Debevoise & Plimpton

Arbitration Quarterly

IN THIS ISSUE

Editors' Remarks

Welcome to the 2015 opening edition of Arbitration Quarterly, Debevoise & Plimpton LLP's review of significant developments in international arbitration over the last few months.

2014 was a busy year in international arbitration.

In the investment disputes arena, in *Yukos v. Russia* the Claimants were collectively awarded over US$50 billion, following the tribunal's ruling that Russia had breached the Energy Charter Treaty. This award provided persuasive evidence of the potentially immense impact of investment agreement protections. Of course, the next steps in the long-running saga, as the Claimants seek to enforce the awards and Russia challenges them, will provide the denouement and no doubt provide arbitration commentators with much to feast on. Likewise, the European Union's increasing engagement in investor-state disputes has prompted much discourse. Its "suspension" injunction preventing Romania from paying an ICSID award has generated concern about the status and application of investment agreements signed by EU Member States. The EU has also enacted a new regulation that allocates financial responsibility, and provides for cooperation between, the EU and Member States involved in defending investment disputes. It will be interesting

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to observe how the EU's more active involvement will influence the conduct of investment disputes.

In the United States, the U.S. Supreme Court has been occupied by litigation arising from Argentina's sovereign debt default in 2012. In that context, it has had to consider important issues relating to state sovereignty. In particular, it held that the Foreign Sovereign Immunities Act does not operate to limit or provide immunity from discovery. In a separate judgment, the Supreme Court upheld injunctions that sought to prevent Argentina from making payment to its bondholders that had participated in the debt restructuring, without making payment or settling with other bondholders (including NML) that had refused to participate in the debt restructuring and instead had obtained judgments to collect on the defaulted bonds.

Domestic courts have also grappled with a plethora of significant arbitration-related cases, generally continuing a trend of judgments that promote international arbitration as a dispute resolution mechanism. In China, the Supreme People's Court recognized for the first time that a non-PRC arbitral institution (in this case, the ICC) could administer an arbitration seated in the PRC. The Indian Supreme Court has continued its pro-arbitration trend in *Reliance v. India*, in which it held that the Indian courts have no jurisdiction to set aside an arbitral award seated in London and where the arbitral agreement was governed by English law. Also, in Asia, the Singapore High Court has provided welcome clarification to the question of the proper law of an arbitration, holding that absent an express choice of law, it will generally be the law of the seat of the arbitration. This approach accords with a new specific provision in the LCIA Rules.

Arbitral institutions have also been busy. Both the LCIA and ICDR launched new arbitration rules. In a novel development, both institutions expressly considered the conduct of parties' representatives. While the ICDR cautiously indicated that it may in future supplement its rules to regulate parties' representative conduct, the LCIA Rules adopted the more radical step of including mandatory Guidelines setting a minimum standard of conduct, directly enforceable by LCIA tribunals. New arbitration centers have also sprung up, in Melbourne, Australia; Riyadh, Saudi Arabia and Belgrade, Serbia, reflecting a trend for more localized arbitration offerings.

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 publication or any other international arbitration and dispute resolutions matters, we would be delighted to hear from you.

Very best wishes,

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Yukos v. Russian Federation: Largest Arbitration Award to Date

“The Tribunal awarded the Claimants US$50.02 billion in damages, ordered Russia to pay US$60 million to cover approximately 75 percent of the Claimants’ legal fees, and imposed the full costs of the arbitration on Russia.”

On July 28, 2014, the Permanent Court of Arbitration published Awards in the three *Yukos* arbitrations against Russia (the “Final Awards”).[1] The Tribunal unanimously held that Russia had unlawfully expropriated OAO Yukos Oil Company (“Yukos”) in violation of its international law obligations under the Energy Charter Treaty (the “ECT”). Accordingly, the Tribunal awarded the Claimants US$50.02 billion in damages, ordered Russia to pay US$60 million to cover approximately 75 percent of the Claimants’ legal fees, and imposed the full costs of the arbitration on Russia.

Background

The Dispute

The disputes arose out of actions that Russian state authorities took against Yukos, starting in the early 2000s, including:

- in 2003 tax reassessments and consequential fines covering the years 2000-2004, that resulted in a record tax bill of more than US$24 billion;
- the freezing of Yukos’ assets by a Russian court, and the seizing and subsequent auction of a key production subsidiary, Yuganskneftegaz (“YNG”), for the repayment of Yukos’ tax debt; and
- the initiation of bankruptcy proceedings against Yukos and subsequent sale of the bankrupt’s property for the repayment of debts to creditors.

As a result of the sale of the property of Yukos, most of the assets were in the end acquired primarily by the state-owned companies, Gazprom and Rosneft.

In 2003, in parallel with the tax claims filed against Yukos, a series of criminal investigations were launched against senior Yukos executives resulting in the imprisonment of a number of executives.

The Arbitration Proceedings

The arbitration proceedings took place under the UNCITRAL Rules and lasted nearly 10 years. The proceedings were bifurcated, with a preliminary phase on jurisdiction and admissibility (concluding with Interim Awards on Jurisdiction and Admissibility in November 2009 (the “Interim Awards”)), followed by a merits phase that also incorporated some issues deferred from the preliminary phase. For the merits phase alone, after receipt of voluminous written submissions totaling 2,504

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1. The Tribunal adjudicated three arbitrations, each brought by a different shareholder (Hulley Enterprises Limited, Yukos Universal Limited, and Veteran Petroleum Limited) (the “Claimants”). The arbitrations were heard in parallel, but the Tribunal issued three Awards. *See Hulley Enterprises Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 226, Final Award (July 18, 2014); *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Final Award (July 18, 2014); *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. AA 228, Final Award (July 18, 2014). The Awards are substantially identical; the only distinction being the damages owed to each shareholder. Collectively, the Claimants held a 70.5 percent shareholding in Yukos. Final Awards, ¶ 69.

Yukos v. Russian Federation: Largest Arbitration Award to Date

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pages, at least 6,281 exhibits, 9 witness statements and 19 expert reports, the Tribunal heard the parties in a 22 day oral hearing held in The Hague in late 2012. Unsurprisingly, the dispute evolved during the course of the lengthy arbitration proceedings. The Claimants' complaints covered conduct primarily between July 2003 and November 2007, after the arbitration had been initiated.

The Interim Awards on Jurisdiction and Admissibility

The Tribunal had dismissed most of Russia's jurisdictional objections in its 2009 Interim Awards. Most notably, the Tribunal had considered the consequences of the fact that Russia had not ratified the ECT and therefore it had not entered into force. The ECT itself provides that once it has been signed by a State it shall apply "provisionally pending its entry into force for such signatory to the extent that such provisional application is not inconsistent with its constitution, laws or regulations." ECT, Article 45(1).

Russia had argued that provisional application did not apply because it was inconsistent with its internal laws. However, the parties disputed the proper interpretation of this carve-out. Russia argued that the relevant issue was whether particular provisions of the ECT and Russia's internal laws were consistent. The Claimants argued that the relevant issue was simply whether the principle of provisional application of a non-ratified treaty was consistent with Russian law. The Tribunal favored the Claimants' interpretation and found that the principle of provisional application was not inconsistent with Russian law. *See, e.g., Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Interim Award (Nov. 30, 2009), ¶ 394.

The Final Awards

Jurisdiction and Admissibility

The Tribunal had reserved certain jurisdictional objections and admissibility arguments for the merits phase. In the Final Awards, the Tribunal dismissed Russia's argument that, because of the Claimants' alleged "unclean hands," the Tribunal lacked jurisdiction, the Claimants' claims were inadmissible, and/or the Claimants should be deprived of the substantive protections of the ECT. Final Awards, ¶ 1373. However, the Tribunal did note that the alleged conduct could have an impact on the Tribunal's assessment of liability and damages. *Id.* ¶ 1374.

The Tribunal also rejected Russia's objection that, based on a carve-out in the ECT, the Tribunal did not have

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Recognition: Debevoise & Plimpton LLP Partner Sophie Lamb named "*Rising Star*" by Law360.

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jurisdiction over claims relating to "Taxation Measures." ECT, Article 21. It held that claims *prima facie* excluded by the carve-out would be brought back within the Tribunal's jurisdiction by an express claw-back provision in the ECT which provided that Article 13 (prohibiting unlawful expropriation) shall apply to taxes. In any event, the carve-out could only apply to *bona fide* taxation measures. *Id.* ¶¶ 1406-1407.

Liability

The Tribunal found that Russia had engaged in a concerted attack on Yukos. This involved the imposition of unlawful tax demands which the Tribunal concluded evidenced that "the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets." *Id.* ¶ 756. It also included the auction of YNG. The Tribunal found that the purchase price was far below the fair value and identified Russia's imposition of massive tax liabilities on YNG and its speedy arrangement of the auction as possible causes. *Id.* ¶¶ 1020-1022. The Tribunal concluded that the auction "was in effect a devious and calculated expropriation by Respondent of YNG" with drastic consequences for Yukos' prospects for survival. *Id.* ¶¶ 1037, 1043-1044. Finally, the Tribunal reviewed the bankruptcy proceedings and found that it "[could not] accept that it was in any sense proper or fair . . . for the court to declare Yukos bankrupt, or for Yukos to have been deprived of all of its remaining assets through a hasty and questionable liquidation process." *Id.* ¶ 1180.

The Tribunal was also critical of the "harsh treatment" suffered by Yukos executives in criminal proceedings, which it said did "not comport with the due process of law" and which indicated that the Russian courts had been influenced by the state executive. *Id.* ¶ 1583. Similarly, it highlighted the "intimidation and harassment" suffered by Yukos' mid-level employees, in-house counsel and external lawyers. *Id.* ¶ 820. The Tribunal found that such treatment supported the Claimants' submission that the Russian authorities were conducting a "ruthless campaign to destroy Yukos, appropriate its assets and eliminate Mr. Khodorkovsky as a political opponent." *Id.* ¶ 811.

The Tribunal found that Russia was in breach of Article 13 of the ECT, which prohibits measures "equivalent to nationalization or expropriation," except under specified circumstances (*i.e.*, when for public purpose, non-discriminatory, under due process of law, and accompanied by compensation). *Id.* ¶¶ 1580-1585. Given this finding, the Tribunal considered it unnecessary to address the Claimants' additional claim that by failing to accord their investments fair and equitable treatment, Russia's conduct was in breach of Article 10 of the ECT. *Id.* ¶ 1585.

2nd time in 3 years

Debevoise & Plimpton LLP Receives 2014 Chambers Latin America International Arbitration Award for the Second Time in Three Years.

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Notwithstanding the Tribunal's finding of liability against Russia, it recognized that the Claimants were at fault insofar as Yukos' tax practices "contributed in a material way to the prejudice which they subsequently suffered." *Id.* ¶ 1634. It apportioned 25 percent of responsibility to the Claimants. *Id.* ¶ 1637.

Damages and Interest

The Tribunal awarded US$50.02 billion to the Claimants, the largest amount of damages in history. In arriving at this figure, the Tribunal first ruled on three preliminary issues pertaining to the selection of the valuation date, causation, and the Claimants' failure to mitigate.

The Tribunal then determined the categories of damages to which the Claimants were entitled as being: (i) the value of their shares in Yukos as of the valuation date; and (ii) the value of the dividends that would have been paid to the Claimants by Yukos up to the valuation date, but for the expropriation of Yukos (as well as pre-award simple interest on these amounts). *Id.* ¶ 1778. However, the Tribunal rejected the assessment of the Claimants' damages based on a potential listing of Yukos on the NYSE and a completed merger between Yukos and Sibneft, finding that both events were either "too uncertain" or "too speculative." *Id.* ¶¶ 1779-1780.

Using the Award date as the valuation date, the Tribunal quantified the valuation of the Claimants' 70.5 percent share in Yukos to be US$30.049 billion and the valuation of the Claimants' lost dividends to be US$36.645 billion (totaling US$66.694 billion). *Id.* ¶¶ 1822-1825. This amount was reduced by 25 percent to account for the Claimants' contributory fault, leading to a final damages award of US$50.02 billion (less than half of the US$114.17 billion in damages sought by the Claimants). *Id.* ¶¶ 171, 1827.

Appeal and Enforcement

Russia has declared that it will exhaust all legal avenues to challenge the Awards and resist enforcement. The legal seat of the arbitration is the Netherlands, so any legal right to challenge the Awards is governed by Dutch arbitration law. In mid-November, it was reported that Russia had applied to the Dutch Courts to have the Awards set aside. In common with many jurisdictions, under Dutch arbitration law, there is no right to a substantive "appeal." This leaves Russia with only very limited grounds upon which it can apply to have the Awards set aside. These grounds focus on procedural irregularities and jurisdiction, rather than a substantive analysis of the merits of the Awards. For example, one would expect Russia to try to make an argument that the Tribunal wrongly assumed jurisdiction (*e.g.*, because it wrongly found that the ECT applied provisionally). However, the substantive correctness of the Tribunal's Awards is not reviewable on the merits;

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it will not be sufficient for Russia to challenge the Awards or contest enforcement just because the Tribunal was "wrong."

Because the Netherlands is a Contracting State to the New York Convention, the Awards are *prima facie* enforceable in any one of the other 149 Contracting States. There are only very limited grounds upon which a Contracting State may refuse to recognize and enforce an award rendered by a Tribunal seated in another Contracting State. As part of the enforcement process, if Russia persists in non-payment, the Claimants may be able to obtain attachments against Russian assets outside of Russia, provided that they are "commercial" as opposed to "sovereign" in nature. Sovereign assets are generally protected by State immunity.

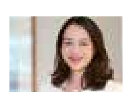
Depending on the relevant national law, the Claimants may not be limited to seeking enforcement against the assets owned directly by Russia itself. The Claimants may also seek to enforce the Awards against the assets of Russia's State-owned companies, so long as they can show that the State-owned entity has no separate existence. The Claimants have already indicated that they may target the assets of Rosneft in light of the Tribunal's suggestion that Rosneft was an instrumentality of the State. The Tribunal's findings regarding attribution to the Russian State of Rosneft's conduct may help advance that argument. It is also possible that the Claimants will seek to receive debts owed to Russia (such as accounts payables) by third-party companies as a means to enforce the Awards – a procedure commonly known as garnishment. This possibility should not be ruled out, in particular by investors owing Russia debts of a commercial nature.

> "The Claimants have already indicated that they may target the assets of Rosneft in light of the Tribunal's suggestion that Rosneft was an instrumentality of the State."

Conclusion

The Tribunal's Final Awards demonstrate the potentially immense impact of the investment protections afforded by bilateral investment treaties, free-trade agreements, and multilateral treaties containing investment chapters. Moreover, they also demonstrate the reach of international law, even when a State has not internally ratified a treaty. In this respect, the ECT's provisional application provisions were of critical importance.

For further information, please contact:



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EU Issues Injunction to Obstruct Payment of ICSID Award

In a striking development, the European Commission (the "Commission") has issued a "suspension" injunction preventing Romania from paying an arbitral award arising from proceedings in *Micula & Ors v. Romania* (ICSID Case No. ARB/05/20) concluded in 2013. The ICSID Tribunal had ordered Romania to pay US$250 million to Swedish investors on the basis that the withdrawal by Romania of certain incentives and benefits was contrary to the legitimate expectations and the protections owed to the investors under the Romania-Sweden Bilateral Investment Treaty (the "BIT"). Romania has so far complied with the terms of the Commission's injunction.

