NORTON ROSE FULBRIGHT

International arbitration report

Issue 5 – October 2015

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Editorial

Welcome to issue 5 of Norton Rose Fulbright's *International arbitration report*.

In this issue we discuss the Comprehensive Economic and Trade Agreement between Canada and the EU, which is being negotiated during a period of increased debate about the merits of investment treaty dispute settlement mechanisms. Our interview is with Lim Seok Hui, the chief executive of SIAC; we find out her views on Singapore's new mediation centre (SIMC). And our third (and final) item in our series on mediation looks at what's involved in concluding a mediation.

We also provide insight into setting aside awards in Singapore for a breach of natural justice, a summary of amendments to the IBA 2014 *Guidelines on Conflicts of Interest in International Arbitration* and an overview of the US law of privilege.

This issue features a trio of articles with a Russian flavour: a Q&A on the impact of Russian sanctions on commercial arbitration in Asia; an update from Moscow on arbitration cases out of Russia; and a discussion around the status of anti-suit injunctions in Europe following the *Gazprom* decision by the Court of Justice of the European Union.

We look at arbitration developments in Hong Kong and offer case updates from London (in which the High Court refuses to stay execution of a New York Convention award for tactical reasons) and Singapore (where the High Court rejects the 'single economic entity' theory).

Mark Baker and Pierre Bienvenu Ad. E.
Co-heads, International arbitration
Norton Rose Fulbright

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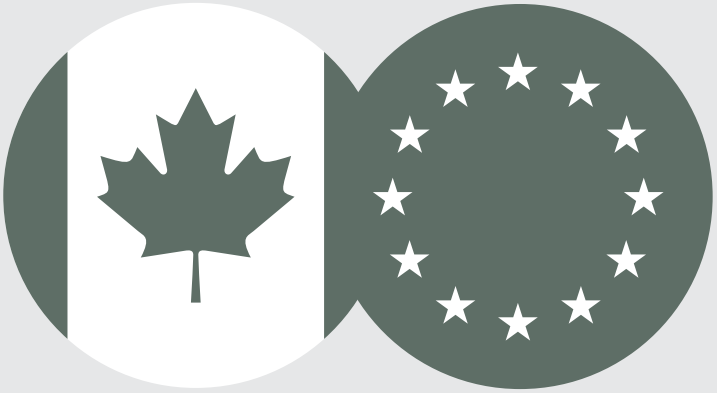
About the cover

The International Bar Association's 2015 Annual Conference is to be held in Vienna, a regional hub for European and international business, as well as seat of international organisations such as OPEC and the third UN headquarters. Our cover for this issue features the statue of one of Vienna's greatest composers, Johann Strauss Jr, the 'Waltz King', located in Stadtpark.

CETA's watershed moment

The Comprehensive Economic and Trade Agreement breaks new ground

Pierre Bienvenu and Éric-Antoine Ménard



The Comprehensive Economic and Trade Agreement's (CETA) novel investment protection provisions provide a measured – and timely – response to criticisms directed at the ISDS system. The bargain struck in CETA between the interests of investors and those of the host state will undoubtedly inform the negotiation of the Transatlantic Trade and Investment Partnership (TTIP).

The Treaty on the Functioning of the European Union conferred exclusive competence to the EU over foreign direct investment. The European Commission has – not without controversy – taken this to extend beyond investment liberalisation to investment protection and Investor-State Dispute Settlement (ISDS).

This is of no small importance since it gives the EU the mandate to negotiate at a supranational level EU-wide agreements – over and above the 1400 or so bilateral investment treaties (BITs) between individual EU Member States and third countries.

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada is the first of the EU's new generation of free trade agreements (FTAs) negotiated by the EU in the exercise of its new competence.

However, CETA must first overcome the hurdle of an eagerly anticipated judgment of the European Court of Justice. The ECJ has been asked by the European Commission to opine on whether an analogous FTA between the EU and Singapore may be ratified at EU level or if it also requires individual ratification by each of the 28 EU Member States. The latter would prompt debate in multiple national parliaments, making it likely that CETA would take significantly longer to come into force, if ever.

If it does enter into force, CETA's investment protection and ISDS provisions will replace eight existing BITs between Canada and individual EU Member States. However, the ramifications of this new, unified regime will reach far beyond the Canada–EU trade relationship. As part of the first wave of FTAs to be negotiated by the EU, CETA has laid the groundwork for future FTAs and BITs to be negotiated and potentially concluded by the EU, including the all-important Transatlantic Trade and Investment Partnership (TTIP) with the US.

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CETA also comes at a critical time in the public discourse over investment protection, with a particular focus on ISDS, a system that has been criticised by influential publications and governments alike. Many question why ISDS is necessary where both state parties have robust legal systems, while others would prefer to do away with the system entirely. One polemicist has gone so far as to qualify TTIP as a 'monstrous assault on democracy'. It is no surprise that the debate should be so fierce given that ISDS touches on the ability of states to regulate in the public interest and may result in significant monetary awards being paid out of the public purse.

An overview of some of CETA's features indicates a measured response to the array of critics.

A model of transparency

CETA challenges the assertion that ISDS is a secretive forum lacking in transparency by adopting the ground breaking UNCITRAL Transparency Rules. These provide for:

- public hearings
- online access to submissions and arbitral decisions
- access for interested parties, such as NGOs and trade unions, who may seek leave to file amicus curiae submissions.

This signals a significant change since, of the approximately 3000 BITs containing ISDS, only those to which the US or Canada are party contain transparency provisions.

CETA challenges the assertion that ISDS is a secretive forum lacking in transparency.

An end to treaty shopping?

CETA addresses the issue of 'treaty shopping' with provisions designed to avoid the circumvention of jurisdictional conditions through 'mailbox' subsidiaries.

Investors often structure investments through corporate entities in states that have advantageous BITs with the host state, to gain optimal protection. These corporate intermediaries may be 'shells' with no business operations of their own. For example, investors often choose an intermediate corporation in the Netherlands to benefit from the 90-plus investor-friendly BITs to which it is a party (hence the expression the 'Dutch Gold Standard'), in addition to that country's favourable tax regime.

CETA's language makes it clear that one of its underlying objectives is to eliminate this practice.

Under CETA, an enterprise must conduct 'substantial business activities' in the territory in which it is constituted, to qualify as an 'investor'. Thus, only enterprises that have actual business operations in the country in which they are constituted will be able to bring claims under CETA's ISDS provisions.

Jurisdiction limited to investments with inherent economic characteristics

BITs typically require that a claimant's investment falls within the treaty's definition of 'investment' before an arbitral tribunal can have jurisdiction over a claim. Such definitions have traditionally been very broad, encompassing 'any kind of asset' and including non-exhaustive lists of specific examples, such as 'claims to money' and 'shares'. Tribunals have often limited their analysis to verifying whether the claimant's assets in the host state fall within one or more of the categories listed by the treaty.

CETA would narrow the scope of investments afforded protection. Inspired by recent developments in international jurisprudence, CETA has adopted what has been described as the 'objective' definition of 'investment' in international law, which requires that the claimant's activities in the host state meet certain inherent characteristics, including:

- a certain duration
- the commitment of capital or other resources
- the expectation of gain or profit
- the assumption of risk.

Locking the gates of Most Favored Nation Treatment (MFN)

CETA's MFN clause strikes at another manifestation of treaty shopping, namely the claimant's ability to invoke MFN protection as a gateway for the protection provided by more advantageous provisions contained in other BITs.

Under CETA, for the purpose of MFN clauses, the scope of the term 'treatment' has been narrowed:

- 'Treatment' does not include the dispute settlement procedures provided for in other BITs.
- 'Treatment' will generally not include the 'substantive obligations' in other BITs; therefore a breach of 'substantive obligations' will not give rise to a breach of CETA's MFN protection (unless 'measures' were adopted by a party under 'substantive obligations').

While the MFN clause of CETA is more restrictive, it has the benefit of providing clarity on an issue that has divided arbitral tribunals.

A firm stance on the state's right to regulate for the public welfare

CETA draws on awards that have refused to hold states liable to pay compensation to a foreign investor on account of non-discriminatory, bona fide regulations aimed at public welfare.

Under CETA, there can be no finding of indirect expropriation where measures are 'designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment'. There is an exception 'in the rare circumstances where the impact of the measure or series of mesures is so severe in light of its purpose that it appears manifestly excessive'.

This addresses one of the most frequent criticisms of the ISDS system, that it results in a 'regulatory chill' that undermines the legitimate right of host states to regulate in the public interest. The provisions also constitute a clear repudiation of the 'sole effects' doctrine, under which the effect of the regulation is the only relevant factor that must be analysed.

This approach is consistent with CETA's preamble, in which Canada and the EU recognise that its provisions 'preserve the right to regulate within their territories' and resolve 'to preserve their flexibility to achieve legitimate policy objectives, such

as public health, safety, environment, public morals and the promotion and protection of cultural diversity'.

A new 'fair and equitable treatment' standard (FET)

CETA is the first international investment agreement which seeks specifically to describe the circumstances that constitute a breach of FET. The intent of the CETA parties was to standardise the interpretation of FET and fetter what the European Commission has described as the 'unwelcome discretion' of arbitrators.

In contrast with previous generations of BITs, CETA resorts to a closed text that seeks to define FET by reference to a list of five explicit breaches. These measures define a fairly high threshold for breach (e.g. manifest arbitrariness). The list, however, is not definitive; the parties expressly provided that they may review the content of the obligation to provide FET and adopt supplementary elements.

Innovative procedural provisions

CETA contains several innovative procedural provisions, including:

- A 'fast-track' rejection of unmeritorious claims, providing two distinct mechanisms by which the host state can file preliminary objections to a claim that it considers either manifestly without legal merit or unfounded as a matter of law.
- A provision whereby claimants may propose that a dispute be settled by a sole arbitrator. Such a proposal must be given 'sympathetic consideration' by the host state, especially 'where the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low'.

> CETA will mark a watershed moment for the EU as it defines a common approach to investment protection and ISDS for its Member States.

A way forward?

If ratified, CETA will mark a watershed moment for the EU as it defines a common approach to investment protection and ISDS for its Member States.

While CETA seeks to make it more difficult for foreign investors to bring successful claims against host states than has been the case with previous generations of BITs, the provisions still afford meaningful protection to foreign investments. This, coupled with the procedural novelties of CETA, should serve to meet some of the criticisms directed at the ISDS system.

> CETA strikes a workable compromise between the views of the defenders of ISDS and those of its most ardent critics.

While the most passionate on both sides of the debate are likely to remain dissatisfied, CETA strikes a workable compromise between the views of the defenders of ISDS and those of its most ardent critics. This bargain – between the interests of investors and those of host states – will undoubtedly inform the negotiation of the TTIP and will, in our view, increase the likelihood that this next significant EU-wide FTA will include ISDS provisions.

If nothing else, CETA should be put to work to placate the uninformed campaign that is being conducted in certain quarters against ISDS, as part of the wider debate surrounding the TTIP and the Trans-Pacific Partnership (TPP). In this regard, the International Bar Association has recently published a helpful statement designed to identify and correct the misconceptions informing the current public debate about ISDS.

Pierre Bienvenu is an editor-in-chief of International arbitration report *and a senior partner and global co-head of international arbitration and Éric-Antoine Ménard is an associate, both in the Montréal office of Norton Rose Fulbright.*

The Q&A

Lim Seok Hui, chief executive of SIAC and SIMC

Sherina Petit and Marion Edge

We speak to Lim Seok Hui about her first two years running the Singapore International Arbitration Centre, the prospects for Singapore's new mediation centre and her views on emergency arbitrator measures.

01 | How has your role changed during your two years as chief executive of the Singapore International Arbitration Centre?

SIAC has a Board of Directors to oversees its operations and a separate Court of Arbitration which supervises case administration by the Secretariat and deals with appointments and challenges of arbitrators. I joined the management team in 2013, at the same time as Tan Ai Leen, SIAC's Registrar. Since then, and working closely with the Board and the Court, SIAC's management team has reviewed all the internal controls, policies and processes and we have introduced measures to streamline workflow, tighten controls and enhance the efficiency and quality of our services.

I have also spent a lot of time raising awareness of arbitration and the benefits of conducting arbitrations in Singapore with SIAC. That has involved a lot of travel throughout the region; I have spoken in India, China, Indonesia, Korea, Japan, Cambodia, Laos and Vietnam. Further afield, I have also covered the US, UK, Germany, Russia and Australia and have plans to visit South America, which is an important market for businesses in Asia. We have also held workshops in Mongolia and Myanmar. We are keen to reach out beyond the capital cities to the smaller cities. Speaking at universities is an important part of this, as well as making contact with businesses and law firms.

