSID Chairman added that "[i]f it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process." *Id.*

A similar scenario is presently unfolding in *ConocoPhillips v. Venezuela*. Venezuela filed a challenge against L. Yves Fortier and presiding arbitrator Judge Kenneth Keith on March 11, 2014, just one day after they issued a decision rejecting Venezuela's request to reconsider a decision rendered in September 2013 that found Venezuela liable for expropriation (Venezuela's appointed arbitrator, Professor Georges Abi-Saab, dissented from both decisions). Venezuela had already unsuccessfully challenged Mr. Fortier on the grounds that he allegedly failed to timely disclose the proposed merger between his then-law firm, Norton Rose, and another law firm that Venezuela alleged was "for many

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Recognition: *Global Arbitration Review* named *British Caribbean Bank v AG of Belize*, a Caribbean Court of Justice case argued by Debevoise partner Lord Goldsmith QC with Debevoise team Jessica Gladstone, Nicola Leslie and Conway Blake, as the "Most Important Published Decision of 2013." In addition, David W. Rivkin, a partner in the firm's New York and London offices, was shortlisted in the "Best Prepared/Most Responsive Arbitrator" category.

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years more adverse to [Venezuela] than any other law firm in the world." *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision dated February 27, 2012, ¶ 25. That challenge was dismissed in February 2012 by the other two arbitrators on the tribunal, Judge Keith and Professor Abi-Saab. *Id.* The ICSID Chairman's decision on Venezuela's second challenge is currently pending.

A decision on proposals to disqualify a majority of the tribunal is also pending in *Transban Investments Corp. v. Venezuela*, ICSID Case No. ARB/12/24. On the same day that the tribunal was constituted (February 24, 2014), each of the parties made applications to disqualify the other party's appointed arbitrator. Venezuela's challenge to Professor David D. Caron is reportedly based on his previous appointment as an expert in another case against Venezuela, and Transban Investments' challenge to Dr. Santiago Torres Bernárdez is reportedly based on his multiple appointments by Venezuela's counsel.

Conclusion

In light of the evolving grounds for challenging arbitrators and the increasing frequency of such challenges, it is heartening to note the timely initiatives that are underway to explore this dynamic area of law. The American Society of International Law and the International Council for Commercial Arbitration have formed a joint Task Force on Issue Conflicts under the auspices of the Howard M. Holtzmann Center on International Arbitration and Conciliation. The Task Force, for which Debevoise associate Ina Popova is a reporter, will evaluate and report on issue conflicts in investor-State arbitration at the upcoming ASIL Meeting and ICCA Congress in April 2014. In addition, the IBA Arbitration Conflicts of Interest Subcommittee is in the process of revising the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration. Approval of the revised IBA Guidelines is expected this year, to coincide with the tenth anniversary of the original IBA Guidelines.

For further information, please contact:


Ina C. Popova
ipopova@debevoise.com
New York, +1 212 909 6754


Z.J. Jennifer Lim
jlim@debevoise.com
New York, +1 212 909 6343

ICSID Tribunal Orders Third-Party Funded Claimant to Pay Entirety of Advance on Costs

In a decision issued on December 12, 2013 in *RSM v Saint Lucia*, ICSID Case No. ARB/12/10, an ICSID tribunal composed of Siegfried Elsing, Edward Nottingham and Gavin Griffin QC, ordered the claimant to pay the full advance on costs, departing from the usual equal apportionment of the advance between claimant and respondent contemplated by Article 14 of the Administrative and Financial Regulations of ICSID. The tribunal found that it had "good cause" to depart from the usual apportionment set forth in Article 14 based on, among other things, the fact that the claimant was third-party funded, that it had admitted it might not be able to satisfy any monetary award – such as a costs award – at the end of the proceedings, and that it had failed to make certain required advances on costs in previous unrelated proceedings.

The underlying dispute arose out of an agreement between US-based oil exploration company RSM Production Corporation ("RSM") and the Government of Saint Lucia relating to an exclusive oil exploration licence in an area off the coast of Saint Lucia.

One month after the constitution of the tribunal, Saint Lucia applied for security for costs (pursuant to Rule 39 of the ICSID Arbitration Rules) and an order that RSM pay all costs advances during the pendency of the proceeding (pursuant to ICISD Administrative and Financial Regulation 14(3)(d) and Rule 28(1)(a) of the ICSID Arbitration Rules) on the grounds that that there was a material risk that RSM would be unable or unwilling to comply with any costs award issued against it. Saint Lucia relied principally on:

- RSM's failure to honour certain obligations under costs awards or requests

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New Partner: Tony Dymond has joined the London office as a partner. His practice focuses on complex, multi-jurisdictional disputes, in both litigation and arbitration.

ICSID Tribunal Orders Third-Party Funded Claimant to Pay Entirety of Advance on Costs"

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for payment of advances in other ICSID proceedings;

- RSM's admission that it might not be able to satisfy any costs award; and
- the fact that the claim was funded by third parties that could not be made subject to any costs award and could therefore carry out an "arbitral hit-and-run" justifying an order of security for costs.

RSM opposed the application for security for costs on the bases that the tribunal had no jurisdiction to make such an order, and even if it had, no "exceptional circumstances" existed warranting the granting of the order. Further, RSM argued that because Saint Lucia had not yet put forward its case in the arbitration, the tribunal could not balance the legitimate interests of the parties and the relative equities of granting the requested relief. With respect to the application for an order that RSM pay the entirety of the advance on costs, RSM argued that Saint Lucia's reliance on RSM's conduct in other arbitrations was inapposite, and that payment of the whole of the advance on costs in this arbitration would be tantamount to paying security for costs and should be rejected for the same reasons.

The tribunal succinctly disposed of the security for costs application on the grounds that security for costs had not previously been granted by ICSID tribunals, and that in these circumstances the tribunal wished to defer consideration of the application until a later date, presumably after presentation of Saint Lucia's case on the merits.

> This decision is believed to be the first in which a tribunal has been willing to depart from the normal equal allocation of the advance on costs to ICSID.

Regarding the application concerning the apportionment of the advance on costs, the tribunal relied on Rule 28 of the ICSID Arbitration Rules to conclude that it had the explicit authority to deviate from the equal split set out in Article 14 of the Administrative and Financial Regulations of ICSID, which the tribunal described as a "presumptive allocation of advance payments." The tribunal expressed the view that "any variance from this presumption must be supported by a record showing good cause for the variance," which "standard should be less stringent than the 'exceptional circumstances' more generally required for a tribunal to order provisional measures." Applying this "good cause" test, the tribunal allowed Saint Lucia's application, particularly in light of RSM's acknowledgement that it might not be able to satisfy a monetary award. The tribunal also noted that the third party funding "exacerbated" the concern engendered by RSM's conduct in prior proceedings.

This decision is believed to be the first in which a tribunal has been willing, on the facts of that case, to depart from the normal equal allocation of the advance on costs to ICSID, and is of particular interest in its consideration of third party funding of the claim as a factor relevant to a decision about apportionment of the advance.

For further information, please contact:


Joshua Fellenbaum
jfellenbaum@debevoise.com
London, +44 20 7786 5487


Samuel Pape
spape@debevoise.com
London, +44 20 7786 3023

The American Lawyer named Debevoise its "Litigation Department of the Year," singling out a number of matters handled by the firm's International Dispute Resolution practice, including a record-breaking $2.3 billion bilateral investment treaty award for Occidental Petroleum Corporation; a historic win in the Caribbean Court of Justice for the British Caribbean Bank; and a ground-breaking pro bono victory for Edgar Morales that clarified the scope of New York's Anti-Terrorism Act. *The American Lawyer* quoted one client's General Counsel, who noted "the thing that impresses me about lawyers is when they come up with better answers to problems than I do. Every once in a while, you encounter a lawyer who has really created the better answers. David W. Rivkin is that lawyer."

Suing State-Controlled Entities in Investment Arbitration: The Demise of the "Presumption of Statehood"?