"The extraordinary move by the Commission to enjoin the award . . . has itself prompted many difficult questions about the future operation of investor-state arbitration within Europe."

The EU had participated in the arbitration as *amicus curiae* in support of Romania's position that it did not breach the BIT because withdrawal of the various incentives had been required to comply with EU law, namely to eliminate state aid. However, the Tribunal rejected these arguments. It observed that Romania was not a party to the EU when the BIT was negotiated and concluded in 2003. It further held that, given that the BIT did not contain any reference to the EU or to accession, it could not assume that there was any intention to amend, modify or otherwise detract from the application of the BIT.

The Commission's extraordinary intervention in this arbitration comes against the backdrop of ongoing reforms within the EU in relation to foreign investment policy. The Treaty of Lisbon 2009 transferred exclusive competence over the field of foreign direct investment from the Member States to the EU's Common Commercial Policy. Consequently, Member States are, in principle, no longer permitted to negotiate individual BITs with non-EU countries (as these will be replaced with EU-wide BITs), and the Commission has indicated that all existing intra-EU BITs should be terminated (because they are presumed to breach EU law by providing advantage to certain Member States' investors over others, and hindering the enforcement and coherent application of EU law).

The full consequences of this competence shift from Member States

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to the EU are not yet clear. However these reforms have given rise to much uncertainty about the status and fate of investment agreements signed by EU Member States. In addition, the extraordinary move by the Commission to enjoin the award in *Micula & Ors v. Romania* (ICSID Case No. ARB/05/20) has itself prompted many difficult questions about the future operation of investor-state arbitration within Europe.

One of the main questions raised by the injunction is the vexing issue of the interaction between Member States' obligations under EU law and their obligations under public international law. As a signatory to the ICSID Convention, Romania has an obligation under Article 53 of that treaty to "comply with the terms of the award." The Commission's injunction means that Romania is now in breach of its international obligations, and that the EU is arguably complicit in that breach. There is as yet no consensus on which obligation prevails in such cases of conflict, or how such conflicts should otherwise be resolved.

The injunction has also raised questions about the status and applicability of EU law in the context of investor-state arbitration. In *Micula*, the Commission argued that EU law formed part of the applicable law in investment treaty arbitration, and therefore arbitrators ought to apply BITs in light of EU law. However, there are open questions about how EU law should properly be characterized in the context. Is EU law to be treated as "international law" and therefore applicable under the terms of the ICSID Convention and BITs, or is it to be viewed as more akin to the "domestic law" of Member States? At the heart of this conundrum is the doctrinal assertion of the European Court of Justice that EU law is a *sui generis* legal regime, separate and apart from

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general international law. The divergent decisions in *Electrabel v. Hungary*[1] and *AES v. Hungary*[2] underscore the jurisprudential uncertainty surrounding this issue.

More generally the EU has cast serious doubt on the validity of BITs signed between EU Member States (so-called intra-EU BITs), having taken the position that intra-EU BITs should be phased out. However, this view has been met with skepticism from Member States and has been openly rejected by arbitral tribunals (*See, e.g., Eastern Sugar v. Czech Republic*, Partial Award, March 27, 2007; and *Eureko v. Slovakia*, Award on Jurisdiction, October 26, 2010).

Moreover, all BITs provide specific requirements for termination and usually provide that they remain in effect for a lengthy period of years after termination. It seems improper for the EU to attempt simply to declare them terminated.

In the midst of this legal and policy uncertainty, the saga with respect to *Micula & Ors v. Romania* continues. Romania has initiated annulment proceedings, and an ICSID annulment committee has now been constituted. The committee has lifted a stay on the enforcement of the award after Romania indicated that, in light of the injunction, it was unable to pay the award if the annulment proceedings were unsuccessful. The Claimants in *Micula* have started enforcement proceedings in the United States. The Claimants have also instituted proceedings against the Commission seeking to quash the injunction, on the basis that it was *ultra vires* the Commission's power.

The EU's extraordinary intervention in this arbitration signals a general upheaval and change in the investor-state arbitration regime in Europe. The arbitration community will no doubt be watching developments in this case, and the wider reforms being undertaken under the auspices of the European Commission. At stake is nothing less than the reliability and future of the investment protection regime in Europe.

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1. *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, November 30, 2012.
2. *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, September 23, 2010.

EU and Canada Conclude Free Trade Agreement with Investment Chapter

On August 5, 2014 the European Union and Canada signed the Comprehensive Economic and Trade Agreement ("CETA"). One of the most notable aspects of this agreement – the full text of which was made public in late September – is the inclusion of a comprehensive regime of investment protection. The inclusion of such provisions is illustrative of a shift within the EU since the entry into force of the Treaty on the Functioning of the European Union (the "Lisbon Treaty") on December 1, 2009; whereas previously investors had to rely on bilateral investment treaties entered into by individual Member States for protection, the EU now has exclusive competence in the area of foreign direct investment by virtue of Article 207 of the Lisbon Treaty. CETA must now be ratified by individual Canadian provinces and the 28 Member States of the EU before it can enter into force.

The protections provided by the investment chapter of CETA are largely consistent with current international practice, although there are a number of interesting nuances. Host states are obliged to grant foreign investors fair and equitable treatment and full protection and security. Host states are also prevented from expropriating, either directly or indirectly, the investments of foreign investors, except for a public purpose, under due process of law, in a non-discriminatory manner and against payment of prompt, adequate and effective compensation.

Notably, the parties were unwilling to allow the interpretation of either the fair and equitable treatment standard or the obligation not to effect indirect expropriation to be guided by developing international law on the subject, preferring instead to adopt a much more prescriptive approach as to what constituted a breach of these standards. The annex that seeks to define indirect expropriation is notable for expressly providing that non-discriminatory measures whose purpose is to protect legitimate public welfare objectives (such as health, safety and the environment) do not constitute indirect expropriations, unless the measures are so severe as to appear manifestly excessive.

Additionally, host states are forbidden from discriminating against foreign investors, both vis-à-vis domestic investors (the so-called national treatment obligation) and investors from third states (the provision of so-called most-favored nation (MFN) treatment). Second, the investment chapter imposes obligations relating to the establishment of investments: host states are prevented from imposing on foreign investors (i) certain measures designed to limit market access; or (ii) certain performance requirements.

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EU and Canada Conclude Free Trade Agreement with Investment Chapter

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These two sets of provisions contain three particularly interesting elements. First, the MFN obligation does not apply to dispute settlement provisions. One of the more contested questions in the jurisprudence of investment treaty cases is whether an investor is entitled to use an MFN obligation to take advantage of more favorable dispute-settlement provisions in another investment treaty entered into between the host state and a third party. By expressly stating that the MFN obligation does not apply to dispute settlement, the parties have avoided this difficult issue. Second, substantive obligations included in agreements with third states are only deemed to be "treatment" for the purposes of the MFN provision if the host state in question adopts measures to give effect to these obligations. Merely including such provisions in an investment treaty entered into with a third state is not sufficient. Finally, there are substantial carve-outs from all of the market access, national treatment and MFN obligations: these obligations do not apply in the field of public procurement, and are not breached by either government subsidies or the provision of government support in the field of trade in services.

In the event that a dispute cannot be settled during a mandatory period of consultation, disputes are to be settled by international arbitration under (i) the International Centre for the Settlement of Investment Disputes (ICSID); (ii) the ICSID Additional Facility Rules; and (iii) the UNCITRAL Arbitration Rules. The inclusion of investor-state arbitration was criticized by some commentators, who suggested that this would lead to important public policy decisions being decided by arbitrators sitting behind closed doors.

"It is apparent that the parties have gone to great lengths to counter the perception that disputes arising from the investment chapter would be decided 'in secret.'"

However, it is apparent that the parties have gone to great lengths to counter the perception that disputes arising from the investment chapter would be decided "in secret." The investment chapter not only incorporates the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (for more on this issue see *UNCITRAL Adopts Long-Awaited Rules on Transparency in Treaty-Based Investor – State Arbitration*, Issue 3, Arbitration Quarterly), but expressly broadens the scope of these provisions to permit an even greater

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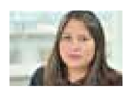
volume of information to be made public than would otherwise be the case. Consequently, members of the public are permitted to attend hearings, review the briefs submitted by the parties, and examine all of the underlying documents submitted in the case. There is also the facility for both ordinary members of the public and states that are not party to a particular proceeding to submit *amicus* briefs. The access enjoyed by the public to arbitrations under the investment chapter of CETA is therefore equivalent to, or potentially better than, that enjoyed to proceedings before ordinary civil courts.

The obligation to arbitrate is limited in scope: it applies only to the sections on non-discriminatory treatment (the national treatment and MFN obligations) and investment protection (the most important elements of which are the obligations on fair and equitable treatment, full protection and security, and expropriation). Importantly, therefore, an investor alleging breach of a host state's obligations with regard to market access or performance requirements would not be able to bring its claim in investor state arbitration, but would instead be obliged to resort to national courts.

The investment chapter of CETA has clearly been carefully negotiated. It contains all of the protections one might expect, although its prescriptive nature might mean that it is unable to keep up with subsequent developments in international investment law. The parties are to be commended for the inclusion of extensive transparency obligations. It will be interesting to see whether a similar approach is adopted in the investment chapter of the Transatlantic Trade and Investment Partnership, which is currently being negotiated between the EU and the United States.

For further information, please contact:



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EU Publishes New Regulation Concerning Financial Responsibility in Investor-State Dispute Settlement

Introduction

On August 28, 2014, the European Union (the "EU") published Regulation (EU) 912/2014 (the "Regulation") as a framework for managing investor-state disputes concerning investment agreements to which the EU or the EU and EU member states ("Member States") are parties. While the Regulation principally serves to allocate financial responsibility between the EU and Member States for such disputes, it also covers related areas:

- allocating responsibility for the costs of defending investor-state disputes;
- determining which of the EU and the relevant Member State will act as respondent;
- imposing general and specific requirements on the EU and Member States to cooperate in defending a claim; and
- providing for which entity will be primarily responsible for payment of any award made against the EU or a Member State.

In principle, investors and Member States should welcome the clarification brought by the Regulation. However, it remains unclear how certain elements of the Regulation will work in practice, and whether it could increase the costs of relevant arbitrations.

Scope of Regulation

The Regulation applies to proceedings which are brought after September 17, 2014, and which arise under investment agreements to which the EU, or the EU and its Member States, are parties (currently, the Energy Charter Treaty and the Comprehensive Economic Trade Agreement with Canada). The European Commission is negotiating treaties with investment protection provisions with China and Myanmar, and free trade agreements with the U.S., India, Japan, Singapore, Thailand, Vietnam and Morocco. Any agreements arising from these negotiations are likely to fall within the scope of the Regulation.

The underlying principle of the Regulation is that financial responsibility for a particular dispute will be attributed to the party whose conduct caused it – *i.e.*, if a dispute arises from a Member State's conduct, that Member State will bear proportionate financial responsibility for the dispute, whereas if a dispute arises from the conduct of an institution, body, office or agency of the EU, the EU will bear

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proportionate financial responsibility. For the purposes of the Regulation, financial responsibility includes both the costs of any award or settlement, and any costs arising from proceedings. The EU has the final say on the allocation of financial responsibility between the EU and any relevant Member State where the EU acts as respondent in a claim.

There are exceptions to the underlying principle of the Regulation. Where a Member State's conduct is required by applicable EU law, and where such conduct prompts a dispute, the EU will bear financial responsibility arising from the dispute. Alternatively, a Member State may also accept financial responsibility of its own accord.

"Financial responsibility includes both the costs of any award or settlement, and any costs arising from proceedings."

The Regulation also provides whether the EU or a Member State will act as respondent in a dispute. The appropriate respondent will depend in part upon whether the Member State or the EU is responsible for the conduct giving rise to the dispute. As a general rule, a Member State will be respondent except where the EU elects to act as respondent. The EU may do so where either:

- the EU would bear all or part of the financial responsibility, or an EU institution, body, office or agency is responsible for all or part of the conduct giving rise to the dispute; or
- a dispute addresses a specific legal issue which is also being addressed in a claim against the EU at the World Trade Organization.

The latter seeks to ensure that consistent arguments are presented before all forums.

A Member State may decline to act as respondent in favor of the European Commission. The preamble to the Regulation suggests, by way of example, that such an option is expected to be exercised where a Member State does not have the requisite technical expertise to defend a particular claim. When the EU acts as respondent, it is required to ensure its defense protects the financial interests of the Member State concerned.

Which of the EU or the relevant Member State pays an award or settlement will depend on which of the EU or a Member State acts as respondent. Generally, when the EU acts as respondent, the Regulation provides for the EU to pay to the claimant the entirety of any award made and costs from the arbitration proceedings in the first instance.

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"Significant emphasis is placed on the regular consultations and extensive exchange of information between the EU and a Member State both at the beginning and throughout the life of a dispute."

The EU is subsequently entitled to repayment of the proportion of the award and costs for which a Member State bears financial responsibility. The European Commission has the final decision on the financial responsibility to be allocated between a Member State and the EU in a dispute where the EU is the respondent, and ultimately can overrule the objections of a Member State thereto. The European Commission is also entitled to require financial contributions from a Member State during the course of a dispute in respect of foreseeable or incurred costs of the proceedings.

The Regulation also governs the conduct of a dispute. Significant emphasis is placed on the regular consultations and extensive exchange of information between the EU and a Member State both at the beginning and throughout the life of a dispute. In particular, the European Commission may require consultations with the Member State on any point of law or other matter of EU interest raised by a dispute. Such provisions apply even where a Member State bears sole financial responsibility and acts as respondent.

Settlement of a dispute is also subject to extensive European Commission involvement where the EU is the respondent and the Member State bears any or all financial responsibility for a dispute. Generally, where the Member State bears full financial responsibility for the dispute, while only that Member State may decide to settle, it must do so in consultation with the European Commission and may only accept a settlement that is compatible with EU law and is enforceable against that Member State only. Where the Member State bears only partial financial responsibility, the European Commission has discretion either to refuse a Member State's request to settle, or, where the European Commission considers that settlement would be in the best interests of the EU, ultimately has discretion to compel settlement of the dispute, provided that such settlement does not have any financial or budgetary implications for the relevant Member State.

Comment:

- The Regulation is a novel mechanism to allocate financial responsibility and responsibility for conduct of a claim between the EU or European Commission and Member States.
- The Regulation sets out a reasonably clear mechanism for the allocation of financial responsibility between the EU and its Member States for any dispute arising in respect of investment agreements to which the EU is a party.
- In light thereof, it has been suggested that a claimant should protect its interests and bring its claim against both the EU and the relevant Member State, in case there is any uncertainty or grounds for challenge on this point.

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EU Publishes New Regulation Concerning Financial Responsibility in Investor-State Dispute Settlement

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- There is some concern that the decision as to which of the EU and its Member States will act as respondent is generally made by the EU rather than the applicable arbitral tribunal, and to what extent, if any, such decision making power undermines the independence and impartiality of the arbitration process. Further concern has been raised as to what recourse a claimant may have if the decision regarding which should act as respondent is later deemed to have been incorrect, particularly given that the Regulation is silent on this point.
- There are some other areas of uncertainty; for example, there is no explicit mechanism prescribing how the EU will pay the portion of any award for which it is financially responsible where a Member State is the respondent of a dispute. This may suggest that such cases are expected to be rare.
- In principle, investors should welcome the introduction of the Regulation, as where the EU is the respondent (subject to limited exceptions), it provides for payment of any award or settlements to be made by the EU in the first instance. It is reasonable to expect that this may result in easier and faster recovery of awards, particularly where there is any dispute between the EU and the relevant Member State as to what financial responsibility each party bears.
- However, the added consultation and information exchange requirements between the European Commission and the Member States will likely increase the costs of arbitration proceedings against the EU or a Member State.
- Furthermore, it is unclear how the application of certain provisions of the Regulation might play out in practice.
- The Regulation is significant given that any future EU-level agreements with investment protection will replace equivalent Member States' existing bilateral investment treaties. The Regulation accordingly will become increasingly central to the conduct of investor claims against Member States and the EU.

