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Litigation & Dispute Resolution

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Editorial Enquiries
Editor@corporatelivewire.com

Advertising Enquiries
advertising@corporatelivewire.com

General Enquiries
info@corporatelivewire.com

Corporate LiveWire
The Custard Factory
Gibb Street
Birmingham
B9 4AA
United Kingdom
Tel: +44 (0) 121 270 9468
Fax: +44 (0) 121 345 0834
www.corporatelivewire.com

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Introduction

By James Drakeford

Not only are disputes both commonplace and highly disruptive, they can also be very costly. Organisations need to be on the ball when it comes to both litigation and dispute resolution and need to cover everything from financial regulation and compliance right the way through to employment disputes. And it's not just about resolving disputes when they arise. It is also about ensuring systems are in place that will minimise the risk of litigation happening in the first place. What we have seen, especially in light of economic turmoil, is that attacks can come from all angles.

2012 is already shaping up to be a year of 'more' – more regulatory investigations, more discovery disputes and more demand for experts in a range of specialisations. Hot on the agenda for this year have been e-discovery and electronic litigation, stricter regulatory investigations with the so-called Volcker Rule and the continued rise in patent infringement litigation.

As we highlighted in our Intellectual Property Roundtable there has been an on-going demand for companies to expand their trove of patents and one of the recurring themes throughout this year so far has been the rise of patent infringement litigation.

Many companies see their IP as their most rock-solid asset and the protection of IP from infringement or theft and enforcing IP licensing along with other rights is seen as a key priority. From TiVo's numerous disputes with Microsoft, Cisco and Verizon to the lengthy mediation between Samsung and Apple – expect this one to stay around for the duration.

e-Discovery and electronic litigation has also seen a rise through 2012. From 27 July, parties in South Africa will be able to serve documents or notices on each other via facsimile or electronic mail. This follows an amendment to the High Court Rules of South Africa aimed at facilitating the efficiency of the South African judicial system. Already across USA and the EU, cloud computing has started to take off among lawyers for various applications, from law practice management to document storage but now it is enjoying a much greater role, particularly in e-Discovery due to its scalability, economy and ease of use.

It is quite fitting that we have chosen the start of August to bring you our Litigation and Dispute Resolution guide as this happens to coincide with the introduction of the biggest development in this sector for some time. July marked the introduction of the controversial Dodd-Frank Volcker Rule which is likely to cause great turmoil in banking and finance while setting off a chain reaction of cases involving banking and financial institutions. Initially many of these matters will be regulatory investigations which will then in turn help breed enforcement litigations, class-action lawsuits, and other actions against these institutes.

Speaking of class-action lawsuits, recent reform in Hong Kong has moved them a step closer to introducing a class action regime with the publication of the Report on Class Actions by the Law Reform Commission. If this report is followed, the introduction of a class action lawsuit regime pursuant its terms would remove some of the current barriers to multi-party action in Hong Kong, and facilitate judicial remedies. The report recommends that class actions be introduced on an incremental basis, and initially be permitted only with respect to "consumer cases" - tort and contract claims by consumers in relation to goods, services and property.

Staying with Asia, Singapore has recognised the importance of alternative dispute resolution mechanisms which tend to resolve disputes more quickly and keep costs to an absolute minimum.

Recent legislative changes have changed the way that 'arbitration agreement' is defined under the terms of the International Arbitration Act in order to enable arbitration agreement to be concluded orally, by conduct or through other means which will be considered as agreed upon providing its content is in some form recorded.

The amendments also include the possibilities of parties appealing to Singapore's High Court if a Tribunal decides it does not have jurisdiction to hear cases, while Tribunals will also be able to force parties in disputes to pay interest on any money they owe following a ruling.

This has significantly boosted Singapore's position around the globe as businesses are now more likely to choose Singapore as a location for bringing disputes to international arbitration.

