Debevoise & Plimpton LLP

Arbitration Quarterly

Issue No 3 – September 2013

Editors' Remarks

Welcome to this third edition of Debevoise's Arbitration Quarterly. The major theme running through the articles in this edition is the progressive development of international arbitral law and practice. In line with this theme, this edition includes articles on a number of significant judicial decisions, including rulings from the Supreme Court of the United States on class action arbitration waivers, the Supreme Court of the United Kingdom on the issuance of anti-suit injunctions to enforce arbitration clauses under the law of England and Wales, and the Caribbean Court of Justice on the limits of anti-arbitration injunctions in the context of investor-state disputes. Other articles address a Russian Arbitrazh Court's enforcement of agreements prohibiting recourse against arbitral awards made in Russia, an English Commercial Court ruling on the courts' power to decide an arbitral tribunal's jurisdiction prior to arbitration, and the views of two United States appellate courts on how the incorporation of the UNCITRAL or ICC Rules into an arbitration agreement affects the arbitral tribunal's power to make a binding determination on the scope of its own jurisdiction.

Alongside these decisions, we highlight recent efforts to codify arbitral best practices through the formulation of new procedural rules and codes of practice, including the International Bar Association's Party Representation Guidelines and the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration. Another article highlights the new Paris Arbitration Rules, which offer parties an alternative to the UNCITRAL rules for ad hoc arbitrations. Arbitration institutions also are evolving, and we discuss the new institutions that have broken off from China's CIETAC.

Finally, in the realm of state-to-state arbitration, we look at the arbitration that the Philippines recently commenced against China in connection with the South China Sea maritime boundary dispute and its implications for states in the region.

Continued on page 2

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

In This Issue

Page

01 Editors' Remarks

02 UK Supreme Court Holds that Anti-Suit Injunctions Can be Issued to Restrain Foreign Proceedings Brought in Breach of an Arbitration Agreement Even if No Arbitration is Pending or Contemplated

04 Standardising Ethics of Counsel Across Borders – Adoption of the IBA Party Representation Guidelines

05 U.S. Supreme Court Upholds Class Arbitration Waivers in Consumer Contracts

08 UNCITRAL Adopts Long-Awaited Rules on Transparency in Treaty-Based Investor-State Arbitration

09 English Commercial Court Ruling Addresses Court Jurisdiction to Decide Arbitrators' Jurisdiction

11 CIETAC's Former Branches in Shanghai and Shenzhen Take Further Steps to Solidify Their Independence

13 The Caribbean Court of Justice Imposes Limits on Anti-Arbitration Injunctions

15 Russian Commercial Court Recognizes Validity of Agreements Excluding Annulment of Arbitral Awards Made in Russia

16 The New Paris Arbitration Rules Boost the Attractiveness of Paris as a Leading Seat for Ad Hoc Arbitration

19 Recent Decisions from the U.S. Courts Resolve Disputes Over the Courts' Power to Determine the Scope of Arbitral Jurisdiction

21 NAFTA Arbitration Tribunal Allows Entry into Record of Evidence Obtained Through "Section 1782" Discovery in U.S. Courts

23 South China Sea: Maritime Dispute Resolution by Arbitration?

24 Recent and Forthcoming Events

26 Debevoise International Dispute Resolution Group

Debevoise & Plimpton LLP
Arbitration Quarterly
Issue No 3 - September 2013

We are confident you will find this edition of the Arbitration Quarterly an interesting and useful summary of key global developments. If you wish to discuss any of the articles or topics featured in this edition or any other aspect of international arbitration or dispute resolution, we would be delighted to hear from you.

Very best wishes,

Donald Francis Donovan
Sophie Lamb
Carl Micarelli
Steven S. Michaels
and the International Dispute Resolution Group
of Debevoise & Plimpton LLP

UK Supreme Court Holds that Anti-Suit Injunctions Can be Issued to Restrain Foreign Proceedings Brought in Breach of an Arbitration Agreement Even if No Arbitration is Pending or Contemplated

In the recent decision in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, the UK Supreme Court effected some important clarifications to English arbitration law.

The Dispute

The case arose out of a long-running dispute between the grantor and grantee of a concession to operate an energy-producing hydroelectric power plant in Kazakhstan. The agreement was governed by Kazakh law but contained a provision calling for arbitration in England. Earlier proceedings before the Kazakh courts had resulted in the arbitration agreement being declared invalid under Kazakh law. In 2009, further proceedings were instituted in Kazakhstan by the appellant Ust-Kamenogorsk Hydropower Plant JSC ("U-KHP"). In response, the respondent AES Ust-Kamenogorsk Hydropower Plant LLP ("AES") brought proceedings before the English Commercial Court, seeking (i) a declaration that the arbitration clause was valid; and (ii) an anti-suit injunction restraining U-KHP from pursuing the proceedings before the Kazakh courts. The Commercial Court granted both

Continued on page 3

Arbitration Quarterly is a publication of Debevoise & Plimpton LLP

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

London
Tower 42
Old Broad Street
London, EC2N 1HQ
+44 20 7786 9000

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

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

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

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

Hong Kong
13/F Entertainment Building
30 Queen's Road Central
Hong Kong
+852 2160 9800

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

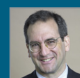
www.debevoise.com

Edition Editors

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

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

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


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

Assistant Editors

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

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

ArbitrationQuarterly@debevoise.com

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

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UK Supreme Court Holds that Anti-Suit Injunctions Can be Issued

Continued from page 2

the declaration and the anti-suit injunction and the Court of Appeal and the Supreme Court affirmed.

The Powers of English Courts to Issue Injunctions in Arbitration Cases

In affirming the lower courts' judgments that the anti-suit injunction should be issued, the Supreme Court established two important propositions. First, it clarified that an anti-suit injunction can be issued to restrain breach of an arbitration agreement (in relation to proceedings in countries not party to either the Brussels Regulation or Lugano Convention) even if no arbitration is pending or contemplated.[1] In reaching this conclusion, Lord Mance, who gave the sole judgment of the court, noted that an agreement to arbitrate has both a positive aspect and a negative aspect: an agreement to resolve the dispute by arbitration, and an often tacit agreement not to institute proceedings in another forum. Lord Mance held that the negative aspect was as fundamental as the positive.

Second, the Supreme Court established that English courts retain jurisdiction to issue anti-suit injunctions in arbitration-related cases even in circumstances not contemplated by the Arbitration Act 1996 (the "Act"). U-KHP had argued that (i) the Act contained a complete scheme for the determination of jurisdictional issues; and (ii) the Act made no provision for the grant of injunctions in circumstances in which arbitral proceedings were not pending or contemplated. The Supreme Court disagreed, holding that an English court retains its jurisdiction under section 37 of the Senior Courts Act 1981 (the "SCA") to issue anti-suit injunctions in all cases, irrespective of whether arbitral proceedings are pending or contemplated.

Lord Mance held that, if an injunction is sought to restrain foreign proceedings brought in breach of an arbitration agreement, the power do so derives not from section 44 of the Act, but from section 37 of the SCA. Section 37 of the SCA grants the English High Court general jurisdiction to issue injunctions, providing: "*The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so*". This was the case irrespective of whether or not arbitral proceedings were pending or contemplated because the anti-suit injunction sought in these circumstances was not "*for the purposes of and in relation to arbitral proceedings*", but rather "*for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings*".

The Court's decision on these two points is of significant practical importance. The relationship between section 37 of the SCA and section 44 of the Act was previously unclear.

It remains to be seen, however, whether section 37 of the SCA and section 44 of the Act will be held to be independent of one another outside of the context of anti-suit injunctions. The jurisdiction given to a court by section 37 is very broad: it authorizes the issuance of injunctions – both interim and permanent – in all circumstances in which the court considers it to be just and convenient to do so. There is a clear overlap with section 44 of the Act, which allows interim injunctions to be granted for the purposes of and in relation to arbitral proceedings. In the present proceedings, the Supreme Court held that section 44 of the Act did not apply, as the injunction sought was not "*for the purposes of and in relation to arbitral proceedings*". In cases in which the injunction sought clearly is for such purposes, it remains to be seen whether the broader powers found in section 37 of the Act continue to apply, or whether they will be limited by section 44 of the Act.

Service Out of the Jurisdiction

The Supreme Court also clarified that the existing procedural rules were broad enough to permit service out of the jurisdiction even in circumstances in which no arbitral proceedings are pending or contemplated. Specifically, it held that the references to applications and remedies "*affecting an arbitration agreement*" in Parts 62.2 and 62.5 of the Civil Procedure Rules allowed service out of the jurisdiction in these circumstances.

This holding will be vitally important in practice. Had the Supreme Court found to the contrary on this point, its finding as

Continued on page 4

1 It has been clear since the decision of the Court of Justice of the European Union in West Tankers Inc v Allianz SpA (Case 185/07) [2009] 1 AC 1138 that anti-suit injunctions cannot be issued to restrain proceedings brought in breach of arbitration agreements if those proceedings are brought in states in which the Brussels Regulation or Lugano Convention applies.

Recognition: Debevoise recently received the "International Arbitration Team of the Year" award from Chambers USA. It was the second year in succession that Debevoise has received this award.

UK Supreme Court Holds that Anti-Suit Injunctions Can be Issued

Continued from page 3

to the availability of anti-suit injunctions in cases in which no arbitral proceedings were pending or contemplated would have been rendered irrelevant in many cases in which it would otherwise apply.

Res Judicata Effect of the Court's Declaration

The Supreme Court made a further interesting ruling in relation to the declaration of the validity of the arbitration agreement, which was the other relief sought and obtained by the respondent. It held that the order granting the declaration sought was, by its terms, a final order of an English court. It therefore had all of the properties that one would expect of such an order – including its preclusive effect. As a result, the Supreme Court opined, it would not be open to the respondent to make submissions before the arbitral tribunal that contradicted those that had been made before the court. The Supreme Court's holding clarifies that a party could not seek an anti-suit injunction from the English court on the grounds that the dispute should be referred to arbitration, and then challenge the jurisdiction of the arbitral tribunal if the other party then sought to commence arbitral proceedings.

And Finally…

The outcome of this case could have been different had the parties not agreed that English law applied. Early in his judgment, Lord Mance noted that the parties had agreed in the lower court that the clause was to be governed by and construed in accordance with English law. It was therefore unnecessary for him to consider relevant authority addressing what law applies in such cases. Had the parties not agreed on the applicability of English law, it is possible that Kazakh rather than English law would have been held to be the governing law of the arbitration agreement, and the court would have had to consider whether to give effect to the Kazakh courts' judgment finding the arbitration agreement invalid under Kazakh law.

Debevoise & Plimpton LLP represented the appellant before the Supreme Court.

For further information, please contact:

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

Standardising Ethics of Counsel Across Borders – Adoption of the IBA Party Representation Guidelines

On May 25, 2013, the International Bar Association adopted the IBA Guidelines on Party Representation in International Arbitration (the "Guidelines"). The adoption of the Guidelines marks an important development in the attempts to harmonise diverse approaches to the international arbitral process.