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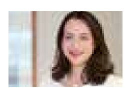
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United Nations General Assembly Adopts Convention on Transparency in Treaty-Based Investor-State Arbitration

On December 10, 2014, the United Nations General Assembly adopted the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (the "Convention").[1] The adoption of the Convention comes in the midst of a long debate about the proper balance among States' desire to attract foreign investment, their obligation to protect the public interests of citizens and the environment, and the allocation of public funds.

The primary purpose of the Convention is to extend the application of the United Nations Commission on International Trade Law ("UNCITRAL") Rules on Transparency in Investor-State Arbitration (the "Transparency Rules"),[2] which came into effect on April 1, 2014.

On their own terms, the Transparency Rules already apply to Investor-State Arbitrations conducted under the UNCITRAL Arbitration Rules brought under an investment treaty which was either (i) concluded on or after April 1, 2014; or (ii) concluded before April 1, 2014 and where either the parties to the dispute or the relevant contracting States to the treaty[3] have agreed that the Transparency Rules apply. The Transparency Rules are optionally available for use in non-UNICTRAL Investor-State Arbitrations.

The Convention expands the application of the Transparency Rules to investor-State arbitrations initiated pursuant to investment treaties concluded *before* April 1, 2014, irrespective of the applicable arbitration rules. Thus, rather than having to renegotiate individually a multitude of existing treaties, State parties can indicate their consent to the application of the Transparency Rules in arbitrations brought under those treaties by signing the Convention. The Transparency Rules will apply to such arbitrations if the respondent State is a party to the Convention *and either* (i) the claimant investor is from a State that is party to the Convention; *or* (ii) the claimant investor agrees to application of the rules.

A State party to the Convention may make a reservation excluding the application of the Transparency Rules in relation to investor-State arbitrations (i) initiated under specific, identified investment treaties; or (ii) conducted under arbitration rules other than the

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1. http://www.un.org/ga/search/view_doc.asp?symbol=A/69/17 (The text of the Convention is appended to the UNCITRAL Report as Annex I.)
2. http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html.
3. In the case of multilateral treaties where the state of the claimant and the respondent State have so agreed.

United Nations General Assembly Adopts Convention on Transparency in Treaty-Based Investor-State Arbitration

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UNCITRAL Arbitration Rules and in which it is a respondent. A State party may also exclude application of the Transparency Rules through consent of the investor claimant, as described in the prior paragraph.

As we explained in a previous article announcing UNCITRAL's adoption of the Transparency Rules (see *UNCITRAL Adopts Long-Awaited Rules on Transparency in Treaty-Based Investor-State Arbitration,* Issue 3, Arbitration Quarterly), reflecting the public interest involved in investment arbitrations, the Transparency Rules introduced innovative provisions aimed at increasing "public access to information and documents concerning arbitration proceedings, as well as [providing] greater opportunity for non-parties to participate" in the proceedings.

Specifically, the Transparency Rules provide for the publication of information at the commencement of the proceedings (such as the names of the parties, the economic sector involved and the relevant treaty under which the claim is being made) and the publication of key documents in the arbitration (including, for example, the pleadings, transcripts of hearings and orders, decisions and awards of the Tribunal). Furthermore, the Transparency Rules *prima facie* provide for public hearings, thus allowing public access to hearings for the presentation of evidence or for oral arguments.

The Transparency Rules also codify a procedure to allow *amicus curiae* participation, which certain tribunals have permitted in the past either by exercising their general powers granted under the relevant arbitration rules or instrument (*e.g.*, Article 15(1) of the UNCITRAL Arbitration Rules or Article 44 of the ICSID Convention) or where specifically provided (*e.g.*, Rule 37(2) of the ICSID Arbitration Rules 2006). The Transparency Rules also permit submissions by non-disputing States party to the treaty and specify that the tribunal shall admit any such submissions on issues of treaty interpretation.

These progressive and innovative provisions, however, are not limitless. The Transparency Rules include important exceptions that protect

"These progressive and innovative provisions, however, are not limitless. The Transparency Rules include important exceptions that protect confidential or protected information, and aim to protect the integrity of the arbitral process."

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United Nations General Assembly Adopts Convention on Transparency in Treaty-Based Investor-State Arbitration

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confidential or protected information, and aim to protect the integrity of the arbitral process.

The adoption of the Convention signifies that the Transparency Rules could potentially apply to disputes arising out of the estimated 3,000 bilateral and multilateral treaties concluded before April 1, 2014 and currently in force. However, the Convention will only apply to those arbitrations commenced after the Convention enters into force (or subsequently takes effect for the relevant parties). Moreover, the Convention does not affect investor-State arbitrations initiated pursuant to a contract. Importantly, the Convention specifies that a claimant cannot invoke a most favored nation clause in a treaty to apply, or to avoid the application of, the Transparency Rules under the Convention.

The Convention will be opened for signature on March 17, 2015, at a signing ceremony to be held in Port Louis, Mauritius, and it will enter into force six months after the date of deposit of the third ratification instrument. There is also a six-month delay before the Convention will bind a State party that ratifies the Convention after its entry into force.

On December 10, 2014, the United Nations General Assembly also designated a Transparency Registry, in which UNCITRAL will make available to the public the information on investor-State arbitrations specified by the Transparency Rules (found at http://www.uncitral.org/transparency-registry/registry/index.jspx).

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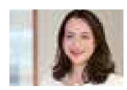

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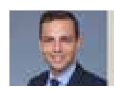

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Agreement for Shanghai – Seated ICC Arbitration Recognized in China

In April 2014, the Supreme People's Court (the "SPC") of the People's Republic of China (the "PRC")[1] published its decision in *Anhui Longlide Packing & Printing Co., Ltd. v. BP Agnati S.R.L.* in the Guide on Foreign-Related Commercial and Maritime Disputes Trial.[2] In *Longlide*, the SPC recognized the validity of an arbitration clause that selected the International Chamber of Commerce (the "ICC") as the arbitral institution that would administer any arbitration under the relevant contract, but designated Shanghai as the arbitral seat. In doing so, the PRC – for the first time – suggested that a non-PRC arbitral institution could administer an arbitration seated in the PRC.

PRC Arbitration Law

The Arbitration Law of the People's Republic of China (the "Arbitration Law")[3] mandates that all arbitrations seated in the PRC be administered by an arbitral institution – *ad hoc* arbitrations, such as those governed by the UNCITRAL rules are not permitted. Article 16 of the Arbitration Law sets forth the requirements for a valid arbitration agreement. It requires: (a) expression of the parties' intent to arbitrate; (b) identification of the subject matter to be arbitrated; and (c) designation of an arbitration commission to administer the arbitration. Article 16 does not address whether the designated "arbitration commission" (the term used in the PRC for arbitral institutions) may be foreign. Article 10 of the Arbitration Law, however, states that arbitration commissions shall be established by the departments and chambers of commerce of certain specified municipalities and cities in the PRC, and that they shall be registered with the corresponding local judicial administrative departments. Since Article 10 only specifies how arbitration commissions may be established in the PRC, most practitioners and commentators on PRC arbitration have taken the view that only PRC arbitral institutions may be selected by the parties, to satisfy the requirements of Article 16.

In addition to this interpretation of the Arbitration Law, the view that only PRC arbitral institutions may administer PRC-seated arbitrations has been influenced by several PRC court decisions. In *Züblin Int'l GmbH v. Wuxi Woco-Tongyong Rubber Engineering Co., Ltd.*,[4] for example, a construction

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1. For the purposes of this article, PRC refers only to Mainland China.
2. [2013] Min Si Ta Zi No. 13. The decision was internally issued on March 25, 2013. The Guide on Foreign-Related Commercial and Maritime Disputes Trial is the official gazette of the SPC for guiding cases on foreign-related commercial and maritime disputes adjudicated by the SPC.
3. Zhong Cai Fa [Arbitration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995).
4. [2003] Min Si Ta Zi No. 23.

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arbitration was conducted under an arbitration clause that stated: "Arbitration: ICC Rules, Shanghai shall apply." The resulting award was challenged in enforcement proceedings before the Wuxi Intermediate People's Court, which held that the arbitration clause was void because it failed to identify a valid arbitration commission. The Court's holding was upheld by the SPC in 2004. Notably, however, the decision only addressed the failure to specify an arbitration commission under Article 16; it did not address whether the ICC would have been a valid selection.

Subsequent to *Züblin*, in its Interpretation on Certain Issues Relating to the Application of the Arbitration Law of the PRC, the SPC clarified, among other things, that a failure to designate an arbitral institution would not invalidate an arbitration agreement if the institution can be ascertained from the arbitral rules referenced in the agreement.[5] But again, the particular circumstances of *Züblin*, where a foreign arbitral institution's rules were referenced, were not addressed.

In 2008, in *Duferco S.A. v. Ningbo Arts & Crafts Imp. and Exp. Co.*,[6] the Ningbo Intermediate People's Court refused to invalidate an ICC award that was rendered by a Beijing-seated tribunal. But it did so on the ground that the challenge to the recognition and enforcement of the award was time barred; the court did not proceed to address the merits of the argument. Since then, there have been few other decisions or guidance that have provided further clarification as to whether foreign arbitral institutions may administer arbitrations seated in the PRC.

> "*Longlide*, therefore, represents yet one more step in the liberalization of international arbitration in the PRC, suggesting that foreign arbitral institutions can administer arbitrations seated in the PRC."

Longlide v. Agnati

On October 28, 2010, Anhui Longlide Packing & Printing Co., Ltd. ("Longlide") entered into a tripartite sales contract with B.P. Agnati S.R.L. ("Agnati") and another Chinese party. Longlide is based in Anhui Province, China, while Agnati is an Italian company. The contract contained the following arbitration clause:

> "Any dispute arising from or in connection with this contract shall be submitted to the Court of Arbitration of the International Chamber of Commerce for final arbitration by one or more arbitrators appointed in accordance with its rules. The place of jurisdiction shall be Shanghai, China. The arbitration shall be conducted in English."

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5. 2006 SPC Interpretation, Art. 3.
6. [2008] Yong Zhong Jian Zi No. 4.

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After a dispute arose, Agnati instituted arbitral proceedings against Longlide pursuant to the arbitration clause. Longlide objected to the arbitration and challenged the clause's validity in the Hefei Municipality Intermediate People's Court in Anhui Province (the "Intermediate Court") on three grounds. *First*, it argued that only arbitral institutions recognized by the Arbitration Law could administer arbitrations seated in the PRC, and the ICC was not so recognized. *Second*, it argued that allowing the ICC (a foreign arbitral institution) to administer arbitrations in the PRC would violate Chinese judicial sovereignty and therefore be contrary to public policy. *Third*, it argued that any ICC award rendered in the PRC should be a "domestic award" governed by the Arbitration Law, which could not be recognized or enforced under the New York Convention.[7]

The Intermediate Court first held that the Arbitration Law governed Longlide's challenge, as the contract did not specify a governing law, which meant that the law of the seat (Shanghai) determined the governing law of the arbitration agreement.[8] The court then held that, pursuant to Article 10 of the Arbitration Law, arbitration services could not be provided in the PRC without specific authorization, and the Chinese arbitration market was not yet open to foreign institutions. In designating an institution that could not legally administer arbitrations in the PRC, the arbitration clause was deemed invalid under PRC law.

The Intermediate Court's decision was submitted to the Anhui High People's Court (the "High Court") for approval under the PRC's Reporting System (explained below). The majority of the High Court rejected the decision, finding that the arbitration clause was valid because it contained the three elements required by Article 16 of the Arbitration Law. Without further elaboration, the majority held that there was no legal basis to invalidate the clause on the ground that foreign arbitral institutions, such as the ICC, cannot conduct arbitrations in the PRC. The minority, however, adopted the reasoning of the Intermediate Court.

Although not required to do so, the High Court sought the SPC's opinion on its decision because the case was novel in the PRC and the court had divergent opinions. In its one-page reply, the SPC agreed with the High Court majority on the ground that the arbitration clause satisfied the elements

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7. It should be noted that even if an award rendered by a tribunal constituted pursuant to the *Longlide* arbitration agreement were to be treated as "domestic," it should still be considered a foreign-related award, at least on the basis that one of the parties to the underlying agreement was foreign. *See* Opinions of the SPC on Certain Issues Concerning the Application of the Civil Procedure Law, Art. 304. Foreign-related awards, though rendered in the PRC, may be enforced there on grounds nearly identical to those available under the New York Convention. *See* Arbitration Law Art. 71 & PRC Civil Procedure Law Art. 260.

8. 2006 SPC Interpretation, Art. 16.

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of Article 16, noting that the arbitration clause stipulated the requisite arbitral institution with sufficient clarity.

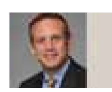
Analysis and Conclusion

By only focusing on the requirements of Article 16, the SPC suggested that Article 10 does not serve to limit the type of arbitral institution that may be selected by the parties – the SPC's concern seems to be only that one be selected with sufficient certainty. *Longlide*, therefore, represents yet one more step in the liberalization of international arbitration in the PRC, suggesting that foreign arbitral institutions can administer arbitrations seated in the PRC.

The *Longlide* decision also highlights the benefits of the Reporting System, which was established in 1995 for foreign-related arbitrations. Under this system, any court decision that refuses to recognize or enforce a foreign-related arbitration agreement or award must be reported to the next higher court for consideration of the issue.[9] If the higher court agrees with the decision to refuse recognition or enforcement, it must further report the case to the SPC for confirmation in order for the lower court's refusal to become final. This system ensures that foreign-related arbitrations are only rejected after careful consideration by multiple, and often more experienced, jurists. There is no similar system for the reporting of non-foreign-related arbitration agreements and awards.

Although *Longlide* has been published by the SPC as a "guiding case" – a practice it uses to promote national uniformity in the judiciary – it should be noted that the decision, as with all court decisions in the PRC, will only have persuasive effect. As a civil law country, courts in the PRC are not bound by the principle of legal precedent. (This contrasts with PRC Opinions, which the PRC issues to clarify points of law, and which have the force of law.[10]) Thus, while *Longlide* will likely be looked to in subsequent cases addressing this issue, it remains advisable to wait for greater certainty that arbitration agreements providing for PRC-seated arbitrations administered by foreign arbitral institutions will be enforced, before agreeing to enter into such agreements.

For further information, please contact:



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9. An agreement is "foreign-related" if one of three factors applies: one of the parties to the agreement is foreign; the subject matter of the agreement is located outside the PRC; or the facts establishing, altering, or terminating the parties' relationship occurred outside of the PRC. *See* Opinions of the SPC on Certain Issues Concerning the Application of the Civil Procedure Law, Art. 304.

10. *See* Provisions of the Supreme People's Court Concerning Work on Guiding Cases, [2010] Fa Fa No. 51.