Finally, during a Presidential Election year in the United States it is difficult to find an aspect of the economy that doesn't contain at least one heated discussion. In litigation and dispute resolutions this topic happens to be an area which we recently featured in our Energy and Natural Resources 2012 guide last month, and if you haven't already guessed, we are referring to the controversial hydraulic fracturing – better known as 'fracking'.

Up until now, the Obama Administration has remained relatively quiet and at unease with regard to fracking, but after a lengthy silence, they have issued an executive order on natural gas with the launch of an inter-agency taskforce on natural gas production, wading into the debate and stirring up the possibility of additional litigation in the energy sector.

With public awareness – and opposition – to the issue gaining momentum, and Barack Obama facing re-election in November, it is likely the president will seek a happy medium between environmentalists, landowners and companies while a resolution is sought. But after November, who knows what will happen when the gloves are off?

International Banks in the Crosshairs: Cross-Border Judgment Enforcement in New York

By Gregory A. Litt

Skadden

As the world of international transactions expands, cross-border judgment enforcement has become an increasingly important part of litigation and arbitration strategy, and successful parties often resort to aggressive judgment enforcement techniques in attempts to satisfy judgment debts. A recent decision by the chief judge of the federal district court in Manhattan may have begun to release international banks from the uncertainty of an ambiguous regime of judgment enforcement with respect to assets held by those banks outside the United States. This regime, which has reigned in New York for the past three years, is a result of the 2009 decision by the New York Court of Appeals – New York's highest state court – in Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533 (2009) ("Koehler").

In Koehler, a judgment creditor, Koehler, sought a turnover order against Bank of Bermuda's Bermuda branch, which heldstock certificates owned by a judgment debtor. The New York Court of Appeals held that a New York court may order a bank to deliver property of a judgment debtor to a judgment creditor even though that property is held by the bank outside New York, so long as the court has personal jurisdiction over the bank in New York. Notably, Bank of Bermuda had consented to the jurisdiction of the courts in New York, a fact emphasised by the Court of Appeals. SeeKoehler, 12 N.Y.3d at 536; see also Koehler v. Bank of Bermuda Ltd., No. M18-302, 2005 WL 551115, at *12 (S.D.N.Y. Mar. 9, 2005), vacated, 577 F.3d 497 (2d Cir. 2009).

In the years since Koehler, judgment creditors have sought to use the court's holding to reach judgment debtors' assets held in foreign bank branches that, unlike Bank of Bermuda in Koehler, have not consented to personal jurisdiction in New York. The judgment creditors in those cases have served petitions to turnover assets on the foreign banks' New York branches, arguing that the presence of a New York branch allows the New York courts to exercise jurisdiction over the entire bank.

Given that well over 100 foreign banks from dozens of countries maintain branches or agencies in New York, see www.federalreserve.gov/releases/iba/201112/bytype.htm (last visited July 10, 2012), judgment creditors may seek to use a foreign bank's New York presence – however small – as a portal to try to reach into depositors' accounts and other assets held outside the United States, bypassing judgment enforcement laws and regulatory regimes in other countries around the world. If the effort is successful, international banks subject to personal jurisdiction in New York could be faced with endless enforcement proceedings before the New York courts. This, in turn, may spawn parallel – and potentially conflicting – anti-turnover litigation in the foreign branches' home countries. See, e.g., Prodprogramma-Impuls Ltd. v. Bank of India,Nos. 12 Civ. 3036, 11 Civ. 5559, 2012 WL 2411809, at *3 (S.D.N.Y. June 25, 2012).

In this respect, judgment creditors have been forced to contend with a longstanding rule of New York law known as the "separate entity rule." Under this rule, bank branches that are not separately incorporated nevertheless historically have been treated as separate jurisdictional entities from their sister branches in other countries for judgment enforcement and other purposes. Under the separate entity rule, serving process on a New York branch of a foreign bank would not be sufficient to establish jurisdiction over the bank's foreign branches where a judgment debtor may have accounts or assets.