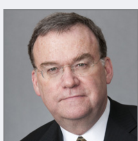
The Guidelines will help to address two common difficulties that arise in international arbitration. First, they provide an optional independent standard to resolve the issue of having different ethical standards applying in arbitration proceedings. Consider a case, for example, in which counsel from the Russian Federation have an arbitration in the United Arab Emirates under Swedish law. Which country's ethical rules apply? The existence of this uncertainty was illustrated by a 2010 survey commissioned by the drafters of the Guidelines.

The second issue is the potential unfairness that results from different counsel in the same arbitral proceedings being bound by different sets of ethical rules.

The Guidelines have therefore been formulated to assist with "*issues of counsel conduct and party representation in international arbitration that are subject to, or informed by, diverse and potentially conflicting rules and norms*". The drafters focused on the following topics: party representation, communications with arbitrators, submissions to the arbitral tribunal, information exchange and disclosure, witnesses and experts, and remedies for misconduct.

In many respects, the Guidelines simply confirm widely accepted standards of professional conduct: for example, counsel should not invite witnesses to give false evidence or make false submissions of fact to the tribunal. In other respects, however, they require particular standards that may not be

Continued on page 5



Recognition: Debevoise partner Donald Francis Donovan has been selected as one of Chamber USA's honorees for Outstanding Contribution to the Legal Profession.

Standardising Ethics of Counsel Across Borders –

Continued from page 4

expected in some jurisdictions. For example, the Guidelines explicitly provide the Arbitral Tribunal with authority to exclude a new party representative from participating in arbitration proceedings if a relationship exists between that person and an arbitrator that would create a conflict of interest.

There are then further areas in which the Guidelines provide useful clarifications of applicable principles. For example, the Guidelines restrict ex parte communications between a party and an arbitrator to certain regulated situations, and explicitly state that a party representative should not seek the views of the prospective party-nominated arbitrator on the substance of the dispute.

The Guidelines will provide parties to arbitrations with an optional standard that can help "level the playing field" regarding the conduct of their legal representatives. In those cases in which the parties adopt the Guidelines, and there is then a breach of the Guidelines by one of the counsel involved, the tribunal is permitted to draw an appropriate inference when assessing evidence or submissions presented by that counsel, or to consider the misconduct when apportioning the costs of the arbitration.

We expect that parties arbitrating outside of the main centres will find the Guidelines useful, particularly if a number of counsel from different jurisdictions are involved. Without being too prescriptive, the Guidelines are a useful step towards raising standards for party representation in international arbitration, and avoid seeking to create a binding regulatory norm that could be met with more resistance. The Guidelines are expected to be implemented on a regular basis by parties and tribunals similarly to the other rules and guidelines published by the IBA, including the *IBA Rules on the Taking of Evidence in International Arbitration*, the *IBA Guidelines on Conflicts of Interest in International Arbitration,* and the *IBA Guidelines on Drafting Arbitration Agreements*.

For further information, please contact:

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

Nicola Leslie
nleslie@debevoise.com
London, +44 20 7786 5462

U.S. Supreme Court Upholds Class Arbitration Waivers in Consumer Contracts

Class arbitration is a relatively recent phenomenon, yet it has provoked intense debate. In the past, many had assumed that an agreement to arbitrate, if enforceable, precluded resort to class-action procedures of the kind that are available in federal and state courts in the United States. In recent years, however, some arbitrators have been persuaded to allow claimants to pursue arbitration as representatives of a class of similarly-situated persons. In response, businesses began to include express waivers of class-action procedures in arbitration clauses, particularly in standard form contracts. These waivers soon came under challenge, especially in consumer cases, on the ground that they deprived claimants with small claims of any practical remedy.

On June 20, 2013, the U.S. Supreme Court dealt a significant blow to efforts to invalidate class arbitration waivers. In *American Express Company, et al. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Court held that, under the U.S. Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq., class arbitration waivers are enforceable even if the claimant's cost of individually arbitrating a federal claim exceeds the potential recovery. The decision in *Amex* extends the Court's 2011 decision in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which held that, because the FAA preempts conflicting law of the 50 U.S. states, state law may not condition the validity of arbitration agreements on the availability of class procedures. Together, the two decisions appear to leave little room for courts and, potentially, arbitrators to refuse to enforce waivers of class arbitration proceedings. As a practical matter, it appears likely that the decisions will circumscribe the availability of class procedures in arbitration and in litigation, at least in the short term.

Nevertheless, in an earlier, unanimous decision in the recently concluded term also addressing class arbitration, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the Supreme Court re-opened the door to class arbitration ever so slightly, by holding that an arbitrator has authority to order class procedures where there is "*any* contractual basis" for the decision. Although the Sutter decision was friendlier to class arbitration, its impact is likely to be more limited as businesses adapt their behavior to the recent decisions.

Earlier Decisions

The Court's first major decision squarely addressing class arbitration came in *Stolt-Nielsen S.A. et al. v. AnimalFeeds*

Continued on page 6

International Corp., 559 U.S. 662 (2010), in which the Court held that class arbitration is unavailable unless the parties specifically agree to it in the contract. The arbitration tribunal in *Stolt-Nielsen* had permitted companies alleging price-fixing against providers of parcel tanker shipping services to proceed as a class against the shippers, notwithstanding that the parties stipulated that no agreement to class arbitration had been reached in the charter contract. Based on that stipulation, the Supreme Court vacated the arbitral award on the ground that the tribunal had exceeded its authority. Because arbitration is a matter of consent, the Court reasoned, "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."

A year later, in *AT&T Mobility v. Concepcion*, the Court held that the FAA preempted a California state law rule that invalidated as unconscionable most class action waivers in consumer arbitration agreements. The claimants in that case had complained that they were advertised free cellular phones but were charged $30.22 in sales tax based on the phones' retail value. The contract required arbitration of all disputes, but prohibited class proceedings. The lower federal courts in the Ninth Circuit concluded that the waiver clause was unenforceable under California law and refused to compel arbitration. The Supreme Court reversed. Echoing *Stolt-Nielsen*, the majority opinion reasoned that requiring the availability of classwide arbitration "interferes with fundamental attributes of arbitration" – informality, flexibility, efficiency, and confidentiality – "and thus creates a scheme inconsistent with the FAA." The Court also noted that the agreement contained a number of consumer-friendly cost-shifting provisions to help consumers pursue their claims, and thus was unlikely to prevent the claimants from having their claims decided.

Amex

This term's Amex case presented a variation on *Concepcion*: whether a class action waiver in an arbitration clause is enforceable in circumstances in which the waiver effectively prevents the assertion of federal antitrust claims. Italian Colors Restaurant and other merchants complained that American Express' "Honor All Cards" policy, which requires them to accept all American Express credit cards – with transaction fees 30 percent higher than other credit cards – if they accepted Amex's premium charge cards, constituted a tying arrangement in violation of U.S. antitrust laws. The merchants' contract with Amex required arbitration of all disputes, precluded class arbitration, prohibited disclosure of information about the arbitration, and, unlike the agreement at issue in *Concepcion*, precluded any form of cost-shifting for successful claims.

> As a practical matter, the decisions will circumscribe the availability of class procedures in arbitration.

The Second Circuit invalidated the arbitration agreement, concluding that the antitrust claims could not reasonably be pursued in individual actions, because they required an expert report costing hundreds of thousands of dollars to prove – which could not be shared among the class members – yet the maximum recovery for any individual plaintiff was less than $40,000, even when trebled under the antitrust statutes. The court of appeals reconsidered and affirmed its decision twice, first in light of *Stolt-Nielsen* and then *Concepcion*. Amex then sought review in the Supreme Court.

From the time of its filing, *Amex* drew intense public attention. No fewer than 20 amicus briefs were filed in the case, including from business groups, consumer advocacy groups, employers' groups, the defense bar, academic entities, a group of 22 states, and the Solicitor General of the United States.

The Supreme Court reversed the lower courts' decisions, upholding the class arbitration waiver. Consistent with prior decisions, it found that the FAA requires courts to "rigorously enforce" arbitration agreements according to their terms. Although the statute provides an escape-hatch to enforcement where another federal statute demonstrates a "contrary congressional command," the Court found no evidence that Congress intended the federal antitrust statutes or Federal Rule of Civil Procedure 23, which provides for certification of class actions, to override the FAA and guarantee access to class procedures.

The Court also rejected the application of the "effective vindication" theory,

Continued on page 7

Appointment: Debevoise partner Catherine Amirfar has been appointed to the International Council for Commercial Arbitration's Task Force on Efficiency in International Arbitration.

U.S. Supreme Court Upholds Class Arbitration Waivers

Continued from page 6

under which an arbitration agreement may be invalidated if it "operat[es] … as a "prospective waiver of a party's *right to pursue* statutory remedies." The majority held that this exception would certainly cover a provision in an arbitration agreement forbidding the assertion of a particular statutory right, and it might cover filing and administrative fees that made access to arbitration impracticable. However, in *Amex*, the Court found that the mere "fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute an elimination of the *right to pursue* that remedy."

Businesses may welcome the Court's decision and may take the opportunity to include increasingly restrictive dispute-resolution clauses in their consumer contracts – reducing class litigation by requiring arbitration of consumers' disputes and forbidding class arbitration. (This would not necessarily preclude companies from waiving arbitration and litigating cases they may wish to have resolved judicially in a way that would bind the full class, but companies should be mindful of the possibility that this would be considered a waiver in other cases.) Consumer advocates will continue to exert pressure on companies to ensure access to dispute resolution procedures that are fair and equitable. In addition, Congress could amend the FAA to overrule *Amex*, and the Consumer Finance Protection Bureau is presently studying class action arbitration waivers and could issue a rule banning them pursuant to its own authority under the Dodd-Frank Act.

Sutter

This term's decision in *Sutter* resolved a disagreement among the lower courts, and answered a question left open by *Stolt-Nielsen*: what kind of arbitration clause authorizes arbitrators to order class arbitration? Under the Court's decision, the arbitral tribunal can interpret an arbitration clause to authorize class arbitration even if the authorization is not express.

In the *Sutter* case, the claimant asserted that Oxford Health Plans systematically failed to reimburse him and tens of thousands of other doctors in New Jersey for services provided to patients under the plan. The individual claims were small; Sutter lost approximately $1,000 per year. The arbitration clause in the contract was silent on class arbitration, but the sole arbitrator determined that the parties must have intended to permit class arbitration, because of the breadth of the clause – which he read as intending that "the entire universe of actions that could possibly have been brought in any court" could be brought in arbitration – and because an alternative reading would prevent the claimant from pursuing a class action in any forum. The district court and the U.S. Court of Appeals for the Third Circuit held that arbitrator's decision was enforceable, on the basis that the arbitrator had endeavored to interpret the agreement and the interpretation was not totally irrational.