Singapore High Court Decision in *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd* – Choosing the Law of the Arbitration Agreement

In the recent decision of *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd and others* [2014] SGHCR 12, the Singapore High Court held that where there has been no express choice of law, the proper law of an arbitration agreement will generally be the law of the seat of the arbitration.

In *FirstLink*, a dispute arose following the plaintiff's (a public company incorporated in Singapore) alleged violation of an agreement (the "Contract") between the parties, which resulted in the first defendant suspending the plaintiff's account. The governing law of the Contract was not straightforward:

> "This Agreement is governed by and interpreted under the laws of Arbitration Institute of the Stockholm Chamber of Commerce as such laws are applied to agreements entered into and to be performed entirely within Stockholm."

The Contract also contained an arbitration clause:

> "Any claim will be adjudicated by Arbitration Institute of the Stockholm Chamber of Commerce. You and GTPayment agree to submit to the jurisdiction of the Arbitration Institute of the Stockholm Chamber of Commerce. Both parties expressly agree not to bring the disputes to any other court jurisdictions, except as agreed here to the Arbitration Institute of the Stockholm Chamber of Commerce" (the "Arbitration Agreement").

Ignoring the Arbitration Agreement, the plaintiff commenced a claim against the defendants in the Singapore courts (the second and third defendants being companies related to the first defendant), and by way of response, the defendants sought a court ordered stay of the litigation to allow for the dispute to be arbitrated. The plaintiff challenged the application and argued that the Arbitration Agreement was "null and void, inoperative or incapable of being performed."

The plaintiff argued that: (i) generally, in the absence of any express provision as to the proper law of an arbitration agreement, the proper law would be the same as the substantive law of an arbitration agreement; (ii) here, the substantive law of the Arbitration Agreement was the "law" of the Arbitration Institute of the Stockholm Chamber of Commerce; and (iii) it was nonsensical for an arbitration agreement to be governed by the "laws" of an international arbitral institute, such as the Stockholm Chamber of Commerce, which only provides a framework of

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Singapore High Court decision in *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd* – Choosing the Law of the Arbitration Agreement

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rules applicable to govern the procedure of an arbitration.

In deciding whether to order the stay, Assistant Registrar Leong ("Leong AR") began by addressing the first limb of the plaintiff's argument. At the outset, Leong AR observed that the general methodology for determining the law governing an arbitration agreement was set out in the leading English Court of Appeal decision of *SulAmérica Cia Nacional De Seguros S.A. and others v. Enesa Engenharia S.A.* [2012] EWCA Civ. 638, which presented a three-stage test: (i) the parties' express choice; (ii) the parties' implied choice in the absence of an express choice; and (iii) where the parties had not made any choice, the proper law would be the law with which the arbitration agreement has its closest and most real connection. Each of the stages was to be examined separately and in that order. Leong AR "welcomed" the *SulAmérica* methodology – he noted that the same test was also used in Singapore when determining the substantive law governing commercial contracts and that, as a matter of Singaporean law, arbitration agreements should be construed like any other form of commercial contract – but he questioned the "precise application" of the methodology.

In respect of the second stage of the *SulAmérica* test, Leong AR disagreed with what he termed the "rebuttable presumption" that the English Court of Appeal in *SulAmérica* created – that the express substantive law of a contract would be taken as the proper law governing an arbitration agreement such that "in a competition between the chosen substantive law and the law of the chosen seat of the arbitration, all other facts being equal, . . . the law will make an inference that the parties have impliedly chosen the substantive law to be the proper law applicable to the arbitration agreement."

> "All things being equal, the mere fact of an express substantive law in the main contract would not in and of itself be sufficient to displace the parties' intention to have the place of the seat be the proper law of the arbitration agreement."

Instead, Leong AR concluded that the opposite was true. In his view, not only could it not be assumed that commercial parties want the same law to govern both their substantive relationship as well as their relationship when resolving disputes but, as a result of a desire for neutrality in disputes, the "natural inference would instead be to the contrary." As well as referring to two decisions of the English courts in support of his position (*Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others* [2007] UKHL 40 (House of Lords) and *C v. D* [2007] EWCA Civ 1281), Leong AR also looked to Article V(1)(a) of the New York Convention, which renders

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Singapore High Court decision in *FirstLink Investments Corp Ltd v. GT Payment Pte Ltd* – Choosing the Law of the Arbitration Agreement

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an arbitral award unenforceable if the arbitration agreement is invalid under the law of the country where the award was made, if there had not been a choice of proper law, and Article 34(2)(a)(i) of the Model Law, which specifies that an arbitral award can be set aside if the arbitration agreement is invalid under the law of the seat.

As a result, and while cautioning that determining the implied proper law of an arbitration agreement was a question of construction that would turn on the facts of a case, Leong AR rejected the plaintiff's argument and held that,

> "In the absence of indications to the contrary, the reasons above would ordinarily compel the law to find that parties have impliedly chosen the law of the seat as the proper law to govern the arbitration agreement, in a direct competition between the chosen substantive law and the law of the chosen seat of arbitration. All things being equal, the mere fact of an express substantive law in the main contract would not in and of itself be sufficient to displace the parties' intention to have the law of the seat be the proper law of the arbitration agreement."

Leong AR went on to conclude that given the specific referral of disputes to the Stockholm Chamber of Commerce, and the absence of any express clause prescribing a different place in which arbitration proceedings were to be conducted, the parties had impliedly selected Sweden as the seat of any arbitration and, consequently, the parties had impliedly chosen the law of Sweden as the proper law applicable to the Arbitration Agreement.

In rejecting the plaintiff's argument that the proper law of the Arbitration Agreement was the "law" of the Arbitration Institute of the Stockholm Chamber of Commerce, Leong AR did not then have to go on and consider whether the "laws" of an international arbitral institute, such as the Stockholm Chamber of Commerce, could stand as the valid proper law of an arbitration agreement. However, Leong AR considered the issue in some detail and, although he ultimately reserved judgment on the issue, he did note that where an arbitral institution had a clear system of rules and consistent application of principles, that might be enough to "persuade a court to find that, at least on the *prima facie* threshold, such an arbitration agreement would be valid, but only for the specific purpose of staying court proceedings, which does not preclude a jurisdictional challenge before the arbitral tribunal, or a complete review of the question by the enforcement court."

Given that it is not uncommon for courts to be faced with flawed or ambiguous arbitration agreements, the observations from Leong AR in this case will prove to be helpful guidance for parties and tribunals in the future.

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Grynberg v. BP and Statoil: NY Court Disqualifies Arbitrator from Kazakh Oil Dispute

On July 17, 2014, the Supreme Court of the State of New York disqualified an arbitrator from a consolidated arbitration involving energy companies BP Exploration Company Limited ("BP") and Statoil ASA ("Statoil") for failing to abide by an earlier court order. *Jack J. Grynberg, et al., v. BP Exploration Operating Co. Ltd., et al.*, index number 1116840/04 in the Supreme Court of the State of New York. Given that, generally, U.S. courts give great deference to decisions of arbitrators and there is a general presumption in favor of upholding arbitration awards if challenged, this is a highly unusual decision, although the circumstances are also highly unusual.

Jack J. Grynberg had entered into a joint venture with BP and Statoil to develop an oil field off the shores of Kazakhstan in the Caspian Sea. In 1999, Grynberg entered into settlement agreements with BP and Statoil, separately, to resolve a dispute arising out of the operation of the oil field. As part of the settlements, the parties agreed to resolve any dispute thereunder through arbitration and agreed to appoint Stephen Hochman as the sole arbitrator or, if he was unavailable, a three-person tribunal.

The settlement agreements provided that BP and Statoil were to pay Grynberg a certain portion of the net profits from their interests in the field. Claiming to be entitled to additional funds pursuant to these settlement agreements, Grynberg initiated arbitration against BP (the "BP Arbitration") and Statoil (the "Statoil Arbitration") separately. One of the key issues was the allegation that BP and Statoil had classified certain "signature bonus" payments to the government of Kazakhstan as costs of doing business, deducting a proportionate amount of those payments from the share of profits to which Grynberg was entitled. Grynberg argued that the payments were in fact bribes and could not be considered legitimate costs of doing business.

After many years of arbitration, on February 9, 2010, Mr. Hochman issued an award in the BP Arbitration dismissing all of Grynberg's claims for additional payments under the settlement agreements. Mr. Hochman rejected Grynberg's argument as to the alleged bribes holding that "as long as the signature bonuses were paid, the issue of whether the signature payments were or were not bribes was not a relevant issue." No final award has yet been issued in the Statoil Arbitration.

BP then filed a motion with the first instance court, the Supreme Court of the State of New York (the "Supreme Court"), to confirm the award and Grynberg filed a cross-motion to vacate it. The Supreme Court ultimately confirmed the award. Grynberg appealed, and the Appellate Division,

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First Department, subsequently reversed the Supreme Court's decision, vacated the award, and remanded to the arbitrator to determine the nature of the signature bonus payments. In particular the First Department held that "[c]ontrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy."

On November 27, 2013, Mr. Hochman issued a new award in the BP Arbitration refusing to make the determination required by the First Department (*i.e.*, determining whether the signature bonus payments were bribes). In the new award, Mr. Hochman explained that the First Department had erred on the law by vacating the award on the basis of public policy, which basis was not authorized under the U.S. Federal Arbitration Act (the "FAA"), and encouraged the parties to appeal the decision to the New York Court of Appeals.

The FAA provides that any party to arbitration can apply to a U.S. federal court for an order confirming an arbitration award within one year of the issuance of the award. Only for very limited reasons enumerated in sections 10 and 11 of the FAA will a court not confirm the award. Specifically, section 10 of the FAA only provides four grounds for vacating an award: (i) where the award was procured by corruption, fraud, or undue means; (ii) where there was evident partiality or corruption in the arbitrators, or either of them; (iii) where the arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or refusing to hear evidence pertinent and material to the controversy; or of any other behavior by which the rights of any party have been prejudiced; and (iv) where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definitive award upon the subject matter submitted was not made. Public policy is not one of the grounds provided in the FAA for vacating an award.

> "The First Department held that "[c]ontrary to the arbitrator's finding, deducting a payment intended to be a bribe to a public official is unenforceable as violative of public policy."

Grynberg then filed a motion to vacate the new award and requested that the BP Arbitration be given to another arbitrator. On April 2, 2014, the Supreme Court issued a decision remanding the BP Arbitration to an arbitration panel instead of to Mr. Hochman. The Supreme Court's ruling was based on the fact that (i) Mr. Hochman explicitly stated in his new award that he refused to comply with the First Department directive and (ii) the new award made it clear that it was not addressed solely to the parties but was instead directed to the

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Grynberg v. BP and Statoil: NY Court Disqualifies Arbitrator from Kazakh Oil Dispute

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Court of Appeals to convince it that the First Department was incorrect when it failed to uphold his first award. Specifically, Mr. Hochman had stated in the new award that "if he had to decide the factual issue of whether the payments made by BP were or were not bribes, it would be inconsistent with his ethical duties to the arbitration process and the New York Court which is to support the arbitration process." Based on this statement, the Supreme Court held that the "arbitrator would not be able to fairly make a determination with respect to the issue remanded to him by the First Department."

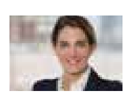
Grynberg then brought this most recent action to the Supreme Court to (i) disqualify Mr. Hochman from any further participation in the Statoil Arbitration; (ii) consolidate the Statoil and the BP Arbitrations; and (iii) discharge Mr. Hochman from any further participation as an arbitrator in any existing or future disputes relating to the parties' settlement agreements.

With regard to Grynberg's petition to consolidate the two arbitrations, the Supreme Court found that "it is appropriate to order that proceedings be consolidated in arbitration where they involve common issues of law and fact and where there is a possibility that separate arbitrations could result in separate rulings." Given that Grynberg was dealing with Kazakhstan government officials in seeking to "explore, develop and produce the oil fields as a joint venture and both of them were making signature bonus payments to these officials," the Supreme Court held that consolidating the two arbitrations would be appropriate.

Consequently, given that the arbitrations needed to be consolidated, the Supreme Court found that Mr. Hochman "must be disqualified from being the arbitrator in the Statoil Arbitration as he has already been disqualified from resolving the signature bonus payment issue and that will be the primary issue to be determined in the consolidated arbitration." Additionally, the Supreme Court independently found that Mr. Hochman should be disqualified from being the arbitrator in the Statoil Arbitration "based on his refusal to follow the unambiguous directive of the First Department." The Supreme Court further held that, based on the actions taken by Mr. Hochman to date, the "arbitration process would not be free of appearance of bias if Mr. Hochman were permitted to continue as arbitrator in either of the two arbitrations."

According to public records, it appears that BP has appealed this last decision of the Supreme Court, which will further delay a final resolution of the underlying dispute.

For further information, please contact:



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NML v. Argentina: the Lasting Effects of Argentina's Default

In 2001, Argentina defaulted on its sovereign debt. In the wake of that default, the Republic declared a moratorium on payment of its debt, and a number of creditors, located both within and outside the United States, brought suit in U.S. Courts. Some of these cases dissipated as creditors chose to participate in Argentina's 2005 and 2010 restructurings (the "Exchange Bondholders" now in possession of "Exchange Bonds"). Others refused to participate in the restructurings and sought final money judgments against Argentina (the "Non-Tendering Bondholders").

Faced with the Republic's refusal to pay these judgments or make payments on its non-restructured debt, many of the Non-Tendering Bondholders have spent over a decade looking for ways to recover on their bonds. The efforts of one creditor in particular, NML Capital Ltd. ("NML"), have sparked two significant legal battles that have reached the United States Supreme Court (the "Supreme Court").

International Discovery of Sovereign Assets

After winning several judgments against Argentina in the District Court for the Southern District of New York (the "District Court") to collect on the defaulted bonds, NML served subpoenas on two non-party banks, Bank of America and *Banco de la Nación Argentina*, to obtain information on Argentina's extraterritorial assets with the goal of seeking enforcement against those assets. Argentina opposed the subpoenas on the grounds that they violated the Foreign Sovereign Immunities Act (the "FSIA" or the "Act").

The District Court rejected Argentina's contention, and the Second Circuit affirmed, holding that "because the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed." *EM Ltd. & NML Capital, Ltd. v. Republic of Argentina*, 695 F.3d 201, 205 (2d Cir. 2012). The Supreme Court granted Argentina's petition for *certiorari*.

In its 7-1 decision written by Justice Scalia with a dissent by Justice Ginsberg, the Supreme Court affirmed, holding that the FSIA did not limit discovery by virtue of Argentina's sovereign status. The Supreme Court began by observing that Rule 69(a)(2) of the Federal Rules of Civil Procedure permits broad discovery in post-judgment execution, but clarified that the "single" question before the Supreme Court was whether the FSIA "specifies a different rule when the judgment debtor is a foreign state." *Republic of Argentina v. NML Capital, Ltd.*, No. 12-842, 134 S. Ct. 2250, 2255 (June 16, 2014). The Supreme Court found that it did not.

First, it held that the FSIA provides no additional immunity from discovery. While the text of the FSIA provides

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express immunities from jurisdiction and execution, "[t]here is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets." The Court refused to draw meaning from this silence, noting that "[t]he question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA."