After Koehler, New York's state courts have steadfastly held that the separate entity rule remains intact, and cannot be abrogated absent legislative action or a clear statement to that effect by the Court of Appeals. For instance, in Global Technology, Inc. v. Royal Bank of Canada, No. 150151/2011, 2012 WL 89823 (N.Y. Sup. Ct. Jan. 11, 2012), a state court held that "under the separate entity rule, service of the petitioner's restraining notice upon respondent's branch in Manhattan did not restrain [the judgment debtor's] bank accounts in Canada." Id. at *13. See also, e.g.,Samsun Logix Corp. v. Bank of China, No. 105262/10, 2011 WL 1844061 (N.Y. Sup. Ct. May 12, 2011).

In contrast, certain federal district court judges sitting in Manhattan have been more equivocal about the survival of the separate entity rule after Koehler. For instance, in a January 2011 decision, one district judge took the view that "Koehler indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings." JW Oilfield Equip., LLC v. Commerzbank, AG, 764 F. Supp. 2d 587, 595 (S.D.N.Y. 2011). The court appears to have based its decision, in part, on a concession by Commerzbank that the separate entity rule had been preempted in certain instances. Id. Nine months later, another district judge cited JW Oilfield approvingly and rejected contrary precedents from the New York state courts. Eitzen Bulk A/S v. Bank of India, No. 09 Civ. 10118, 2011 WL 4639823 (S.D.N.Y. Oct. 5, 2011).

Courts and commentators took note of the growing split between and the state and federal courts, and the state court in Global Technology even observed in January 2012 that "[f]ederal courts are deeply divided from New York trial-level courts on this issue." Global Technology, 2012 WL 89823, at *1.

However, in March 2012, Judge Loretta Preska, Chief Judge of the federal district court in Manhattan, in a detailed decision, expressed the view that the foregoing federal decisions did not reflect the overall view of the federal courts, and joined the New York state trial courts in holding that the separate entity rule remains the law of New York. Hamid v. Habib Bank Limited, No. 11-cv-920, 2012 WL 919664 (S.D.N.Y. Mar. 14, 2012), app. pending, No. 12-1481-cv (2d Cir.) In Hamid, a judgment creditor petitioned for turnover of the judgment debtor's assets by Habib Bank Limited.

The petitioner served Habib's New York branch even though it alleged that the judgment debtor's assets were held by a Habib branch in Pakistan. The court declined the petitioner's invitation to discard the separate entity rule, and refused to order Habib to turnover assets held by the Pakistani branch.

> *"After Koehler, New York's state courts have steadfastly held that the separate entity rule remains intact, and cannot be abrogated absent legislative action or a clear statement to that effect by the Court of Appeals."*

The Hamid court took the view that if the New York Court of Appeals intended to abrogate the longstanding separate entity rule, "it is not unreasonable to expect that . . . it would have said so." Id. at *5. The court also pointed out that there are "significant policy principles underlying the separate entity rule," including "the 'intolerable burden' that would otherwise be placed on banking and commerce if mere service of a writ to a New York branch could subject foreign bank branches to competing claims" in New York and the foreign jurisdiction. Id.

It remains to be seen whether the appellate courts in New York will act in Hamid or another case to address the viability of the separate entity rule after Koehler. Standing alone, the Hamid opinion is a first instance decision that is not binding on other federal judges, but it may influence them to fall in line with the New York state courts and restrict the ability of judgment creditors to use local branches of foreign banks to enforce judgments against assets around the world.

Gregory A. Litt is counsel in litigation and international arbitration in the New York office of Skadden, Arps, Slate, Meagher & Flom LLP. This article does not necessarily represent the views of Skadden Arps or any one or more of its clients.

Mr. Litt represents clients in complex commercial disputes before state and federal courts and domestic and international arbitral tribunals, and he is actively litigating matters concerning the issues addressed in this article. He has represented clients in a wide range of international corporate, commercial and securities disputes in a variety of industries, including aviation, energy, finance, hospitality, and insurance.