In the recent decision in *Tulip v Turkey,* ICSID Case No. ARB/11/28, March 10, 2014, an arbitral tribunal composed of Dr. Gavin Griffin QC, Mr. Michael Evan Jaffe and Prof. Dr. Rolf Knieper, held that the actions of a Turkish investment trust, a private company wholly controlled by the national housing authority, were not attributable to the Turkish State. In so holding, the tribunal squarely rejected the position set forth in *Maffezini v Spain*, that State control of a corporate entity gives rise to a rebuttable presumption that the entity is a State organ.

The case concerned a contract for the construction of a residential and commercial development in Istanbul, between a joint venture, in which Tulip Real Estate Investment ("Tulip") was the lead partner, and Emlak, a Turkish real estate investment trust which is 100% controlled by the Turkish Housing Development Administration ("TOKI"). The project was subject to numerous delays, due in part to disputes between the joint venture partners, financial difficulties and problems with the zoning plan for the district, prompting Emlak to terminate the contract in May 2010. Tulip filed an ICSID claim alleging, inter alia, expropriation and denial of fair and equitable treatment.

At the heart of the dispute was whether Emlak's actions could be attributed to Turkey, so as to bring the dispute within the scope of the Netherlands-Turkey BIT. Tulip advanced three bases for attribution, relying on the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles"). First, it argued that TOKI's 100% control of Emlak gave rise to a presumption of statehood, relying on the award in *Maffezini v Spain,* ICSID Case No. ARB/97/7.

Second, Tulip submitted that Emlak was empowered to "exercise elements of governmental authority", and that such conduct should be attributed to the Turkish State, in accordance with Article 5 ILC Articles. Third, Tulip claimed that Emlak acted under "the instructions of, or under the direction or control of" the State (in this instance, TOKI, the public housing authority) and therefore its conduct should be attributed to the State pursuant to Article 8 ILC Articles. In this regard, Tulip pointed to Emlak's corporate structure, namely to the fact that TOKI owned 39% of shares and controlled 100% of them and that the majority of Emlak's board were TOKI employees, including the Chairman of TOKI who also served as head of Emlak.

The tribunal rejected all of Emlak's arguments on attribution. First, it held that Emlak, a private company established under Turkish domestic law, was not a State organ for the purposes of Article 4 ILC Articles. Specifically, it rejected the position that State control or ownership of a corporate entity can trigger a "presumption of statehood," stating that there was "no basis under international law" for this position. State ownership could not "convert a separate corporate entity into an 'organ' of the State." The tribunal also concluded that Emlak was not empowered to exercise governmental powers for the purposes of Article 5, since Emlak's role in respect of zoning permits did not amount to a sovereign power.

The tribunal was divided, however, as to whether Emlak acted under TOKI's direction or control. The majority, Mr Michael Evan Jaffe dissenting, found that it had not. The tribunal accepted that, from an "ordinary company law perspective," Emlak was under TOKI's managerial control and there were occasions where TOKI did in fact use Emlak to exercise sovereign powers. However, the only relevant question for the tribunal was whether TOKI exerted sovereign direction or control over Emlak *in respect of the specific activity at issue* in the dispute. Applying the high threshold of "effective control," the tribunal was satisfied that, at all relevant times, Emlak exercised its own independent business judgment and acted in its best commercial interests. There was no proof that its decision to terminate the contract was in pursuit of any sovereign interest or was motivated by an ulterior State purpose.

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Global Arbitration Review ranked Debevoise as the 7th busiest international arbitration practice in the world. David Samuels, managing editor of GAR, commented "if I had to pick out one star performer this year, I think it would be Debevoise & Plimpton… its overall portfolio value has quadrupled."

Suing State-Controlled Entities in Investment Arbitration

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The tribunal proceeded to find that, even if Emlak's actions could have been attributed to the State, its conduct, and that of other State organs and officials, did not violate the substantive investment protections guaranteed by the BIT, and were in fact a commercially appropriate response to a project plagued by delays and inadequate funding.

Tulip's reliance on the BIT's "umbrella clause" also warrants further comment. While umbrella clauses are often used to integrate contractual provisions into BITs, in this case, Tulip attempted to argue that the umbrella clause should extend to the Turkish Foreign Direct Investment Law ("FDIL"), such that a violation of the domestic investment law could occasion a violation of the BIT. While the tribunal was not required to determine this issue, it nonetheless expressed "reservations about the argument that a legislative instrument such as the FDIL is capable of falling within the scope of obligations envisaged by the 'umbrella clause'". It remains to be seen whether this novel use of the umbrella clause could provide a new source for investor claims in the future.

The tribunal in *Tulip v Turkey* has firmly rejected the notion that State control over a corporate entity gives rise to a "presumption of statehood" and reaffirmed the importance of the ILC Articles, which it recognised as reflecting customary international law, for the purposes of state responsibility in international investment arbitration. In *Maffezini v Spain*, the tribunal established a two-part test for arbitration of acts of non-state entities, which first assessed the structure of the entity before addressing its functions. The present tribunal put the emphasis firmly on the functional test, scrutinising whether the specific actions alleged could be considered to be manifestations of sovereign power or were simply ordinary commercial conduct. It would appear that there is no room for presumptions based on corporate structure in this analysis.

For further information, please contact:


Conway Blake
cblake@debevoise.com
London, +44 20 7786 5403


Ciara Murphy
cmurphy@debevoise.com
London, +44 20 7786 5508

US Supreme Court Issues Ruling in *BG Group v. Argentina*, Extends Contract Arbitration Analysis to Investor-State Treaty Dispute

On March 5, 2014, the Supreme Court of the United States issued its opinion granting BG Group's appeal against a lower appellate court decision that had vacated BG Group's investor-State arbitration award against the Republic of Argentina. *BG Group plc v. Republic of Argentina*, 514 U.S. ___, Case No. 12-138, slip op. (decided March 5, 2014). The decision marks the first time the US Supreme Court has taken up a case concerning an arbitral award rendered in an investor-State treaty dispute, and the case's outcome had been greatly anticipated by the arbitration community both in the US and abroad.

BG Group, a British company specializing in liquefied natural gas, invested in Argentina in the late 1990s, and like many other investors subsequently suffered large losses during Argentina's economic crisis of 2001-2002. After a period of negotiations with the government to try to reach a workable deal for the enterprise going forward, BG Group eventually brought an international arbitration under the UNCITRAL Arbitration Rules, alleging that Argentina had breached its obligations under the UK-Argentina bilateral investment treaty (BIT).

Critically for this case, the UK-Argentina BIT contained a clause requiring investors to submit their claims to the host State's local courts for 18 months before bringing the dispute to international arbitration. BG Group, however, elected not to take this step, as Argentina had suspended local proceedings challenging its emergency measures and decreed that investors who

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Recognition: Catherine M. Amirfar has been named "Pro Bono: Private Practice Lawyer of the Year" by *Chambers & Partners* as part of the 2014 Chambers USA Women in Law Awards.

US Supreme Court Reverses in BG Group

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brought such proceedings would be left out of the renegotiation process for public services contracts.

In the arbitration, Argentina argued that BG Group's failure to first seek recourse in the Argentine courts deprived the arbitral tribunal of jurisdiction. The tribunal disagreed, holding in its December 2007 award that, in the case before it, the obvious futility of applying to the Argentine courts for relief meant that any interpretation of the BIT's local litigation clause as an absolute requirement would lead to an "absurd and unreasonable" result. On the merits, the tribunal awarded BG Group $185 million in damages. *BG Group plc v. The Republic of Argentina*, UNCITRAL, Final Award (Dec. 24, 2007).

BG Group and Argentina then filed dueling motions in the US Federal District Court for the District of Columbia, with Argentina petitioning for annulment of the award and BG Group requesting its confirmation. In decisions issued in June 2010 and January 2011, respectively, the District Court denied the annulment petition and confirmed the award, finding that, under US law, the arbitral tribunal had the authority to decide questions of its own jurisdiction, and that those determinations would be reviewed with great deference. After engaging in such a deferential review, the District Court found that the tribunal had not exceeded its powers. *Republic of Argentina v. BG Group plc*, 715 F. Supp 2d 108 (D.D.C. 2010); *Republic of Argentina v. BG Group plc*, 764 F. Supp. 2d 21 (D.D.C. 2011). Argentina appealed both decisions to the Court of Appeals for the District of Columbia Circuit.