Second, the Supreme Court held that creditors may obtain discovery relating to assets worldwide without a showing that those assets are attachable under the FSIA. In its view, "the reason for these subpoenas is that NML *does not yet know* what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's laws." Justice Ginsberg dissented on this point on the ground that she believed the permissible scope of discovery should be limited by what is attachable under the FSIA.

"Faced with the Republic's refusal to pay these judgments or make payments on its non-restructured debt, many of the Non-Tendering Bondholders have spent over a decade looking for ways to recover on their bonds."

Despite the very broad language of the opinion, the Supreme Court expressly limited its scope, noting "this appeal concerns only the meaning of the Act" and there is "no reason to doubt that . . . 'other sources of law' ordinarily will bear on the propriety of discovery requests of this nature and scope." It went on to explain that such "sources of law" include "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted." Those limitations will no doubt be the subject of future litigation.

The *Pari Passu* Litigation

NML also prompted an appeal to the Supreme Court based on the *pari passu* clause – a clause contained in many of the defaulted debt instruments that requires equal treatment among bondholders.

In the context of its claims on the defaulted bonds that had not yet gone to judgment, NML argued that Argentina breached the *pari passu* clause by making interest payments to the Exchange Bondholders while failing to pay the Non-Tendering Bondholders and moved to enforce its so-called "Equal Treatment" rights.

In February 2012, the District Court issued orders enjoining Argentina from making payments to the Exchange Bondholders without making payment to the Non-Tendering Bondholders, such as NML. *NML Capital, Ltd. v. Republic of Argentina*, No. 08 Civ. 6978 (TPG) (S.D.N.Y. Feb. 23, 2012). The Second Circuit substantially affirmed the injunctions in October 2012. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012). After remanding the orders for clarification to the District Court, the Second Circuit again affirmed the amended injunctions in August of 2013,

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***NML v. Argentina*: the Lasting Effects of Argentina's Default**

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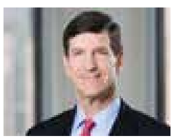

David W. Rivkin became President of the International Bar Association on January 1, 2015.

but stayed enforcement pending a review by the Supreme Court. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013). In June 2014, the Supreme Court denied *certiorari* and the injunctions entered into effect.

In the wake of the denial of *certiorari* by the Supreme Court, the battle between Argentina and its creditors intensified. The next interest payment on the Exchange Bonds was due on June 30, with a one-month grace period before Argentina would enter into default for failing to make timely payment. In the face of the injunctions, Argentina seemingly would have to choose whether to (i) settle with the injunction holders, (ii) pay the Exchange Bondholders and the injunction holders in equal proportionate amounts, or (iii) default on its obligations to the Exchange Bondholders which would be the second default in just over a decade.

On June 30, Argentina attempted to make a payment on the Exchange Bonds without making any payment on the injunction holders' debt, but the District Court blocked such payment. A Special Master was then appointed to facilitate settlement during the next 30 days in order to avoid default, but no resolution was reached and, by most accounts, Argentina defaulted on its debt again on July 30. Argentina claims that no default occurred because it made the payments due, even though those payments were blocked and not received by the Exchange Bondholders.

Since July 30, Argentina has continued its attempts to evade the impact of the *pari passu* injunctions. So far, these efforts have been largely unsuccessful, and most of the attempted payments to the Exchange Bondholders still have not been completed. These evasion attempts have, however, embroiled a multitude of formerly uninvolved third-party banks and financial institutions in this increasingly complex dispute. Earlier this month, Argentina went so far as to pass a law that, among other things, would permit a change in the payment jurisdiction of the Exchange Bonds so as to circumvent the injunctions.

Though there has been some talk about a renewed willingness to negotiate in 2015, after the Rights Upon Future Offers Clause in the Exchange Bonds expires, Argentina has steadfastly refused to negotiate with the Non-Tendering Bondholders, and has eschewed meetings convened by the Special Master. The Republic's recalcitrance has led additional Non-Tendering Bondholders to file for similar *pari passu* injunctions in an attempt to enforce their payment rights. Though the future of negotiation and settlement remains unclear, it has become increasingly clear that unless Argentina begins working towards reaching a global resolution with all of its creditors, Argentina will continue to be frozen out of international financial markets and the Argentine economy will continue to suffer.

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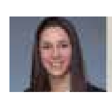

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Refusing to Pay the Advance on Costs: Repudiatory Breach of Contract?

Arbitration rules generally provide that the parties to arbitration must equally share the costs of the arbitration pending a final award by the tribunal. This can be a very significant sum, and respondents commonly refuse to pay their share of the costs. This is often tactical, in order to put financial pressure on the claimant. Until recently, it was not known whether potentially serious adverse consequences might arise from such deliberate refusal where the seat of the arbitration is in England.

Earlier this year, the Commercial Court of England & Wales ("the Commercial Court") considered whether a refusal by a party to arbitration proceedings to pay its share of the advance on costs of the arbitration could amount to a breach of the arbitration agreement entitling the non-defaulting party to prosecute its claims in the courts instead of in arbitration.

In *BDMS Limited v. Rafael Advanced Defence Systems* (February 26, 2014) [2014] EWHC 451 (Comm), Mr. Justice Hamblen held that the refusal by Rafael Advanced Defence Systems (the "Defendant") to pay its share of the advance on the costs of the arbitration did amount to a breach of the arbitration agreement, but not a breach that entitled BDMS Limited (the "Claimant") to commence proceedings in the High Court.

In *BDMS*, the parties had entered into a consultancy agreement that provided for the payment of certain "success fees." A dispute arose between them for the alleged failure to pay those fees. The consultancy agreement contained an arbitration agreement providing for ICC arbitration seated in London, before a sole arbitrator.

The arbitration

The Claimant initiated ICC arbitration in London and, pursuant to Article 30 of the ICC Rules, the ICC fixed the advance on costs at US$27,000. Each party was asked to contribute US$13,500.

The Defendant refused to pay its share of the advance unless the Claimant posted security for the costs of the arbitration. Before the tribunal could hear the parties on the preliminary issue relating to the posting of security for costs, the ICC invited the Claimant to cover the Defendant's share of the advance on costs. The ICC set a final deadline of March 9, 2012 for the payment by the Claimant of the Defendant's share.

The deadline passed without payment. On March 14, 2012, the ICC gave formal notice that, pursuant to Article 30(4) of

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the ICC Rules, the claims were considered withdrawn as of March 9, 2012. The ICC confirmed that the Claimant retained the right to prosecute its claims again in a new set of arbitral proceedings.

Commencement of proceedings in the English Commercial Court

Responding to the Defendant's refusal to pay its share of the advance on the costs of the arbitration, the Claimant served English High Court proceedings on the Defendant. The Claimant purported to accept the Defendant's refusal to pay its share of the advance on costs as a repudiatory breach of the arbitration agreement, entitling the Claimant to discard the agreement and to pursue its claim in the Commercial Court. The Defendant sought a permanent stay of the proceedings on the basis of the arbitration agreement.

"If the refusal to pay the share of the advance on costs renders the arbitration agreement "unworkable". . . then that breach could well go to the root of the contract and therefore amount to a repudiatory breach of the arbitration agreement."

The Decision of the Commercial Court

Was there a breach?

The Commercial Court sided with the majority of commentators and tribunals, and the only known common law decision on this point – the decision of the Alberta Court of Appeal in *Resin Systems Inc. v. Industrial Service & Machine Inc.* [2008] ABCA 104 and concluded that the failure to pay the advance on costs did constitute a breach of contract.

Was the breach repudiatory/fundamental, and did it render the arbitration agreement inoperative?

Mr. Justice Hamblen found that if the refusal to pay the share of the advance on costs renders the arbitration agreement "unworkable," as found by the Court of Appeal of Alberta in *Resin*, then that breach could well go to the root of the contract and therefore amount to a repudiatory breach of the arbitration agreement. Mr. Justice Hamblen considered that this question was fact and case specific.

In this specific case, Mr. Justice Hamblen held that the Defendant's breach was not a repudiatory/fundamental one and based his decision, amongst other things, on the following:

i) This was not a case in which the Defendant was refusing to participate in the arbitration more generally, nor was the refusal absolute, as the costs would have been covered if the Claimant had provided security for costs.

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ii) The breach did not deprive the Claimant of the right to arbitrate as it could at all times have decided to proceed with the arbitration by paying the Defendant's share of the advance and then sought an interim award or interim measure order that the advance should be paid by the Defendant.

iii) The Claimant could have objected to the withdrawal of its claim by the ICC, but it chose not to. Had it done so, perhaps the ICC would have waited until after the hearing of the preliminary issues before deciding whether to withdraw the claims.

iv) The Claimant had not proved that the arbitration agreement had been repudiated, only that this particular reference to arbitration could not continue. The Claimant could advance the claims again in a new set of proceedings.

For the same reasons, Mr. Justice Hamblen concluded that the arbitration agreement had not been rendered inoperative. Mr. Justice Hamblen therefore granted the stay of the proceedings, pointing the claimant back towards arbitration.

In light of this judgment, parties to arbitration in England faced with an opposing party that refuses to pay its share of the costs of the arbitration should not be quick to abandon the arbitration. In almost all cases, the safest course of action will be for the non-defaulting party to pay the defaulting party's share of the costs, and then to seek an interim award or an interim measures order from the arbitral tribunal for reimbursement of the payment by the defaulting party. For respondents, unless advancing a counterclaim, there remains little obvious downside in refusing to pay half of the costs where doing so might prove strategically advantageous.

For now, therefore, claimants in England-seated arbitrations will likely continue to face respondents who refuse to pay their share of the advance on costs. However, the decision of Mr. Justice Hamblen has not shut the door on the possibility of this being viewed differently in extreme cases.

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Indian Supreme Court Continues Pro-Arbitration Trend

The Indian Supreme Court (the "Supreme Court") has provided further clarity in respect of the jurisdiction of the Indian courts to review arbitral awards. In its May 2014 judgment in *Reliance Industries & Anr v. Union of India*, the Supreme Court held that Indian courts have no jurisdiction to set aside an arbitral award where the parties agreed that the seat of the arbitration was to be London and the arbitration agreement was governed by English law.

The *Reliance* case is the latest in a series of pro-arbitration judgments from the Supreme Court which began with the landmark decision in *Bharat Aluminum Co v. Kaiser Aluminium Technical Service Co.* (2012) 9 SCC 552, which partly overturned the judgment in *Bhatia International v. Bulk Trading S.A. & Anr.,* (2002) 4 SCC 105, which was perceived as being hostile to international arbitration. *Reliance* is of particular importance because it further clarifies the scope of India's domestic arbitration legislation.

The key issue, which was first tackled in *Bhatia International*, is the extent to which Part I of the Indian Arbitration and Conciliation Act 1996 (the "Indian Arbitration Act") applies to arbitrations with an Indian counterparty. If Part I applies then the Indian courts enjoy statutory authority to supervise the arbitration's conduct and review the award on the merits. If Part I does not apply then the Indian court's supervisory authority is limited. In *Bhatia International* the Supreme Court held that Part I of the Indian Arbitration Act applied to all arbitrations, including those with a foreign seat, unless the parties explicitly or impliedly excluded the application of Part 1 of the Indian Arbitration Act.

In *Bharat Aluminum* the Supreme Court overturned the decision in *Bhatia International* and those cases that followed it.[1] *Bharat Aluminum* clarified that Part 1 of the Indian Arbitration Act did not apply to foreign seated arbitrations and only applied to domestic Indian arbitrations. Significantly, however, although the *Bharat Aluminum* judgment brought an end to future interventionist approaches of the Indian courts, the decision only had prospective effect such that it only applied to arbitration agreements concluded after the date of the judgment, September 6, 2012. *Bhatia International's* interventionist principles continue to apply to any arbitration agreements entered into before September 6, 2012.

In *Reliance* the arbitration agreement at issue was entered into in 1994, placing it

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1. Discussed in more detail in *Indian Supreme Court Decision Signals Pro-Arbitration Turn*, Issue 1, Arbitration Quarterly.

Indian Supreme Court Continues Pro-Arbitration Trend

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firmly within the remit of the Supreme Court's decision in *Bhatia International*. Here the dispute between the parties arose from two production sharing contracts (the "PSCs") which related to the exploration and production of petroleum in fields off the coast of India. The PSCs were governed by Indian law. However, they also contained dispute resolution clauses which provided for all disputes to be settled by arbitration under the UNCITRAL rules with English law governing the arbitration agreement and with London as the seat of the arbitration.

A dispute arose between the parties in respect of the amount of taxes and royalties that had to be paid by Reliance Industries to the Government of India ("India") pursuant to the PSCs. In July 2011, the parties constituted the arbitral tribunal. India argued that Reliance Industries' claims were not arbitrable but, in 2012, the tribunal handed down a 'Partial Consent Award' in which the tribunal ruled that Reliance Industries' claims were arbitrable. Using section 34 of the Indian Arbitration Act (dealing with setting aside applications), which is found in Part I of the legislation, India challenged the partial award in the Delhi High Court. Reliance Industries' counter-argument, that Part I of the Indian Arbitration Act did not apply, failed and the Delhi High Court found for India, setting aside the partial award. Reliance Industries appealed to the Supreme Court.

At the outset the Supreme Court made clear that it was bound by the judgment in *Bhatia International* and, as a result, for Reliance Industries to succeed in its appeal, it needed to demonstrate that the parties had agreed, either impliedly or expressly, to exclude any or all of the provisions of Part I of the Indian Arbitration Act.

After considering the arguments, the Supreme Court set aside the decision of the Delhi High Court and held that Part I of the Indian Arbitration Act did not apply. The Supreme Court stated that because the parties had agreed that the seat of the arbitration would be London, and because the arbitration agreement specified English law, the "provisions of Part I of the Arbitration Act 1996 (Indian) are necessarily excluded." In reaching this conclusion, the Supreme Court relied on its earlier decision in *Videocon Industries Limited v. Union of India & Anr.* (2011) 6 SCC 161, which it said was factually and legally

> "The decision should be seen as a positive development for arbitration law in India and should be welcomed by those who wish to do business in India."

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Indian Supreme Court Continues Pro-Arbitration Trend

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similar to the issues presented in the *Reliance* dispute and which also held that where the parties had agreed that the arbitration agreement in question was to be governed by the laws of England and Wales, this "necessarily implie[d] that the parties had agreed to exclude the provisions of Part I of the Act." Moreover, the Supreme Court considered that the provision within the dispute resolution clause for the Permanent Court of Arbitration at The Hague to be the appointing authority in the event of a dispute, rather than the Chief Justice of India, was a "strong indication" that the parties had agreed to exclude Part I of the Indian Arbitration Act.

The Supreme Court also dismissed India's argument that, regardless of any agreement of the parties, Part I of the Indian Arbitration Act applied as the issues in dispute related to violations of Indian public policy. Instead, the Supreme Court held that "[w]hether or not the award is challenged on the ground of public policy, it would have to satisfy the pre-condition that the Arbitration Act 1996 is applicable to the arbitration agreement" which, it stated, was not the case in this instance as, "the arbitration law of England would be applicable to the arbitration agreement."

The *Reliance* decision is important for anyone who entered into an arbitration agreement with an Indian counterparty prior to September 6, 2012. More broadly however, the pro-arbitration nature of the decision should be seen as a positive development for arbitration law in India and should be welcomed by those who wish to do business in India and to resolve any ensuing disputes by international arbitration without the interference of the Indian courts.

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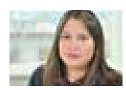
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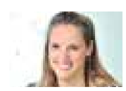
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Appointment: Partner Natalie L. Reid has been named to the Board of Editors of *The American Journal of International Law* the pre-eminent publication of The American Society of International Law.