Mr. Litt can be contacted by phone on +1 212 735 2159 or alternatively via email at Greg.Litt@Skadden.com.

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The Lawyer's "Duty-to-Know & Duty-to-Tell" in Third Party Funding: A Time to Recognise & Respect these Obligations

By Selvyn Seidel

Introduction & Overview

A lively focal point in the Third Party Funding industry has been the obligations of the Funders. In the UK that interest and related inquiries and analyses have resulted, after three years of study and debate, in the November 2011 launch of a UK Code of Funding about the Funders' obligations. In the US, we have seen similar studies by the American Bar Association and others, with publications of white papers and other reports relating to Funders' obligations.

It is now time that the obligations of others in the market and industry receive equal attention and helpful guidelines. In this respect, the spotlight should fall, as a priority, on the legal and ethical obligations of the lawyers for the claimants. In a recent media article, the question of lawyers' obligations was raised with various professionals, and those interviewed said that there should be obligations imposed on the lawyers. This article was first published by Commercial Dispute Resolution, a leading journal on litigation, arbitration and funding, on 9th July 2012.

To kick off what hopefully will be a deep research dive into the area, this article contends that lawyers have what should be called a "Duty-to-Know, and Duty-to-Tell" their clients about Third Party Funding. Only if the lawyer has and fulfills these duties can their clients be given what they need to decide whether or not to seek Funding, and if so, how? what kind? and from whom?

Ethical Duty

The duty seems to be both an ethical duty and a separate legal one. This is the case at least if one focuses on the two most active litigation and funding jurisdictions in the world, the UK and the US. The ethical duty might be found in various explicit and implicit rules in various jurisdictions. For example, in the UK, the newly modified (15 June 2011) Ethical Code of Conduct for Solicitors, the SRA Code of Conduct 2011, lays down this requirement.

Here, in the Code as well as the Indications of Behavior to the Code, there are any number of separate and independent provisions that identify and generate these duties. Collectively, they say the same thing. (The prior Code also contained a provision, RULE 9 that was often read to carry the same obligation).

Indeed the Code emphasises, as does this Article, the overriding importance that the 'public interest' plays in this situation (as in others). It reads:

'Where two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice. Compliance with the Principles is also subject to any overriding legal obligations'.

The situation in the U.S. is similar. In general, lawyers of course owe clients a variety of ethical duties with regard to Funding. This was discussed in an important and far reaching ethical opinion issued in June of 2010 by the Ethics Committee of the New York City Bar Association. (For example, the lawyer and the client may face a conflict of interest when the lawyer is negotiating a financing agreement with the Funder.) Among the ethical duties a US lawyer has, it would not be hard to spell out explicitly and/or by inference the "Duty to Know" about third party funding and when appropriate, the "Duty to Tell" the client about it.

Legal Duty

Beyond ethics, a legal obligation can be taken from various possible legal sources. In the UK, an illustration of a court decision supporting this position is the Queen's Bench decision in 2010, Adris v. Royal Bank [2010] EWHC 941 (QB). There, the Court found that a solicitor's failure to obtain costs insurance for his client, protecting against adverse costs that later were incurred, was a "gross breach of the Consumer Credit Act of 1974 s. 78." Such a duty here, as in the area of Funding, is one that is rooted in the basic requirement that a lawyer be competent in what the lawyer is doing, and provides his or her client with competent advice. The branches of this fundamental requirement spread far and wide.

Specific Questions & Duties

Within the general duties posited, there is also a need to address concrete specific questions that abound. Can a lawyer avoid culpability for lack of knowledge on the back of an argument that the industry is a young one unknown to many or indeed most lawyers? Is actual knowledge the test, versus "should have" known? Is there mandated "knowledge," and automatic liability?

Does a duty apply in the UK not only to solicitors but also to barristers under the ethical and legal rules that apply to barristers? Can an unknowing barrister maintain that knowledge and guidance here is the responsibility of the solicitors only.