The Supreme Court affirmed the Third Circuit's decision. The Court explained that, because the FAA permits a court to vacate an arbitrator's decision only if he has "exceeded [his] powers," the arbitrator's decision to order class procedures could not be disturbed unless it lacked "*any* contractual basis," and not merely, as Oxford argued, because it lacked a "sufficient" basis. In other words, because the arbitrator engaged in his delegated task of interpreting the parties' agreement, "[his] construction holds, however good, bad, or ugly." The Court observed that, in this case, Oxford itself had agreed that the arbitrator should determine whether the contract authorized class procedures—but reserved the question whether, in other circumstances, the availability of class arbitration could be a threshold "question of arbitrability" for courts to determine *de novo*.

The decision in *Sutter* re-opens the door to class arbitration, at least in those few remaining cases where the contracts do not expressly prohibit class arbitration. However, it remains to be seen whether courts will take a different tack if the respondent contends that the question of the availability of class procedures is for the court rather than the arbitrator to decide. It is in any event virtually certain that the decisions in *Amex* and *Sutter* will significantly shape the future drafting of dispute resolution clauses in consumer contracts and potentially contracts between businesses.

For further information, please contact:

Rebecca S. Hekman
rshekman@debevoise.com
New York, +1 212 909 6219

Recognition: Debevoise was awarded the prize for Global Dispute of the Year (Investment Arbitration) by the American Lawyer, in connection with its successful representation of Occidental Petroleum in its long-running dispute with Ecuador.

UNCITRAL Adopts Long-Awaited Rules on Transparency in Treaty-Based Investor-State Arbitration

Investor-state arbitration has been subject to criticism from both civil society and certain states both for its lack of transparency and its failure to include real parties in interest. It has been argued that important decisions affecting matters of public policy, the allocation of public funds and national sovereignty have been made behind closed doors, with little access to hearings and written documents for non-parties, and without the ability for non-parties to participate in proceedings even though such non-parties may have a significant and sometimes direct interest in their outcome.

In response to such criticism and against the background of a broader backlash against the investment arbitration system, on 11 July 2013, the United Nations Commission on International Trade Law ("UNCITRAL") adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "Transparency Rules"). The action follows several years of negotiations and drafting by the UNCITRAL Working Group II (Arbitration and Conciliation). The Transparency Rules are intended to allow for greater public access to information and documents concerning arbitration proceedings, as well as to provide greater opportunity for non-parties to participate in such proceedings.

Specifically, in arbitrations to which the Transparency Rules will apply, the disputing parties will be required promptly to transmit a copy of the notice of arbitration to a central repository (which will be the Secretary-General of the United Nations or an institution to be designated by UNCITRAL), which will then make available to the public information regarding the names of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.

Subject to certain exceptions for confidential or protected information and for maintaining the integrity of the arbitral process, the disputing parties will also be required to make available to the public, through the repository, the most significant documents in the proceedings, including, among other documents, the pleadings, a table listing all exhibits to the pleadings, expert reports and witness statements, any written submissions by any non-disputing parties to the treaty and by third persons, transcripts of hearings, if available, as well as orders, decisions and awards of the arbitral tribunal.

> The Transparency Rules allow for greater public access to information and greater opportunity for non-parties to participate.

Again subject to certain exceptions, any hearings for the presentation of evidence or for oral argument will be held in public, and the tribunal will be required to make logistical arrangements to facilitate public access to hearings, including, if appropriate, by video link.

Further, the Transparency Rules also include provisions allowing for amicus curiae participation, which certain tribunals had already permitted pursuant to their general power under Article 15(1) of the UNCITRAL Rules. Under the Transparency Rules, after consultation with the disputing parties, the tribunal may allow a person that is not a disputing party to file a written submission in the proceedings, and may also allow (or indeed invite) non-disputing state parties to file submissions on issues of treaty interpretation or further matters within the scope of the dispute.

The Transparency Rules will apply to all treaty-based investor-state arbitration initiated under the UNCITRAL Arbitration Rules in which the treaty in question was concluded after 1 April 2014. For arbitrations under treaties concluded prior to this date, the disputing parties must agree to the application of the Transparency Rules. The Transparency Rules will only apply to investor-state arbitration brought under the auspices of an investment treaty. The Transparency Rules will not automatically apply to other kinds of investor-state arbitration, including arbitrations pursuant to a contract between the investor and the state.

Given these restrictions, the initial impact of the Transparency Rules is therefore likely to be limited. This is unless parties to investor-state arbitration expressly agree to their application: parties to investor-state arbitrations initiated under other rules can decide to make use of the Transparency Rules should they so wish.

The adoption of the Transparency Rules has been received as a welcome step towards openness and inclusivity in investment arbitration, and may provide the impetus for other arbitral institutions to adopt similar measures.

For further information, please contact:

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

English Commercial Court Ruling Addresses Court Jurisdiction to Decide Arbitrators' Jurisdiction

The English Commercial Court has held that it has, in some instances, the authority to decide, based on an arbitration clause, the arbitrability of issues arising out of or relating to an agreement, rather than reserve the issue for determination by the relevant tribunal. The court's judgment provides detailed guidance as to the factors the court will consider when deciding whether to exercise that jurisdiction.

In *Golden Ocean Group Limited v (1) Humpuss Intermoda Transportasi Tbk Limited (2) Genuine Maritime Ltd* [2013] EWHC 1240 (Comm), a dispute arose as to which of the two respondents was the disponent owner (that is, the lessor) of a vessel under a charterparty. The charterer, Golden Ocean Group Limited ("Golden Ocean"), was the claimant.

The factual and procedural background to the dispute is complex. The charterparty was originally governed by English law and contained provision for any dispute to be referred to arbitration in London. Following Golden Ocean's commencement of such proceedings against Genuine Maritime Limited ("Genuine Maritime") in 2009, in which it argued that Genuine Maritime was the disponent owner of the vessel, the parties reached a settlement that culminated in a written addendum to the charterparty providing for disputes to be referred to arbitration in Singapore rather than England. English law remained the governing law.

Following that agreement, Golden Ocean later claimed that in fact Humpuss Intermoda Transportasi Tbk Limited ("HIT") was the disponent owner of the vessel, not Genuine Maritime. Golden Ocean claimed that the addendum it entered into with Genuine Maritime was of no effect and void and, as a result, it had neither contracted with Genuine Maritime nor had it agreed to arbitrate in Singapore. After the addendum was agreed, various proceedings were commenced in different locations. Most recently, Genuine Maritime commenced an arbitration in Singapore and Golden Ocean responded by issuing a claim in the English Commercial Court. At the outset of these Commercial Court proceedings, Golden Ocean made an application seeking, first, permission to serve its claim form out of the jurisdiction on each of HIT and Genuine Maritime and, second, an interim-arbitration injunction against Genuine Maritime in respect of its Singapore arbitration. It is in respect of this application that judgment has been handed down.

> The judgment provides guidance on when a court should order a trial on arbitrability and when it should permit the arbitrators to resolve the issue.

In reaching a decision as whether to allow service out of the jurisdiction on Genuine Maritime, Justice Popplewell concluded that it would be inappropriate to allow such service if, after doing so, a court would grant Genuine Maritime a stay of the English Commercial Court proceedings in favour of the Singapore arbitration. As a result of this "threshold question", Popplewell J considered whether Genuine Maritime could successfully obtain a stay pursuant to section 9 of the Arbitration Act 1996 (the "Act") (which allows the court, in some instances, to consider the validity of an arbitration agreement), or pursuant to the court's inherent jurisdiction (which would leave the issue of the validity of an arbitration agreement to be determined by an arbitral tribunal). In considering this set of issues, Popplewell J set out consolidated statements of principle, as well as detailed guidance, as to what an English court must consider when asked to make such orders.

Popplewell J held that, in order for section 9 of the Act to apply and a stay to be ordered, pursuant to section 9(1) of the Act an applicant must establish that an arbitration agreement was concluded and that its terms apply to the underlying dispute. It is not enough for an applicant simply to show that there is an arguable case that they are a party to such a concluded agreement: unless the court is satisfied that there is an agreement to arbitrate, there is no authority under section 9 to stay proceedings. Popplewell J confirmed that if the court is unable to decide, on the written evidence, whether the section 9(1) criteria have been met, it must direct a trial to determine this before granting a stay pursuant to section 9. The only alternative to having a trial to determine whether the section 9(1) criteria have been met would be for the court to grant a stay under its inherent jurisdiction without resolving the issue.

In circumstances in which an applicant successfully demonstrates that the section 9(1) criteria have been met, a stay is mandatory unless the respondent satisfies the court that the arbitration agreement is "*null and void, inoperative, or incapable of being performed*" within the meaning of section 9(4) of the Act. Further, and unlike

Continued on page 10

English Commercial Court Ruling Addresses Court Jurisdiction

Continued from page 9

when determining whether the section 9(1) criteria are met, if the evidence is not clear as to whether the arbitration agreement is "*null and void, inoperative, or incapable of being performed*" pursuant to section 9(4), the court does not have to, though it may, order a trial to determine whether the section 9(4) criteria are met.

Having set out the principles that should guide the court when considering whether to order a stay pursuant to section 9 of the Act, Popplewell J went further and provided guidance as to how a court should determine whether it should order a trial of the arbitrability issue under sections 9(1) and/or 9(4) or whether it should grant a stay of judicial proceedings under the inherent jurisdiction to permit the arbitrability issue to be resolved by the tribunal. The significant factors were:

(i) Whether the arbitrability issue was likely to be resolved by the court in any event (for example in the context of enforcement of an award).

(ii) Whether the resolution of the arbitrability issue will involve findings of fact or conclusions of law that affect the substantive rights and obligations of the parties in relation to their underlying dispute, or whether such resolution will affect only the question of whether such rights and liabilities are arbitrable.

(iii) What the likely length and cost of the inquiry into the arbitrability issue would be and how quickly it will be resolved; the longer the length of time, the less inclined the court should be to order the issue to be tried in advance of the arbitration.

(iv) Whether there have been or will be related proceedings addressing the arbitrability issue between or among the same or other parties; the court should seek to minimise the risk of inconsistent judgments.

(v) The degree of connection between the arbitrability dispute and England; the law applicable to the arbitrability issue may be of significance. Factors to consider include: (a) whether the law governing the existence, effectiveness or applicability of the agreement to arbitrate is English law; (b) relative convenience of the parties of contesting the arbitrability question before the English court or the arbitral tribunal; (c) location; (d) language of witnesses and documents; and (e) potential applicability of an English jurisdiction clause if the agreement to arbitrate did not exist or was ineffective or inapplicable.

(vi) The strength of the arguments on the arbitrability issue; the court will not conduct a mini-trial but if this is determinable from a brief review of the papers, the court will take this into account.