02 | Can you tell us about the SIAC training video?

The idea behind the video is to raise awareness of SIAC arbitration. It takes the viewer through all the key stages of an international commercial arbitration administered under the SIAC Rules. We were lucky to be able to work with the award-winning Singaporean film director Eric Khoo and his team, so the production quality is really high. Making the video was enormous fun. It features an international cast of eminent arbitration experts from civil and common law jurisdictions (including Norton Rose Fulbright partner KC Lye). The video has been well received by law firms and universities from all over the world and has had positive feedback from in-house counsel users. Online sales have been higher than expected, because of its usefulness as a training tool.

03 | What is the SIAC doing to ensure that awards are delivered expeditiously?

Arbitrators are required to sign an undertaking to devote sufficient time to the case throughout the process. A close eye is kept on the progress of awards; the President writes to the arbitrator upon acceptance of their appointment, setting out SIAC's expectation that each arbitrator will conduct the arbitration expeditiously. The Secretariat and the Court of Arbitration also monitor the conduct of the arbitration and address promptly any delays that may arise. The Registrar also monitors the issuance of awards and can sanction a slow tribunal by reducing their fees. The Secretariat generally scrutinises draft awards within two to three weeks. So, you see, we pride ourselves on quality and efficiency.

04 | SIAC has more experience than most arbitration institutions with emergency arbitrator appointments. What learning is available from that?

SIAC introduced emergency arbitrator provisions in 2010; since then, 45 emergency arbitrators have been appointed [as at July 31, 2015]. An emergency arbitrator can be valuable where the parties do not have confidence in seeking interim measures from the local courts or where the parties value confidentiality. Emergency arbitrator awards are effective with a high rate of voluntary compliance. In most cases, the tribunals subsequently constituted have affirmed the orders and awards issued by the emergency arbitrator. Speed is of the essence and most appointments are made within one business day or on the same day. The Secretariat prides itself on moving quickly – the current record is 5.5 hours for an appointment of an arbitrator in regular (i.e. not emergency arbitrator) proceedings. The average time for an interim order from receipt of the emergency arbitrator application is 2.5 days. For an award after having heard the parties, the average time is 8.5 days but has been as short as one day.

05 | Why has there been such a growth in the number of arbitrations before SIAC?

The number of new cases filed has more than doubled since 2008 and we now have an active caseload of more than 600 cases. There are many reasons for this but the economic growth in the region is a key factor. High trade flows in Asia have led to an increase in the number and complexity of cross-border commercial disputes. Judicial support for arbitration is also important with a high support/minimum intervention

approach. The Singapore courts are known to be free of corruption and to have high-calibre judges.

Geography plays its part, with Singapore acting as a natural hub for trade. The infrastructure and connectivity is excellent. The government has actively supported the development of arbitration. There are no restrictions on the use of foreign counsel, and income tax exemptions and tax incentives are in place for arbitrators and law firms. The facilities for arbitration hearings at Maxwell Chambers are world class.

06 | What are the key features that distinguish SIAC's approach to arbitration?

I would say that efficiency, transparency, flexibility and cost are the key things that attract users to SIAC. We are defined by the service we offer and we are always striving to improve. For example, our rules require us to seek to appoint an emergency arbitrator within one business day. We always try our best to meet this deadline – even on the eve of Chinese New Year! We are transparent about what we do and publish detailed statistics in our annual report. Our appointments process is clear; under our rules, all appointments are made by the President to ensure quality.

And we are mindful of costs. Our fee caps for tribunals are lower than those of most other major institutions. In a typical case, fees will be 75–85 per cent of the fee cap and there is often a refund of the balance at the conclusion of the proceedings. When a case settles early, the refunds are higher.

Our expedited procedure, introduced in 2010, has proved very popular: more than 130 cases have been dealt with this way [as at July 31, 2015]. This route is available for cases where the sum in dispute does not exceed SG$5 million or the parties agree or there is exceptional urgency. Cases are dealt with by a sole arbitrator and awards are made within six months of the constitution of the tribunal.

07 | SIAC recently opened an office in India. Why did you choose India?

There are strong cultural links between India and Singapore and its close geographic location makes Singapore a natural choice of seat for Indian parties. In terms of the nationalities of parties referring disputes to SIAC, India has ranked (alternately with China) as either our number one or two foreign user in the last few years. India has seen tremendous economic growth and foreign investment recently and this trend is set to continue, so we anticipate an even greater number of international disputes involving Indian parties in the years to come. Opening an office in India has been an important demonstration of our commitment to India and has enabled us to raise SIAC's profile in India.

For similar reasons, we also opened a representative office in Seoul, South Korea, in 2013.

08 | How does your work with the Singapore International Mediation Centre relate to your work with SIAC?

The two institutions are closely linked and are run from the same building. This enables us to serve clients who commence arbitration but then wish to explore a settlement through mediation. The Arb-Med-Arb service gives parties this opportunity. If the mediation is successful, parties may request that their mediated settlement agreement be converted into a consent arbitral award, giving the mediated settlement agreement the advantage of enforceability under the 1958 New York Convention. If the mediation is not successful then the parties can continue with the arbitration.

The SIMC opened in November 2014 and was founded by SIAC, the Singapore Academy of Law and the Singapore Business Federation. The SIMC's panel of mediators is completely international and includes leading mediators from many different countries. Mediation is still a new method of dispute resolution in this part of the world and is regarded with some suspicion so there is a lot of work to do to explain its benefits to businesses.

09 | You are the first woman to be appointed to the role of CEO at SIAC. Do you think that there are now more opportunities now for women as arbitrators?

I see a lot of good women working in this area with the drive to succeed, and their time will come. Our Secretariat is mostly made up of women. Recently, a number of women have been appointed to lead arbitration institutions. Teresa Cheng chairs HKIAC, Chiann Bao is Secretary General of HKIAC and Dr Jacomijn van Haersolte-van Hof is LCIA's director general. I think there is also a growing awareness of the importance of diversity. But you don't want to be appointed because you're a woman. You want to be appointed because you're good.

Sherina Petit is a partner and Marion Edge a senior knowledge lawyer in the London office of Norton Rose Fulbright,

Singapore courts: breach of natural justice

KC Lye and Katie Chung

Challenges of arbitral awards in the Singapore courts on the basis of a breach of natural justice are on the rise – while success rates are notoriously low. So what does and doesn't work in setting aside an arbitral award on this ground?

Challenges of arbitral awards in the Singapore courts on the basis of a breach of natural justice are on the rise. There have been at least seven in the past 18 months (compared with a total of just 19 in the period 1985–2005) and the Chief Justice of Singapore, Sundaresh Menon, made some astute observations on this topic at an arbitration conference in London in July this year.

The success rates for such challenges are notoriously low – so what motivates arbitrating parties to rush to court? In this article, we explore what does and what does not work in setting aside an arbitral award on this ground.

Breach of natural justice

In international arbitration, a breach of natural justice is a ground on which an aggrieved party may rely to set aside an arbitral award in the Singapore courts. Natural justice is an administrative law concept that encapsulates two famous maxims:

- No one shall be a judge in his own cause (*nemo iudex in causa sua*).
- Each party is to be given the opportunity to be heard (*audi alteram partem*).

Unlike administrative law cases, in international arbitration the arbitrating parties submit their disputes to an arbitral tribunal for resolution, and agree to accept the finality of an award. This *caveat emptor* approach, buyer beware, underlies the principles to which the Singapore courts adhere in applying this deceptively simple test for a breach of natural justice under section 24(b) of the International Arbitration Act (IAA).

Test for breach of natural justice

Under section 24(b) of the IAA, a court can set aside an award if there has been a breach of the rules of natural justice in the making of an award which has then prejudiced the rights of the aggrieved party.[1]

In a 2001 case[2], the Singapore High Court set out the elements that need to be established to set aside an arbitral award for breach of natural justice:

a which rule of natural justice was breached

b how that particular rule of natural justice was breached

c in what way the breach of natural justice connected with the making of the award

d how the breach prejudiced the rights of the party concerned.

This test has been applied and approved in subsequent cases.[3]

The Singapore courts adopt a test of actual or real prejudice to the aggrieved party in the making of the arbitral award – a lower threshold than the test of 'substantial prejudice' in the English Arbitration Act 1996, for example.

The application of the test for breach of natural justice is best enunciated by the Court of Appeal in *L W Infrastructure* (at [54]):

> 'the real inquiry is whether the breach of natural justice was merely technical and inconsequential or whether as a result of the breach, the arbitrator was denied the benefit of arguments or evidence that had a real as opposed to a fanciful chance of making a difference to his deliberations. Put another way, the issue is whether the material could reasonably have made a difference to the arbitrator, rather than whether it would necessarily have done so.'

Principles in the application of the test

Party autonomy is sacrosanct in international arbitration, but runs the attendant risk that parties, having chosen their arbitrators, accept the finality of an arbitral award (good or bad) with no avenue for appeal.

1 Under section 24(b) of the IAA:
'Court may set aside award
24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if –
...
(b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.'
S 24(b) of the IAA (in pari materia with s 48(1)(a)(vii) Arbitration Act (Cap. 10) governing domestic arbitrations) tends to be relied on together with Article 34(2)(a)(ii) or (iii) of the UNCITRAL Model Law 1985.

2 *John Holland Pty Ltd (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443.

3 Notably in the Court of Appeal decisions in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2013] 1 SLR 125, *BLC & Ors v BLB & Anor* [2014] 4 SLR 79, and *AKN v ALC* [2015] 3 SLR 488.

> Singapore courts ... adhere to a policy of minimal court intervention in the challenges of arbitral awards.

The Singapore courts respect the choice of parties to resolve their disputes in arbitration and adhere to a policy of minimal court intervention in the challenges of arbitral awards. However, they also attempt to uphold fairness in deciding a challenge on the basis of breach of natural justice.

Fairness means:

- There is equality of treatment of the arbitrating parties.
- A successful party should not be deprived of the fruits of their labour – and put to greater expense – because of arid technical challenges brought by a dissatisfied party.

Arguments which failed

Common arguments which failed in support of breach of natural justice challenges include the following:

- The arbitral tribunal misunderstood the case presented and so did not apply its mind to the actual case of the aggrieved party.
- The arbitral tribunal did not mention the arguments raised by the aggrieved party and so must have failed to consider that party's actual case.
- The arbitral tribunal must have overlooked a part of the aggrieved party's case because it did not engage with the merits of that part of the party's case.

Some of these are technical challenges and usually disguise the true nature of the complaint – that the arbitral tribunal made errors of law and/or fact in the arbitral award.

Arguments which succeeded

The following are examples which have succeeded in supporting a challenge of an arbitral award for breach of natural justice:

- The arbitral tribunal failed to consider an important issue that had been pleaded in an arbitration (*Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* [2010] SGHC 80).
- The arbitral tribunal failed to give an opportunity to the aggrieved party to address the tribunal on a claim raised at the eleventh hour before rendering the award and was aware that the aggrieved party had not addressed the claim (*AKN v ALC*).
- The arbitral tribunal failed to give an opportunity to the aggrieved party to address the tribunal on issues to be decided in an additional award to be rendered under article 33 of the Model Law (*L W Infrastructure*).

The arbitral tribunal's finding(s) must demonstrate a dramatic departure from the submissions of the parties, e.g.:

- receiving extraneous evidence
- adopting a view wholly at odds with the established evidence adduced by the parties
- arriving at a conclusion which was unequivocally rejected by the parties as being trivial or irrelevant (*Soh Beng Tee* at [65]).

It is equally important, if not more so, to show that there is a causal nexus between the breach of natural justice and the arbitral award, and whether the breach prejudiced the aggrieved party's rights (*AKN v ALC* at [48]).

Caveat emptor

While an aggrieved party may go to the Singapore courts to set aside an arbitral award for breach of natural justice, arbitrating parties must also accept the risk that the arbitral tribunal may well make errors of law and/or fact which are not within the remit of a challenge of an award.

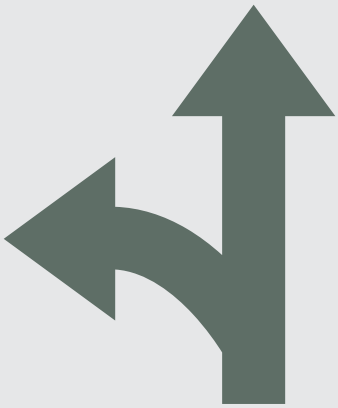
To avoid having to rely on this tenuous ground, parties should exercise great care in their choice of arbitrator. At every point of the arbitration proceedings, parties should ensure that the tribunal is aware of the essential issues that need to be addressed in an arbitral award.