What do the duties entail? How much must be known? Must one know all the basic subtleties that go into Funding? Should, for example, the lawyer be concerned about his or her potential lack of experience or capacity to adequately understand and advise on the topic? What about an actual or potential "conflict of interest"? Should "independent advice" be sought by the lawyer on behalf of the client?

What differences exist between common law systems as found in the U.S. and U.K., and civil law systems, as found in Germany and France? What about nuanced differences within different legal systems? How are conflicts resolved or harmonised?

In the study that should go into this area, there should of course be an opportunity for all stakeholders to voice their views.

The lawyers are of naturally at the head of the queue among that group. So also is anyone who has challenged the industry on various grounds. The most vocal and well known one is the U.S. Chamber of Commerce. It and any kindred spirit should have the chance to voice their views.

Conclusions & Recommendations

This article is of necessity short and summary, but that should not mask the scope of the need and responsibilities to fill – they are broad and deep. The market and industry are young. The guidelines are relatively few, and a work in process. The emphasis to date has been on the requirements imposed on the funders.

That emphasis on funders is producing results. However, alone, the results are inadequate. The market and industry requirements weave a seamless web. The time has come to expand the emphasis to the other stakeholders. The legal community's duties are compelling, as one's instincts can confirm. Those duties should be spelled out. The health of the market and industry need this. So does the legal community itself. The project is not a small one. It requires collaboration of the different participants in the industry, clarifying the duties and rights of each segment.

But most of all it takes leadership and time from the legal community. The Law Society in U.K., the bar associations in the U.S. and elsewhere, are logical candidates to take this forward, as they have taken forward so many other projects effecting the law and legal services. The industry should work hand in hand with these groups.

In fact, the duties here go well beyond the practicing lawyers. Law schools and educational programs should be informing their students about the industry and market, and how to act within them. A few are starting to do this. But very few. At one point all the law schools should put this topic on their standard teaching programs.

In the meantime, regardless of the actual state of the ethical and legal responsibilities, it seems sensible to assume there is a duty to adequately know, with a corresponding duty to tell. The assumption in practice will, in the end, not only better serve the client, the market, and the industry. It will, in the end, better serve the lawyer. It will also by itself provide impetus to the overall and more formal analysis of and reporting on the situation.

Selvyn Seidel is Founder and Chairman of Fulbrook Management LLC, and Co-Founder and former Chairman of Burford.

Clementine Travis, an associate at Fulbrook, contributed valuable assistance.

Selvyn Seidel can be contacted via email at sseidel@fulbrookmanagement.com

An Arbitrator's Failure to Disclose Conflicts Practical Advice Before Starting & After Completing An Arbitration

By Mark Bravin

WINSTON & STRAWN LLP

Every well-recognised set of international arbitration rules in use today contains a provision requiring arbitrators to file a certificate of independence. The purpose of the certificate is to confirm the arbitrator's impartiality and to elicit information that might provide grounds for challenging the arbitrator's appointment.

For example, the ICC Arbitration Rules, which are widely used in international commercial contracts, require the arbitrator to disclose to the ICC Secretariat and to the parties "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties." Most rules also require the arbitrator to promptly disclose new facts or circumstances that arise during the proceedings.

If the arbitrator makes no disclosures, and simply signs the certificate of independence, what then? The parties typically proceed with the arbitration without giving the issue of independence further thought. It can be a costly mistake.

This article discusses some practical considerations, pitfalls and best practices to consider before commencing arbitration, and again after the final arbitral award is issued.

How Do Arbitrators Decide Whether They Have Something To Disclose?