(vii) The degree of prejudice that may be suffered by a party in requiring it to entrust the issue of arbitrability to an arbitral tribunal when, it may transpire, there is no (a) applicable and concluded arbitration agreement; or (b) the applicable and concluded arbitration agreement is null and void, inoperative, or incapable of being performed. In determining the degree of prejudice the court will consider the nature and quality of the arbitral tribunal and arbitral process, including the supervisory jurisdiction of the courts of the seat of the arbitration.

Applying these factors to the facts in issue, and notwithstanding that it would require a deliberation upon substantive as well as jurisdictional issues, Popplewell J concluded that it was appropriate for the English court to determine the issue of arbitrability of the agreement, that Genuine Maritime was not entitled to a stay of the English Commercial Court proceedings, and he thus allowed service out of the jurisdiction. In reaching his conclusion, Popplewell J gave particular weight to the concern that, due to the multiple arbitrations in progress, there was a possibility of inconsistent judgments on the arbitrability issue (as well as the substantive dispute). In light of this, and on the basis that the English court was the single forum to which all of the parties were amenable to suit and could participate, it was appropriate for the court to decide the arbitrability issue. As to concerns that the English court would be cutting across the parties' entitlement to arbitration, Popplewell J concluded that this was not an issue: "*if the court resolves the arbitrability issue in favour of Genuine, the substantive claims will be heard in a Singapore arbitration; if the court resolves it in favour of Golden Ocean, Genuine will not be deprived of the benefit of any applicable arbitration agreement because it will be held that there is no effective and applicable arbitration agreement*".

Popplewell J's judgment not only consolidates statements of principle that were previously identified in a number of earlier cases. It also provides additional and detailed guidance as to what the court must consider when asked to make orders pursuant to section 9 of the Act. It will be of interest in situations in which a party ("A") brings proceedings in relation to which another party ("B") claims, but A disputes, are governed by an arbitration agreement that confers the authority to determine arbitrability on the arbitral tribunal.

For further information, please contact:

Jane Rahman
jrahman@debevoise.com
London, +44 20 7786 5463

CIETAC's Former Branches in Shanghai and Shenzhen Take Further Steps to Solidify Their Independence

There have been further developments in the dispute between the China International Economic and Trade Arbitration Commission ("CIETAC") and its former branches in Shanghai and Shenzhen. Although the developments reflect the solidification of the former branches' independence from CIETAC, the long-term implications for arbitration in China and the CIETAC brand remain unclear.

Last year, CIETAC adopted a new version of its arbitration rules, which came into effect on May 1, 2012 (the "2012 CIETAC Rules"). One effect of the changes introduced by the 2012 CIETAC Rules was a strengthening of the power of CIETAC's headquarters in Beijing ("CIETAC Beijing"). Previously, if an arbitration agreement specified CIETAC arbitration in the city of one of its four sub-commissions (Shanghai, Shenzhen, Tianjin and Chongqing), a resulting arbitration would be administered by the local sub-commission. Now, an arbitration governed by such an agreement will be administered by CIETAC Beijing, with its seat located in the specified city. If parties wish to have one of CIETAC's sub-commissions administer their arbitration, they must expressly specify that they prefer such an arrangement over administration by CIETAC Beijing.

This change provoked a strong reaction from the Shanghai and Shenzhen Sub-Commissions, which viewed it as an attempt to usurp their purported independence and to divert their caseload to CIETAC Beijing. As a result, on May 1, 2012, the Shanghai and Shenzhen Sub-Commissions announced their separation from CIETAC Beijing.

This was a dramatic break. Since their establishment (in 1983 and 1988, respectively), CIETAC Shenzhen and CIETAC Shanghai formed an integral part of the CIETAC brand, sharing the same arbitration rules and panel of arbitrators.

In August 2012, CIETAC Beijing responded to this action by suspending the Shanghai and Shenzhen Sub-Commissions and barring them from accepting and administering arbitration cases. On December 31, 2012, CIETAC followed with a formal announcement that the two sub-commissions were operating unlawfully and not in accordance with the 2012 CIETAC Rules. CIETAC Shanghai and Shenzhen were expressly prohibited from continuing to use the name, brand or logo of CIETAC, as well as from conducting further arbitration-related activities in the name of CIETAC.

Meanwhile, on October 22, 2012, CIETAC Shenzhen changed its name to the Shenzhen Court of International Arbitration ("SCIA") and the South China International Economic and Trade Arbitration Commission ("SCIETAC"). The different nomenclature is not meant to differentiate between distinct entities with separate powers: the two names can be used interchangeably. It also adopted a new set of arbitration rules that came into effect on December 1, 2012. Most recently, on April 11, 2013, CIETAC Shanghai followed suit, changing its name to the Shanghai International Arbitration Center ("SHIAC") and the Shanghai International Economic and Trade Arbitration Commission ("SIETAC"), and adopting a new set of arbitration rules that came into effect on May 1, 2013. As in Shenzhen, the two names may be used interchangeably. The new rules for both SCIA and SHIAC are based upon the prior version of CIETAC's rules, which was adopted in 2005.

The actions of CIETAC Shanghai and CIETAC Shenzhen have the support of their respective municipal governments. In November 2012, the Shenzhen municipal government promulgated a set of administrative rules for SCIA, confirming SCIA as an independent arbitral institution registered in the Qianhai Shenzhen-Hong Kong Modern Service Industrial Cooperation Zone, an area slated to be a new financial and commercial hub in Southern China. That same month, the Shenzhen Intermediate People's Court issued a ruling that explicitly confirmed SCIA as the lawful arbitral institution under arbitration clauses that specify CIETAC Shenzhen as the arbitral institution.[1] Although there has been no similar court

Continued on page 12

Appointment: Debevoise partner Lord (Peter) Goldsmith QC has been named as a member of the newly-established Association of Caribbean Corporate Counsel and will sit on the International Board of Advisors.

CIETAC's Former Branches in Shanghai and Shenzhen

Continued from page 11

decision in Shanghai, the Legal Affairs Department of the Standing Committee of the Shanghai Municipal People's Congress and the Shanghai Bureau of Justice have both confirmed SHIAC's status as an independent and legally constituted arbitral institution.[2]

The dispute among the former branches of CIETAC has already caused some reputational damage to the CIETAC name, with commentators suggesting that the uncertainty has made all of the branches of CIETAC less popular.

The split also raises potential jurisdictional issues for those choosing, and in particular those who have already chosen, to arbitrate in China. Article 16 of the PRC Arbitration Law requires that an arbitration clause calling for arbitration in China expressly select an arbitral institution – *ad hoc* arbitration is not permitted. For agreements that currently specify CIETAC arbitration in Shanghai or Shenzhen, it is now unclear which institution is intended – or legally able – to administer the arbitration. CIETAC Beijing made the issue even more complicated when it opened new offices in Shanghai or Shenzhen that operate under its 2012 rules.

These concerns were borne out by a recent civil ruling by the Suzhou Intermediate People's Court, in which an application to enforce an arbitral award rendered by SHIAC was held to be invalid.[3] In that case, the parties' dispute resolution clause specified CIETAC arbitration in Shanghai. The request for arbitration was filed in 2010, before the CIETAC dispute arose, but the award was not rendered until December 2012. The Court held that, because CIETAC Shanghai had been a part of CIETAC at the time the request for arbitration had been filed, CIETAC Shanghai had jurisdiction over the case when it was filed. However, as CIETAC Shanghai was no longer a part of CIETAC, CIETAC Shanghai lost jurisdiction of the case, and the award could not be enforced. The Court criticized CIETAC Shanghai for failing to advise the parties of the change or giving them the opportunity to choose another arbitration institution. It should be noted that some commentators have raised concerns about the Suzhou court decision, as the opponent of enforcement was a company located in the Suzhou New District, suggesting that it may have been motivated by local protectionism.

Perhaps one positive result of the split is that it may have begun to create competition among these institutions, and in particular competition to attract foreign users. This was already a stated goal of CIETAC. The 2012 CIETAC Rules, for example, established for the first time that CIETAC arbitrations concerning foreign-related disputes could be conducted outside of the PRC, and CIETAC subsequently opened the CIETAC Hong Kong Arbitration Center in September 2012.

SHIAC and SCIA have also begun to promote their appeal to international users, noting the international diversity of their panel of arbitrators. The new SHIAC Panel of Arbitrators (effective from May 1, 2013) lists 625 arbitrators, of whom 199 are from 36 different countries and regions (including Hong Kong, Macau and Taiwan), accounting for 32 percent of its panel. Similarly, the new SCIA Panel of Arbitrators (effective from December 1, 2012) consists of 516 arbitrators of whom 180 are from 25 different countries and regions (including Hong Kong, Macau and Taiwan), accounting for 35 percent of the panel.

Although the arbitration community is witnessing new institutions, distinct from CIETAC, come into their own, confusion remains. as Chinese courts wrestle with the implications of the CIETAC split. Parties should therefore be conscious of the potential risks of using any of these institutions without revisiting and appropriately revising their arbitration agreements to ensure that their desired arbitral institution is made absolutely clear.

For further information, please contact:

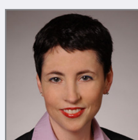
Corey Whiting
cwhiting@debevoise.com
Hong Kong, +852 2160 9817

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

1 Civil ruling by the Shenzhen Intermediate People's Court of Guangdong Province, (2012) *Shen Zhong Fa She Wai Zhong Zi No. 226* [（2012）深中法涉外仲字第226号].

2 *See, e.g.*, SHIAC, Shanghai Local Legislation Reconfirms Our Status as an Independent Arbitral Institution (上海地方性法规再次明确我会为独立仲裁机构), Jan. 25, 2013, at http://www.cietac-sh.org/NewsDetails.aspx?tid=7&nid=275.

3 Civil ruling by the Suzhou Intermediate People's Court of Jiangsu Province, *(2013) Su Zhong Shang Zhong Shen Zi No. 0004* [（2013）苏中商仲审字第0004号].



Recognition: The American Lawyer has named New York partners Roger Podesta and Maura Monaghan "Litigators of the Week" for winning a $3.5 billion federal bench trial for American Airlines in the World Trade Center litigation.

The Caribbean Court of Justice Imposes Limits on Anti-Arbitration Injunctions

Recently the Caribbean Court of Justice ("CCJ") handed down its much anticipated decision in *British Caribbean Bank v Government of Belize.*[1] This was the first occasion that an apex court in the Caribbean has articulated the judicial policy on international arbitration and investment treaties in that region. It is also one of the rare occasions that a court in any jurisdiction has addressed the question of whether courts may issue injunctions restraining arbitral proceedings under a bilateral investment treaty.

The appeal arose from a long running battle between British Caribbean Bank ("BCB") and the Government of Belize over the nationalisation of BCB's assets in the telecommunications industry in 2009. BCB was initially successful in challenging the constitutionality of the nationalisation in the Belizean courts. However, after those courts ruled that the expropriation was illegal, the Government re-nationalised BCB's assets under new legislation in 2011, and took steps to prevent the domestic courts from enquiring into the legality of the re-nationalisation.