J&P Avax v. Tecnimont SPA: French Court Considers Whether It is Bound to Respect Arbitral Institutional Rules in Annulment Proceedings

The French *Cour de Cassation* has, in *J&P Avax v. Tecnimont SPA*, Civ. 1ère, June 25, 2014, n°11-26.529 (*"Avax v. Tecnimont"*), confirmed that when considering an application for the annulment of an arbitral award, judges must apply any relevant institutional rules that applied to the underlying arbitration. A further decision is expected from the Paris Court of Appeal in 2015.

Avax has sought the annulment of the tribunal's partial award on the ground that the arbitral tribunal was irregularly constituted.

Avax's challenge, first raised before the International Court of Arbitration of the ICC (the "ICC Court"), focuses on the independence and impartiality of the Chairman of the tribunal. In September 2007, the ICC Court dismissed Avax's request for a recusal of the Chairman pursuant to Article 11 of the 1998 ICC Rules (the equivalent of Article 14 of the 2012 ICC Rules) which allows for recusal *"for an alleged lack of independence."*

> "The *Cour de Cassation* overturned the decision of the Reims Court holding that it had erred in deciding that it was not bound to consider the parties' compliance with the 1998 ICC Rules. The *Cour de Cassation* held that when a party knowingly abstains from asking for a recusal request within the time period provided by the applicable arbitral rules, here 30 days from when the party knew of the facts giving rise to the recusal application, it is deemed to have waived the right to challenge an arbitrator's independence and impartiality before the courts."

The *Cour de Cassation's* June 2014 decision in *Avax v. Tecnimont* comes seven years after the tribunal in the underlying arbitration, seated in Paris and subject to the 1998 International Chamber of Commerce Rules ("1998 ICC Rules"), handed down its December 2007 partial award. The Court's decision is the fourth judgment of the French courts in relation to Avax's attempts to have the partial award annulled.

Following the dismissal of Avax's request, the tribunal went on to issue

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***J&P Avax v. Tecnimont SPA*: French Court Considers Whether It is Bound to Respect Arbitral Institutional Rules in Annulment Proceedings**

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its partial award in December 2007. Thereafter, Avax again raised the issue of the Chairman's independence and impartiality, this time in an annulment action that it brought in the Paris Court of Appeal on the grounds that the tribunal was irregularly constituted.

Specifically, Avax argued that, because the Chairman of the tribunal was "of counsel" at a law firm in which some of his colleagues acted either as counsel

or as arbitrator in matters involving either Tecnimont's parent company and/or its subsidiaries, he was unable to be independent and impartial and thus ought to be recused. Moreover, Avax argued that not only did the Chairman lack independence and impartiality but, following an initial inadequate declaration, he had also failed to make continuing declarations in relation to several relevant representations by other members of his firm.

The Paris Court of Appeal found for Avax and ordered the annulment of the partial award. Tecnimont challenged the Paris Court of Appeal's decision and the matter has since been heard by the *Cour de Cassation* (twice) as well as the Reims Court of Appeal (the "Reims Court").

The most recent decision in the dispute, the *Cour de Cassation's* June 2014 decision, considered the judgment of the Reims Court. The Reims Court had held that Avax's application for annulment could proceed irrespective of whether Avax had complied with the 1998 ICC Rules. Moreover, the Reims Court had said that the ICC Court's decision to reject Avax's recusal request was administrative in nature and did not prevent a French court from hearing the

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***J&P Avax v. Tecnimont SPA*: French Court Considers Whether It is Bound to Respect Arbitral Institutional Rules in Annulment Proceedings**

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same request. It further held that an arbitrator's duty of disclosure was broad in scope and ongoing. The Reims Court went as far as to hold that an arbitrator is required to disclose anything that could affect their judgment or cause reasonable doubt to the parties regarding their impartiality and independence.

The *Cour de Cassation* overturned the decision of the Reims Court holding that it had erred in deciding that it was not bound to consider the parties' compliance with the 1998 ICC Rules. The *Cour de Cassation* held that when a party knowingly abstains from asking for a recusal request within the time period provided by the applicable arbitral rules, here 30 days from when the party knew of the facts giving rise to the recusal application, it is deemed to have waived the right to challenge an arbitrator's independence and impartiality before the courts. The *Cour de Cassation* noted that, to decide this case, a judge must consider whether the 30-day period was complied with in relation to each relevant fact and circumstance that provided a basis for the recusal application.

As a result, the *Cour de Cassation* has now remitted the case to be considered, in full, by a different panel of the Paris Court of Appeal, which will likely hear the case in 2015. If the Paris Court of Appeal allows the annulment application to go ahead, and considers the substance of that application, any eventual recourse by either party to the *Cour de Cassation* will be important. It is hoped that this case will lead to guidance from that court on the scope of an arbitrator's duty to disclose information relating to their independence. Such a decision would provide practitioners with greater certainty in respect of what arbitrators must disclose, and when, to ensure compliance with their obligation of independence and impartiality.

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Update on the Ongoing Russian Arbitration Reform

As we reported in the last issue of the Arbitration Quarterly (*Russia Publishes Draft of New Arbitration Law*, Issue 5, Arbitration Quarterly), an important arbitration reform is currently under way in the Russian Federation. By way of background, in January 2014, the Russian Ministry of Justice published a series of draft amendments to various laws and regulations governing the arbitration and enforcement processes (the "January Draft"). The second wave of comprehensive draft amendments was published in April 2014 (the "April Draft"). The April Draft retained most of the key features of the January Draft, such as amalgamation of Russia's domestic and international arbitration regimes, establishment of clearer arbitrability criteria, and setting rigorous requirements for domestic-based arbitral institutions.

"Given the significance of the arbitration reform being undertaken, it is expected that the drafting process will continue to be subject to meticulous attention and further alterations"

During the past few months, the April Draft has been subject to public review and comment, and Debevoise & Plimpton LLP has taken an active role in this process. The revision process has proven slow, with the Ministry of Justice paying careful attention to the numerous, often contradictory, comments it has received from the judiciary, practitioners, arbitral institutions, the business community, and others in the government. Notwithstanding the size and complexity of the task, some notable modifications to the April Draft have already been introduced (the "Further Amendments") and the most important of these are described below.

First, the Further Amendments grant first-tier courts (district courts of general jurisdiction or arbitrazh/commercial courts, as the case may be) original jurisdiction, *i.e.*, the jurisdiction to hear cases for the first time, in respect of cases that deal with the recognition and enforcement of domestic arbitration awards. However, second-tier (arbitrazh/commercial and general jurisdiction) courts would, as proposed in the April Draft, retain their original jurisdiction over foreign arbitral awards.

Second, the Further Amendments remove the April Draft's proposed three-month limitation period for challenging arbitral awards on the grounds that

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the underlying contract at issue was a "contract of adhesion," *i.e.*, a party challenging an award on the grounds that they were coerced into the contract that the dispute related to. As a result, there is no proposed time limit on making such a claim.

Third, the Further Amendments propose modifications in respect of the choice of rules in arbitral proceedings. Specifically, it is proposed that, unless the parties agreed otherwise, in circumstances where an arbitration agreement is silent as to the choice of rules for the proceedings (but not silent as to the arbitral institution that will administer the arbitration), the arbitral tribunal would have the authority to choose the most appropriate set of rules and, until the appointment of the arbitral tribunal, the applicable rules will be chosen by the relevant arbitral institution.

Fourth, a new provision is introduced stating that the rules of an arbitral institution, which are in effect at the time of the conclusion of an arbitration agreement, would prevail over newly adopted rules, unless the arbitration agreement or the new rules (explicitly or implicitly) prescribe otherwise.

Fifth, provisions criminalizing bribery and some other offences in arbitrations have been removed.

It should be reiterated that these recent changes remain a work in progress. Given the significance of the arbitration reform being undertaken, it is expected that the drafting process will continue to be subject to meticulous attention and further alterations. The next draft is likely to be finalized by the end of this year and will then be submitted to the State Duma, the lower chamber of the Russian parliament, for parliamentary review and deliberations. It is unclear whether the current geopolitical situation, as well as the recent significant arbitral awards involving Russian parties (specifically, the "Yukos" awards discussed in *Yukos v. Russian Federation: Largest Arbitration Award to Date* in this issue of Arbitration Quarterly) might impact the trajectory and/or substance of Russian arbitration reform. Therefore, it remains a challenging task to predict the exact timeline and the final language of the new arbitration laws. Debevoise will continue to actively partake in, closely monitor and promptly report on any future critical developments in the Russian arbitration reform.

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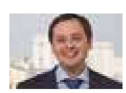
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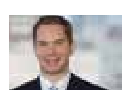
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Russia's Supreme Arbitrazh Court's Legacy

Landmark Judicial Reform in Russia and Its Impact on the Arbitration and Enforcement Regimes

This summer marked a momentous change in the Russian judicial landscape. For decades, there were two independent judicial branches in Russia – the so-called "arbitrazh" (or commercial) courts, which dealt with, amongst other things, arbitration-related litigation, and the courts of general jurisdiction. The Supreme Arbitrazh (Commercial) Court of the Russian Federation (the "SCC") was the highest court among the commercial courts and the Supreme Court of the Russian Federation (the "SC") was the highest court of general jurisdiction. On August 6, 2014, both the SCC and SC were dissolved and their powers and responsibilities were transferred to one new court, also called the Supreme Court of the Russian Federation (the "New SC"), which became the single highest court in Russia. The reform did not affect lower courts, which remain divided into commercial courts and the courts of general jurisdiction.

News of the proposed dissolution of the SCC raised serious concerns about the continued validity of its decisions (primarily "resolutions" and "clarifications"). The SCC decisions, and its resolutions in particular, while not legally binding in a civil law jurisdiction like Russia, served as guiding benchmarks for lower commercial courts, practitioners and commercial entities. Over the past decade, the SCC had actively issued many resolutions on various commercial legal issues, including in the areas of commercial arbitration and enforcement.

> "There remains – at least temporarily – a certain predictability in the application of Russian commercial laws, including those relating to arbitration."

To an extent, this uncertainty was resolved by new legislation. According to the Federal Constitutional Law No. 8-FKZ dated June 4, 2014, SCC resolutions will remain in force until and unless the New SC, which is not bound by SCC decisions, overrules them. Moreover, the corresponding amendments to the Commercial Procedural Code, which applies to all commercial litigation in Russia, also expressly permits the lower commercial courts to continue to rely on SCC

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resolutions to the extent that such decisions do not conflict with the pronouncements of the New SC.

As a result, notwithstanding the significant overhaul that Russia's judicial system has been through, there remains – at least temporarily – a certain predictability in the application of Russian commercial laws, including those relating to arbitration. Debevoise will continue monitoring and reporting on the noteworthy decisions of the New SC.

SCC Resolutions Related to Arbitration and Enforcement

The SCC resolutions were of particular importance in establishing the arbitration and enforcement frameworks in Russia. The SCC provided critical guidance by (i) allowing interim measures in support of arbitration, (ii) describing prerequisite impartiality components of arbitrations, (iii) declaring land-related disputes against governmental entities non-arbitrable, (iv) declaring disputes against insolvent or bankrupt parties non-arbitrable, (v) dealing with various enforceability issues, and (vi) disregarding "asymmetrical" arbitration agreements. All of these are described below.

(i) Allowing Interim Measures in Support of a Foreign Arbitration

In Edimax Limited v. Chiriginsky (SCC Resolution No. 17095/09 dated April 20, 2010), the SCC permitted a lower commercial court to adopt interim measures – where and to the extent such court deemed it fit – in support of a foreign commercial arbitration. This resolution is of particular importance because the Commercial Procedure Code of the Russian Federation does not currently empower state commercial courts to adopt such interim measures.

(ii) Describing Prerequisite Impartiality Components of Arbitrations

The issue of impartiality of arbitration proceedings was addressed in a number of SCC resolutions (No. 8445/13 dated October 29, 2013, No. 1567/13 dated July 16, 2013, No. 16541/11 dated May 22, 2012, No. 17020/10 dated May 24, 2011, No. 1308/11 dated June 28, 2011, and No. 18412/12 dated July 9, 2013). In these resolutions, the SCC stated that the impartiality of arbitration proceedings consisted of two components: the objective impartiality of the arbitration institution and the subjective impartiality of the arbitrators. This decision came at a time when Russian companies began creating and financially supporting their own "pocket" arbitration centers. The SCC held that the objective impartiality cannot be attained if one of the parties to the dispute establishes and finances the activities of an arbitration institution handling the dispute. A violation of impartiality gives the state court grounds to nullify an arbitration agreement, even if no objections were filed by the parties to the arbitration.

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(iii) Declaring Land-Related Disputes Against Governmental Entities Non-Arbitrable

In a series of resolutions, the SCC ruled that the arbitral process was not adequate for purposes of resolving land-related disputes against municipal and state entities. In *Republic of Karelia v. Forest Group* (SCC Resolution No. 11059/13 dated February 11, 2014), the SCC held that disputes arising from lease agreements of state or municipal forestry plots were non-arbitrable and, therefore, that arbitration agreements requiring arbitration of such disputes were invalid. The SCC also held that the "public interest" in ensuring a rational and sustainable use of forestry resources prevails over any private interest of tenants in extracting profits from such resources. The SCC further declared that the public interest cannot be duly served and ensured in a confidential arbitration process with its simplified procedure for the collection and submission of evidence and a limited appeal process. The SCC thus concluded that such arbitral resolution of disputes would violate the underlying principles of Russian law.

For nearly identical reasons, in *ArbatStroy v. The City of Moscow* (SCC Resolution No. 11535/13 dated January 28, 2014), the SCC deemed non-arbitrable any disputes arising from contracts concluded in accordance with, and in pursuance of, the state or municipal legislation governing the supply of goods, performance of work or provision of services for the state or municipal needs. Similarly, in *Aldega v. Krasnozavodsk* (SCC Resolution No. 17043/11 dated April 3, 2012), the SCC declared non-arbitrable any disputes related to the alleged violations by a municipality of investment contracts and other similar obligations, particularly with respect to the construction of buildings on real estate on municipally-owned land plots.

> "The SCC leaves behind a valuable legacy of resolutions on key arbitration and enforcement matters. These resolutions will continue to provide guidance to lower commercial courts, practitioners and commercial parties."

(iv) Declaring Disputes Against Insolvent or Bankrupt Parties Non-Arbitrable

In a number of resolutions, the SCC also declared non-arbitrable any disputes with a debtor against whom a bankruptcy proceeding had been commenced or who had already been declared bankrupt (SCC resolutions

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No. 14355/12 dated March 19, 2013, No. 12751/12 dated February 12, 2013, No. 8141/12 dated November 13, 2012, and No. 7917/11 dated December 6, 2011). According to the SCC, a state court handling a bankruptcy proceeding was the only proper forum to consider all monetary claims against the debtor, which would eliminate the possibility of satisfying the claims of one of the creditors of an insolvent debtor without regard to and to the detriment of the rights and legal interests of other creditors. The SCC reasoned that an arbitration court loses competence to consider such a dispute from the date of commencement of the receivership proceedings against the respondent. However, if an award was issued prior to the commencement of a receivership proceeding, its enforcement should be conducted by the bankruptcy court.