KC Lye is a partner and Katie Chung is a senior associate in the Singapore office of Norton Rose Fulbright.

Fork-in-the-Road clauses

Divergent paths in recent decisions

Deborah Ruff and Trevor Tan



Two recent cases have shaken up the approach most often taken by tribunals in situations where states raise jurisdictional issues in state investor proceedings, bringing into question the clear distinction between 'treaty' and 'contract' claims.

In 'Fork-in-the-Road' (FITR) clauses in bilateral investment treaties (BITs), the claimant investor must make a choice between pursuing its claims against the state either through the arbitration mechanisms provided in the relevant BIT or in local courts or other venues provided for in the relevant contractual mechanisms.

However, where a FITR clause has been invoked by a state to raise a jurisdictional issue in state investor proceedings, tribunals often base their approach on a separation of 'treaty' claims from 'domestic law' or 'contractual' claims, so that investors bringing contractual claims in state courts or elsewhere are not precluded from raising international law treaty claims arising out of BITs or a submission by the state to ICSID.

Two recent cases contradict this previously permissive grain of jurisprudence.

Permissive approach

The permissive approach is exemplified by the tribunal's decision in a case on the contested issue of Ecuadorian legislation denying certain VAT refunds to the claimant.

In *Occidental v Ecuador*[1], Ecuador argued that the USA-Ecuador BIT contained a FITR provision which prevented the claimant from bringing an investment treaty claim due to its already having challenged the offending legislation before local courts.

The tribunal demurred, accepting instead the claimant's argument that the investment treaty claim was founded upon the question of its rights under the BIT; and the local action was founded upon the question of the legality of the legislation under local law.

Although the objective of these actions – a declaration that the local legislation was illegal – was similar, the causes of action underlying the claims were distinct. The tribunal also suggested that FITR clauses are predicated on a true and free 'choice' between alternate avenues, which may be defeated if there are onerous timelines which urge a claimant toward choosing one over the other (e.g. 20 days for the claimant to challenge the VAT law under Ecuadorian law, failing which it became final and binding).

1 *Occidental v The Republic of Ecuador* (UNCITRAL Case No. UN3467).

In *Toto Costruzioni*[2], Lebanon argued that the FITR provision in the Italy-Lebanon BIT meant that Toto's pursuit of domestic remedies precluded the tribunal taking jurisdiction over Toto's investment treaty claims. The tribunal rejected Lebanon's interpretation of the treaty and reinforced the distinction between the causes of action, stating that:

'[i]n order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is 'on a different road,' i.e. that a claim with the same object, parties and cause of action, is already brought before a different judicial forum. C*ontractual claims arising out of the Contract do not have the same cause of action as Treaty claims*'. (emphasis added)

'Fundamental basis' test v 'contractual/treaty claims' test

In 2009, in a case[3] involving the ransacking of a contractor's worksite in Albania following massive losses incurred by the populace in the wake of Ponzi schemes, the claimant (contractor Pantechniki) first launched local proceedings – and later ICSID proceedings – under the Greece-Albania BIT, in an effort to recoup its losses of around US$1.8 million from the Ministry of Public Works.

Jan Paulsson, as sole arbitrator, deemed certain of the claimant's claims inadmissible on the basis they were subsumed by the claim before the Albanian courts and thus excluded from ICSID jurisdiction by the FITR clause in the BIT.

In his treatment of the arbitration law on FITR clauses, Paulsson implicitly acknowledged the continuing distinction between claims that can be brought before local courts and those that can be brought before international fora. In doing so, however, he avoided the semantics of 'contractual' and 'treaty' claims, which he suggested were simplistic and constituted 'argument by labelling – not by analysis'.

He stated it was:

> 'common ground that the relevant test is ... whether or not the "fundamental basis of a claim" sought to be brought before the international forum is autonomous of claims to be heard elsewhere'.

2 *Toto Costruzioni Generali SpA v Republic of Lebanon* (ICSID Case No ARB/07/12) (Decision on Jurisdiction).
3 *Pantechniki SA Contractors & Engineers (Greece) v The Republic of Albania* (ICSID Case No ARB/07/21).

> The arbitrator avoided the semantics of 'contractual' and 'treaty' claims, which he suggested were simplistic and constituted 'argument by labelling – not by analysis'.

Establishing an identical or fundamental basis requires more than a simple assertion that the factual basis and the relief claimed are the same. Equally, however, an assertion that two claims do not have the same fundamental basis requires more than mere reliance on the assumption that the claim before the tribunal is made under a treaty, while the other before a local court is made under a contract or local law, and the two are thus automatically and inherently different.

Paulsson took pains to emphasise that the 'same facts can give rise to different legal claims. The similarity of prayers for relief does not necessarily bespeak an identity of causes of action'. However, if his line of reasoning is adopted by subsequent tribunals, claims that may previously have been characterised as 'treaty' claims could be rejected if there is established some normative or fundamental basis on which they are identical to claims brought locally.

A recent unpublished 2014 decision on merits indicates that this view may be finding some early support. In that case, a Californian company, H&H Investments, sued Egypt under the US-Egypt BIT for alleged mistreatment of a resort investment in the Gulf of Suez. The decision apparently involved the tribunal enforcing an FITR clause and refusing jurisdiction on the basis that the FITR provision of the US-Egypt BIT was triggered by the claimant's previous submission of claims with 'the same fundamental basis' to an arbitral tribunal and to Egyptian courts. [Based on publicly available information from press releases by Egypt's counsel.]

Where next?

While these two cases constitute a refinement of the test to determine the applicability of FITR clauses – and may be seen to signal a more onerous burden for the claimant investor – the general trend still seems to favour a finding of jurisdiction, allowing BIT/ICSID arbitrations to proceed.

> ... the *Pantechniki* decision has muddied the waters in terms of a clear distinction between 'treaty' and 'contract' claims.

The effect of these cases cannot be ignored. Although the wording of individual FITR clauses will continue to frame the approach and interpretation of tribunals in arbitrations to come, the *Pantechniki* decision has muddied the waters in terms of a clear distinction between 'treaty' and 'contract' claims.

It remains to be seen if the rationale behind the decision is followed, and if so, how the new test is applied. The 'fundamental basis' approach may mean that tribunals take a more substantive and case-by-case approach to assessing the applicability of FITR provisions to related claims that have been heard before local fora. Alternatively, in implicitly acknowledging the continuing distinction between claims arising out of the same facts, the new approach may simply result in a semantic reordering of claims that may be brought before local courts versus those that may be brought before international tribunals.

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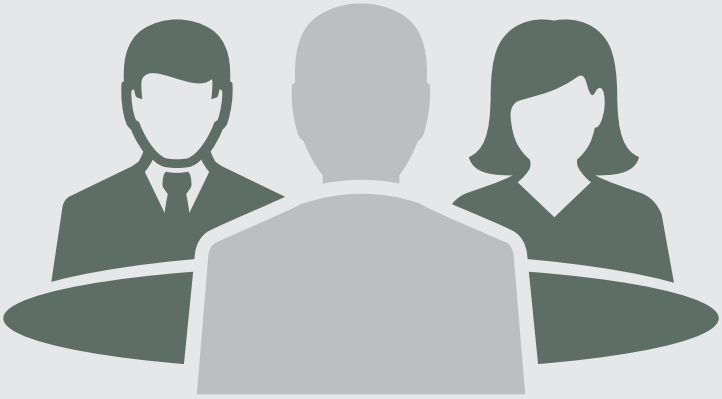
Concluding an international mediation

What constitutes 'success'?

Mark Baker and Lucy Greenwood



This is the third and final item in our series offering practical advice for anyone involved in the mediation of an international dispute. Previously, we looked at choosing the right mediator (issue 3) and preparing for and conducting a mediation (issue 4); here, we consider how to conclude an international mediation.

At a very basic level, a mediation can go one of two ways: either the dispute will settle, or it will not. This is, however, to simplify what can be a very complex process.

We will look at three main issues.

1. What constitutes a 'successful' mediation?
2. If the dispute settles, how best to render the settlement enforceable?
3. If the dispute doesn't settle, can the information learned during a mediation be used in a subsequent arbitration and can the costs of the mediation be recovered in any subsequent arbitration?

What constitutes success?

A mediation that does not settle is often referred to as a mediation 'failing', but a great deal of useful information can be learned during the process. What constitutes 'success' in a mediation very much depends on the position of each of the parties, and, quite possibly, whether the mediation was imposed upon the parties or voluntarily agreed to. Often, the nature of the interactions between the parties in commencing the mediation has an impact on how the mediation finishes.

A voluntary negotiation affords the parties the greatest level of 'free' participation (and, arguably, a greater level of 'buy-in' to the process). Mediation which has been mandated by a 'step' clause (see issue 4 of *International arbitration report*) has a degree of choice, in that the parties chose the original clause. Conversely, court-ordered mediation has no element of choice since it is a mandatory obligation prior to the court determining the dispute.

It is rare to have a situation in which an international mediation has been mandated by anything other than the wording of the dispute resolution clause. Alternatively, the parties may have agreed to conduct a mediation voluntarily prior to or after commencing an arbitration.

- Mediations that have been commenced in a balanced way, with both parties feeling they have had equal input into the choice of the mediator, the procedure to be followed and the level of participation and seniority of the corporate representatives who will be present, are likely to be more conducive to settlement.

- A mediation where a party is a reluctant participant in the process – possibly feeling that they are simply there to be 'pumped' for information – is much less likely to resolve the dispute.

If the dispute settles, how will the agreement be enforced?

Anecdotally, the settlement rate of international mediations is around 80 per cent. On this basis, there is a very good chance that the dispute, once the parties have agreed to submit it to mediation, will settle. However, there is no way of testing this figure and our experience is that high-stakes complex disputes that are submitted to mediation are not resolved at this rate. None the less, there is a reasonable chance that even a very significant dispute may settle at the mediation stage.

If the mediation is successful, the parties will be in possession of a binding settlement agreement. This is not an enforceable arbitral award, unless steps are available to the parties to convert it into such. For some parties this will not be an issue, but for others the ability to enforce an award under the New York Convention might be an important consideration.

- It is possible to mediate, then appoint the mediator as arbitrator in order to turn the agreed settlement into an arbitration award by consent.

- Unless an arbitration is already ongoing prior to the mediation, issues may arise when it comes to enforcing any such award.

- Where parties appoint the mediator as arbitrator after they have resolved their differences, views differ as to whether the resulting award is properly enforceable under the New York Convention. Accordingly, if the parties need any settlement to be reflected in an enforceable arbitral award, then they should ideally have commenced an arbitration prior to the mediation in order to be in a position to request that the arbitration tribunal issue a consent award reflecting the settlement agreed by the parties.

Most major institutional rules governing mediation do not expressly refer to arbitral awards securing mediation settlements. However, article 14 of the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce specifically provides: 'In case of settlement, the parties may, subject to the consent of the Mediator, agree to appoint the Mediator as an Arbitrator and request him/her to confirm the settlement agreement in an arbitral award.'

All major international arbitration institutions provide for a form of 'consent award,' where parties that settle post-commencement of arbitration proceedings can obtain an arbitral award, if so requested and if the arbitral tribunal agrees. The UNCITRAL Model Law sanctions such awards and their recognition: '[i]f during the arbitral proceedings, the parties settle the dispute, the Arbitral Tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the Arbitral tribunal, record the settlement in the form of an Arbitral Award on agreed terms.' Article 31 provides that 'such an award has the same status and effect as any other award on the merits of the case.'

There are similar provisions giving deference to 'agreed awards' in the rules governing ICC, ICDR and ICSID arbitrations. Article 26.9 of the LCIA Rules similarly notes that, in the event of any final settlement of the parties' dispute, the arbitral tribunal may decide to make an award recording the settlement if the parties jointly so request in writing (a 'consent award'), provided always that such consent award contains an express statement on its face that it is an award made at the parties' joint request and with their consent. A consent award need not contain reasons. As noted, these consent awards should be enforceable under the provisions of the New York Convention.

Handling costs and the exchange of information

The costs of a mediation, while much less than those of an arbitration, can still be significant.