Faced with these formidable domestic hurdles, BCB initiated UNCITRAL arbitration against Belize under the UK-Belize Bilateral Investment Treaty (the "BIT") seeking compensation for the expropriation of its assets. In response, the Government passed legislation (the Supreme Court of Judicature Amendment Act), which empowered the Belizean courts to enter injunctions against international arbitrations anywhere in the world and impose fines on parties who fail to observe the terms of those injunctions. The Government then obtained an interim injunction from the courts in Belize restraining BCB from continuing its BIT arbitration on the basis that the arbitration was "*vexatious and oppressive*". BCB ultimately appealed this injunction to the CCJ, asking the Court to uphold its right to arbitrate under the BIT.

On 25 June 2013, the CCJ issued its decision allowing BCB's appeal, reversing the lower courts' decision, and discharging the interim injunction imposed by those courts, leaving BCB free to pursue its arbitration against the Government of Belize. For present purposes, it suffices to highlight two main issues that formed the basis of the CCJ's judgment: (i) the effect of BITs and the rights of investors to arbitrate under these treaties; and (ii) the proper test to be applied by common law courts when considering an application to restrain international arbitral proceedings.

The Right to Arbitrate Under BITs

The first issue addressed by the CCJ was whether a BIT provided investors with an "*unqualified or indefeasible right*" under international law to have disputes under a BIT resolved by an arbitral process. In this context, the CCJ had to consider the extent to which it was open to domestic courts to restrain arbitral proceedings initiated under a binding investment treaty. On this issue, the CCJ held that although investors did not have an "*unqualified*" right to arbitration, the BIT was binding on Belize, and, accordingly, the treaty afforded investors a right to arbitration that was enforceable in domestic courts. In this context, the CCJ noted that:

> *"[I]nvestment treaties form an important feature of the modern economic jurisprudence and … they constitute an important developmental option for capital-importing developing countries such as those in the Caribbean. The bilateral investment treaty was developed to remedy the vulnerability of the foreign investor and ameliorate the conditions of their investments and the success of the treaty regime depends upon the acceptance and fulfillment by the host state of the legal obligations imposed by the treaty."*

The CCJ rejected the Government's argument that BCB's right to arbitrate was subject to the prior exhaustion of domestic constitutional court proceedings. In this context, it noted that the effect of the BIT was to "*oust the jurisdiction of the domestic courts by agreeing to submit such disputes to*

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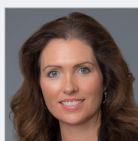


Appointment: Debevoise partner Sophie Lamb has been appointed to the board of the Arbitration Institute of the Finland Chamber of Commerce.

1 [2013] CCJ 4.

The Caribbean Court of Justice Imposes Limits on Anti-Arbitration Injunctions

Continued from page 13

the selected international arbitral tribunal". Relying on a number of ICSID decisions, the Court held that: "*the effectiveness of [investment treaty arbitration] would be undermined if the investor was required to exhaust remedies in domestic courts before proceeding to international arbitration*". In this context, the CCJ concluded that BCB had a legally enforceable right under the BIT that should rightfully be recognised by the domestic courts.

The Applicable Standard

As to the test for issuing an injunction, the CCJ held that the Belizean courts, like other common law courts of unlimited jurisdiction, had the ability to restrict or enjoin parallel proceedings on the grounds that they are either vexatious or oppressive. However, it noted that this power was subject to a "*high threshold*". The CCJ emphasised that courts must exercise restraint and grant injunctions only in the rarest circumstances, and in the most exceptional cases. The CCJ further noted that, in cases involving international arbitration proceedings, "*the court must re-double the caution it normally exercises in restraining foreign proceedings because of the importance of recognizing and enforcing the agreement of parties to the mechanism for dispute resolution and the accepted principle of international law that the arbitral tribunal should not be subjected to the control of the domestic courts before it makes an award*".

The main plank of the Government's case was that the continuation of the arbitral proceedings should be restrained because it was vexatious and oppressive for BCB to pursue the arbitration proceedings simultaneously with the domestic proceedings regarding the constitutionality of the expropriation. The Government claimed that the multiplicity of proceedings (including the risk of conflicting or overlapping orders) rendered the process vexatious and oppressive. However, the CCJ held that there was nothing to support this assertion, noting that:

> "*Proceedings could be vexatious where they are absurd or the litigant seeks some fanciful advantage by suing in two courts at the same time but they would not be so held where there are substantial reasons of benefit to the plaintiff to bring the two sets of proceedings. There is no presumption that a multiplicity of proceedings, or that merely bringing the proceeding in an inconvenient place, is vexatious…*"

The CCJ recognised that the arbitration proceedings were a bona fide attempt by BCB to vindicate its rights under international law, in light of the various hurdles BCB encountered in seeking compensation in Belize. Consequently, the CCJ held that the anti-arbitration injunction in place since 2010 should be discharged.

> The CCJ has set a high bar for parties seeking an anti-arbitration injunction.

This decision is an important affirmation by Caribbean courts of the importance of respecting and supporting international arbitration, and investment treaties more specifically. The CCJ acknowledged the value of these instruments in relation to the development objectives of Caribbean states, and their role in upholding the rule of law in the region. The decision also provided a clear and welcome statement that only in the rarest cases and in exceptional circumstances should a party be prevented from pursuing an international arbitration. Indeed, the CCJ has set a high bar, by requiring the parties seeking an anti-arbitration injunction to demonstrate "*the wrongful conduct of the person to be restrained*". As one of the few decisions by an apex court on the judicial restraint of BIT arbitration, it will also contribute to the ongoing judicial dialogue on the proper relationship between domestic courts and international arbitral proceedings.

Debevoise & Plimpton LLP represented BCB in this matter.

For further information, please contact:

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

Appointment: Debevoise partner Catherine Amirfar has been appointed to the Board of Directors and has been selected as a Program Chair for the newly launched New York International Arbitration Center.

Russian Commercial Court Recognizes Validity of Agreements Excluding Annulment of Arbitral Awards Made in Russia

The Federal Arbitrazh (Commercial) Court of Moscow District ("Moscow Arbitrazh Court") recently handed down a number of rulings[1] that recognize the validity of arbitration agreements which exclude the parties' rights to seek annulment of arbitral awards. These rulings evidence an important pro-arbitration stance on the part of the Moscow Arbitrazh Court.

All of the cases involved the same factual scenario. A Russian company, Vega Engineering LLC, obtained from the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the "ICAC") an award against another Russian entity, Company TransTeleCom, for the recovery of certain monetary amounts. These cases were covered by the provisions of the Russian Law on International Commercial Arbitration, not the legislation regulating domestic arbitrations, since a Chinese entity was a third party to the contract and arbitration agreement. The respondent applied to the Moscow Arbitrazh Court for the annulment of the ICAC award. However, both the court of first instance and the court of cassation[2] refused to examine the respondent's petition on the merits, holding that the respondent was precluded from filing an application to set aside on the ground that both the parties' arbitration agreement and the ICAC Rules expressly provided for the finality of the ICAC award.

These rulings are noteworthy because the applicable Russian law—Article 34 of the Russian International Commercial Arbitration Law of 1993, which mirrors Article 34 of the UNCITRAL Model Law—does not expressly contemplate that the parties will be able to agree to exclude the possibility of annulment. The provisions of Article 34 are in marked contrast to Article 40 of the Russian Federal Law on Arbitration Courts in the Russian Federation of 2002 (the "Federal Law"), governing domestic arbitrations, which specifically allows the parties to waive the right to file annulment applications. Thus, it was possible to read these contrasting provisions as granting the parties greater autonomy in respect of domestic awards when compared to international awards.

In the rulings under discussion, however, the Moscow Arbitrazh Court decided to extend the application of Article 40 of the 2002 Federal Law to ICAC awards. In so doing, it made reference to certain provisions of the Russian Arbitrazh (Commercial) Procedural Code that harmonize the procedure governing the annulment of arbitral awards rendered by Russian internal arbitration courts with those rendered by international commercial arbitration tribunals seated in Russia (Article 230(1)). The court of cassation also stressed that allowing the parties to waive the right to seek annulment did not mean that all court review was excluded, pointing out that the petitioner would be able to assert defenses based on the alleged irregularities of an arbitral award during the course of recognition and enforcement proceedings.

These decisions are also noteworthy because of the breadth of the principle applied. First, the Moscow Arbitrazh Court did not limit the validity of such agreements by either nationality or residence. It therefore appears to be possible for all parties to Russian-seated arbitrations, irrespective of their origin, to elect to waive the possibility of bringing annulment proceedings. Second, the court also did not limit the application of this principle to arbitrations brought under the auspices of other arbitral institutions. Therefore, parties to Russian-seated arbitrations under the UNCITRAL Rules or under the auspices of the International Chamber of Commerce (to give two examples) would also be entitled to waive the right to bring annulment proceedings.

While the approach taken by the Moscow Arbitrazh Court in these cases is not wholly unprecedented, it stands in sharp contrast to a number of previous decisions in which Russian courts considered annulment petitions on the merits notwithstanding the fact that both the arbitration agreement and applicable ICAC Rules provided for the finality of the arbitral award.[3]

It remains to be seen whether the Higher Arbitrazh (Commercial) Court, the court

1 Rulings of the Federal Arbitrazh (Commercial) Court of Moscow District dated 07.02.2013 r. under case No. A40-124999/12-50-1261, dated 18.02.2013 under case No. A40-124996/12-143-588, dated 12.03.2013 r. under case No. A40-125009/12-52-1162, dated 18.03.2013 r. under case No. A40-125006/12-25-589, dated 27.03.2013 r. under case No. A40-126833/12-143-605.

2 The arbitrazh (commercial) courts in Russia have a three-tiered structure. The lower tier consists of the courts of first instance. The middle tier consists of courts of cassation that hear appeals on legal questions. The final court of review for commercial disputes is the Higher Arbitrazh Court of the Russian Federation.

3 See, e.g., Rulings of the Presidium of the Higher Arbitrazh Court No.4325/10 dated 20.07.2010, No.17481/08 dated 19.05.2009 and No.17476/08 dated 19.05.2009.

Continued on page 16

Russian Commercial Court Recognizes Validity of Agreements
Continued from page 15

of final review for commercial disputes, will endorse the approach of the Moscow Arbitrazh Court. In view of the current case law, it may be advisable for parties to draft arbitration clauses that in the most express terms indicate the finality of any arbitral award to be rendered in Russia. This may help to reduce interference by the Russian state courts in arbitral proceedings.

For further information, please contact:

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

The author would like to express his gratitude to Debevoise consultant Anton Asoskov for his assistance on this article.

The New Paris Arbitration Rules Boost the Attractiveness of Paris as a Leading Seat for Ad Hoc Arbitration

Over the past ten years, the arbitration world has seen intense competition among the prominent seats of arbitration. According to surveys of users of the international arbitration system, the four primary places of arbitration around the world are London, Geneva, New York and Paris.