In a decision that surprised many arbitration practitioners, the Court of Appeals reversed the District Court, holding that "[b]ecause the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded … the question of arbitrability is an independent question of law for the court to decide." *Republic of Argentina v. BG Group plc*, 665 F.3d 1363, 1371 (D.C. Cir. 2012). The Court of Appeals then held, based on its own textual analysis of the BIT, that the arbitral tribunal was wrong to find that it had jurisdiction, because "[t]he Treaty explicitly requires judicial proceedings prior to arbitration," making the local litigation requirement a condition to Argentina's consent to arbitrate. *Id.* at 1372-73. Since BG Group had failed to satisfy this condition, no arbitration could properly take place. *Id.* at 1373.

> [T]he Court's decision in *BG Group* is likely to be perceived as a 'pro-arbitration' decision and particularly as a pro-*treaty arbitration* decision, given that it extends a deferential standard of review beyond the realm of ordinary contracts and into the world of investor-State treaty disputes.

The Supreme Court, signaling the importance of questions relating to international arbitration, granted certiorari, and the case was argued in December 2013.

The key question, as stated by the Supreme Court in its recent opinion, was "who – court or arbitrator – bears primary responsibility for interpreting and applying [the BIT's] local court litigation provision. Put in terms of standards of judicial review, should a United States court review the arbitrators' interpretation and application of the provision *de novo*, or with the deference that courts ordinarily show arbitral decisions on matters the parties have committed to arbitration?" 514 U.S. ___, slip op. at 6.

In deciding this question, the Court indicated that it would "initially treat the document before us [the BIT] as if it were an ordinary contract between private parties," and proceeded to conduct its analysis using the principles set out in the substantial body of existing jurisprudence on the question of the extent to which courts defer to arbitral tribunals' determinations of their own jurisdiction. That body of case law has given rise to the following analytical framework: If the contract (here, the BIT) explicitly states who has the authority to decide jurisdictional issues – the arbitral tribunal or a court – that agreement will be respected; but if the agreement is silent on the issue (as was the BIT in this case), courts will employ certain presumptions to fill in the blanks.

The first presumption is that a court will decide substantive questions of "arbitrability," such as "'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *Id.* at 7, quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U. S. 79, 84 (2002). That presumption, however, is altered in the case of "disputes about the meaning and application of particular procedural preconditions for the use of arbitration," as

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US Supreme Court Reverses in BG Group

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such questions are presumed to be left to the arbitrators. *Id.* at 8.

The crux of the matter before the Court, therefore, was whether the local litigation requirement was "substantive" or "procedural" in nature. The Court closely examined the BIT's "text and structure" and found that the requirement was procedural, as it determined "*when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all." *Id.* (emphasis in original). The local litigation requirement was, in the Court's opinion, "highly analogous to procedural provisions that both this Court and others have found are for arbitrators, not courts, primarily to interpret and to apply," such as time limits on filing a request for arbitration or requirements for pre-arbitration negotiation. *Id.* at 9. The Court also emphasized the fact that the BIT contained no rule requiring the arbitrators to consider the *substance* of any decision issued by the local court. *Id.* The requirement was, therefore, no more than a "claims processing rule." *Id.* at 16.

Having found the answer to the question using a contract analysis, the Court then considered whether there was any reason to vary that analysis based on the fact that the agreement in this case was a treaty. On this point, the Court held that "[a]s a general matter, a treaty is a contract, though between nations," and "[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent." *Id.* at 10. There was, therefore, no reason to depart from the established analytical framework.

The Court then noted that the BIT's text did not explicitly label the local litigation requirement as a "condition of [Argentina's] consent" to arbitration, and the Court left "open for future argument" the question of whether a treaty that *did* specifically define a requirement as a "condition of consent" would automatically trigger *de novo* court review regarding fulfillment of that condition. *Id.* at 12. However, in *dicta* that inspired a concurring opinion from Justice Sonia Sotomayor, the Court did venture to state that even such an explicit statement in a treaty would be "unlikely to be conclusive." *Id.* at 11.

The Court concluded that the "upshot is that our ordinary presumption applies and it is not overcome," meaning that the "interpretation and application of the local litigation provision is primarily for the arbitrators." *Id.* at 14. The arbitrators' decision on their own jurisdiction must therefore be reviewed with considerable deference, and, after performing such a review, the Court found that the arbitrators' conclusions on their own jurisdiction were "lawful." *Id.* at 19.

The opinion outlined above was not unanimous, although it enjoyed strong support. It was joined by seven of the nine members of the Court: Justices Samuel Alito, Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, Antonin Scalia, Sonia Sotomayor, and Clarence Thomas. Justice Sotomayor also wrote a brief concurring opinion indicating her disagreement with the Court's *dicta* regarding the effect of explicit language in a treaty stating that a particular point is a "condition to consent." Substantively, she thought the *dicta* were potentially wrong: "[I]f the local litigation requirement at issue here were labeled a condition on the treaty parties' 'consent' to arbitration, that would in my view change the analysis as to whether the parties intended the requirement to be interpreted by a court or an arbitrator." 514 U.S. ___, concurrence slip op. at 3.

The opinion also garnered a sharply-worded dissent by Chief Justice John Roberts, joined by Justice Anthony Kennedy. The Chief Justice opined that the BIT was *not* analogous to an ordinary contract. 514 U.S. ___, dissent slip op. at 1, 5. In his view, the Treaty's dispute resolution clause contained a "standing offer" to individual investors to arbitrate, which could then be accepted by fulfilling the precondition of local litigation. *Id.* at 5-6. Without fulfillment of that precondition, Argentina's offer was not accepted and no agreement was ever formed. *Id.* at 14. In addition, because that requirement went to the fundamental question of consent and was not, in the Chief Justice's opinion, a mere "procedural" issue, the tribunal's determination on its own jurisdiction was subject to *de novo* court review. As a more fundamental philosophical point, the Chief Justice strongly emphasized Argentina's status as a sovereign State and his belief that "[i]t is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country – including our own – takes that step lightly." *Id.* at 9.

Broadly, the Court's decision in *BG Group* is likely to be perceived as a "pro-arbitration" decision and particularly as a pro-*treaty arbitration* decision, given that it extends a deferential standard of review beyond the realm of ordinary contracts and into the world of investor-State treaty disputes. Of course, the decision does not touch on any number of important remaining questions in US arbitration law, but given the Court's historical interest in arbitration matters and its explicit statement in this case that it granted certiorari due to "the importance of the matter for international commercial arbitration" (514 U.S. ___, slip op. at 5), we can likely expect the Court to take up further significant arbitration cases in the future.

For further information, please contact:

Terra Gearhart-Serna
tlgearhart-serna@debevoise.com
New York, +1 212 909 6673

Paris Court of Appeal Denies Annulment Application in Line With its Policy of Refusing to Review the Merits of the Underlying Dispute

In *General Motors v Daewoo*, the Paris Court of Appeal rejected a request for partial annulment of an ICC award on the grounds of excess of mandate and violation of due process. The Court's decision, issued on January 21, 2014, confirms its consistent policy of refusing to reconsider the merits of the underlying dispute, even where the application is framed as a request falling within the available grounds for annulment under Article 1520 of the French Code of Civil Procedure (the "Code").

The Underlying Arbitration

In the underlying arbitration, General Motors ("GM"), which had acquired the automotive division of Daewoo Motor Co Ltd ("Daewoo"), sought indemnification for certain pre-acquisition liabilities and to reserve certain further indemnification claims for a future arbitration. Under the acquisition documents, satisfaction of all such liabilities was available only from certain funds and shares held in escrow accounts. In a counterclaim, Daewoo requested the return of those funds and shares.

The tribunal allowed some of GM's claims for indemnification, and also accepted Daewoo's counterclaim in full, thus ordering that the funds and shares held in escrow be returned to Daewoo.