- In the event of a failed mediation, it is extremely unlikely that the costs incurred in the mediation will be recoverable in any subsequent arbitration.
- None of the major international arbitration institutional rules allow for the recovery of these mediation costs as costs of the arbitration, although many do give the tribunal discretion in how they award costs at the end of the arbitration.
- Most major mediation rules provide that costs should be borne equally between the parties. Alternatively, if the dispute does settle, the parties will be free to provide for the costs of the mediation to be incorporated into the settlement, if appropriate.

A major factor in mediations is the obligation to maintain confidentiality regarding information learned during the process and most of the major mediation rules provide for this.

- ICDR Mediation Rule 10 imposes a duty of confidentiality, forbidding the disclosure of offers made, views expressed, and admissions made by a party during mediation – although the existence of the mediation itself is not confidential.
- Article 9 of the ICC Mediation Rules has a similar obligation, allowing for disclosure of the existence of mediation proceedings but not the content.
- Article 3 of the Stockholm Chamber of Commerce Mediation Rules imposes a high standard of confidentiality: 'Unless the parties have agreed otherwise, neither the parties, the mediator, nor the SCC shall disclose the existence of the mediation and the outcome, or use any information learned in the context of the mediation'.
- Article 10 of the LCIA Mediation Rules imposes a similarly high standard, mandating that the mediation be confidential: 'unless agreed among the parties, or required by law, neither the mediator nor the parties may disclose to any person any information regarding the mediation or any settlement terms, or the outcome of the mediation'.

While rules on confidentiality of arbitrations vary from institution to institution, the obligation of confidentiality in relation to a mediation endures even after the mediation has 'failed' and information learned during the course of a mediation may not be relied upon in any subsequent arbitration, if obligations of confidentiality attach to that information.

Getting the most out of your mediation

Even if a mediation 'fails', it can still be a successful experience for the parties and may lay the foundation for resolution of the dispute at a later stage. However, whether or not the mediation can be considered a positive experience will largely come down to both the quality of the mediator and the level of preparation undertaken by counsel and the parties to best position themselves through the process.

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Russia's Supreme Court

Case law and arbitration in Russia

Yaroslav Klimov and Andrey Panov

It has been a year since the new Supreme Court took over from the Supreme *Arbitrazh* Court as Russia's highest court on commercial matters, including arbitration. Yaroslav Klimov and Andrey Panov look at recent arbitration-related cases resolved by the Supreme Court.

The new Russian Supreme Court has ushered in an additional level of judical review.

When the new Russian Supreme Court took over from the *Arbitrazh* Court last year, it ushered in an additional level of judicial review – the Commercial Division of the Supreme Court – which hears appeals against the decisions of lower courts (including the first instance courts, the Appellate Court and the Cassation Court).

A party may appeal the ruling of the courts of the Commercial Division to the Presidium of the Supreme Court. The interpretations of the legal principles by the Presidium will be binding on the lower courts.

As yet, there have been no arbitration-related cases considered by the Presidium, but the courts of the Commercial Division have made a number of interesting rulings which have been closely followed by the arbitration community in Russia. These decisions are not technically binding on other courts within the Commercial Division.

Arbitrators' duty to apply the law and contract provisions, and the effect of public policy

Corradino Corporation Ltd. v JSC Russian Insurance Center[1] concerned the enforcement of an award rendered by the Maritime Arbitration Commission at the Russian Chamber of Commerce and Industry. It had a somewhat odd underlying set of circumstances, which may have dictated the overall outcome.

The arbitral tribunal issued an award ordering the insurer to pay a certain amount to the foreign claimant under the maritime insurance agreement. The insurer subsequently applied to the tribunal for a correction of an error, which was understood by the tribunal to be a request to render an additional award. The tribunal issued this additional award in which it corrected the reasons for, and operative part of the original award by deducting an unconditional franchise which it had mistakenly failed to deduct previously.

As the additional award was rendered without giving proper notice to the parties or conducting a hearing, it was set aside by the Russian courts. The claimant then sought to enforce the original award, but the first instance court rejected the application, stating that enforcing the award – which contained obvious errors – would be contrary to the principle of legality, one of the fundamental principles of Russian law. The Cassation Court (which hears appeals from first instance courts) reversed the decision as interfering with the finality of the original award and ordered enforcement.

On appeal from the Cassation Court, the Commercial Division agreed with the first instance court's position. In particular, it found that:

- The principle of legality of judgments – which means that the judgment should be rendered in accordance with the applicable law, well-grounded, reasoned and final – is equally applicable to arbitral awards as one of the fundamental principles of Russian law.
- The error in the award was accepted by the tribunal itself in the additional award, and therefore, the original award violated the principle of legality and was contrary to the provisions of the insurance contract.

The principle of legality of judgments is equally applicable to arbitral awards as one of the fundamental principles of Russian law.

Unlike the first instance court, however, the Commercial Division ordered partial enforcement of the original award, effectively deducting the unconditional franchise as per the insurance agreement on its own motion, and in effect implemented the additional award.

This ruling may encourage others to challenge awards on the basis of a tribunal error as to the effect of the applicable law or the provisions of the contract. It could also allow judicial correction of such errors by making adjustments to the way in which the award is enforced. The consequences of this approach are yet to be seen, as it is unclear whether this ruling will be followed by courts in future cases.

1 Case No. A40-274/2014.

An arbitral award may be enforced in Russia at the place where a foreign entity holds its assets

This case[2] concerned an attempt by a US company to enforce an SCC arbitral award against a Ukrainian respondent in Russia. It raises interesting questions as to when Russian courts have jurisdiction over enforcement cases against foreign persons.

The enforcement was attempted in Kaliningrad Region, where the Ukrainian respondent allegedly held certain equipment. Under Russian law, an application for recognition and enforcement of a foreign arbitral award must be filed with the *Arbitrazh* (Commercial) Court 'at the place of the debtor's location or residence or, if the debtor's location is unknown, at the place where the debtor has property'. Technically, this provision could prevent the enforcement of an award against a foreign debtor's assets located in Russia, if its location or residence is known.

The Commercial Division of the Supreme Court ruled that, in principle, the enforcement of an arbitral award is possible at the place where the debtor's assets are located, even if the debtor's location is known. However, the burden of proving that the assets are located in Russia and that they belong to the debtor lies with the applicant seeking recognition and enforcement of an award.

> The burden of proving that the assets are located in Russia and that they belong to the debtor lies with the applicant seeking recognition and enforcement of an award.

In this case, the courts concluded that the burden was not discharged.

- The applicant sought to rely on information from a Russian entity which was allegedly storing the respondent's goods in Kaliningrad, as well as warehouse receipts. However, the Russian entity in question had been dissolved by the time the application was filed before the Russian court, undermining the credibility of the evidence.
- The court noted that, even if the location of the equipment in question were proven, the applicant had failed to establish that the respondent owned it.
- The Commercial Division also suggested that the applicant could have sought disclosure of the debtor's assets, but did not do so.

This ruling confirms that the Russian court located within the jurisdiction in which the debtor's assets are held can enforce any arbitral award against such assets, but the applicant must be able to establish the location of the assets, and establish that they belong to the debtor.

Public policy argument should not open the door to a review on the merits

In this case[3] there was a dispute over the enforcement of an award rendered by an international arbitral tribunal acting under the auspices of the Serbian Chamber of Commerce. The dispute arose out of the privatisation of a Serbian automobile producer, Ikarbus. Serbian authorities terminated the privatisation contract, claiming that a Russian company had breached some of its obligations. The Russian company commenced arbitration, seeking recovery of the payment price, and the Serbian authorities subsequently filed a counterclaim seeking contractual penalties. The tribunal dismissed the claim and partially awarded the penalties sought.

The Russian respondent sought to resist enforcement of the award, alleging that it was contrary to Russian public policy (due to the punitive nature of the penalty awarded) and that the penalty had also been rendered in breach of the applicable Serbian law. The first instance court found these arguments compelling, but the Cassation Court reversed the ruling and enforced the award against the Russian party.

The Commercial Division supported the Cassation Court's position, as the Russian company was effectively disagreeing with the merits of the award. It is notable that the Commercial Division followed the Supreme *Arbitrazh* Court decision of 2013, which stated that public policy cannot constitute grounds for review of a case on its merits. This confirms that the Supreme *Arbitrazh* Court's earlier rulings remain authoritative in arbitration cases.

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2 Case No. A21-8191/2013.

3 Case No. A72-15958/2013.

Russian sanctions: Asian arbitration

How sanctions on Russia affect commercial arbitration in Asia

James Rogers and Andrey Panov

Recent Russian sanctions – particularly those implemented by the EU and the US – have boosted interest in Asian arbitration markets among Russian businesses. James Rogers (editor of *International arbitration report*) and Andrey Panov explore whether this presents more opportunities for Asian arbitration.

In what way do Russian sanctions affect commercial arbitrations?

The current sanctions regime may affect ongoing or anticipated arbitrations in a number of ways:

- Arbitral institutions located in countries implementing sanctions many need to obtain licenses from their governments to administer arbitrations involving sanctioned persons; this will also apply to law firms resident in such relevant states.
- Nationals from states implementing sanctions may also be prevented from arbitrating cases without obtaining relevant licences (this applies particularly to US nationals).
- Banks may delay or even be unable to process arbitration-related payments, depending on the status of the persons ordering such payments.
- The sanctions regime may form a part of the law applicable to the dispute either by virtue of the seat being in the relevant state or because the law applicable to the merits of the case is that of a state implementing sanctions. So, for example, EU sanctions may arguably be applicable to a dispute by virtue of the parties' choice of English law to govern and/or Paris as a seat.
- The sanctions may also, in theory, prevent enforcement of an award in favour of a sanctioned person in a state that has adopted sanctions or – at least in theory – prevent enforcement of an award against a sanctioned person in Russia.

As yet, there are few examples to draw on to say which of these risks is most likely or relevant. The effect of sanctions will also differ depending on the level of sanctions against a particular person.

Broadly, there are three types of sanctions:

1 **Sanctions against certain persons, involving freezing of assets.**
Arguably, arbitrations involving such persons could be effectively blocked since institutions or their banks would be unable to accept payments made by such persons.

2 **Financial sanctions against certain companies restricting their ability to obtain long-term funding.**
In theory, such financial sanctions should not impact a case proceeding, other than to require institutions, law firms and arbitrators to obtain licenses, where relevant.

3 **Sectoral sanctions, restricting business relationships with Russian parties in certain sectors, such as the oil industry.**
It is likely that sanctions of this type will affect the outcome of a case, depending on the treatment of such sanctions under the relevant applicable law and contract.

Although there is some anecdotal evidence of arbitrations being delayed due to sanctions, we are not aware of any case where the sanctions regime has materially affected the outcome of a dispute. While the arbitral institutions admit that the sanctions have made their lives and internal procedures more complicated, this has not rendered them unable to administer disputes.

Are Russian parties concerned about sanctions?

The response of the Russian parties is mixed.

Many companies that carry out projects internationally (particularly those that are state-owned or controlled) have started looking into alternatives to long-standing leaders such as the LCIA, ICC or SCC. Some have even declared that the usual traditional venues will no longer be acceptable for their arbitrations. However, it would be premature to say that they are changing their policies with respect to acceptable arbitration venues altogether. Many major companies have come to realise that there is no 'default' arbitral institution and that choices should be made on a case-by-case basis.

Many Russian companies have not been affected – and are not likely to be affected – by the sanctions regime, and there does not seem to be an overwhelming move towards new arbitral institutions.

The attitude of many Russian companies is best demonstrated by a recent survey conducted by the Russian Arbitration Association (RAA). The majority (over 50 per cent) of those surveyed stated that, while sanctions did not affect the functioning of the Western arbitral institutions, they believed that the political situation overall 'changed the attitude of European arbitrators to Russian companies'. Despite that,

over 55 per cent of the respondents confirmed that they will continue including arbitration clauses in favour of the Western arbitral institutions in their agreements.

Do Russian sanctions present new opportunities for Asian arbitral institutions?

Asian arbitral institutions certainly believe the sanctions regime represents an opportunity for them, and they have increased their presence in the Russian market enormously over the past year. SIAC and HKIAC (probably the most active ones) are present at all professional gatherings in Moscow and St Petersburg, and both institutions seem to be intent on making themselves more Russian user-friendly. They have been hiring Russian-speaking members of staff, offering Russian translations of their rules and are looking at expanding their pool of Russian-qualified arbitrators. This has definitely raised Russian awareness of the alternative venues, which were largely unknown before.

More importantly, perhaps, we are likely to see more Russian businesses coming to Asia to make purchases they cannot now make with European or US suppliers, or for funding they are unable to find elsewhere. This increased level of Russian business activity in Asia will probably boost the number of disputes – and Asian arbitral institutions may be a more natural and practical choice for these types of disputes than Western ones.