The factors influencing this choice are numerous, including national arbitration law, the law governing the substance of the dispute, the arbitration-friendliness of the seat and the convenience of the location.

France offers highly qualified courts that are familiar with arbitration as well as an arbitration-friendly legal environment. French lawmakers have demonstrated unfailing support for arbitration. France was one of the first states to adopt modern pro-arbitration legislation in 1981. This very favorable legal framework has recently been updated by Decree n°2011-48 of 13 January 2011. This Decree codified the abundant case law developed over the previous 30 years and introduced a number of innovations that render French law on arbitration even more attractive.

In addition, Paris hosts the International Secretariat of the International Court of Arbitration ("ICC"), one of the world's most renowned international arbitration institutions. Paris is also the home of several other arbitration institutions such as the *Centre de Médiation et d'Arbitrage de Paris and the Association Française de l'Arbitrage*.

Arbitral institutions located in Paris continue to work to make the city a top choice as a seat for ad hoc arbitrations. In this respect, a non-profit association named *Paris, the Home of International Arbitration* is working to promote Paris as a place of arbitration. The association describes itself as "*a not-for-profit association created by different actors in the arbitration community in March 2009 with a sole objective: the promotion of Paris as the world's leading site for international arbitration*". Its website, which is available in nine languages, including English and French, is www.parisarbitration.com.

On 15 April 2013 the association unveiled a new set of rules for ad hoc arbitration drafted by leading personalities from the arbitration scene: the Paris Arbitration Rules (the "Rules").

The Rules, which are published in English and French, are intended to serve as an alternative to the existing rules that are commonly used in ad hoc arbitration (mainly the UNCITRAL arbitration rules) and to institutional rules. When not otherwise specified by the parties, the Rules provide for Paris as the seat of the arbitration.

Scope of Application

The Rules are striking in their brevity: only 12 articles, in contrast, for instance, to the 43 articles of the UNCITRAL arbitration rules. This brevity is emphasized by one of their authors: "*there is a tendency for arbitral rules to be long and elaborate, offering a great deal of explanation. We think that through being applied by experienced arbitrators in a common sense fashion, these rules will accumulate best practices around them*".

The Rules apply when the parties have selected them. In that regard, the foreword suggests a basic arbitration model clause: "Any dispute arising out of or in connection with this agreement shall be settled by arbitration in accordance with the Paris Arbitration Rules".

The parties are free to amend the Rules as they see fit. However, amendments made after the arbitrators have accepted their mandate require the agreement of all the arbitrators.

Efficiency and Timeliness

The Rules are "*intended to provide a framework for the swift, efficient, and cost-effective resolution of disputes in keeping with due process*" (Article 1.1). The Rules therefore pursue the same objectives as were

Continued on page 17

The New Paris Arbitration Rules Boost the Attractiveness of Paris
Continued from page 16

set out in the Decree of 13 January 2011 reforming the French law of arbitration, namely improving the efficiency and the speed of the arbitration process.

The Rules also promote cooperation between parties and arbitrators in order to increase efficiency. Arbitrators must disclose any circumstances that may call into question their independence or impartiality (Article 5.3); in turn, the parties are obliged to inform the arbitrators of any circumstances of which they are aware that could be relevant for the arbitrators' disclosure (Article 5.4). With regard to the enforcement of the award, the Rules state that it is the duty of the parties and the arbitrators to take such steps as may be necessary to ensure that the award is enforceable by any competent courts (Article 11.9).

The Rules include provisions intended to promote the timely completion of the arbitration process. The award must be rendered within 18 months from either (i) the date of the first hearing or (ii) the date on which all members of the arbitral tribunal accept their mandate as arbitrators, whichever is later. Further, the award must be rendered within 3 months from the date of the last procedural step in the calendar.

In an innovative step, the Rules authorize the appointing authority to intervene, at the request of a party, if the arbitral tribunal does not respect these time limits. After making inquiries as to the cause of the delay, the appointing authority is empowered, in an appropriate case, to remove one or more arbitrators (Article 3.2).

Parties must raise objections to the jurisdiction of the arbitral tribunal or the admissibility of the claim early in the arbitration process, namely at the time of their first reply to the request of arbitration (Article 6.3). Failure to do so waives the objection (Article 8.3).

> The Paris Arbitration Rules promote innovation, flexibility, efficiency and effectiveness.

Further, the parties' submissions must be as concise and focused as possible (Article 6.7).

If any arbitrator on a three-member arbitral tribunal fails to complete his or her mandate, the two other arbitrators have the power to continue the arbitration notwithstanding his or her absence, including the power to make any decision, ruling or award (Article 7.5). The arbitral tribunal has the explicit power to determine its own jurisdiction (Article 8.1).

Perhaps most unusually, the Rules explicitly authorize the arbitral tribunal to consider an "early award", on its own motion or at the request of a party, including dismissing the claim under appropriate circumstances (Article 7.4). This provision will undoubtedly attract the attention of parties and their counsel as a strategic opportunity.

All in all, these provisions seem well-suited to reduce efforts by the parties (and sometimes the arbitrators) to slow down the arbitration process.

The Appointing Authority

The Rules provide that an appointing authority is afforded powers to assist with and control the arbitration process. If the parties do not specify otherwise, the Rules designate the Secretary General of the Permanent Court of Arbitration in The Hague as appointing authority (Article 1.3).

For example, the appointing authority is charged with ensuring that the arbitral tribunal complies with the time limit for rendering the award (Article 3.2); the appointing authority can appoint an interim arbitrator upon a party's request (Article 4.3); it is also charged with helping the parties to appoint arbitrators when they face difficulties in doing so (Article 5.1); ruling on parties' challenges of an arbitrator for lack of independence or impartiality or otherwise (Article 5.5); replacing or removing arbitrators (Article 5.6); and determining the method of financial compensation of the arbitral tribunal (Article 11.4).

Therefore, although the Rules are ad hoc arbitration rules, under these rules the appointing authority holds rather broad powers that could help reassure parties with a preference for institutional arbitration and parties that have been disappointed by the UNCITRAL arbitration rules.

Continued on page 18

Recent Event: On 18 September, Debevoise partner Sophie Lamb presented at an event organised by the Directors' Roundtable to honour former Debevoise partner Peter Rees, now General Counsel of Royal Dutch Shell. Ms. Lamb spoke about the role of arbitration and investment treaties in meeting contemporary challenges to the rule of law.

The New Paris Arbitration Rules Boost the Attractiveness of Paris
Continued from page 17

Interim Relief

The Rules also provide that any party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal may request the appointment of an interim arbitrator at any time prior the constitution of the tribunal.

The interim arbitrator is given powers to "*grant whatever interim relief he/she deems appropriate in view of the circumstances*" (Article 4.2). Those powers, however, are framed by several enumerated factors, such as the urgency of the matter and the necessity of the relief sought. Any decision rendered by the interim arbitrator is of course provisional, meaning that the decision can be modified or even reversed or withdrawn at any time by the arbitral tribunal (Article 4.5). The interim arbitrator is also given the power to grant relief *ex parte*, upon an application from one party showing extraordinary circumstances (Article 4.7). Such relief remains valid only until it can be reviewed on an *inter partes* basis.

These provisions are explicitly deemed to be "non-exclusive" of the rights to parties to seek such relief in a competent court (Article 4.9). The arbitral tribunal itself is also given the power to grant interim relief that it deems appropriate in view of the circumstances, either on an *inter partes* or an *ex parte* basis (Article 7.3). All in all, the Rules' provisions relating to interim relief provide a flexible, credible and innovative alternative to the UNCITRAL arbitration rules.

Information Exchange

On the ever-sensitive question of information exchange, the Rules provide that the arbitral tribunal can order a party "*to produce identified documents or disclose specified information*" (Article 6.8.g). Addressing an issue of significant current debate, the Rules provide that "metadata" in electronic documents need not normally be produced (Article 6.8.h).

It is also worth noting that, unlike most comparable rules, which are generally silent on the subject, the Rules provide that proceedings undertaken pursuant to them, and information exchanged or presented in them, are confidential, other than as necessary for any party to respect its legal disclosure obligations (Article 1.5).

Conclusions

Overall, the Rules are ambitious and helpful. They promote innovation, flexibility, efficiency, and effectiveness. There are, of course, certain pitfalls. For example, in order to promote efficiency the Rules provide that the arbitral tribunal can decide in its discretion to refuse or limit witness or expert appearances (Article 6.8.e). At least in some circumstances, such a provision may not meet the expectations of parties accustomed to relying on witness testimony. Also, although the foreword indicates that the Rules are intended to apply to "*commercial entities, state agencies or States*", one may doubt that States will accept arbitration rules under which parties "*shall be deemed to have waived their right to any form of recourse or immunity insofar as such waiver can validly be made*" (Article 6.10).

It will be interesting to see the degree to which these rules are used, and once used whether they fulfill the expectations of arbitration practitioners, whether they will be viewed as offering advantages over existing, competitive rules, and whether Paris will benefit from the Rules as a choice of seat for ad hoc arbitrations.

For further information, please contact:

Alexandre Bisch
abisch@debevoise.com
Paris, +33 1 40 73 13 37

Appointment: Debevoise partner Catherine Amirfar has been appointed as Vice Chair for the International Bar Association's Climate Change and Human Rights Task Force.

Recent Decisions from the U.S. Courts Resolve Disputes Over the Courts' Power to Determine the Scope of Arbitral Jurisdiction

The United States Courts of Appeals for the Second and Ninth Circuits recently issued decisions that confirm the general view of U.S. courts that a provision stating that arbitrators may determine their own jurisdiction (which is found in most standard arbitration rules) gives the arbitrators jurisdiction to determine the scope of the arbitration clause, once the existence and validity of the arbitration agreement has been established.[1]

In *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, 717 F.3d 322 (2d Cir. 2013), the Second Circuit reversed an order from the United States District Court for the Southern District of New York denying enforcement of an arbitration award rendered in São Paulo. In 2010, the Brazilian airline VRG, a subsidiary of Gol Linhas Aereas Inteligentes S.A., obtained an ICC arbitration award now valued at roughly US$80 million against two hedge funds managed by New York-based MatlinPatterson for fraud in the course of a share purchase transaction in which the MatlinPatterson funds were indirectly the seller. Although MatlinPatterson did not sign the purchase and sale agreement, the tribunal held that an amendment or addendum to the agreement that MatlinPatterson did sign incorporated the arbitration agreement from the main contract, which in turn covered the dispute at hand. The U.S. District Court assumed *arguendo* the existence of an arbitration agreement between VRG and Matlin Patterson, but held that the dispute was beyond the scope of that agreement and hence denied enforcement of the award. The Second Circuit reversed on the ground that the District Court had thereby usurped the tribunal's authority, because were the ICC arbitration clause incorporated, it would confer on the tribunal the authority to determine whether it covered the fraud claim. Accordingly, the Second Circuit remanded the case to the District Court to determine whether an arbitration agreement had been formed between the parties, making clear that if such an agreement had been formed, the District Court would be required to defer to the tribunal as to the scope of the arbitration clause and the merits of the claim.