GM's Application for Partial Annulment

GM applied for annulment of the tribunal's decision allowing Daewoo's counterclaim. GM contended that the tribunal had exceeded its mandate by accepting that GM could reserve for a future arbitration certain further claims for indemnification, whilst at the same time ordering the return of the funds and shares which were to serve as the sole source of satisfaction for any such claims. GM also argued that by ordering the return of these funds and shares, the tribunal had decided, by implication or effect, on these reserved claims, which decision was beyond the tribunal's mandate and violated GM's rights of due process.

> The Court issued a €100,000 order on costs pursuant to Article 700 of the Code, one of the largest awards on costs ever awarded by the Court in this type of proceeding.

The Court's Decision

Rejecting the request for annulment, the Court reasoned that Daewoo had appropriately asserted its counterclaim in the arbitration and thereby effectively brought the issue of the return of the funds and shares from escrow within the tribunal's mandate. GM had the opportunity to be heard in relation to this issue and therefore was afforded due process.

The Court issued a €100,000 order on costs pursuant to Article 700 of the Code, one of the largest awards on costs ever awarded by the Court in this type of proceeding.

Daewoo was represented in the Paris Court of Appeal by Debevoise's Chair of European and Asian Litigation Lord Goldsmith QC and Paris-based partner Antoine Kirry. The Debevoise team advising Daewoo also included partner Sophie Lamb, and associates Samuel Pape and Geoffrey Goubin. In the arbitration, Daewoo was represented by Lord Goldsmith QC and a team of lawyers from Bae, Kim & Lee LLC in Seoul.

For further information, please contact:

Samuel Pape
spape@debevoise.com
London, +44 20 7786 3023

Recent Event: Sophie Lamb, a London based partner at Debevoise & Plimpton LLP, has been listed in *The Lawyer* magazine's "Hot 100 2014." The annual list recognizes the profession's most innovative and inspirational lawyers.

In Dispute Over Attorneys' Fees in *Wal-Mart Wage and Hour Litigation*, Ninth Circuit Court of Appeals Clarifies Scope of 'Non-Appealable' Arbitration Clauses

After successfully engineering a settlement with Wal-Mart over the wages it paid employees, the plaintiff employees' attorneys subsequently found themselves in a wage dispute of their own. As part of the settlement, the plaintiffs' attorneys agreed that they would employ "non-appealable" arbitration to resolve any disputes that arose over how to allocate their fee award. When the District Court that approved the settlement awarded $28 million in attorneys' fees, the plaintiffs' attorneys almost immediately entered into arbitration. After the arbitrator's award was confirmed by the District Court, several of the plaintiffs' counsel appealed to the Ninth Circuit Court of Appeals seeking to modify or vacate the award, claiming their contributions were not fairly valued.

Their appeal raised a question about the extent to which parties can contract out of judicial oversight of arbitration proceedings, and in particular, whether parties can agree that no appeals may be taken pursuant to Section 10 of the Federal Arbitration Act ("FAA"), which provides the federal statutory grounds for appealing arbitration awards, most of which go to issues of fairness and due process.

The Third and Eleventh Circuit Courts of Appeals had previously held that parties cannot contract out of the remedies provided by Congress in Section 10 of the FAA. Thus, in those circuits, a clause providing that arbitration is non-appealable may be valid as to the merits of the arbitration, but the award can still be appealed and vacated under the process-based grounds enumerated in Section 10 of the FAA. *See Southco, Inc. v. Reell Precision Mfg. Corp.*, 331 F. Appx. 925, 927–28 (3d Cir. 2009); *Rollins, Inc. v. Black*, 167 F. Appx. 798, 799 n.1 (11th Cir. 2006).

Prior to those decisions, the Second Circuit Court of Appeals had held that "non-appealability" clauses cannot strip the federal courts of the power to entertain appeals based on the FAA's Section 10 or the "manifest disregard of law" standard. *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 63–64 (2d Cir. 2003). Putting aside the current status of the "manifest disregard" standard, which is questioned from time to time in case law – *see, e.g., Hall St. Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329 (2d Cir. 2010) (noting "ambiguity surrounding the interpretation of the manifest disregard standard in the wake of *Hall Street*") – it seems reasonable to expect that the Second Circuit standard is now equivalent to that of the Third and Eleventh Circuits: Section 10 review cannot be waived.

The Ninth Circuit Court of Appeals, having reviewed these precedents, joined their holdings and found that an arbitration agreement's non-appealability clause is enforceable as to the merits of the arbitration, but does not waive parties' right to appeal on the grounds enumerated in Section 10 of the FAA. Interestingly, the Ninth Circuit's opinion characterized *Hoeft* as holding that a non-appealability clause strips federal courts of jurisdiction to hear an appeal "on any ground," and used this characterization of *Hoeft*, contrasted with *Southco* and *Rollins*, to support the argument that the non-appealability clause at issue in *Wal-Mart* was "ambiguous." *In re Wal-Mart Wage and Hour Employment Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013). The Ninth Circuit did not hesitate to uphold the importance of Section 10, however, noting that "[p]ermitting parties to contractually eliminate all judicial review of arbitration awards would . . . frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration." *Id.* at 1268. The fact that due process guarantees were at issue was critical: Section 10 "barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct." *Id.* In a separate memorandum opinion, the Ninth Circuit agreed with the District Court that no such due process problems were presented in this case, and affirmed the District Court's ratification of the award.

Thus, in all four circuits to have considered the question, although parties can waive their right to appeal the merits of an arbitration award, the provisions in Section 10 remain valid grounds for a party to appeal an award, even if rendered in an arbitration governed by a non-appealability clause.

For further information, please contact:

Christopher S. Ford
csford@debevoise.com
New York, +1 212 909 6161

Appointment: Lord Goldsmith QC has been appointed Vice-Chair of the Hong Kong International Arbitration Centre.

Swiss Supreme Court Finds that Enforcement of Arbitral Award does not Violate Iranian Sanctions Regime

In a decision dated January 21, 2014, the Swiss Federal Supreme Court rejected an attempt by an Israeli-controlled Swiss company to resist the enforcement of a $97 million arbitral award in favour of an Iranian company on the basis that payment of the award would violate international economic sanctions against Iran and therefore contravene Switzerland's public policy. *X Ltd. v. Société Z*, 4A_250/2013, January 21, 2014.

In 1977, a Swiss company, referred to in the judgment only as "Company X", entered into a contract with an Iranian company (referred to as "Company Z") for the purchase of Iranian crude oil, which was ultimately intended for three Israeli companies. The contract was subject to Iranian law and provided that disputes would be resolved by a three-member arbitral tribunal sitting in Tehran.

In 1985, the Iranian company initiated arbitration proceedings against the Swiss company for non-payment of five shipments of crude oil delivered in 1978. The Israeli companies were later joined to the arbitration proceedings as co-respondents. In 2001, the arbitral tribunal ordered the Swiss and Israeli companies to pay US $96.9 million in damages plus interest and charges.

In 2011, with the payment of the award still outstanding, the Iranian company initiated enforcement proceedings before the Swiss courts. The Court of First Instance in Geneva granted the enforcement and release ("*mainlevée*") of the award, which was affirmed on appeal by the Court of Justice in Geneva.

The Swiss company appealed to the Federal Supreme Court of Switzerland. Relying on the public policy exception set out in Article V(2)(b) of the New York Convention and provisions of the Swiss Federal Constitution, it argued that enforcement should be refused on the basis that the payment of the award would violate international economic sanctions against Iran, which would constitute a breach of Swiss public policy by bringing Switzerland into conflict with its obligations under international law. Notably, it argued that compliance with the international sanctions regime was a "fundamental norm of the law of nations" and consequently, national courts were bound to ensure its primacy over conflicting provisions.

The Swiss company also argued that it was precluded from paying the award because payment would expose its controlling Israeli companies, upon which it was financially dependent, to criminal liability under Israeli law for providing financial assistance to an enemy of the State. Finally, it argued that the lower courts had failed to provide adequate reasons for their decisions, in violation of the right to be heard.