Can Asian arbitral institutions solve the issues posed by the sanctions?

Choosing an Asian arbitral institution will address some of the issues involved, but not all. For example, the institutions may not need to wait for a licence to administer the dispute, but certain arbitrators may still be unable to accept appointments and the banks may still be unable or unwilling to carry out transfers involving funds of persons under sanctions.

Also, to the extent that the sanctions regime may form a part of the law applicable to the dispute, it may still affect the outcome of the case, no matter where the seat is. For that reason, some Russian companies will, no doubt, start looking at Hong Kong or Singapore law, rather than English law.

> ... while choosing an Asian arbitral institution may be helpful, it is in no way a magic anti-sanctions pill.

So, while choosing an Asian arbitral institution may be helpful, it is in no way a magic anti-sanctions pill.

Will Western arbitral institutions lose some of their Russia-related work to their Asia counterparts?

We will probably see a reduction in the number of Russia-related cases in the Western arbitral institutions and a corresponding increase in Asian arbitration centres, particularly SIAC and HKIAC. A recent article jointly published by the ICC, LCIA and SCC downplays the impact of sanctions on their ability to administer cases with Russian parties. However, the reduction in Russia-related cases in Western institutions may not all be down to sanctions. The increase of Russian business activity in Asia and the increasing awareness of Russian parties of alternative arbitration venues are both contributing factors. Singapore may be a more natural venue for arbitration of a Sino-Russian or Russian-Indian dispute, compared to, say, London. Just as Hong Kong may be a more convenient seat for an arbitration involving Russian and Venezuelan parties than, say, Paris.

> We will probably see a reduction in the number of Russia-related cases in the Western arbitral institutions and a corresponding increase in Asian arbitration centres, particularly SIAC and HKIAC.

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Anti-suit injunctions in Europe

Lucy Greenwood and Mark Stadnyk

A recent decision by the Court of Justice of the European Union has held that anti-suit injunctions issued by arbitral tribunals are not covered or prohibited by EU Regulation 44/2001.

Anti-suit injunctions are orders directing a party not to initiate or pursue legal action in a different jurisdiction. These measures may be necessary to preclude litigation in fora other than the exclusive forum to which parties have agreed – for example, arbitration. International arbitrators are increasingly issuing anti-suit injunctions to prevent parties from having recourse to the courts in breach of their arbitration agreements. Recently, questions have arisen about the enforceability of such arbitral anti-suit injunctions, particularly in the European Union.

EU Regulation No 44/2001 (the Brussels I Regulation), governs the jurisdiction of EU Member State courts over civil and commercial matters and provides guidance on resolving conflicts of jurisdiction between courts of the various Member States. While it purports to exclude arbitration from its ambit, it was unclear whether the Brussels I Regulation covered or restricted anti-suit injunctions issued by arbitrators (as opposed to courts).

In a recent decision, the Court of Justice of the EU held that anti-suit injunctions issued by arbitral tribunals are not covered by the Brussels I Regulation. In *Gazprom*[1], the Court of Justice determined that the Brussels I Regulation:

> 'must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.'

It said that arbitral anti-suit injunctions 'are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought'.

This is a decision that will be welcomed by the international arbitration community.

Facts underlying *Gazprom*

The *Gazprom* case arose out of a shareholder dispute between the Russian energy giant, Gazprom, and Lithuania's energy ministry over the management of gas provider Lietuvos Dujos.

In 2012, Gazprom obtained an arbitration award against Lithuania's energy ministry from a Stockholm Chamber of Commerce tribunal ordering the ministry to 'withdraw or limit some of the claims' pending before local courts. However, the Lithuanian courts refused to enforce this anti-suit award, leading to the Lithuanian Supreme Court's referral of the matter to the Court of Justice in 2013.

In essence, the question put to the Court of Justice by the Lithuanian Supreme Court was whether the Brussels I Regulation 'must be interpreted as precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State'.

Context for *Gazprom*

To set the case in context, it is necessary to understand two earlier events: the Court of Justice's decision in *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* (C-185/07); and efforts to reform the Brussels I Regulation, which culminated in a 'recast' Brussels I Regulation which came into force on January 10, 2015.

The Court's decision in *West Tankers*

The Brussels I Regulation does not cover arbitration. Article 1(2)(d) states that '[t]he Regulation shall not apply to ... arbitration.'

Despite this exclusion, in *West Tankers* the Court of Justice controversially ruled that a preliminary issue concerning the application of an arbitration agreement, including its validity, falls within the scope of the Brussels I Regulation if the main subject matter of the proceedings comes within scope. As a result, the Court of Justice held that it was incompatible with the Brussels I Regulation 'for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.'

1 Case C-536/13 *Gazprom OAO v Lithuania.*

This narrow interpretation of the arbitration exception had significant implications for arbitration in Europe. Many practitioners considered anti-suit injunctions in favour of arbitration to be an essential component of the supervisory authority of courts in the seat of arbitration. This led some commentators to postulate that parties could delay or frustrate an arbitration by commencing proceedings in their court of choice concerning the existence or validity of an arbitration agreement – so-called 'torpedo' actions.

However, in the *West Tankers* decision, the Court of Justice did not address the interaction between the Brussels I Regulation and the New York Convention, a treaty governing the recognition and enforcement of foreign arbitral awards to which all EU Member States are party.

Reforms to the Brussels I Regulation

In 2012, the Brussels I Regulation was 'recast' to provide unified rules on conflicts of jurisdiction in civil and commercial matters and to ensure the rapid recognition and enforcement of judgments given in Member States. The recast Brussels I Regulation came into effect on January 10, 2015, and includes revisions to the arbitration exception.

Article 1 of the recast Brussels I Regulation continues to exclude arbitration from its scope. To address the issues raised by the *West Tankers* ruling, amongst others, the recast Brussels I Regulation clarifies (in its Recital 12) that there is an absolute exclusion of arbitration from its scope. It recognises 'the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ... which takes precedence over this Regulation'.

In the absence of an authoritative interpretation of the recast Brussels I Regulation, it is not clear whether the recast Brussels I Regulation prohibits anti-suit injunctions issued by Member State courts in support of arbitration.

The *Gazprom* decision

Many in the arbitral community hoped that the Court of Justice would use the *Gazprom* case to reconsider their position in *West Tankers*, especially in light of the recast Brussels I Regulation.

The Advocate General of the Court, Melchior Wathelet, issued his non-binding advisory opinion on December 4, 2014. He argued that the recast Brussels I Regulation overturned the *West Tankers* prohibition on intra-EU court anti-suit injunctions in support of arbitration.

The Advocate General's opinion stated that there was nothing in the Brussels I Regulation requiring the Court of Justice to refuse to recognise the tribunal's anti-suit award. In reaching this conclusion, he outlined two lines of reasoning:

- First, Recital 12 of the recast Brussels I Regulation showed how the arbitration exclusion must, and always should have been, interpreted. In Advocate General Wathelet's view, Recital 12 makes clear that, contrary to the *West Tankers* decision, an EU court could grant an anti-suit injunction in support of arbitration against court proceedings elsewhere in the EU. This reasoning not only supports the power of an EU-seated arbitral tribunal to grant an anti-suit award against court proceedings elsewhere in the EU, but also permits a Member State court to do the same.

- His second line of reasoning expressed a more conventional view. He opined that, since arbitral tribunals are not bound by the Brussels I Regulation, the matters in dispute should be left to national arbitration law. The Advocate General concluded that the Brussels I Regulation does not require the court of a Member State to refuse to recognise and enforce an anti-suit injunction issued by an arbitral tribunal, and the fact that an award contains an anti-suit injunction is not sufficient grounds for refusing to recognise and enforce it.

The Court of Justice only focused on the text of the Brussels I Regulation that was enacted in 2000, and did not interpret the recast Brussels I Regulation. The Court of Justice followed the Advocate General's second line of reasoning, holding that the Brussels I Regulation does not preclude an EU court from giving effect to an anti-suit award made by an arbitral tribunal. Rather, this matter should be resolved under the national arbitration law applicable in the Member State in which enforcement is sought, such as the New York Convention. The Court of Justice therefore held that proceedings for the recognition and enforcement of an arbitral anti-suit award are covered by national and international law, such as the New York Convention, and not by the Brussels I Regulation.

The court in *Gazprom* did not however address the impact of the recast Brussels I Regulation on its earlier decision in *West Tankers*. The question as as to whether the recast Brussels I Regulation permits anti-suit injunctions by Member State courts to protect arbitration agreements therefore remains unanswered.

> ... The *Gazprom* judgment is positive for arbitrations seated in the EU.

The future of anti-suit injunctions in Europe

The *Gazprom* judgment is positive for arbitrations seated in the EU:

- It confirms that the original Brussels I Regulation does not tie an EU court's hands in determining the effect to be given to an anti-suit award issued by an arbitral tribunal seated elsewhere in the EU.
- This conclusion endorses the primacy of the New York Convention regime to which all EU Member States (and more than 150 countries) are party. Moreover, the decision allows arbitrators greater power to protect the exclusive jurisdiction bestowed upon them by the parties.
- As a result of the *Gazprom* decision, however, it is conceivable that arbitral tribunals now have greater anti-suit powers than judges in EU Member State courts.

It still remains to be seen how the Brussels I Regulation will be interpreted and applied to arbitration matters. One outstanding issue after *Gazprom* is whether *West Tankers* will survive under the recast Brussels I Regulation. Unless *West Tankers* is overruled, parties with EU-centric disputes should consider obtaining any anti-suit injunctions from an arbitral tribunal by means of an award enforceable under the New York Convention, rather than going to the courts of the seat of the arbitration for an anti-suit injunction in support of the arbitration.

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Pro-arbitration decisions in Hong Kong and China

Alfred Wu and Muriel Cheng

Hong Kong courts have demonstrated a pro-arbitration stance in the first two quarters of 2015. We discuss the first anti-suit injunction granted by the Hong Kong court to enjoin foreign proceedings and the first constitutional challenge of the Arbitration Ordinance. And, in China, the Supreme People's Court has clarified confusion generated by the CIETAC split.

Astro – the Hong Kong episode

The Singapore Court of Appeal's decision in *PT First Media TBK v Astro Nusantara International BV and others* in 2014 attracted much attention. It decided that – under article 16(3) of the Model Law – a party that was dissatisfied with a ruling of a SIAC tribunal on a question of jurisdiction could withhold its challenge to that ruling in the Singapore court until after further awards were rendered against it in the arbitration. In other words, a party could leave its challenge to a decision on jurisdiction until the enforcement stage of proceedings.

In 2010, the Hong Kong court granted orders allowing Astro to enforce SIAC awards in Hong Kong against First Media. However, First Media did not immediately take any action to set aside the orders. In the interim, (i) Astro managed to obtain a garnishee order in Hong Kong against a loan by First Media; and (ii) First Media obtained a favourable decision in Singapore against the enforceability of a substantial part of the awards. First Media therefore later applied to the Hong Kong court to set aside the 2010 orders together with the necessary application for an extension of time to do so.

At first instance, First Media's application did not succeed. The judge considered it a well-established principle of Hong Kong law that an award-debtor seeking to resist enforcement of an award was under a general duty of good faith. This duty was wide enough to cover situations recognised as giving rise to an estoppel or waiver.

The court found that:

- First Media had not acted in good faith in deliberately reserving the jurisdictional point – not raising it while the arbitration was ongoing but only challenging on jurisdictional grounds during enforcement.
- First Media's delay in contesting enforcement was caused by a deliberate and calculated decision not to take action in Hong Kong. The court would not therefore assist First Media out of its predicament.

The court pointed out that the SIAC awards had not been set aside in Singapore. The position that the awards were valid and created legally binding obligations in Hong Kong therefore remained unchanged.

Constitutionality of the Arbitration Ordinance

In a case in March 2015[1] the Court of Appeal held that – in light of s84(3) of the Arbitration Ordinance and s14(3)(ea)(v) of the High Court Ordinance – there could not be any appeal from the decision of a Court of First Instance judge refusing leave to appeal a decision allowing a Mainland China arbitral award to be enforced.

It held that courts have a limited role in the enforcement of arbitral awards. It is a deliberate policy decision to restrict rights of appeal, so that parties' expectation of finality is met.