The Second Circuit relied on the U.S. Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), which held that courts must separately inquire into whether the court or the arbitrator has the power to decide "questions of arbitrability". In reviewing the District Court's judgment, the Second Circuit found that this threshold inquiry had not been undertaken and remanded the case for the district court to determine in the first instance whether there was a valid arbitration agreement. The Second Circuit also relied on its own prior holding in *Shaw Group, Inc. v. Triplefine International Corp.*, 322 F.3d 115 (2d Cir. 2003), which held that an arbitration clause incorporating the ICC rules evidences a clear and unmistakable commitment of questions of arbitrability to the arbitral tribunal. The Second Circuit's holdings in *Triplefine* and *VRG* that incorporation of the ICC rules commits arbitrability questions to the arbitrators is consistent with appellate precedent in the First, and Tenth circuits. *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989); *Quinn v. CGR*, 828 F.2d 1463 (10th Cir. 1987).

In *Oracle America, Inc. v. Myriad Group A.G.*, No. 11-17186 (9th Cir. July 26, 2013), the Ninth Circuit became the third federal appellate court to hold that arbitration provisions that incorporate the UNCITRAL Arbitration Rules clearly and unmistakably commit all questions of scope to the jurisdiction of the arbitral tribunal. Like the Second Circuit's decision in *VRG*, the Ninth Circuit's decision in *Oracle* holds that district courts cannot usurp the power of

Continued on page 20

1 The Second Circuit hears appeals from the federal trial courts in New York, Connecticut, and Vermont. The Ninth Circuit, which covers states comprising approximately twenty percent of the population of the United States, hears appeals from the federal trial courts in the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington, as well as those in the territories of Guam and the Northern Mariana Islands.

Promotion: William H. Taft V, a longtime associate at the firm with extensive experience in investment arbitrations and U.S. corporate governance disputes, was promoted to partner effective 1 July.

Recent Decisions from the U.S. Courts Resolve Disputes

Continued from page 19

the arbitrator to determine questions of scope in a valid arbitration clause that commits such questions to arbitration. In *Oracle*, the arbitration clause in question incorporated the UNCITRAL Rules. In agreement with prior decisions of the Second Circuit and the District of Columbia Circuit,[2] the Ninth Circuit held that such incorporation is clear and unmistakable evidence that the parties intended to commit questions of scope of the agreement to arbitrate to the arbitral tribunal.

The dispute in *Oracle* arose over royalty payments that Oracle alleged it was owed under license agreements allowing Myriad to use Oracle's Java programming language and trademarks. The relevant arbitration clause in the license agreement between Oracle and Myriad stated that "[a]ny dispute arising out of or relating to this License shall be finally settled by arbitration as set out here . . . in accordance with the rules of [UNCITRAL] in effect at the time of arbitration". The agreement also contained an explicit carve-out provision, which stated that arbitration was generally required, "except that either party may bring any action . . . with respect to any dispute relating to such party's Intellectual Property Rights." The Ninth Circuit rejected Oracle's contention that the clause in the agreement carving out certain disputes from the arbitration clause evidenced the parties' intent that questions about the scope of the arbitration clause would be resolved by the courts, holding instead that incorporation of either the 1976 or 2010 UNCITRAL Rules would suffice to commit all such questions to the arbitral tribunal.

> The US courts hold that the ICC and UNCITRAL Rules require courts to defer to the arbitrators' determination of their own jurisdiction.

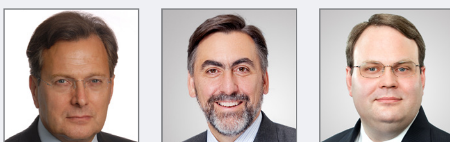
With the *Oracle* decision, all three circuits to decide the question of whether the UNCITRAL Rules give the arbitrator jurisdiction to determine the scope of the arbitration clause have responded affirmatively. Although the *Oracle* court is the first to hold specifically that this is true for both the 1976 and 2010 versions of the Rules, its reasoning that there is no substantive distinction between the two versions on this question is persuasive. Moreover, given the consistency of the three circuits' reasoning, it also seems reasonable to expect that U.S. courts in other circuits will follow this trend. The same is true of the ICC Rules, which three circuits have held commit arbitrability issues to the arbitrators. Accordingly, the U.S. courts can be expected to continue to hold that adoption of any version of the UNCITRAL or ICC Rules will constitute a commitment to arbitrate the scope of an arbitration clause, even if the arbitration agreement carves out certain categories of dispute for judicial resolution.

Debevoise & Plimpton LLP represented VRG in the Second Circuit appeal.

For further information, please contact:

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

2 *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363 (D.C. Cir. 2012); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011).



Recognition: Debevoise has been designated as a "highly recommended" firm for International Arbitration in the forthcoming first edition of Benchmark Litigation Asia-Pacific. In the same edition, partners Lord (Peter) Goldsmith QC and Christopher K. Tahbaz are ranked as "Litigation Stars – Asia-Pacific, International Arbitration", and counsel Philip Rohlik is ranked as a "Future Star – Hong Kong."

NAFTA Arbitration Tribunal Allows Entry into Record of Evidence Obtained Through "Section 1782" Discovery in U.S. Courts

An arbitral tribunal under the North American Free Trade Agreement ("NAFTA") has recently issued a decision relating to the evidence obtained through "Section 1782" discovery in the U.S. courts and its admissibility in the proceedings before it.

In October 2011, U.S. investor Mesa Power Group LLC ("Mesa") filed for arbitration under NAFTA against the Government of Canada, alleging numerous violations of the treaty. Pursuant to NAFTA, Mesa elected to proceed under the UNCITRAL Rules. Mesa's claims were based on its unsuccessful application to the "FIT" Program, created by the province of Ontario in 2009 to encourage the production of renewable energy. Successful FIT applicants were awarded a Power Purchase Agreement ("PPA") guaranteeing a set purchase price for renewable energy over a twenty year period. Mesa claimed, *inter alia*, that Canada had treated it less favorably than domestic companies and other foreign companies, violating the national treatment and most-favored-nation provisions of the NAFTA. Mesa then turned to the U.S. courts under Section 1782 of Title 28, United States Code, for assistance in gathering evidence to support its discrimination claims.

Section 1782 allows U.S. federal courts to order parties within their jurisdiction to produce documents or provide testimony upon the request of "any interested person." It provides that:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

Federal courts were initially unanimous that Section 1782 did not extend to international arbitration. However, since the Supreme Court's 2004 decision in *Intel v. AMD*, 542 U.S. 241 (2004), in which the Court stated in dicta that the word "tribunal" used in Section 1782 extends to, *inter alia*, "administrative and arbitral tribunals," U.S. courts have been quicker to come to the aid of international arbitration, including investment treaty arbitration. Moreover, while U.S. courts recognize that evidence produced pursuant to Section 1782 may be held inadmissible in the foreign proceedings in support of which it is sought, that is not necessarily sufficient to defeat such an order; in a recent decision, the Second Circuit held that "a district court should not consider the … admissibility of evidence in the foreign proceeding in ruling on a section 1782 application."[1] There remains, however, a continuing disagreement among the U.S. federal courts whether Section 1782 authorizes the procurement of evidence for private arbitration,[2] though some lower courts have held that treaty-based investor-state arbitration should be eligible for Section 1782 discovery even if a private contract-based arbitration is not.[3]

> Section 1782 evidence is not per se inadmissible, but the opposing party may object to specific pieces of evidence on procedural fairness grounds.

In November and December 2011, Mesa successfully filed Section 1782 applications in courts in Florida, California and New Jersey against the companies that Mesa alleged had been favored by Canada. Having obtained orders directing discovery, Mesa then submitted the evidence that it had obtained to the record in the NAFTA arbitration. In October 2012, Canada objected to the admissibility of the Section 1782 evidence, citing the IBA Rules on the Taking of Evidence in International Commercial Arbitration. Specifically, Canada argued that Mesa's failure to obtain the Tribunal's pre-authorization had circumvented the document production process in the arbitration, undermined the authority of the Tribunal to govern its own procedure, and undermined fairness and equality between the Parties.

1 *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 82 (2d Cir. 2012). The Second Circuit ist the regional federal appellate court that hears appeals from federal trial courts in the states of New York, Connecticut and Vermont.

2 *Compare, e.g., Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA)*, Inc., 685 F.3d 987, 990 (11th Cir. 2012) (Section 1782 applies to private contractual arbitration), *with, e.g., NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999) (Section 1782 applies to "governmental or intergovernmental arbitral tribunals" but not to private contractual arbitration).

3 *See, e.g., In re Chevron Corp.*, Nos. 10-CV-2989-AW, 10-CV-2990-AW, 2010 WL 4880378, at *3 (D. Md. Nov. 24, 2010)

Continued on page 22

NAFTA Arbitration Tribunal Allows Entry into Record of Evidence

Continued from page 21

The Tribunal rejected Canada's application in its Procedural Order No. 3 issued on 28 March 2013, considering it "premature to deny the admissibility of all future Section 1782 evidence by anticipation," and that such evidence already on the record could not "be struck in a wholesale exercise." The Tribunal noted in particular that Mesa's Section 1782 applications had preceded the constitution of the Tribunal in June 2012, and that procuring documents through court proceedings is not sufficient reason to summarily reject their admissibility. Canada would have the opportunity to object to specific documents once they were submitted and before the Tribunal. In that regard, the Tribunal required Mesa to identify Section 1782 evidence as such. Moreover, Mesa was required to provide regular reports to the Tribunal on the current Section 1782 proceedings, and to request authorization for any new evidentiary requests made to the U.S. courts.

It remains to be seen how the Tribunal will treat Mesa's Section 1782 evidence when it is faced with any specific objections that Canada may raise in the future. However, in light of the limited body of investment treaty jurisprudence on the subject, it is worth taking stock of the implications of the Tribunal's decision. On the one hand, it represents a continuation of the approach endorsed by the ICSID tribunal in *Caratube International Oil Company LLP v. Republic of Kazakhstan*:[4] Section 1782 evidence is not *per se* inadmissible, but the party against whom it is brought must have the opportunity to object to specific pieces of evidence on procedural fairness grounds.

On the other hand, this approach is not uniform. The only other investment treaty tribunal to issue a public decision discussing Section 1782 was the NAFTA tribunal in *Methanex v. United States of America*. In that case, the investor approached the Tribunal to request pre-authorization to file a Section 1782 application before the U.S. courts. The Tribunal declined to grant such authorization, in part because it accepted Methanex's position that a party to an arbitration could initiate Section 1782 proceedings without prior resort to the Tribunal under the IBA Rules, which recognize that each party is entitled to gather evidence on its own, "whilst recognising that it was not a point which the Tribunal itself had any power to determine."