(v) Dealing with Various Enforceability Issues

The SCC considered a number of enforcement challenges, allowing some and rejecting others. For instance, in *Autorobot-Strefa v. Sollers-Elabuga* (SCC Resolution No. 1332/14 dated June 25, 2014), the SCC dismissed a challenge to an arbitral award on the ground that the notice of arbitration and all correspondence with the LCIA was not conducted by the respondent, but rather by a general counsel of its parent company (entitled to issue binding instructions to the subsidiary). The SCC held that in such circumstance, it was immaterial whether the general counsel possessed a power of attorney or other authority to act on the respondent's behalf.

Enforcement challenges were more successful in other cases. In *Karat-L v. Russian Academy of Agricultural Sciences* (SCC Resolution No. 15554/13 dated February 11, 2014), the SCC declared that an arbitral award can only be enforced against persons who were parties to the arbitration agreement and participated in the corresponding arbitration proceedings. Additionally, the SCC stated that domestic commercial courts should not give weight to any facts established in an arbitral award detrimental to the interests of third parties.

In *FNC Engineering v. FGC UES* (SCC Resolution No. 16497/12 dated April 23, 2013), the SCC deemed unenforceable an arbitral award in excess of the cost of the actual work because such award was clearly disproportionate to the inflicted damage. The SCC thus reiterated that 'proportionality' between damages suffered and liabilities imposed was one of the fundamental principles of Russian law.

In *Vergillios LSM v. Second Printing Office* (SCC Resolution No. 16882/11 dated March 29, 2012), the SCC ruled that the Russian state enterprises are not legally empowered to offer commercial guarantees and, thus, any arbitral awards against such state enterprises acting as guarantors would be unenforceable.

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(vi) Disregarding "Asymmetrical" Arbitration Agreements

RTK v. Sony Ericsson (SCC Resolution No. 1831/12 dated June 19, 2012) is one of the most notable SCC resolutions. In this case, the SCC found that a so-called "asymmetric" arbitration agreement allowing only one party to choose between arbitration and litigation violated the fundamental Russian legal principle of equal access to justice. Consequently, the SCC permitted the party that only had the option to arbitrate to continue its proceeding in Russian courts.

Conclusion

The SCC leaves behind a valuable legacy of resolutions on key arbitration and enforcement matters. These resolutions will continue to provide guidance to lower commercial courts, practitioners and commercial parties.

However, the SCC's legacy might be short-lived. Not only is the New SC not bound by prior SCC decisions, but, separately, Russia is also conducting an ongoing reform of its arbitration law (discussed in *Update on the Ongoing Russian Arbitration Reform* in this issue of Arbitration Quarterly), which might render some of the SCC resolutions invalid. Arbitration law is changing in Russia and will continue to be in a state of flux for some time. Debevoise will continue to monitor and report on any critical future developments.

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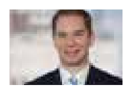
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Lord Goldsmith QC was awarded the Lifetime Award for Extraordinary Contribution to the Development of Pro Bono Culture in Europe at the 2014 PILnet European Pro Bono Forum. The award recognizes a member of the legal community who is a leading figure of pro bono development in Europe and who has helped PILnet advance its pro bono efforts in Europe. Lord Goldsmith is currently leading a team of Debevoise lawyers representing the International Commission of Jurists (ICJ), the Commonwealth Lawyers Association (CLA) and the Human Dignity Trusty (HDT) who are interested parties in a ground-breaking challenge in the Supreme Court of Belize. The case challenges the constitutionality of s.53 of the Criminal Code of Belize, which effectively criminalizes homosexuality.

New LCIA Arbitration Rules Published

Sixteen years after the previous version was introduced, the London Court of International Arbitration (the "LCIA") has published the final text of its new Arbitration Rules (the "2014 Rules"), which came into force on 1 October 2014. These Rules apply to any LCIA arbitration commenced after that date, irrespective of when the arbitration agreement was concluded.

"The 2014 Rules are intended to modernize the procedures used in LCIA arbitration, promoting efficiency, aiming to reduce cost and providing novel procedures to meet user demand."

The 2014 Rules are intended to modernize the procedures used in LCIA arbitration, promoting efficiency, aiming to reduce cost and providing novel procedures to meet user demand. Many of the changes are evolutionary, but some are entirely new developments, particularly the introduction of mandatory guidelines on conduct for parties' legal representatives, and a new emergency arbitrator procedure allowing parties to seek urgent interim relief.

Conduct of the Parties' Legal Representatives

The most controversial and innovative change in the 2014 Rules is the introduction of mandatory conduct rules (the "Guidelines"). The concept of general guidelines or rules on conduct has been the subject of much discussion in the arbitration community, particularly following the International Centre for Dispute Resolution (the "ICDR") indicating that it may institute conduct rules of its own in future (International Arbitration Rules, Article 16). However, the 2014 Rules are the first rules of any arbitral institution to make such guidelines both mandatory and directly enforceable.

The Guidelines set a minimum standard of conduct, requiring that legal representatives: do not knowingly make any false statement to the tribunal or LCIA Court; do not knowingly procure or assist in the preparation of false evidence; do not knowingly conceal or assist in the concealment of any document which the tribunal orders to be produced; do not engage in activities intended unfairly to obstruct proceedings or jeopardize the finality of an award; and do not deliberately initiate unilateral communication with any arbitrator (all communications between any party and one or more arbitrators must be sent to all parties, under Article 13.4).

The 2014 Rules require each party to ensure that its legal representatives have agreed to observe the Guidelines. Parties

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should consider including such express agreement in engagement letters with outside counsel. The tribunal has power to sanction the parties' representatives for any breach of the Guidelines by written reprimand, a written caution as to future conduct, and "any other measure necessary" to fulfil the general duties of the tribunal.

Appointment of an Emergency Arbitrator

Following the example set in recent revisions to other institutional rules (such as the 2012 ICC Rules, the 2013 HKIAC Rules, and the 2010 SCC Rules, among others), the 2014 Rules include a new "emergency arbitrator" procedure. It allows one or more parties, in a case of "emergency," to apply to the LCIA Court for the appointment of a temporary sole arbitrator, before the formation of the tribunal, to conduct proceedings to determine a claim for emergency relief. This is a welcome development given that it expands the range of options open to parties to protect and enforce their rights.

The emergency arbitrator can make any award or order permissible under the terms of the arbitration agreement, or, alternatively, may adjourn all or any part of the application to be considered by the tribunal once appointed. Unless challenged by the parties or the tribunal (which it may do so out of its own discretion), the order or award of the emergency arbitrator will remain in effect.

Importantly, the application of this emergency arbitrator regime is not automatic. For all arbitration agreements concluded prior to October 1, 2014 the emergency arbitrator procedure will only apply if the parties expressly agree in writing to "opt-in." For agreements concluded after October 1, 2014, the parties can expressly "opt-out" of the emergency arbitrator procedure at any time, by agreement in writing.

Consolidation of Disputes

The 2014 Rules have expanded the existing powers of LCIA Tribunals to manage complex disputes, adding new powers to consolidate arbitrations in addition to the existing powers to allow joinder of parties.

The tribunal may order, with the approval of the LCIA, the consolidation of an arbitration with one or more other arbitrations. Importantly, this new power appears to permit the tribunal to order consolidation if the relevant conditions are met, even if one of the parties in one of the arbitrations objects.

A new Article 22.6 gives the LCIA a similar power to consolidate two or more arbitrations where they are between the same parties, under the same arbitration agreement and no Tribunal has yet been appointed in any of the arbitrations to be consolidated. The LCIA must give the parties an opportunity to state their views on consolidation, but again the LCIA appears to be entitled to proceed with

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consolidation if it considers it appropriate to do so, even if a party objects.

These new provisions are likely to assist in ensuring that multiple related arbitrations are dealt with efficiently. However, the range of conditions that must be satisfied before a tribunal or the LCIA is entitled to exercise these default powers means that it is likely that parties involved in complex contractual arrangements will still wish to draft their own bespoke consolidation provisions into their arbitration agreements, to widen the range of disputes that can be consolidated.

“The emergency arbitrator can make any award or order permissible under the terms of the arbitration agreement.”

Costs

Article 28 contains new provisions enhancing the tribunal’s power to order that a party should pay all or part of the legal costs of another party or the costs of the arbitration “on such reasonable basis as it thinks appropriate,” including with consideration to the conduct of the parties and their legal representatives. Article 28.3 now states that the tribunal “shall not be required to apply the rates or procedures for assessing such costs practiced by any state court or legal authority.”

The new rules have also imported a concept under English law which applies where one or more parties agree to bear all or part of the costs of proceedings in any event, irrespective of outcome. Following section 60 of the Arbitration Act, Article 28.5 provides that for such agreements to be effective, the parties must confirm the agreements in writing after the date of the Request.

There is some concern that this new provision may give undue leverage to any party liable to pay under such agreements, but who subsequently refuses to confirm the agreement. Pending clarification of how tribunals interpret Article 28.5, any parties wishing to enter into such agreements should take Article 28.5 into account.

Law of the Arbitration Agreement

A significant development under the 2014 Rules is the inclusion of provisions that determine the law of the arbitration agreement. Article 16.2 adds to the previous rule that, in the absence of agreement of the parties or order of the tribunal (previously the LCIA Court), or unless the parties expressly agree otherwise, the law of the arbitration agreement will be the same as the law of the seat (and therefore by default, English law). The impact of this new provision should be borne in mind in the drafting of any arbitration agreement that will be subject to the 2014 Rules.

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Conclusion:

The 2014 Rules are a welcome development and modernization of the previous LCIA Rules, particularly as they clarify the powers of the tribunal, and the introduction of the Guidelines for legal representatives. As a result of the changes introduced, there are four key changes in the 2014 Rules that parties should now bear in mind when drafting their arbitration clauses:

- In all arbitration agreements concluded prior to October 1, 2014, the parties must specifically "opt-in" to Article 9B if they wish to make use of the emergency arbitrator provisions. Therefore, parties with existing arbitration agreements may wish to consider agreeing such an opt-in, whether by amending their arbitration agreement or signing a separate side letter. Conversely, for arbitration agreements concluded on or after October 1, 2014, if the parties do not want the emergency arbitrator provisions to apply they should expressly opt-out.
- If the parties wish to agree that a party should pay costs in any event (for arbitrations seated outside of England and Wales), they must take into account the effect of Article 28.5. An express statement that Article 28.5 is not to apply may be necessary.
- Previously, if parties did not wish to allow for consolidation of multiple arbitrations, it was sufficient for their LCIA arbitration clause to remain silent. With the changes to Article 22 in the 2014 Rules, if the parties do not want consolidation to be available, or want to have consolidation available on a different basis from the new default position, the parties will need a specific alternative.
- It is typical to see parties agree the law that governs any arbitration agreement. However, given the changes the 2014 Rules have introduced, the parties should ensure that they express any choice of law in respect of the arbitration agreement clearly, to avoid any unintentional operation of Article 16.2 deeming the law of the arbitration agreement to be that of the seat, or English law.

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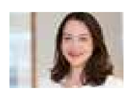
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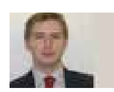
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Promotion: Alex Parker, based in the London office, has been promoted to International Counsel. Mr. Parker, is a member of the firm's International Dispute Resolution Group and its White Collar and Regulatory Defense Group.

ICDR Revised Rules Update

Effective as of June 1, 2014, the International Centre for Dispute Resolution (the "ICDR"), the international division of the American Arbitration Association (the "AAA"), has updated its International Dispute Resolution Procedures (including Mediation and Arbitration Rules) (the "IDR Procedure"). The significant amendments are mainly focused on the International Arbitration Rules within the IDR Procedure (the "Rules"). This update to the Rules, the most substantive since 1996, aims to promote efficiency and bring the Rules up-to-date with best international arbitration practices through the introduction of new procedures, amendments to old procedures, and the codification of certain ICDR practices.

The amendments to the Rules are detailed and lengthy. Key developments include the introduction of provisions related to: joinder and consolidation, document production and the exchange of information, privilege, and expedited procedures. This article will explore the key details of these rule changes.

Joinder & Consolidation

Articles 7 and 8 of the Rules are new provisions which address joinder and consolidation. Now, pursuant to the revised Rules, a party wishing to join an additional party need only submit a Notice of Arbitration to the party to be joined, the Administrator (the ICDR), and all other parties prior to the appointment of an arbitrator. If joinder is sought after the appointment of an arbitrator, all parties, including the party to be added, must agree to be joined.

Article 8 provides for a novel approach to consolidation. A party seeking consolidation may request the appointment of a "consolidation arbitrator" who will have the power, under certain circumstances, to join any two or more arbitrations pending under the Rules or being administered by the ICDR or the AAA. The consolidation arbitrator has broad discretion in determining whether consolidation is appropriate, and may consider "all relevant circumstances" including not only the applicable law, but also the procedural portion of the pending arbitrations and general concepts of "justice and efficiency." Furthermore, the consolidation arbitrator is not required to issue a statement of reasons as to the ultimate decision whether to grant consolidation.

Document Production and the Exchange of Information

Where previously the Rules did not substantively deal with the exchange of information, Article 21 now addresses this issue in detail. The tribunal now has a clear mandate to oversee the exchange of information to promote economical and limited discovery procedures; while parties may provide their views on

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the appropriate level of information exchange for each case, the tribunal retains final authority.

Parties are now required to exchange all documents upon which they intend to rely and, in line with the International Bar Association's (the "IBA") Rules on the Taking of Evidence in International Arbitration (the "Rules on the Taking of Evidence"), provision is made for the tribunal to order, upon application, the production of any specific documents or class of documents that are reasonably believed to exist and to be relevant and material to the outcome of the case. If a party fails to comply with orders relating to information exchange the tribunal is empowered to draw adverse inferences. Moreover, the Rules now, and for the first time, deal with requests for, and the provision of, electronic documents.

Most significantly for a set of rules that derive from the AAA, Article 21 provides that U.S. court procedures, such as depositions and interrogatories, are not appropriate procedures for obtaining information under these Rules. Such clarity will be welcomed by the international users of arbitration who would perhaps worry that by choosing the Rules they were opening themselves up to U.S.-style procedures.

"This substantial set of changes and additions is an encouraging sign that the ICDR has recognized and is attempting to resolve challenges of wastefulness and delay that can plague international arbitrations, and should help the ICDR stand out as a strong arbitral forum for the resolution of international disputes."

Privilege

The Rules' position on privilege distinguishes them from the rules of many other arbitral institutions. Where previously the Rules simply required the tribunal to take account of applicable principles of legal privilege, Article 22 of the revised Rules goes much further and sets a much higher standard. Now, where parties may be subject to different privilege rules, the tribunal "should" where possible apply the privilege rule that provides the "highest level of protection" to all parties. This stringent position on privilege goes beyond even that provided for in the IBA Rules on the Taking of Evidence.

Expedited Procedures

The Rules are now supplemented by the new International Expedited Procedures that are contained in Articles E-1 through E-10 of the IDR Procedure

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(the "Expedited Procedure"). However, the Expedited Procedure, designed to minimize cost and enhance efficiency, only applies to arbitrations with a sole arbitrator and which have a value of less than US$250,000.

Mediation

The Rules now offer a unique and practical method to facilitate the efficient resolution of disputes. Pursuant to Article 5, the Administrator may encourage parties to mediate their dispute, following the filing of the Answer in an arbitration. Any such mediation would be conducted concurrently with the arbitration unless the parties agree otherwise. Note that the Administrator is not required to offer the mediation, nor do the Rules provide for any inferences to be drawn for failure to mediate when offered.