In July 2015, the Court of Appeal heard an application by China International Fund Limited (CIF) challenging the constitutionality of sections 81(4) and 84(3) of the Arbitration Ordinance.[2] CIF attempted to resist enforcement of an arbitral award in the Court of First Instance but failed. Its application for leave to appeal made to the Court of First Instance also failed. It then sought leave to appeal from the Court of Appeal arguing that, under article 82 of the Basic Law (the constitutional document of Hong Kong) the power of final adjudication should be vested in the Court of Final Appeal and should not be limited at the Court of First Instance level.

The Court of Appeal considered the issue to be of general public importance and allowed a full hearing of the issues before a three-judge bench – the first time the provisions of the Arbitration Ordinance have been subject to a constitutional challenge. On August 12, 2015, the Court of Appeal rejected the challenge, finding that the restriction of appeal to the higher court was both proportionate and constitutional. The court stated that the restriction was in line with the Ordinance's aims to provide a fast, final and binding dispute resolution process with limited intervention from domestic courts.

First Hong Kong anti-suit injunction to restrain foreign proceedings

In April 2015, in *Ever Judger Holding Co v Kroman Celik Sanayii Anonim Sirketi*,[3] the court held that Hong Kong courts would readily grant an anti-suit injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement to arbitrate in Hong Kong. This was particularly the case where the injunction was sought without delay and the foreign proceedings were not too far advanced. Strong reasons had

1 *Guangdong Changhong Electric Co Ltd v Inspur Electronics (HK) Ltd* [2015] 2 HKLRD 714.
2 *China International Fund Limited and others v Secretary for Justice* HCMP 2472/2014.
3 *Ever Judger Holding Co v Kroman Celik Sanayii Anonim Sirketi* [2015] 3 HKC 246.

to be shown by the defendant to dissuade the court that an injunction should not be granted.

The principle, according to the court, is that the parties should be held to their contract. Questions as to the balance of convenience or whether one forum is more appropriate than another are not relevant. The fact that there might be a risk of parallel proceedings and inconsistent decisions would not necessarily deny an anti-suit injunction.

The forensic nightmare

Traditionally, courts in Hong Kong have frowned upon issues in dispute between the same parties being split, to be decided in different fora. The modern approach[4] is to interpret an arbitration agreement upon the assumption that, unless they indicate clearly to the contrary, commercially-minded parties are likely to want all disputes to be decided by the same tribunal.

In July of this year, in *CPC Construction Hong Kong Limited v Harvest Engineering (HK) Limited*,[5] the court referred to a 'forensic nightmare' of possible parallel proceedings in litigation and in arbitration, since the arbitration clause in the subcontract covered the defendant's counterclaim, but not the plaintiff's claim under the loan and guarantee agreements (which were related to but not arising from the subcontract).

The court therefore only stayed the counterclaim in favour of arbitration and not the plaintiff's claim. Recognising that this left open the possibility of simultaneous litigation and arbitration proceedings, the court suggested that it might be appropriate to order a stay of the claim pending arbitration as a case management decision to avoid duplication of time and resources and possible inconsistent results. It considered there was bound to be considerable overlap in each forum. It then reserved its decision, allowing time for the plaintiff to respond.

Update on the CIETAC split

In China, the Supreme People's Court (SPC) has taken the welcome step of clarifying certain issues concerning arbitrations administered by the China International Economic and Trade Arbitration Commission (CIETAC), South China International Economic and Trade Arbitration Commission (SCIA), and Shanghai International Economic and Trade Arbitration Commission (SHIAC).

These issues arose following the controversial 2012 move by the Shenzhen and Shanghai sub-commissions of CIETAC to break away and establish themselves as separate arbitration commissions. This led to significant confusion in the China arbitration scene as to which institution should be competent to accept and administer arbitrations brought under clauses which provided expressly for disputes to be resolved by arbitration at the CIETAC Shenzhen and Shanghai sub-commissions.

The SPC published a notice of reply concerning judicial review of arbitral awards by CIETAC and its former sub-commissions. The Reply – effective from July 17, 2015 – is binding on all of China's lower courts. It provides as follows.

SCIA/SHIAC
SCIA/SHIAC will have jurisdiction over disputes arising from arbitration agreements entered into before the CIETAC Shenzhen sub-commission and CIETAC Shanghai sub-commission change of names to SCIA and SHIAC (on October 22, 2012 and April 8, 2013 respectively) (the Change of Names) which provide for the submission of disputes to these sub-commissions.

CIETAC
CIETAC will have jurisdiction over disputes arising from arbitration agreements entered into on or after the Change of Names which provide for the submission of disputes to the CIETAC Shenzhen sub-commission or the Shanghai sub-commission. However, where such an arbitration has been referred to SCIA or SHIAC and the respondent has not challenged its jurisdiction before an award is rendered, an application to have an award set aside or declared unenforceable after it has been rendered (on the basis that SCIA or SHIAC has no jurisdiction) will not be supported by the court.

Status of arbitrations accepted by CIETAC/SICA/SHIAC prior to July 17, 2015
If an arbitration accepted by CIETAC, SIAC or SHIAC prior to July 17, 2015 should not have been accepted, a party is not entitled to have an award set aside or declared unenforceable upon it being rendered on the basis of the lack of jurisdiction of the arbitral body.

Where more than one arbitral body has accepted jurisdiction before July 17, 2015, a party may apply to the Mainland China court prior to the first hearing of the arbitral tribunal for a determination on the validity of the arbitration agreement; a decision will be made by the court in accordance with the Reply. In the absence of such an application, the arbitral body that first accepted jurisdiction shall have jurisdiction.

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4 As stated in *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254.
5 *CPC Construction Hong Kong Limited v Harvest Engineering (HK) Limited and another* (HCA 2096/2013).

The IBA on conflicts of interest

Pierre Bienvenu and Alison FitzGerald

The 2014 *IBA Guidelines on Conflicts of Interest in International Arbitration* updates the original 2004 text with current practices. We look at five areas: advance waivers, issue conflicts, the duty to enquire, law firm issues and third-party funding.

The 2014 *IBA Guidelines on Conflicts of Interest in International Arbitration* (published by the International Bar Association), were approved on October 23, 2014. The IBA guidelines reflect the cumulative wisdom of arbitration practitioners, institutions and users over the past decade, and – although not binding – offer important guidance to parties and their lawyers, arbitrators and arbitral institutions on conflicts of interest.

They are often invoked by parties and their counsel as the basis for arguing challenges to arbitrator appointments, as well as by arbitral institutions as the basis for deciding such challenges. Accordingly, arbitration practitioners, arbitrators and users of arbitration should be aware of the key changes.

The review process

The IBA guidelines were reviewed by a diverse group of professionals (user community, counsel, arbitrators, etc.) representing different regions and communities.

They found that the original IBA guidelines struck a proper balance between different stakeholder interests and so set about identifying areas where they could be brought up to date through clarification or better reflect new practices.

By canvassing national practices, arbitral institutions and arbitration practitioners around the world, they identified areas of special interest, including the five picked out here:

1 advance waivers
2 issue conflicts and double hats
3 the duty to enquire
4 barristers' chambers and large firm issues
5 third-party funding.

Key changes to the IBA guidelines

The IBA guidelines now clarify that they apply equally to investment arbitration and to international commercial arbitration, as well as to legal and non-legal professionals serving as arbitrators. This removes any suggestion that different standards apply, depending on the type of arbitration or the professional calling of the arbitrator.

Similarly, General Standard 5 confirms that the IBA guidelines apply to tribunal assistants and secretaries, who are held to the same standard of independence and impartiality as arbitrators, irrespective of whether they are required to execute a formal declaration of independence and impartiality.

The five principal changes to the IBA guidelines' General Standards are discussed below.

1 Advance waivers

Increasingly, arbitrators are asking that parties waive in advance issues that may arise should other partners of an arbitrator's firm be instructed to act in unrelated matters involving parties to the arbitration, or one of their affiliates.

Not all legal systems allow a waiver in advance of non-existent (i.e. future) rights. The IBA guidelines do not take a position on the validity and effect of advance waivers, but do clarify that these waivers do not discharge arbitrators from the ongoing duty to disclose, established in General Standard 3.

Regardless of the terms of an advance waiver, the arbitrator seeking the waiver must disclose any facts or circumstances that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality. The revisions made to General Standard 3 reflect the approach generally taken by arbitral institutions to such waivers.

2 Issue conflicts and double hats

Issue conflicts concern an arbitrator's relationship with the subject matter of the dispute, e.g. where an arbitrator has previously expressed a legal opinion on an issue that arises in the case of a separate and unrelated arbitration.

'Double hats' refers to the practice of practitioners assuming dual roles as counsel and arbitrator.

Both practices raise the potential for bias, or the apprehension of bias, and problems of asymmetrical information between arbitrators.

The IBA guidelines provide general guidance on disclosure in General Standard 3. Part II of the guidelines also highlights the possible need to make disclosures in situations not listed in the Orange List – for example, disclosing the fact that an arbitrator currently acts as counsel in an unrelated case in which similar issues are raised.

3 Duty of parties/arbitrators to enquire

Under General Standard 7, both the parties to an arbitration and the arbitrators have an ongoing duty to make 'reasonable enquiries' to identify conflicts of interest.

In the revised guidelines, these duties have been clarified and, in the case of arbitrators, given additional rigour. There is greater guidance as to what constitutes a 'reasonable enquiry' for the purpose of satisfying the duty to enquire. Parties and arbitrators must investigate 'any relevant information that is

reasonably available to them' to satisfy their respective duties of disclosure, and reasonable enquiries must be carried out irrespective of whether an arbitrator is a member of a large firm or a small, boutique firm.

4 Barrister and law firm issues

Many arbitrators today come from large global legal practices and – regardless of structure – this increases the likelihood of conflicts.

General Standard 6(a) now clarifies that arbitrators are, in principle, considered to bear the identity of their law firm and that – when considering potential conflicts or disclosure – the activities of the arbitrator's law firm and the relationship of the arbitrator with the firm should be considered in each individual case. If the activities of an arbitrator's firm involve one of the parties, this will not necessarily constitute a source of conflict or a reason for disclosure, but it must be considered as a fact or circumstance that could do so.

A new scenario has been added to the waivable Red List where an arbitrator or his or her firm regularly advises the party or an affiliate of the party, and the arbitrator or their firm derives significant financial income therefrom.

The 2004 *guidelines* provided for disclosure of certain relationships within the past three years (e.g. past involvement as counsel to one of the parties or past appointments by one of the parties or its counsel): this three-year period is still considered adequate and is therefore maintained.

The IBA guidelines recognise that many barristers' chambers have evolved into specialised chambers marketed similarly to law firms and composed of both arbitration counsel and arbitrators. This – and the experience gained through published arbitration cases[1] – means that General Standard 7(b) now imposes a duty on the parties to disclose the identity of their counsel appearing in the arbitration and of any changes to their counsel team. The explanatory note to General Standard 6(a) notes that while barristers' chambers should not be equated with law firms for the purposes of conflicts, disclosure may be warranted in view of the relationships among barristers, parties or counsel.

General Standard 7(b) also provides that a party's disclosure of the identity of its counsel must be made 'at the earliest opportunity' to avoid late-rising conflicts that may prejudice the opposing party(ies) or jeopardise the proceedings.

5 Third-party funding

The practice of engaging a third-party funder to an arbitration can constitute a fact or circumstance requiring disclosure. Because of its direct economic interest in the dispute and its possible involvement in the conduct of the case, the third-party funder may have to be considered the equivalent of the party being funded.

The explanatory note to General Standard 6 sets out important definitions on third-party funders and insurers:

'[T]he terms 'third-party funder' and 'insurer' refer to any person or entity that is contributing funds, or other material support, to the prosecution or defence of the case and that has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.'

General Standard 7(a) now provides that a party shall inform the arbitrator, the tribunal and all other parties (as well as any administering or appointing authority) of any relevant direct or indirect relationship between the arbitrator and 'the party (or another company of the same group of companies or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in the award to be rendered in the arbitration' (i.e. a third-party funder or insurer).

Conclusion

The IBA guidelines working group adopted the approach 'if it ain't broke, don't fix it'. The original guidelines have generally withstood the test of time and the revisions reflect a gradual evolution in conflicts and disclosure rather than a dramatic departure from established principles, ensuring their usefulness as a tool for practitioners and institutions alike over the next decade.

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1 See e.g. *Hrvatska Elektroprivreda v The Republic of Slovenia*, ICSID Case No. ARB/05124, tribunal's ruling regarding the participation of a particular person in further stages of the proceedings, May 6, 2008.