In sum, investment treaty arbitration has yet to develop a consistent approach to Section 1782 evidence. However, three considerations should be borne in mind when investors are contemplating resort to Section 1782. *First*, investors seeking evidence held by a respondent state to an investment treaty arbitration may find the courts unreceptive to a Section 1782 application; for example, one U.S. court has held that "a foreign government does not constitute a 'person' from whom discovery may be sought pursuant to 28 U.S.C. § 1782."[5] As a result, Section 1782 proceedings are more likely to be valuable to investors if the evidence is held by either a third party or, possibly, a state-owned entity. *Second*, cautious investors should consider seeking a Tribunal's pre-approval before initiating Section 1782 proceedings where practicable to avoid later challenges to the admissibility of the evidence obtained. *Third*, the body of investment arbitration case law addressing Section 1782 and similar mechanisms will only continue to grow as investors, absent intervening controlling case law under Section 1782 or its amendment, avail themselves of such procedures with growing frequency.

On a final note, the issue of court assistance in discovery matters also colored the choice of seat in *Mesa v. Canada*. The Tribunal resolved this issue in favor of a U.S. seat: "[t]his possibility of facilitating the production of allegedly relevant and material evidence [under Section 1782 and Section 7 of the Federal Arbitration Act] – *whether or not it is in fact invoked or permitted* – thus speaks in favor of a U.S. seat, which would allow all procedural options to be kept open."

For further information, please contact:

Samantha Rowe
sjrowe@debevoise.com
New York, +1 212 909 6661

The author would like to express her gratitude to Debevoise summer associate Lukman Azeez for his assistance on this article.

4 ICSID Case No. ARB/08/12, Procedural Order No. 3 (26 May 2010).

5 *Thai Lao Lignite (Thailand). Co. v. Gov't of the Lao People's Democratic Republic*, No. 11 Civ. 4363 (KMW), 2012 WL 966042 at *2 (S.D.N.Y. Mar. 20, 2012).

Recognition: David W. Rivkin was named by *The Best Lawyers in America* as the 2014 New York City International Arbitration - Commercial Lawyer of the Year.

Debevoise & Plimpton LLP
Arbitration Quarterly
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South China Sea: Maritime Dispute Resolution by Arbitration?

In a landmark step for the highly disputed South China Sea region, the Philippines has filed for arbitration in respect of China's claim to sovereignty up to its "nine dash line" in the South China Sea (see image to the right). The Philippines claims that areas within this region are in fact within the Philippines' 200 mile exclusive economic zone ("EEZ") and continental shelf, which are both defined under the United Nations Convention on the Law of the Sea ("UNCLOS"). The claim also contests China's assertion of sovereignty and occupation over certain submerged banks, reefs and low tide elevations on the basis of China's assertion that they are "islands" under UNCLOS. The presence of "islands," as opposed to "rocks," would under UNCLOS entitle China to justify increased maritime zones, because islands, unlike uninhabitable rocks, are entitled to the creation of an independent EEZ and continental shelf.

UNCLOS provides for binding dispute resolution of issues arising under its provisions, although it permits states to opt out of binding dispute resolution with respect to certain matters (for example, sea boundary limitations). Parties may elect from among several possible fora for the dispute to be resolved, including the International Tribunal for the Law of the Sea ("ITLOS"), the International Court of Justice, or specially constituted arbitral tribunals, which are often chosen to resolve maritime boundary issues.

The Philippines has filed the arbitration request in recognition that China, as a party to UNCLOS, has accepted compulsory dispute resolution. However, China has so far rejected any participation in the arbitration on jurisdictional grounds and on the basis that disputes should be resolved through negotiations, as per the 2002 ASEAN Declaration on the Conduct of Parties in the South China Sea.

China's Nine-Dash Line
This map is reprinted with the permission of Stratfor.

Nonetheless, the procedures under Annex VII of UNCLOS permit the President of ITLOS to appoint the arbitral tribunal, and a tribunal was accordingly formed in April 2013. Interestingly, the Philippines itself raised an objection to the Chair of the Panel, Chris Pinto, on the ground that his wife is a Philippines national, and as a result the ITLOS President has recently appointed a former president of ITLOS from Ghana, Thomas Mensah, as the new Chair of the Panel. The move by the Philippines to strengthen the apparent neutrality of the Panel signals its commitment to the arbitral process, which is now underway. The Panel held its first meeting on July 11, 2013, at which it determined, among other things, that The Hague would be the seat of arbitration. The Panel has also set procedural Rules, and ordered that the Philippines file its Memorial by March 2014. China continues to deny the Tribunal has any jurisdiction.

A key issue will be jurisdiction, as China has expressly made a reservation under Article 298(1)(a) of UNCLOS against dispute resolution relating to sea boundary delimitations. That provision permits a state to declare that it does not accept binding dispute resolution for disputes relating to sea boundary delimitations. Although China's reservation should prevent the tribunal from determining sovereignty issues or the delimitation of any maritime boundaries, neighbouring states will be watching the Tribunal's decision closely. In particular, China's reservation does not appear to incorporate a key aspect of the dispute, i.e. whether the disputed islands generate independent maritime zones under UNCLOS that a state could benefit from, for example by gaining rights to hydrocarbon reserves or fisheries resources around those islands. In addition, a statement by the Tribunal that the boundaries in the South China Sea are governed by UNCLOS, such that all maritime boundaries must be delineated in accordance with UNCLOS principles, would be significant politically. In this regard, it will be interesting to see whether the Tribunal chooses to issue its decision on jurisdiction at the same time as its decision on the merits.

The case is considered to have significant implications not only for the South China Sea region, but to signal China's approach to the UNCLOS dispute settlement system as a whole. What is particularly concerning is that, because dispute settlement under UNCLOS does not have a sanctions regime that guarantees enforcement of resulting awards (unlike the WTO regime of retaliatory measures), engagement in the process by states is critical if awards are to be honoured.

For further information, please contact:

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

Nicola Leslie
nleslie@debevoise.com
London, +44 20 7786 5462

Recent and Forthcoming Events

- On 25 September 2013, partner Christopher K. Tahbaz spoke in Seoul at the "International Conference on the Advancement of the Arbitral System and Revitalization of Arbitration," sponsored by the South Korean Ministry of Justice, the Korean Commercial Arbitration Board and the Korean Council for International Arbitration.

- On 27 September 2013, partner Sophie Lamb and associate Aimee-Jane Lee presented at the Africa International Legal Awareness (AILA) Investment Treaty Law and Arbitration Programme in London.

- On 2 October 2013, partner David W. Rivkin will be speaking on a panel entitled "Investment Treaty Arbitration in Asia 101" at the Singapore International Arbitration Center's conference "The Marco Polo Effect: Arbitrations and Contracts with Chinese, Indian and ASEAN Parties," to be held at the JW Marriott Essex House, New York.

- On 3 October 2013, partner Christopher K. Tahbaz will speak in New York at an event organised by the Hong Kong International Arbitration Centre. The event is entitled "Highlighting Hong Kong: A World Class Arbitral Venue".

- On 8 October 2013, partner Mark P. Friedman will give a speech entitled "Back to the Future?" during the Annual Meeting of the International Bar Association in Boston.

- On 8 October 2013, in connection with the Annual Meeting of the International Bar Association in Boston, partner David W. Rivkin will be speaking on a panel entitled "I, Robot: The Interface Between Man and Machines," addressing the legal issues raised by brain and body enhancements, including their impact on disability law. Topics will include the European Commission's RoboLaw Project and the handling of such issues in connection with international sporting events such as the Olympics.

- On 10 October 2013, partner Christopher K. Tahbaz will moderate a panel discussion at the Annual Meeting of the International Bar Association in Boston entitled "Resolving international business disputes – using the World Trade Organization, bilateral investment treaties, international commercial arbitration and European Union courts".

- On 13 November 2013, partner David W. Rivkin will be speaking on the panel "The Differences Between Investment and Commercial Arbitration: 'Much Ado About Nothing' or 'More Than Meets the Eye'". The panel discussion will take place at the IBA-JFBA Joint Conference on Cross-Border Legal Services in the Asia Region at the International House of Japan, Tokyo.

- On 21 October 2013, partner David W. Rivkin will give a speech entitled "Is Delegation of Powers to Institutions in Appointing Arbitrators the Way to go?" The speech will be at the Corporate Counsel International Arbitration Group Conference in Paris. He will also address the CCIAG annual meeting the next day.

- On 23 October 2013, partner Lord (Peter) Goldsmith QC will speak at the Hong Kong International Arbitration Centre's 2013 ADR in Asia Conference in Hong Kong.

- On 25 October 2013, partner Donald Francis Donovan will give the keynote address at the International Law Weekend at Fordham Law School, an event organised by the International Law Students Association. The address will be entitled "Internationalization of Law and Legal Practice".

Continued on page 25

Recognition: Debevoise was ranked Number 1 overall in the American Lawyer's 2013 "10-Year A-List" survey.

Recent and Forthcoming Events

Continued from page 24

- Two Debevoise partners will be presenting during the Midyear Meeting of the American Society of International Law, which takes place from 31 October to 2 November 2013. Partner Donald Francis Donovan will give a speech during the event, while partner William H. Taft V will be moderating a practitioner's forum on the enforcement of arbitral awards and foreign judgments.
- On 27 November 2013, Debevoise partners Lord (Peter) Goldsmith QC and Sophie Lamb will present at the International Chamber of Commerce Annual Symposium, to be hosted by Debevoise & Plimpton LLP in London.
- On 2 December 2013, at a programme entitled "Adventures with Blank Sheets," partner David W. Rivkin will be a Lead Speaker on a panel entitled "Rethinking Commercial Arbitration" at the Singapore International Arbitration Forum 2013.
- On 5 December 2013, partner David W. Rivkin will be speaking on "Road Blocks to Efficiency and Economy in International Commercial Arbitration" at a conference in Sydney entitled: "Key Issues in International Arbitration in the Asia Pacific Region" sponsored by the IBA Arbitration Committee, the Australian Centre for International Commercial Arbitration, and the Business Law Section of the Law Council of Australia.

Debevoise International Dispute Resolution Group

Partners and Counsel

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

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

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

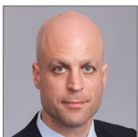
Lord Goldsmith QC
Partner, London and Hong Kong
phgoldsmith@debevoise.com
+44 20 7786 9088
+852 2160 9800

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

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

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

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



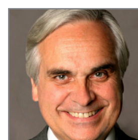
Dietmar W. Prager
Partner, New York
dwprager@debevoise.com
+1 212 909 6243

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

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

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

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



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

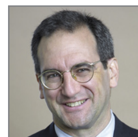
Frederick T. Davis
Of Counsel, Paris
ftdavis@debevoise.com
+33 1 40 73 13 10

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

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

Suzanne M. Grosso
Counsel, New York
smgrosso@debevoise.com
+1 212 909 6755

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



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

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