The Court dismissed these arguments and affirmed the enforcement of the award. It found that the Swiss company had failed to establish its claims, having framed them only in general terms and by reference to "abstract considerations of international politics" such as the fractious relationship between Israel and Iran. It had not, however, developed or substantiated its arguments on the relationship between Swiss and international law, nor had it demonstrated why payment of the award would violate the sanctions regime or would be incompatible with Swiss public policy.

In addition, the Supreme Court found that the lower courts had provided adequate reasons for their decisions. The lower courts based their decisions on the fact that the Swiss company had not established that the debt had been extinguished; that the Swiss company had already made payments to the Iranian company in March 2009, demonstrating that there was no objective or subjective impediment to payment; and that the Swiss company could not be relieved of its debt by reference to political problems unrelated to the underlying commercial obligation.

The Supreme Court thus concluded that enforcement could not be avoided by invoking the Iranian sanctions regime. It should be noted, however, that the Court did not directly address the question of whether violation of the sanctions regime

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Joshua Fellenbaum co-authored the Young ICCA Guide on Arbitral Secretaries, which was launched at the 2014 ICCA Congress in Miami, and is the first publication to set out best practices for the appointment and use of arbitral secretaries.

Iranian Sanctions Regime No Bar to Enforcement of Arbitral Award

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would, in fact, constitute a public policy exception for the purposes of Article V of the New York Convention, confining its holding to the appellant's deficient reasoning and failure to establish the bases of its allegations. This question, therefore, remains a live one. Of note, US federal courts have previously found that economic sanctions and foreign policy disputes are not sufficient to override the strong public policy in favour of the recognition of international arbitration awards. (See *Ministry of Defense of Iran v Cubic Defense*, 665 F.3d 1091 (9th Circ. 2011)).

However, as this thirty-six year saga seemingly drew to a close, the Court potentially opened a new door on the issue in its final paragraph. The Court stated that it would bring the judgment to the attention of the State Secretariat for Economic Affairs (*Secrétariat d'Etat à l'économie*, or "SECO"), the government branch responsible for implementing sanctions. Article 11 of the Swiss ordinance which implements Iranian sanctions requires persons or institutions having knowledge of financial resources which are subject to the asset freezing regime to report them to SECO. However, a 2012 revision to the ordinance also provides that SECO may, in exceptional cases, authorise payments to accounts subject to the sanctions regime where the payments are made to satisfy judgments and arbitral awards (Article 10(3)(c) Ordinance of 19 January 2011 establishing measures against the Islamic Republic of Iran, 946.231.143.6, as amended).

For further information, please contact:


Jessica Gladstone
jgladstone@debevoise.com
London, +44 20 7786 9166


Ciara Murphy
cmurphy@debevoise.com
London, +44 20 7786 5508

Recent Indian Supreme Court Decisions Continue Arbitration-Friendly Trend

Background

Over the past decade, India has often been viewed as a challenging jurisdiction for arbitration. The most important such decision, of course, was *Bharat Aluminium v. Kaiser Aluminium Technical Services, Inc.* ("*BALCO*"), in which the Supreme Court announced that the application of Part I of the Indian Arbitration and Conciliation Act 1996 (the "Act") would be limited to arbitrations seated in India. More recently, however, the Indian Supreme Court has issued a series of decisions signalling an approach that is more supportive of arbitration. In a previous issue of the *Arbitration Quarterly*, we discussed the more recent cases of *Shri Lal Mahal Ltd. v. Progetto Grano SpA.* and *Vale Australia Pty. Ltd. v. Steel Authority of India Ltd. & Anr.*, which continued a pro-arbitration trend.

Between December 2013 and February 2014, the Supreme Court issued four new decisions in cases involving arbitration. In each case, the Court declined for the most part to interfere in the arbitration involved in the case, leaving matters to the arbitrators. These decisions provide further evidence of a continuing trend in Indian Supreme Court jurisprudence that is supportive of parties' decisions to elect arbitration in their commercial agreements, and that limits judicial interference in arbitration.

Enercon (India) Ltd. & Ors. v. Enercon GmbH & Anr.

In 1994, Enercon GmbH, a German wind turbine manufacturer, and the Indian Mehra Group set up a joint venture, Enercon (India). However, the relationship between Mehra Group and Enercon GmbH gradually soured. In particular, the parties each claimed breaches of a 2006 Intellectual Property License Agreement ("IPLA"). In July 2007, Enercon GmbH stopped supplying technology to the joint venture, and Enercon (India) sought resumption by commencing litigation in Mumbai in September 2007. Relying on the IPLA's arbitration clause, which provided for *ad hoc* arbitration, Enercon GmbH opposed the Mumbai proceedings and commenced arbitration and supporting judicial proceedings in London, which the IPLA described as the "venue" of the arbitration. In response, Enercon (India) petitioned the High Court in Daman to declare the IPLA and the arbitration clause invalid, and sought an anti-suit injunction against the English proceedings. Enercon GmbH eventually obtained favourable decisions in Mumbai and Daman, which Enercon (India) appealed to the Supreme Court.

In the Supreme Court, Enercon (India) argued that: (i) the arbitration clause was invalid as the IPLA was not validly concluded; (ii) the clause was also defective because it required the appointment of three arbitrators, but only provided a mechanism for the appointment of two; (iii) assuming that the arbitration clause was workable, the arbitral seat (unspecified by the agreement) had to be India and not London; and (iv)

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Indian courts thus should have exclusive supervisory jurisdiction over the dispute.

Enercon GmbH prevailed on the first two points as the Supreme Court found, based on the negotiating history of the clause and the elements of the clause itself, that an effective arbitration clause existed as a self-standing agreement, regardless of the validity of the underlying IPLA. The Supreme Court also declined to cure any defects in the arbitrator appointment mechanism, deciding that the two party-appointed arbitrators in this case should appoint the third arbitrator. In reaching this ruling, the court relied on Sections 10 and 11 of the *Indian Arbitration and Conciliation Act 1996* ("Act"), which set rules concerning a number and appointment of arbitrators, to hold that the arbitrators should in effect fix the "clumsy drafting" of the clause.

On the crucial question of the seat of the arbitration, however, the Supreme Court found that the seat had to be India based on the nature of the transactions and the fact that all applicable laws specified in the agreement (*i.e.*, the substantive law, the procedural law, and, particularly, the governing law of the arbitration clause) were Indian. The Court reasoned that since the parties had clearly expressed their intention to subject their arbitration to the Act, India had to be the seat because, in the post-*BALCO* era, Part I of the Act could not apply to a foreign-seated arbitration.

By upholding the validity of an arbitration clause and salvaging a potentially defective mechanism for the appointment of arbitrators, the Supreme Court in *Enercon* clearly applied a pro-arbitration approach. The Court's reliance on *BALCO* to support its ruling on the choice of seat was somewhat surprising, however, in light of the *BALCO* Court's direction that its ruling on the geographic scope of Part I of the Act – that it would only apply to Indian-seated arbitrations – would apply only with respect to arbitration agreements concluded after September 6, 2012 (*i.e.*, the *BALCO* decision date). In any event, that the question of the seat was left open by the parties to the IPLA in *Enercon* underscores the critical importance of carefully drafting the arbitration clause.

> The recent Supreme Court cases of *Enercon*, *Arasmeta*, *Chatterjee*, and *World Sport Group* indicate a continued pro-arbitration trend in India.

Arasmeta Captive Power Company Pvt. Ltd. & Anr. v. Lafarge India Pvt. Ltd.

Arasmeta Captive Power Company ("Arasmeta") concluded two power purchase agreements with its minority shareholder, Lafarge India ("Lafarge"). The dispute resolution clause in the agreements provided for arbitration but reserved "excepted matters" for expert determination. The two companies disagreed as to whether certain sums were due and payable under the agreements and whether this billing dispute was an "excepted matter." Lafarge rejected Arasmeta's proposal to initiate expert determination and commenced arbitration. Arasmeta then referred the case to the High Court of Chhattisgarh, but the High Court decided that the dispute was not an "excepted matter," allowing the arbitration. Arasmeta then appealed to the Supreme Court, which upheld the decision below, holding that the arbitral tribunal should decide whether the dispute was arbitrable.