The single economic entity concept

Singapore court rejects enforcement of arbitral award against related company

KC Lye and Nicholas Thio

Confirmation of separate legal personality

The Singapore High Court has confirmed in *Manuchar*[1] that the long-standing and well-established principle of separate legal personality remains applicable in the context of enforcement of arbitral awards. Singapore law is clear that limited exceptions exist for piercing the corporate veil. Beyond these exceptions, which are narrow in nature, situations where third-party non-signatories may be bound by an arbitration agreement are likely to be extremely limited.

The established law

It is well established that a company and its owner are separate legal persons. The landmark *Salomon* case[2] held that – save for very limited exceptions – the company has rights and liabilities of its own which are distinct from those of its shareholders. It is also generally accepted that consent is central to the formation of an arbitration agreement.

Combining these two concepts, only companies that have consented to an arbitration agreement may enforce arbitral awards or bear liabilities flowing therefrom. It also follows that third-party non-signatories, including their shareholders, are *prima facie* precluded from holding such rights and obligations.

There may be exceptions to this general rule. Some such exceptions are found in private law principles:

- assignment – when contracts are assigned from one party to another.
- agency – when agents conclude or perform contracts on behalf of principals.
- succession – when companies merge to form new entities, arbitral obligations might correspondingly be 'transferred'.

However, it would be a misnomer to refer to such doctrines as 'exceptions' to the rule of privity – these private law principles serve to *identify*, as a matter of law, the correct parties to the arbitration agreement.

We should also mention the *Dow Chemicals* decision (ICC case numbers 2375 and 5103) – a case that gave birth to the highly controversial 'group of companies' doctrine, known to be limited in application outside France. Under this doctrine, an arbitration agreement signed by one company in a group of companies entitles (or obligates) affiliate non-signatory companies, if the circumstances surrounding negotiation, execution and termination of the agreement show that the mutual intention of all the parties was to bind the non-signatories.

1 *Manuchar Steel Hong Kong Ltd v Star Pacific Line Pte Ltd* [2014] 4 SLR 832.
2 *Aron Salomon (Pauper) v A Salomon and Company, Limited* [1896] *UKHL* 1.

Manuchar

In July 2008, the steel company Manuchar chartered a vessel from SPL Shipping. A dispute arose resulting in Manuchar commencing arbitration in London. SPL Shipping failed to participate. In default, two arbitral awards were rendered in Manuchar's favour, leading to attempts to enforce the awards in Singapore.

Enforcement was ineffectual and Manuchar sought enforcement of the award against a third party, Star Pacific, on the grounds that SPL Shipping and Star Pacific were part of a 'single economic entity' as both were part of the same corporate group.

Manuchar then sought an order from the court for pre-action discovery of certain documents from Star Pacific to support this action. The court dismissed Manuchar's application. Among other things, it held that Manuchar's intended cause of action, even with sufficient evidence, was unviable at law.

The Singapore High Court's decision

This decision was based on the following grounds:

- Star Pacific was not party to the arbitration agreement. Using language borrowed from the Singapore Court of Appeal in the high-profile *PT First Media* case[3], the court noted that allowing enforcement against a non-party to the arbitration would be anathema to the 'internal logic of the consensual basis of an agreement to arbitrate'. It also cited the well-known decision of the English courts in the *Peterson Farms* case[4], and held that an arbitral tribunal has no jurisdiction to make orders binding on parties which have not entered into binding arbitration agreements.

- The Singapore High Court noted that there was a 'striking similarity' between the group of companies doctrine described above and the 'single economic entity' concept advanced in *Manuchar*. The Singapore High Court, following the *Peterson Farms* decision, noted that the approach embodied by the group of companies doctrine had been described in that case as being 'open to a number of substantial criticisms' and 'seriously flawed in law'. In so doing, the Singapore High Court held that it was 'beyond doubt that an arbitral award cannot impose enforceable obligations on strangers to an arbitration agreement'.

- The 'single economic entity' concept relied upon by Manuchar was conceptually difficult to reconcile with the established doctrine of separate legal personality and the narrow exceptions for the piercing of the corporate veil. This basic tenet of company law ensures that businesses can structure their transactions to take advantage of benefits conferred by law. Only in very limited circumstances of abuse, such as evasion of the law or frustration of its enforcement, can the corporate veil be pierced.

The court also compared the unidirectional movement of liability (in the direction of the ultimate controller), when abuse of the corporate form occurs, to the multidirectional movement of liability should the proposed single economic entity concept be held valid. In the former situation, parent companies would only be liable for obligations of their subsidiaries. However, in the latter, companies could be held liable for the obligations of both their subsidiary companies as well as other related companies (e.g. 'sister' companies). Conceptually, the High Court was concerned that the idea of 'one for all, all for one' under the 'single economic entity' concept would have wide-reaching implications.

As a practical example, the High Court referred to the well-established practice of one-ship companies. Regarded as legitimate practice for shipping businesses to limit their liability, it is settled law that a one-ship company is not liable for losses caused by a sister ship owned by another company.

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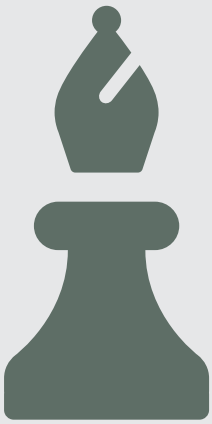
3 *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372.
4 *Peterson Farms Inc v C&M Farming Ltd* [2004] 1 Lloyd's Rep 603.

English Commercial Court

Tactical stay of execution rejected

Deborah Ruff and Julia Belcher



An English court refused to stay execution of an order giving permission to enforce a New York Convention award, the stated purpose of which was tactical. The judge stressed that the court retains discretion in these circumstances to stay, although discretion will rarely be exercised.

Can the court stay an order to enforce an award?

Under the Arbitration Act 1996 (the Act)[1], English courts should grant permission to enforce a New York Convention (NYC) arbitration award 'in the same manner as a judgment or an order' of an English court – and the award creditor can elect to turn the award into an English judgment.

There are limited ways for a debtor under an NYC award to resist or delay such enforcement. These are set out at section 103 of the Act, which enacts Article V of the New York Convention grounds.

H&C S Holdings v Rbrg Trading (UK) Limited[2]

This recent case before the English Commercial Court involved a dispute between the claimant, a Singaporean company, and the defendant, an English company. It tested whether – if no NYC grounds have been argued (or, if argued, made out) and the award creditor has elected to turn the NYC award into an English judgment – there remains any residual discretion under which the English court can none the less stay enforcement and, if so, what the threshold would be.

The most common grounds for petitioning the court to stay enforcement of an award under Part 83 of the English Civil Procedure Rules (which govern English litigation proceedings) are:

- The existence of claims to set aside or suspend the award before a foreign court in the seat of the arbitration.
- The award debtor advances counterclaims or cross-claims in excess of the award debt, and there is doubt that the award creditor can repay the amounts counter or cross-claimed.

In both cases, the court has power to grant a stay of execution of an award. The overall test is whether there are any 'special circumstances which render it inexpedient to enforce the judgment or order'.

In *H&C*, the English court denied the stay application on the particular facts. Following the *Far Eastern*[3] decision (see below), it clarified that residual jurisdiction to do so did exist, but confirmed that it would only stay execution of an NYC award in very limited circumstances.

H&C: the facts of the case

The original dispute arose from a contract for the sale of Brazilian iron ore in 2009. It was referred to and decided by a sole arbitrator in Singapore, who issued an award in favour of the claimant for US$1.9 million (with interest). The claimant obtained an order giving it permission to enforce the award.

1 Section 101 – fulfilling New York Convention obligations.
2 *H&C S Holdings Pte Limited v Rbrg Trading (UK) Limited* [2015] EWHC 1665 (Comm).
3 *Far Eastern Shipping Co v AKP Sovcomflot* [1995] 1 Lloyd's Rep 520.

Subsequently, the defendant commenced another arbitration in Singapore, relating to an earlier iron ore agreement (also dated 2009), claiming US$1.5 million as an allegedly 'admitted debt' and damages of around US$0.9 million.

The defendant then applied for a stay of execution of the award pending determination of its new case in arbitration on the grounds that the stay would ensure that the claimant was 'motivated to cooperate in the pursuit of the second arbitration and not to delay its outcome'. There was no suggestion on the part of the defendant that there were any concerns as to the enforcement of any award it might obtain in the new arbitration against the claimant. The defendant also offered to pay the full amount of the award and costs into court as a condition of the stay.

Mr Justice Phillips dismissed the defendant's application.

- He rejected the defendant's contention that the close link between the two iron ore sale contracts – which could have given rise to an equitable set-off in relation to claims arising from them if they had been decided together – was sufficient to amount to a 'special circumstance' under CPR Part 83 Rule 7.4.
- The judge noted that the defendant made its claim 'belatedly' and had failed to foreshadow it in any way during the preceding five years.
- He also found that, although the second iron ore contract was briefly referred to in the transcripts of the arbitration hearing, there was no suggestion of any claim arising out of the second contract.
- He rejected the defendant's argument that it was 'understood' that the US$1.5 million was admitted by the claimant, as no evidence of this belief was put before him.
- He rejected the defendant's submission that it should be entitled to a stay of execution 'for no more than the tactical purposes of giving the claimant an incentive not to delay the defendant's new arbitration', as this would not render the enforcement of the award 'inexpedient' to satisfy the requirements of CPR Part 83 Rule 7.

However, he went on to quote Potter J in the *Far Eastern* case (decided under the 1975 Arbitration Act), who said that 'having elected to convert an award into an English judgment, the plaintiff ought in principle to be subject to the same procedural rules and conditions as generally apply to the enforcement of such judgments' and that 'once judgment has been entered in terms of the award, it shall [not] for the purposes of enforcement be treated in any different manner from any other judgment or order' and, consequently, be subject to the English court's power to stay execution of the judgment under the Civil Procedure Rules. Accordingly, he took the view that the court did retain discretion to stay enforcement of an award in appropriate circumstances, but held that it would be inappropriate to exercise that jurisdiction on these particular facts.

> ... English courts will rarely ... regard it as appropriate to make an order to stay enforcement in respect of a New York Convention award ...

What will come from this?

Phillips J confirmed in the *H&C* case that the test for grant of a stay of enforcement of any English judgment is one of 'expediency', and where no circumstances exist which would render the enforcement inexpedient, an application for stay would not succeed. He stressed, citing *Far Eastern*, that the English courts will rarely, if ever, regard it as appropriate to make an order to stay enforcement of a New York Convention award when the grounds for stay or refusal have not been made out. Residual discretion to do so does exist.

The *H&C* case raises interesting issues about the interaction between the NYC and the English Civil Procedure Rules in the context of enforcement of NYC arbitration awards. There may be tactical advantages in seeking to enforce an English judgment rather than the NYC award, but, based on *H&C*, the award creditor should bear in mind that it will be required to comply with the conditions for the enforcement of foreign judgments in England, including residual discretion of the court to stay enforcement. A decision of the higher English courts on the issue is still awaited.

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Privilege in the United States

Anne Rodgers and John Byron

An important component of doing business and defending a lawsuit is the ability to obtain open and candid advice from your lawyer knowing that the advice received will not be subject to disclosure. We highlight the key features of privilege law in the United States.

In an arbitration, matters of privilege are complex. This is because the recognition of privilege is generally based on the rules promulgated by the organisation that hosts the arbitration.[1] What is clear from the rules of many arbitral organisations is that arbitral panels are given broad discretion with respect to the recognition of privilege. That being the case, it is important for the participants in an arbitration to be aware of all potentially applicable privileges.

What is clear from the rules of many arbitral organisations is that arbitral panels are given broad discretion with respect to the recognition of privilege.

How may parties to an arbitration know whether they have a valid privilege claim under United States law? There is no single law on privilege in the United States, as both federal and state laws may apply. There are two main types of privilege protection under US law that may protect a document against disclosure. These are the attorney–client privilege and work product protection.

Attorney–client privilege

Under US law, the attorney–client privilege generally protects communications between in-house or external counsel and their clients that are intended to be and are kept confidential; and that are made for the purpose of seeking or obtaining legal advice or assistance.[2]

Emails and other information provided by in-house lawyers to company personnel (and vice versa) about business (as opposed to legal) issues are not usually protected by the attorney–client privilege. As a corollary, a document or email will ordinarily not be protected by simply copying an attorney. The communication must be made with the primary purpose of obtaining or providing legal advice or services.