Overall, the revisions and updates to ICDR's IDR Procedure provide for greater clarity and attempt to ensure efficiency in procedures for arbitrations overseen by the ICDR. This substantial set of changes and additions is an encouraging sign that the ICDR has recognized and is attempting to resolve challenges of wastefulness and delay that can plague international arbitrations, and should help the ICDR stand out as a strong arbitral forum for the resolution of international disputes. Notably, the Rules suggest that the ICDR may supplement the Rules in the near future to regulate the conduct of parties' representatives. So far, of the rules of the main arbitral institutions, only the London Court of International Arbitration has taken the significant step of regulating the behavior of the parties' representatives in arbitration. It will be interesting to note if the ICDR follows suit soon.

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Arbitration Round-up

New Arbitration Centers

Australia

Further to Australia's plans to offer a grid of dispute resolution hubs across the country, the Melbourne Commercial Arbitration and Mediation Centre ("MCAMC") opened in March 2014. The MCAMC aims to enhance Victoria's reputation in commercial dispute resolution and mark Melbourne as a center for domestic and international arbitration.

The MCAMC compliments Sydney's Australian International Disputes Centre and another center is planned for Perth, largely to serve the oil and gas industry in Western Australia. The plan is for the centers to work co-operatively to offer parties more than one geographic option for resolving their disputes in Australia.

Saudi Arabia

Saudi Arabia has formed the Saudi Center for Commercial Arbitration ("SCCA"). The SCCA is the first commercial arbitration center in Saudi Arabia to handle domestic and international commercial and civil disputes. It will have its headquarters in Riyadh and will oversee the setting-up of other arbitration centers throughout the Kingdom and, potentially, internationally.

The nine-member board of the SCCA will develop a set of arbitral rules, create a list of arbitrators from which parties may choose, and will also consider costs issues.

Serbia

The Belgrade Arbitration Center ("BAC") started operating in January 2014.

The BAC was established by the Serbian Arbitration Association, a not-for-profit organization comprised of industry experts, and is Serbia's first independent arbitration institution. The BAC administers domestic and international disputes, assists with administration of *ad hoc* arbitral proceedings under UNCITRAL and conducts mediation sessions.

The Rules of BAC, adopted on January 1, 2014, contain a specialized procedure for conciliation and rules for BAC to act as appointing authority in *ad hoc* arbitral proceedings under UNCITRAL and other rules.

Other Developments

Australian Senate Committee – Investor-State Dispute Settlement ("ISDS") Provisions to Remain

Australia's Foreign Affairs, Defence and Trade Legislation Committee, a Senate Committee, has concluded that the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014 (the "Trade and Foreign Investment Bill"), which restricts the use of ISDS provisions in future trade agreements, should be rejected. Although the Senate Committee's report is not binding on Parliament, it will be influential in the on-going debate in Australia.

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Arbitration Round-up
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The Trade and Foreign Investment Bill was introduced in response to Phillip Morris's challenge of Australia's Tobacco Plain Packaging Act 2011 and the resulting public concern that ISDS provisions were restricting Australia's ability to legislate freely on issues such as health.

Although the previous Australian government (under Prime Minister Julia Gillard) had stated that it would no longer include such provisions in free trade agreements, the policy of the new government is that Australia will consider ISDS provisions on a case-by-case basis.

The Committee concluded that legislation was not the "best mechanism by which to address the concerns raised about risks associated with ISDS provisions." It remarked that the risks were "overstated" and concluded that a blanket ban on the provisions would "impose a significant constraint on the ability of Australian governments to negotiate trade agreements that benefit Australian business." The Committee's view was that the risks could be managed by careful treaty drafting including the development of a "well-balanced" model investment treaty.

Australia currently has ISDS provisions in four free trade agreements (Chile, Singapore, Thailand and ASEAN) and in 21 bilateral investment treaties.

Cambodia's National Arbitration Center Adopts New Rules

Cambodia's National Arbitration Center ("NAC"), which opened in March 2013 in Phnom Penh, adopted the NAC Arbitration Rules and Internal Regulations in August this year. Pursuant to these new rules, parties will be able to, amongst other things, choose their arbitrators, select the language and law of the arbitration, and elect whether to have a hearing.

International Bar Association Approves Revised Guidelines on Conflicts of Interest:

On October 23, 2014, the International Bar Association ("IBA") approved revisions to its Guidelines on Conflicts on Interest in International Arbitration (the "Guidelines"). This is the first time the Guidelines have been revised since they were first published in 2004.

Although the revised Guidelines are not yet publicly available some of the key changes that they introduce were revealed at the IBA's annual conference in Tokyo. The new Guidelines will deal with a number of new issues including: the role of third-party funders in the arbitration; the use of advance waivers; the issues that arise when counsel are from the same barristers chambers as members of the tribunal; and the duties of tribunal secretaries.

Myanmar Publishes Draft Arbitration Bill

Following Myanmar's accession to the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) in July 2013 (see *Myanmar to Accede to the New York Convention*, Issue 2, Arbitration Quarterly), in May this year, Myanmar's parliament published a draft Arbitration Bill (the "Bill").

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Arbitration Round-up
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The Bill is based on the UNCITRAL Model Law on International Commercial Arbitration (1985). While revisions are possible before it is eventually signed into law, the Bill is a positive step towards bringing Myanmar into the international arbitration spectrum.

Turkmenistan Enacts Commercial Arbitration Law

In August 2014, Turkmenistan enacted its first commercial arbitration law which is set to come into force in 2016. The law will apply to commercial disputes between parties and states where at least one of those parties has business operations outside Turkmenistan.

The law is based on the UNCITRAL Model Law 2006 and is currently only available in Turkmen and Russian. The law will apply to all arbitrations seated in Turkmenistan and will also apply to attempts to enforce foreign arbitral awards in Turkmenistan, regardless of the seat of arbitration or governing law.

Turkmenistan is not a signatory to the New York Convention. As a result, this new law will be the only way of enforcing a foreign award in the country.

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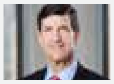

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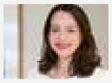

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www.debevoise.com

Recent Events

- **Dietmar W. Prager** spoke on *Diverging Standards of Review of Jurisdictional Decisions* at Columbia Arbitration Day in New York on March 28, 2014
- **Dietmar W. Prager** spoke on *As Influencias Do Poder Judiciaro Na Arbitragem at the ICC* Young Arbitrators' Forum in Rio de Janeiro on May 5, 2014
- **Dietmar W. Prager** spoke on *Evidence in Arbitration* at the 10th Rio de Janeiro International Arbitration Conference in Rio de Janeiro on May 6, 2014
- **Aimee-Jane Lee** spoke 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** spoke on *The Future of Investment Arbitration in Light of the Latest Developments* at the III Roundtable on Investment Arbitration organized by the Comitê on Brasileiro de Arbitragem in São Paulo on May 7, 2014
- **Dietmar W. Prager** spoke on *Como Funciona el Arbitraje International? Tiemos, Costos y Eficiencia del Procedimiento* at the Arbitraje International: Problemas y Tendencias Actuales conference in Lima, Peru on May 21, 2014
- **Christopher K. Tahbaz** spoke on *Highlight on Jurisprudence: The Latest on the Approach of U.S. Courts and Hong Kong Courts in Enforcing International Arbitration Awards* at the ICC Asia-Pacific Conference in Seoul on May 21, 2014
- **Donald Francis Donovan** gave the opening remarks on *Investor State Disputes Involving Energy Policies and Regulations* at the International Energy Arbitration Program in Santiago, Chile hosted by The Center for Global Energy, International Arbitration and the University of Texas School of Law on June 5, 2014
- **Dietmar W. Prager** spoke on *Remedies in International Energy Disputes* at the conference on Emerging Trends in International Arbitration in Latin America in Santiago, Chile on June 5, 2014
- **Ina C. Popova** spoke on *Ethics in International Arbitration* at the NYIAC CLE Panel in New York on June 11, 2014
- **Natalie L.Reid** spoke on *Provisional Measures to Secure Enforcement* at the ITA Young Arbitrators Dallas Roundtable in Dallas on June 18, 2014

Lord Goldsmith QC spoke on *L'Obligation de Loyauté Dans L'Arbitrage* at the Place D' Arbitrage, Paris on June 30, 2014

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Recent Events

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- **Aimee-Jane Lee** acted as counsel in the study of a mock case under the ICC Rules organized by the International Court of Arbitration and The University of Florence in Florence on July 21-25, 2014
- **Christopher K. Tahbaz** spoke on *Thoughts on the Role of Corruption in Investor-State Arbitration* at the KCAB Seminar on Investor-State Dispute Settlement in Seoul on August 20, 2014
- **Natalie L. Reid** spoke at the Annual ICC New York Conference in New York on September 8, 2014
- **Christopher K. Tahbaz** spoke on *Depositions and Cross-Examination in Civil Proceedings* at the Milan Bar Association Seminar on "Taking of Evidence Across the Atlantic: Legal Issues and Practical Hints" in Milan on September 11, 2014
- **Christopher K. Tahbaz** spoke on *Hot Topics in European Cross-Border Commercial Disputes: Brussels I Recast and Recent Trends in ECJ and National Case Law* at the Milan Bar Association Seminar (Conference Co-Chair) in Milan on September 11-12, 2014
- **Mark W. Friedman** spoke at the 3rd Annual GAR Live Conference in New York on September 19, 2014
- **David W. Rivkin** spoke at the 3rd Annual GAR Live Conference in New York on September 19, 2014
- **Lord Goldsmith QC** gave the opening remarks on *The HKIAC New Rules and Recent Practice* at the HKIAC Road Show in Mumbai, India on September 19, 2014
- **Lord Goldsmith QC** spoke on *The Trend Towards International Arbitration and Its Challenges* at the LCIA India Western India Users' Council Symposium in Ahmedabad, India on September 20, 2014
- **Donald Francis Donovan** spoke on *Case Management as a Tool to Optimize Time in Arbitrations: Organizing the Proceedings, Taking Evidence and Partial Awards* at the XIII International Arbitration Congress of the Brazilian Arbitration Committee in Porto de Galinhas, Brazil on September 22, 2014
- **Aimee-Jane Lee** spoke on *Investment Treaty Law and Arbitration* at the annual Investment Treaty Law and Arbitration Programme organized by Africa International Legal Awareness in London on September 26, 2014
- **Lord Goldsmith QC** spoke on *Revisiting the Pathology of Arbitration Clauses* at "Asia at the Cutting Edge" in Hong Kong on October 17, 2014
- **Lord Goldsmith QC** spoke on "*The 10 Most Important Developments in Asian IA From the Past Year: a Collective View*" at the 4th Annual GAR Live Asia Conference in Hong Kong on October 17, 2014

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Recent Events

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- **Christopher K. Tahbaz** spoke on *Investor-State Arbitration in Asian Region – Quo Vadis?* at the 4th Annual GAR Live Asia Conference in Hong Kong on October 17, 2014
- **David W. Rivkin** spoke at the *Arab Arbitration Forum Luncheon* at the IBA Annual Meeting in Tokyo on October 19, 2014
- **David W. Rivkin** spoke at the *North American Forum Luncheon* at the IBA Annual Meeting in Tokyo on October 20, 2014
- **Deborah Enix-Ross** spoke on *We are all Human Rights Lawyers* at the IBA Annual Meeting in Tokyo on October 20, 2014
- **Mark W. Friedman** spoke on *Hot Topics in Arbitration* at the IBA Annual Meeting in Tokyo on October 21, 2014
- **David W. Rivkin** spoke at the *Japanese Diet Meeting on Global Legal Service* at the IBA Annual Meeting in Tokyo on October 21, 2014
- **David W. Rivkin** spoke at the *Showcase Program on Climate Change* at the IBA Annual Meeting in Tokyo on October 22, 2014
- **Christopher K. Tahbaz** spoke on *Masterclass: Using Litigation to Support Arbitration in Asia* at the IBA Annual Meeting in Tokyo on October 22, 2014
- **Christopher K. Tahbaz** spoke on *China: Dealing with Challenge* at the IBA Annual Meeting in Tokyo on October 23, 2014
- **Frederick T. Davis** spoke on *Levelling the Playing Field – Defending Multinationals in a World of Increased Cross-Border Cooperation* at the IBA Annual Meeting in Tokyo on October 23, 2014
- **David W. Rivkin** spoke at the *IBA Council* at the IBA Annual Meeting in Tokyo on October 23, 2014
- **Sophie Lamb** and **David W. Rivkin** spoke on *Reasons for Success and Failure in Offshore Exploration and Production* at the IBA Annual Meeting in Tokyo on October 24, 2014
- **Donald Francis Donovan** moderated a panel on *The Role of Investment Arbitration in Promoting the Rule of Law* at the American Branch of the International Law Association and the International Law Students Association's International Law Weekend in New York on October 24, 2014
- **Dietmar W. Prager** spoke on *Risks and Challenges in International Arbitration: The International Arbitrator's Perspective* at the ICDR and CCB Joint International Arbitration & Mediation Conference in Bogotá on October 28, 2014

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Recent Events

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- **William Taft** spoke on *Alternate Dispute Resolution* at the Prudential U.S. Business Law Conference in New Jersey on October 28, 2014
- **Donald Francis Donovan** gave the 26th Annual Blaine Sloan Lecture on International Law on *The Advocate in the Transnational Justice System* at Pace Law School in White Plains, New York on October 29, 2014
- **Dietmar W. Prager** spoke on *International Arbitration* at the V Brazil Infrastructure Investment Forum in New York on November 5, 2014
- **Natalie L. Reid** spoke at the Association of Caribbean Corporate Counsel in Florida on November 6-7, 2014
- **Christopher K. Tahbaz** and **Samantha Rowe** spoke on *Best Practices – an Excuse for Avoiding Reform?* at the International Arbitration Conference – Sydney Arbitration Week in Sydney on November 13, 2014
- **Dietmar W. Prager** spoke on *Risks and Challenges in International Arbitration* at the 8th International Arbitration and Mediation Conference in São Paulo on November 18, 2014
- **Nicola Leslie** participated in a discussion on a report published by the IBA's Task Force on Climate Change Justice entitled *Achieving Justice and Human Rights in an Era of Climate Disruption* at the House of Lords in London on December 1, 2014
- **Patrick Taylor** spoke on *The Proposed Investment Protection Standards in the TTIP* at a seminar organized by the LCIA's Young International Arbitration Group, and hosted by Debevoise & Plimpton in London, on The Future of European Investment Treaty Protection and ISDS on December 3, 2014
- **Conway Blake** spoke on *The New EU Regulation on Financial Responsibility for EU Investor-State Disputes* at a seminar organized by the LCIA's Young International Arbitration Group, and hosted by Debevoise & Plimpton in London, on The Future of European Investment Treaty Protection and ISDS on December 3, 2014
- **David W. Rivkin** presented the 2nd Annual Seoul Arbitration Lecture at the Seoul International Dispute Resolution Centre in Seoul, South Korea on December 9, 2014

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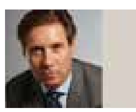

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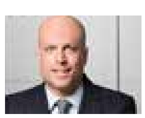

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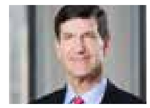

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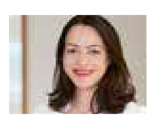

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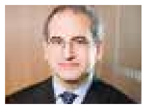

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