As a domestic arbitration, this proceeding was governed by Part I of the Act. In determining its jurisdiction under Section 11 of the Act, which provides that the Chief Justice of India or his designate could upon a party's request appoint arbitrators when party-appointment procedures fail, the Supreme Court ruled on three categories of arbitral disputes: first, the courts *will* exclusively decide on whether a dispute is filed with an appropriate court, whether an arbitration agreement exists, and/or whether a disputant is a party to such agreement. Second, the courts *may* decide on whether a claim is time-barred and whether the parties have concluded the underlying contract. The courts may, however, defer these matters to the arbitral tribunal by taking into account available evidence of parties' intentions and considering the Act's overall objective of expediting the arbitration process with minimum judicial intervention. Third, the arbitral tribunal has exclusive jurisdiction over determining the substantive scope of an arbitration clause and the merits of a claim. In this case, the Supreme Court

Recognition: Christopher K. Tahbaz has been appointed to the IBA Asia Pacific Arbitration Group (APAG) Working Group on Initiatives for Harmonizing Arbitration Rules and Practices.

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decided that the dispute fell squarely within the third category.

Like *Enercon*, *Arasmeta* serves as a reminder of the importance of careful drafting with respect to dispute resolution clauses, especially where the parties wish to utilize different types of dispute resolution procedures in different circumstances. *Arasmeta* also provides useful guidance for in-house and external counsel on the types of issues that an Indian court will resolve in a domestic arbitration versus those that will be left to the arbitral tribunal.

Chatterjee Petrochem Co. & Anr. v. Haldia Petrochemicals Ltd.

On January 12, 2002, Chatterjee Petrochem (Mauritius) Company ("CPMC"), the Government of West Bengal, West Bengal Industrial Development Corporation ("WBIDC") and Haldia Petrochemical Ltd. ("HPL") entered into a restructuring agreement intended to allot 51% of the equity of HPL to CPMC. On March 8, 2002, the parties signed a new agreement recording that some (but not all 51%) of HPL shares had been transferred to Chatterjee Petrochem (India) ("CPIL"), the Indian counterpart of CPMC. Notably, the January agreement provided for ICC arbitration, while disputes under the March agreement were subject to domestic litigation.

HPL agreed to allot shares to the Indian Oil Corporation. CPMC objected to the allotment and to the failure by WBIDC and the Government of West Bengal to transfer the balance of their shares to CPIL. CPMC petitioned to the Company Law Board, which upheld the allotment while supporting the transfer of the remaining shares. The Government successfully appealed to the High Court of Calcutta. CPMC's subsequent appeal to a single-Judge bench of the Supreme Court was unsuccessful.

Upon receiving the Supreme Court decision, CPMC commenced ICC arbitration based on the January agreement. The other parties then obtained a declaration from the High Court that the arbitration clause was nullified by the March agreement. CPMC appealed to the Supreme Court, while the respondent requested that the Supreme Court grant an anti-arbitration injunction.

The two-Judge bench of the Supreme Court upheld the validity of the arbitration clause in the January agreement and denied the anti-arbitration injunction request. Interestingly, the Supreme Court did not address the respondent's argument that CPMC filed for arbitration only after receiving the adverse ruling of the single-Judge Supreme Court. The respondent argued that once the adjudicative forum was chosen and conclusive findings were made, it would be "vexatious and an abuse of law" to then re-open the dispute in an arbitral forum.

The Supreme Court reiterated that the "General Provisions" of Part I, including Section 5, will apply to all Chapters or Parts of the Act, including international arbitration provisions in Part II. Section 5 states that no judicial authority shall intervene unless otherwise specified in the Act. The emphasis of this point in the Court's ruling is an encouraging sign of at least how this Court perceived the limited role of the judiciary with regard to arbitration.

World Sport Group (Mauritius) Ltd. v. MSM Satellite (Singapore) Pte. Ltd.

MSM Satellite (Singapore) ("MSM") agreed to pay World Sport Group (Mauritius) ("WSG") facilitation fees in return for WSG's relinquishing of broadcast rights for cricket that it had acquired from the Board of Control for Cricket in India, the national governing body for Indian cricket, the most popular sport in India. The agreement was later reduced to a deed, which provided for Singapore arbitration and English governing law. Subsequently, MSM rescinded the deed, alleging that WSG's rights had lapsed and that WSG had no rights to relinquish.

MSM sued in the Mumbai High Court to recover sums paid. WSG commenced arbitration in Singapore. However, MSM obtained an anti-arbitration injunction in the High Court, which applied *N Radhakrishnan v. Maestro Engineering & Ors.*, where the Supreme Court held that issues involving public funds and fraud should be tried by courts. WSG appealed to the Supreme Court.

The Supreme Court restricted *Radhakrishnan* to cases concerning domestic arbitrations, holding that application for judicial referral to arbitrations is not required for foreign-seated arbitrations. The Court also held that Section 45 of the Act

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Promotion: Aimee-Jane Lee, based in the London office, has been promoted to International Counsel. Her practice focuses on investment treaty and complex commercial arbitration and public international law.

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applies only to foreign-seated arbitrations, and provides grounds for resisting a referral to arbitration only where the arbitration agreement itself is (i) null and void, (ii) inoperative (*e.g.*, revoked) or (iii) incapable of performance (*e.g.*, arbitration cannot be practically effected). In this case, the Court found that even if the deed were null and void on the basis of WSG's alleged misrepresentation and fraudulent conduct, the arbitration agreement therein was valid. The injunction was set aside.

World Sport Group clarifies the limitations on challenging arbitral referrals under the Act and makes judicial challenge of foreign-seated arbitrations involving fraud and misrepresentation more difficult—but the case also confirms that *Radhakrishnan* still applies to India-seated arbitrations.

Moving in the Right Direction

The recent Supreme Court cases of *Enercon*, *Arasmeta*, *Chatterjee*, and *World Sport Group* indicate a continued pro-arbitration trend in India. Undoubtedly, significant issues remain, but these decisions signify a move in the right direction and mark an auspicious start to 2014.

Please note that Debevoise & Plimpton LLP does not practice or opine on matters of Indian law. If you require such an opinion, we recommend (and would be happy to assist) that you contact an Indian law firm.

For further information, please contact:


Alexander Dmitrenko
admitrenko@debevoise.com
New York, +1 212 909 6838


Xia Li
xli@debevoise.com
Hong Kong, +852 2160 9822


Sebastian Ko
sko@debevoise.com
Hong Kong, +852 2160 9827

Russia Publishes Draft of New Arbitration Law

In January 2014, the Ministry of Justice of the Russian Federation published a package of draft legislation aimed at comprehensively reforming the country's arbitration regime ("New Arbitration Law"). The New Arbitration Law was developed in response to growing demand from the country's arbitration community, business interests, and State authorities for the modernization of the current Russian arbitration laws in line with progressive arbitration regimes in other countries, eliminating existing gaps in legal regulation of the arbitral and enforcement processes, and reducing widespread abuses and misapplication of the law. The New Arbitration Law was drafted by the Ministry's working group, in which lawyers at Debevoise & Plimpton LLP played an active role.

The New Arbitration Law is currently subject to a public review process, primarily by the domestic arbitration community. It is expected that, after taking into account comments, recommendations and suggestions, the New Arbitration Law will be submitted in the coming months to the State Duma, the lower chamber of the Russian Parliament, for further consideration, parliamentary hearings, and ultimate adoption. Although certain alterations to the New Arbitration Law may be anticipated both before and after it is submitted to the State Duma, the New Arbitration Law's key provisions (described below) will likely remain largely intact.

Key features of the New Arbitration Law include, among other things:

(i) *Amalgamating Russia's domestic and international commercial arbitration regimes*

Currently, there are different laws governing domestic (Federal Law No. 102-FZ on Arbitral Tribunals in the Russian Federation) and international arbitration processes (Federal Law No. 5338-I on International Commercial Arbitration). The proposed unified regime will be based on the UNCITRAL Model Law on International Commercial Arbitration (1985), including some amendments made in the 2006 UNCITRAL Model Law ("Model Law").