When external counsel is engaged for a company, there is a presumption that counsel represents the company that engaged him or her, rather than any employees of the company. A difficult question arises as to which individuals within the company can speak on behalf of the company to the lawyer so that the company privilege applies to their communications. In *Upjohn Co. v United States*, the Supreme Court helped resolve that question by finding that employee communications are protected by the company privilege if they are made to counsel at the direction of company superiors; they concern matters within the scope of employees' in-house duties; the information is not available from upper-level management; and the employee was made aware that he or she was being questioned in order for the company to receive legal advice.[3]

Communications involving agents (of the attorney or the client) may also be protected by the attorney–client privilege. Communications between an agent of the attorney (such as an accountant) and the client may be privileged if the purpose of the communication is to facilitate the rendering of legal advice by the lawyer.[4] Communications by an attorney with an agent of the client (who is not simply acting as a conduit or facilitator of attorney–client communications) may be privileged if the agent is authorised to act or speak for the organisation on the subject matter of the communication (i.e. if the agent is the functional equivalent of the client).

Work product protection

US law protects certain information, not otherwise protected under the attorney–client privilege, from disclosure when it qualifies for work product protection.[5] This doctrine, known as the work product doctrine, protects both tangible and intangible work product[6] and encompasses documents prepared in anticipation of litigation or for trial. Actual litigation is not necessary but there needs to be a threat of litigation. In some jurisdictions, a threat of litigation is present when litigation is imminent. In others, there need only be a credible probability that litigation will ensue. In the context of government investigations, courts generally find that litigation is imminent or that there is a credible probability that litigation will ensue once the investigation has begun.

1 For example, while the United Nations Commission on International Trade Law Arbitration Rules allows the arbitration tribunal to require the production of documents and other evidence, it leaves the question of admissibility to the discretion of the tribunal and does not provide guidance on how to deal with a party's assertion of privilege. As another example, the rules of the International Centre for Dispute Resolution, which is the international dispute division of the American Arbitration Association, explicitly direct the tribunal to account for issues of privilege.

2 The purpose of the attorney-client privilege is 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' *Upjohn Co. v United States*, 449 US 383, 389 (1981).

3 *Upjohn Co. v United States*, 449 US 383 (1981).

4 In *In re Kellogg, Brown & Root, Inc.*, the US Court of Appeals for the DC Circuit found that communications by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege. 756 F.3d 754 (DC Cir. 2014). This includes interview notes conducted by non-attorneys at the direction of an attorney. *Id.*

5 The work product doctrine is governed by the common law and various rules of civil procedure. See, e.g. *Hickman v Taylor*, 329 US 495 (1947); Fed. R. Civ. Proc. 26(b).

6 The Federal Rules of Civil Procedure only apply to tangible work product. See *Hickman v Taylor*, 329 US 495, 512-13 (1947); Fed. R. Civ. Proc. 26(b)(3). Intangible work product may be protected by the common law work product doctrine.

There are two types of work product: ordinary work product and opinion work product.

Ordinary work product

Ordinary work product consists of factual material gathered by the attorney, and can include information obtained from the client and third parties. Ordinary work product is subject to a qualified privilege. It can lose its protection from disclosure if opposing counsel can show a substantial need for the work-product material and a hardship in obtaining the needed material by other less intrusive means.

Opinion work product

Opinion work product is work that includes the attorney's mental impressions, conclusions, opinions, or legal theories and it is considered nearly sacrosanct and afforded strong protection against disclosure.

Notes or memoranda of interviews of company personnel conducted by in-house or external counsel may be protected by both the attorney-client privilege and attorney work product doctrine. To ensure strong work product protection, the notes should include the mental impressions of the lawyer where appropriate and should not be disclosed. The underlying facts may not be privileged and could be sought by third parties, including regulators, if relevant to a legal proceeding or government investigation.

Waiver of privilege

Information or documents protected under the attorney–client or work product privileges can be waived, including through disclosure to government regulators,[7] parties to legal proceedings, or a company's outside auditors. Privilege can also be waived by broad dissemination within a company. The law varies among US jurisdictions and should be carefully reviewed prior to disclosure.

The sharing of information with experts, including accountants, retained for the specific purpose of assisting in-house or external counsel in an investigation or litigation may be protected by the attorney–client and work product privileges.

Sharing information with a third party that has a common interest in a pending or prospective litigation may also be protected under the common interest doctrine. The parties must agree to maintain the confidentiality of shared information at the outset and not after information is provided. The agreement may be oral or in writing.

An important concept under US law is subject matter waiver of privileged information. For instance, US Federal Rule of Evidence 502 provides that the disclosure of information covered by the attorney–client or work product privileges can result in the waiver of even undisclosed information on the same subject matter. The three factors considered by courts in making that determination are whether:

- the waiver was intentional
- the disclosed and undisclosed information concern the same subject matter
- the disclosed and undisclosed information 'ought in fairness be considered together'.

Conclusion

US law provides relatively strong protection for lawyer communication and materials prepared in anticipation of litigation. Privilege issues, however, are fact specific and must always be evaluated on a case-by-case basis.

Anne Rodgers is a partner and John Byron is an associate in the Houston office of Norton Rose Fulbright.

7 Compelled disclosure by a government agency of work product does not necessarily waive work product protection for the document.

International arbitration at Norton Rose Fulbright

Our review of 2015

Stay up to date on current developments in international arbitration with our international arbitration video series available on our website.

Awards and appointments

Arbitrator Intelligence
Elisabeth Eljuri was appointed to the advisory board of Arbitrator Intelligence, a non-profit organisation that aims to promote fairness, transparency and accountability in the selection process for international arbitrators by making information more readily available

Award
International Legal Alliance Summit & Awards
Winner, Best USA law firm: international arbitration 2015 (Winner for the third year in a row)

IBA
Martin Valasek was appointed to the Steering Committee of the IBA Arbitration Guidelines and Rules Subcommittee

ICC International Court
Pierre Bienvenu was appointed as alternate member of the ICC International Court of Arbitration for a three-year term. This appointment coincided with the conclusion of Mr Bienvenu's five-year term as member, and vice-president, of the LCIA Court

ICC task force
James Rogers was appointed to the task force on emergency arbitrator proceedings of the ICC Commission on Arbitration and ADR

SIAC
Sherina Petit, James Rogers, KC Lye, and Darius Chan were appointed to the SIAC Users Council, a body consisting of leading practitioners and users of arbitration for the improvement of SIAC Rules and services

YCAP
Catherine Rousseau-Saine was appointed to the board of directors of the Young Canadian Arbitration Practitioners

Activities

Coaching – Harvard Law School Vis moot
Mark Stadnyk coached the Harvard Law School Vis moot team at the Vienna rounds; one of his oralists was second runner-up for best individual oralist (out of 2000+ competitors). Mark Stadnyk has been working with the Harvard Vis team since 2010

Coaching – University of Houston Vis East moot
Lucy Greenwood was a coach to the University of Houston Vis East international arbitration moot team, March 2015

Lecturing – Arbitration Center, Peruvian Chamber of Commerce
Pedro Saghy was invited by the Arbitration Center of the Peruvian Chamber of Commerce to lecture in the international arbitration diploma, August 2015

Mock arbitrations – CIETAC, Beijing, Hong Kong and Shenzhen
James Rogers and Matthew Townsend participated in mock arbitrations conducted under the arbitration rules of CIETAC Hong Kong, June, July 2015

Training – CIArb, North America
Lucy Greenwood was co-lead instructor at the Chartered Institute of Arbitrators' training course for international arbitrators in Washington DC, July 2015

Workshop – Foundation for International Arbitration Advocacy
Martin Valasek was a faculty member at the Foundation for International Arbitration Advocacy's expert witness workshop at George Washington University Law School, Washington DC, June 2015

Speaking engagements

Canada/Business Law Summit
Martin Valasek – Québec-Ontario Business Law Summit: choice of law and choice of venue, Toronto, May 2015

Dominican Republic/ICC YAF
Pedro Saghy – ICC YAF: *componentes para un buen arbitraje*, Santo Domingo, April 2015

Hong Kong/CIETAC
Matthew Townsend – Hong Kong Arbitration Week, panel discussion on enforcement, CIETAC Hong Kong, October 2014

Hong Kong/ICDR
Matthew Townsend – ICDR Young & International Annual Teahouse debate: emergency arbitrators, Hong Kong, March 2015

Italy/Juris
Mark Baker – Juris conference: cross-examination in international arbitration – making the best use of good material, Venice, April 2015

Mexico/ICC World Energy Congress
Elisabeth Eljuri – World Energy Congress, ICC: international arbitration developments in Latin America, Mexico City, August 2015

Mexico/Seventh Treaty Arbitration Forum
Elisabeth Eljuri – Seventh Treaty Arbitration Forum: the Mexican energy reform, Mexico City, July 2015

UAE/CIArb
Charlotte Bijlani – CIArb UAE Branch International Conference: guerrilla tactics in arbitration, Dubai, November 2014

UK/Beijing Arbitration Commission
Trevor Tan – Beijing Arbitration Commission's Annual Summit on commercial dispute resolution in China: international trade and dispute resolution, London, July 2015

UK/ICC
Deborah Ruff – ICC Annual Arbitrators' Forum London, December 2014

UK/IEL/SEERIL
Kevin O'Gorman – IEL/SEERIL International Oil and Gas Law Conference, dispute resolution module (co-chair), London, June 2015

UK/LCIA
Mark Baker – LCIA European Users' Council symposium: questions of evidence; diversity, Tylney Hall, May 2015

US/Commercial Bar Association
Mark Baker – COMBAR: interference with foreign investments and proceedings under the ICSID Convention, Washington DC, April 2015

US/ICC
Elisabeth Eljuri – ICC annual conference in Latin America: arbitration in energy disputes (session chair), Miami, November 2015

US/ICDR
Elisabeth Eljuri – ICDR 20th anniversary, Miami International Arbitration Conference (chair), January 2016

US/Young ICCA
Lucy Greenwood – Young ICCA conference: cultural differences in oral advocacy and witness preparation, Houston, June 2015

Publications

Arbitration International
Lucy Greenwood on gender diversity in international arbitration, 2015

Brazilian Review of Arbitration
Pedro Saghy on 'La renuncia tácita al arbitraje', 2015

Energy Investment Disputes in Latin America: the pursuit of stability
Elisabeth Eljuri (co-author), *Berkeley Journal of International Law*, 2015

Getting The Deal Through: energy disputes
Neil Q Miller and Willie Wood (contributing editors), Law Business Research, 2015

Hong Kong Arbitration Ordinance, Commentary and Annotations
James Rogers (contributing editor), Sweet & Maxwell, Hong Kong Commentary and Annotations Library, 2015

International arbitration
Ernie van Buuren, Professor Martin Davies, Melissa Tang, Claire Bolster (co-authors of Australia chapter), *Global Legal Insights*

International Arbitration Law Review
Matthew Townsend on PRC rules on civil procedure, 2015

Kluwer arbitration blog
Matthew Townsend on the Chinese Supreme People's Court and issues arising from the CIETAC split, August 2015

Kluwer arbitration blog
Wynne Mok and Matthew Townsend on the first anti-suit injunction issued by the Hong Kong court in restraint of foreign court proceedings, July 2015

The Leading Practitioners' Guide to International Oil & Gas Arbitration
Elisabeth Eljuri (co-author), Juris, 2015

The Leading Practitioners' Guide to International Oil & Gas Arbitration
Kevin O'Gorman and Mark Stadnyk (co-authors of chapter, 'Arbitration and Joint Operating Agreements'), 2015

Transnational Dispute Management
Lucy Greenwood on diversity in international arbitration, TDM, 2015

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Sydney
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Norton Rose Fulbright

International arbitration

At Norton Rose Fulbright, we combine decades of international arbitration experience with a commercial approach to offer our clients the very best chance of determining their disputes promptly, efficiently and cost-effectively. Our international arbitration group operates as a global team, regardless of the geographic location of the individual.

We deliver experience across all aspects of international arbitration, from commercial arbitrations to investment treaty arbitrations; skilled advocates experienced in arguing cases before arbitral tribunals, who will oversee the dispute from start to final award; and a commercial approach from a dedicated team experienced in mediation and negotiation and skilled in promoting appropriate settlement opportunities.

Dispute resolution

We have one of the largest dispute resolution and litigation practices in the world, with experience of managing multi-jurisdictional disputes across all industry sectors. We advise many of the world's largest companies and financial institutions on complex, high-value disputes. Our lawyers both prevent and resolve disputes by giving practical, creative advice which focuses on our clients' strategic and commercial objectives.

Our global practice covers alternative dispute resolution, international arbitration, class actions, fraud and asset recovery, insolvency, litigation, public international law, regulatory investigations, risk management and white collar crime.

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