It is worth pointing out that the new unified regime does not anticipate significant changes to the current provisions

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Recognition: *Benchmark Litigation* has named Debevoise as its 2014 International Arbitration Firm of the Year at its second annual awards.

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on recognition and enforcement of foreign arbitral awards and set-aside of domestic awards. One exception is that the New Arbitration Law proposes to replace the current domestic set-aside and non-recognition ground of "contravention to fundamental principles of Russian law" with "violation of public policy," which would make the grounds for set-aside and non-recognition fully consistent with the standards of the Model Law and the New York Convention (1958).

(ii) Establishing clear(er) arbitrability criteria and defining non-arbitrable disputes

Arbitrability criteria and non-arbitrable disputes are vaguely defined in the existing regime and thus represent highly controversial areas in current Russian arbitration law and practice. Notably, the New Arbitration Law renders corporate disputes arbitrable, thus erasing the existing uncertainty over arbitrability of disputes arising out of M&A agreements. Moreover, it is contemplated that arbitration clauses may be incorporated into charters (statutes) of Russian companies.

However, only institutional (administered) arbitration shall be allowed in respect of internal corporate disputes of Russian companies (such as legal challenges to internal corporate resolutions). Subject to certain formalities, foreign arbitral institutions will be allowed to administer such disputes on par with the Russian arbitral institutions.

(iii) Designating the Russian courts as "assistance and control bodies" within the meaning of the Model Law

Absent parties' agreement to the contrary, the New Arbitration Law empowers the Russian courts to resolve deadlocks on appointments and challenges in arbitrations "seated" in Russia. Under the existing Russian Law on International Commercial Arbitration, these functions are delegated to the President of the Russian Chamber of Commerce and Industry.

(iv) Setting rigorous requirements for "qualified" Russian-based arbitral institutions

The New Arbitration Law includes the following new criteria for Russian-based arbitral institutions: (1) the requirement for any (existing or new) domestic arbitral institution to obtain approval to operate from a special non-State expert commission to be formed by the Ministry of Justice (the proposed commission will become a new feature of the Russian arbitration regime and will consist primarily of members from the arbitration, legal and business communities, including also representatives of State bodies and courts); (2) adoption by such institutions of procedural rules meeting certain detailed minimum standards; and (3) establishment by such institutions of nomination committees to decide potential nomination issues and challenges in a collegial way. These requirements are aimed at making Russian arbitral institutions more transparent and also at reducing the growing number of controversial domestic arbitral institutions in Russia, ensuring their compliance with best industry practices, and preventing a currently commonplace abuse of arbitration law (e.g., when so-called "pocket arbitration centers" are created and effectively run by interested parties in order to perpetrate fraud and/or procure biased arbitral awards for the benefit of their founders).

> The New Arbitration Law is currently subject to a public review process, primarily by the domestic arbitration community.

Notably, these new requirements are not proposed to apply to ad hoc arbitrations and foreign arbitral institutions.

(v) Making arbitral institutions civilly liable to the parties for gross negligence as well as establishing criminal liability for corrupt practices

The current regime provides for neither civil liability for negligence on the part of the arbitral institutions nor any criminal liability in cases of bribery aimed at influencing the process or outcome of an arbitration. According to the New Arbitration Law, arbitrators will remain immune from such civil liability, but will become subject to a potential criminal liability for corrupt conduct and general criminal offences such as fraud. Notably, the new regime will not impose a criminal liability upon the arbitrators for issuing a knowingly wrong award.

(vi) There are other important modifications proposed by the New Arbitration Law related to various aspects of arbitral procedure, changing the statutory registry of immovable property based on arbitral awards, tax exemptions in respect of arbitrators' fees, etc.

It is currently contemplated that the New Arbitration Law will enter into force on January 1, 2015, but the rules concerning qualification requirements for Russian domestic arbitration institutions will likely be deferred to later dates (tentatively in 2016 and 2017). The New Arbitration Law will not have a retroactive effect and shall not impact the validity of arbitration clauses entered into before its adoption. The procedural elements of the New Arbitration law will apply to any arbitration filed after its entry into force, but will only have a limited

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application to arbitrations started prior to that date (e.g., procedures related to judicial review of arbitration-related cases).

Lawyers at Debevoise & Plimpton LLP expect to continue to take an active role in the reform of the Russian arbitration laws, and we intend to continue to provide prompt updates on key developments in the modernization of the Russian arbitration regime.

For further information, please contact:


Alexey Yadykin
ayadykin@debevoise.com
Moscow, +7 495 956 3858


Alexander Dmitrenko
admitrenko@debevoise.com
New York, +1 212 909 6838

British Virgin Islands Take Steps to Update Arbitration Framework

The British Virgin Islands ("BVI") has recently taken three important steps to update its arbitration framework. In recent months, the world's largest corporate domicile has passed a new arbitration act, announced plans to open an arbitration centre and persuaded the UK Government to extend the New York Convention to cover the BVI.

The Arbitration Act 2013

On December 17, 2013, the BVI Parliament passed the Arbitration Act 2013 (the "Act") to replace its 1976 Arbitration Ordinance (the "Ordinance"). Unlike the existing legislation, which focused largely on domestic arbitration, the Act was expressly designed with international arbitration in mind. The Act is largely based on the UNCITRAL Model Law 2006 (the "Model Law"), expressly providing that the provisions of the Model Law are to have effect unless the Act provides to the contrary.

In giving effect to the Model Law, the Act introduces into BVI law significant elements of established arbitral practice that were previously absent from, or inadequately covered by, the existing legal framework. These include (i) the principle of *kompetenz-kompetenz* (the rule that an arbitral tribunal has jurisdiction to determine its own jurisdiction); (ii) the established grounds for setting aside arbitral awards found in Article 34 of the Model Law (replacing the existing rule that an arbitral award could be set aside only where an arbitrator or umpire had "misconducted himself or the proceedings" or the award had been "improperly procured"); (iii) an updated definition of what constitutes an "arbitration agreement," via the adoption of the broader of the two alternative versions of Model Law Article 7; and (iv) provisions for the making of interim orders by arbitral tribunals, by giving effect to Model Law Articles 17 – 17G.

In addition to the changes effected by adopting substantial portions of the Model Law, the Act brings into force a number of other noteworthy changes. These include the enactment of detailed confidentiality provisions, which (i) restrict the disclosure of information regarding arbitral proceedings and arbitral awards; (ii) impose a presumption that court proceedings under the Act ought not to be heard in open court; and (iii) restrict the reporting of information from any court proceedings heard otherwise than in open court. The Ordinance did not contain provisions addressing confidentiality, although confidentiality had been recognised as an implied obligation at common law. The inclusion of such detailed confidentiality provisions likely reflects a desire within the BVI Parliament to protect the BVI's reputation for preserving anonymity in corporate transactions.

Another notable change is the introduction of an explicit obligation on the tribunal to adopt cost-effective and efficient procedures that ensure disputes are fairly resolved. Given critiques of

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Recognition: The Latin Lawyer recognised Debevoise & Plimpton LLP's representation of the founder and shareholders of Grupo Diniz as the 2013 "Dispute of the Year" at its Deal of the Year Awards, held in Sao Paolo, Brazil on March 27, 2014.

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arbitration in some quarters as a costly and time-consuming method of dispute resolution, the inclusion of a statutory duty on arbitrators to be mindful of the efficiency of the proceedings is welcome and encouraging.

Finally, the Act follows the English Arbitration Act 1996 in providing for the immunity of arbitral tribunals, their employees and agents, in order to eliminate the possibility of a disgruntled litigant seeking to bring a personal claim against an arbitral tribunal from which it has received an unfavourable award. There is an exception where the act or omission complained of occurred in bad faith.

BVI International Arbitration Centre

In addition to modernising the BVI's legislative framework, the Act took a further step towards making the BVI a more attractive place to arbitrate by providing for the establishment of the BVI International Arbitration Centre ("IAC"). Many of the functions of the IAC are as one would expect: to provide necessary facilities for the conduct of arbitral proceedings; to provide essential dispute resolution services; to receive and process documents on behalf of parties that choose the BVI as an arbitral seat; and to provide necessary support to arbitral tribunals established pursuant to the Act.

The IAC's role is not, however, limited to that of a standard arbitral institution. The Act also provides that the IAC is the appointing authority in arbitrations seated in the BVI where (i) the parties have not specified in their agreement the procedure for choosing the arbitral tribunal; or (ii) the parties have failed to follow the agreed procedure.

Accession to New York Convention

Obtaining the benefits of the New York Convention ("NYC") was the final step the BVI needed to take to become a fully-fledged modern arbitration jurisdiction. This would be critically important: remaining outside the NYC would signify that awards rendered in the BVI could not be granted recognition and enforcement in other countries pursuant to the Convention. The BVI, however, could not simply accede to the NYC: as a British Overseas Territory, the UK Foreign and Commonwealth Office is responsible for the BVI's external affairs.

At the time the Act was passed, the BVI government made known its intention to lobby the UK government to extend the application of the NYC to the BVI. This lobbying has proved successful: on February 24, 2014, the United Nations announced that the UK government had extended the benefits of the NYC to cover the BVI. This extension of benefits will come into effect on May 25, 2014.

Effective Date

The Act is not yet in force. It will come into force by proclamation of the Governor of the BVI at a date to be announced.

Conclusion

The combined impact of the steps outlined above will be to increase the attractiveness of the BVI as an arbitral seat. It remains to be seen whether these steps lead to a marked increase in arbitrations seated in the jurisdiction.

For further information, please contact:

Michael Howe
mhowe1@debevoise.com
London, +44 20 7786 5541

Appointment: Lord Goldsmith QC has been named co-managing partner of the London office alongside tax partner Richard Ward. Lord Goldsmith succeeds James C. Scoville and will continue to lead the firm's European and Asian litigation practices.

Recent and Forthcoming Events

- Donald Francis Donovan spoke at Stanford Law School on "The Practice of International Law" on January 16, 2014.
- Donald Francis Donovan participated in a FIAA International Arbitration Advocacy workshop on "Questioning of Expert Witnesses in International Arbitration" in New York on January 16-18, 2014.
- Catherine M. Amirfar chaired the IBAArb40 program at the 17th Annual IBA International Arbitration Day in Paris on February 13, 2014.
- David W. Rivkin spoke on "Anything Goes? Do counsel owe a duty of honesty in relation to their submissions, and (if so) when and to whom?" at the 17th Annual IBA International Arbitration Day in Paris on February 13, 2014.
- Catherine M. Amirfar Amirfar chaired the CPR Annual Meeting in Charleston, South Carolina on February 20, 2014.
- Mark W. Friedman and Ina Popova spoke on "Can State Counterclaims Salvage Investment Arbitration?" at the ITA-IET Joint Winter Forum on International Energy Arbitration in Houston on February 21, 2014.
- Catherine M. Amirfar spoke on "Judicial Review of Jurisdictional Challenges in Investment Arbitration: What Should Judges Do?" at the Chartered Institute of Arbitrators – New York and Toronto Chapters in New York on February 28, 2014.
- Ina Popova spoke on "International Arbitration: Are You Ready to Practice?" at Columbia Law School 2014 Private Sector Career Symposium in New York on March 7, 2014.
- Aimee-Jane Lee spoke on the use of at amicus curiae briefs in international arbitration at the Cambridge Arbitration Day on March 8, 2014.
- Dietmar W. Prager spoke on "Diverging Standards of Review of Jurisdictional Decisions" at the Columbia Arbitration Day in New York on March 28, 2014.
- Christopher Tahbaz spoke on "Investment Arbitration: Developed vs Non-Developed Countries" at the Generations in Arbitration Conference in Hong Kong on March 30, 2014.
- Mark W. Friedman participated in the "Arbitration Round Table: Japanese Perspectives and Practice" at the ABA Section of International Law Spring Meeting in New York on April 4, 2014.
- Catherine M. Amirfar spoke on "Treaty Arbitration: Is the Playing Field Level and Who Decides Whether It Is Anyway?" at the 2014 International Council for Commercial Arbitration Congress in Miami on April 8, 2014.
- Mark W. Friedman presented a report on international commercial arbitration at the ILA Conference in Washington, DC on April 10, 2014.
- Joshua Fellenbaum participated in a panel on "Should institutional arbitration rules make it easier for arbitrators to order joinder or consolidation?" at the annual International Centre for Dispute Resolution's Young & International debate in Vienna on April 13, 2014.
- Aimee-Jane Lee will speak on "Expert evidence: tips on the effective presentation of complex questions" at the ICC Young Arbitrators Forum in Paris on May 6, 2014
- Dietmar W. Prager will speak on "Evidence in Arbitration" at the 10th Rio de Janeiro International Arbitration Conference in Rio de Janeiro on May 6, 2014.
- Christopher Tahbaz will speak on "Developments in the Enforcement of Arbitral Awards in Hong Kong and the United States" at the ICC Asia-Pacific Conference in Seoul on May 19-21, 2014.
- Donald Francis Donovan will speak on "Investor Disputes Involving Energy Policies and Regulations," and Dietmar W. Prager will speak on "Remedies in International Energy Disputes" at the "Emerging Trends in International Arbitration in Latin America: Energy Disputes" conference in Santiago de Chile on June 5, 2014.
- Natalie Reid will speak on "Provisional measures to secure assets for enforcement in international arbitration" at the ITA Young Arbitrators Dallas Roundtable in Dallas on June 18, 2014.

Debevoise International Dispute Resolution Group

Partners and Counsel

Catherine M. Amirfar
Partner, New York
cmamirfar@debevoise.com
+1 212 909 6398

Donald Francis Donovan
Partner, New York
dfdonovan@debevoise.com
+1 212 909 6233

Tony Dymond
Partner, London
tdymond@debevoise.com
+44 20 7786 9030

Mark W. Friedman
Partner, New York
mwfriedman@debevoise.com
+1 212 909 6034

Lord Goldsmith QC
Partner, London and Hong Kong
phgoldsmith@debevoise.com
+44 20 7786 9088
+852 2160 9800 (Hong Kong)

Antoine F. Kirry
Partner, Paris
akirry@debevoise.com
+33 1 40 73 12 35

Alyona N. Kucher
Partner, Moscow
ankucher@debevoise.com
+7 495 956 3858

Sophie Lamb
Partner, London
sjlamb@debevoise.com
+44 20 7786 3040

John B. Missing
Partner, London
jmissing@debevoise.com
+44 20 7786 9160

Dietmar W. Prager
Partner, New York
dwprager@debevoise.com
+1 212 909 6243

David W. Rivkin
Partner, New York and London
dwrivkin@debevoise.com
+1 212 909 6671
+44 20 7786 9171 (London)

Dr. Thomas Schürrle
Partner, Frankfurt
tschuerrle@debevoise.com
+49 69 2097 5000

Karolos Seeger
Partner, London
kseeger@debevoise.com
+44 20 7786 9042

Christopher K. Tahbaz
Partner, New York and Hong Kong
cktahbaz@debevoise.com
+1 212 909 6543
+852 2160 9839 (Hong Kong)

Jean-Marie Burguburu
Of Counsel, Paris
jmburguburu@debevoise.com
+33 1 40 73 13 09

Frederick T. Davis
Of Counsel, Paris
ftdavis@debevoise.com
+33 1 40 73 13 10

Matthew Getz
Counsel, London
mgetz@debevoise.com
+44 20 7786 5518

Jessica Gladstone
Counsel, London
jgladstone@debevoise.com
+44 20 7786 9166

Aimee-Jane Lee
Counsel, London
ajlee@debevoise.com
+44 20 7786 9168

Carl Micarelli
Counsel, New York
cmicarelli@debevoise.com
+1 212 909 6813

Steven S. Michaels
Counsel, New York
ssmichaels@debevoise.com
+1 212 909 7265

Philip Rohlik
Counsel, Hong Kong
prohlik@debevoise.com
+852 2160 9856