Experts on arbitrator ethics generally agree that that the arbitrator should apply a low threshold for deciding whether to disclose relationships – professional, social or personal – with the parties, their counsel, fellow arbitrators, and even witnesses. The ICC Rules provide that "Any doubt should be resolved in favor of disclosure." A few well-respected organisations, such as the International Bar Association (IBA) and the American Arbitration Association (AAA), have issued disclosure guidelines. The IBA's Guidelines on Conflicts of Interest in International Arbitration consists of colour-coded examples. The Red List enumerates situations giving rise to justifiable doubts as to the arbitrator' impartiality, some that are "non-waivable" and others that may be waived, but all must be disclosed. An Orange List includes matters that may, depending on the facts, give rise to justifiable doubts; arbitrators are advised to disclose them, and they may be waived. And the Green List incorporates a variety of circumstances that the arbitrator need not disclose because they do not give rise to an appearance of conflict of interest.

The IBA Guidelines are not legally binding, or even universally accepted. And they do not cover every conceivable conflict of interest. But they do present sensible and fair guidance, and in most cases they are easy to apply. Nevertheless, transactional lawyers rarely include a reference to such guidelines in the disputes clauses of commercial contracts. The tendency is to keep it simple, including only the bare essentials: arbitration rules, number of arbitrators, location, language, and governing law. By agreeing to such guidelines in the arbitration clause, however, the arbitrator and the parties are more likely to start the dispute resolution process with a common understanding as to what should be disclosed and how such information should be interpreted. In some cases, the parties may agree shortly before the arbitration has commenced to be bound by these Guidelines.

Is It Wise To Rely On The Arbitrator To Decide What To Disclose?

There are good reasons for arbitrating parties and their counsel to be proactive in identifying conflicts before the arbitration gets underway. If an undisclosed conflict surfaces only after the arbitral award is issued, it could give the losing party legal grounds for asking a court to vacate the award or to reject the prevailing party's efforts to enforce the award.

The "New York Convention" on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by 75 percent of all nations, specifies the grounds on which courts may invalidate or refuse to recognise the arbitral award in an international commercial dispute. Several of them may be relevant to the issue of an arbitrator's undisclosed conflict of interest.

First, a party who was "unable to present its case" before an impartial arbitrator may invoke Art. V § (1)(b) of the Convention. This is akin to a claim that the losing party was deprived of its "due process" rights. Courts in the United States have interpreted this concept to mean that an arbitrator must provide a fundamentally fair hearing, one that meets the minimal requirements of fairness—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.

Second, under Convention Art. V § (1)(d), an arbitrator who withholds information that should have been disclosed, according to the agreed arbitration rules, risks a judicial determination that the composition of the arbitral tribunal, or the arbitral procedure followed in the proceeding, was not in accordance with the agreement of the parties. In other words, the arbitrator could be found to have violated the arbitration rules selected by the parties.

Third, Art. V § (2)(b) of the Convention permits the court to deny recognition or enforcement of the award if enforcement would be contrary to public policy. In the United States, as in many countries, there is an explicit public policy requiring arbitrator impartiality.

"The IBA Guidelines are not legally binding, or even universally accepted. And they do not cover every conceivable conflict of interest. But they do present sensible and fair guidance, and in most cases they are easy to apply."

To limit the risk that the time and expense of arbitrating an international commercial dispute will be wasted on an unenforceable final award, there are a number of options available to the parties. Even before the arbitrator is appointed, the parties can provide the arbitrator with the names of all corporate affiliates, the lawyers who will appear for the parties, and the experts and fact witnesses who are likely to testify, as well as other circumstances drawn from the IBA's Red and Orange Lists.

If the stakes are high enough, parties might consider employing the services of a reputable international investigations firm to search out conflicts before the arbitrator's appointment is confirmed. The losing party, at the close of the arbitration, might be inclined to employ an investigator to search for evidence of a conflict that should have been disclosed but was not. By that time, of course, the time and expense of the arbitration already have been incurred, but the importance of the information may be much greater.

A different sort of concern that also can lead to disqualification of a proposed arbitrator, or an unenforceable arbitral award, is an "issue conflict." An arbitrator who also is a practicing lawyer may have paying clients with an interest in an issue that the arbitrator will be required to resolve in the parties' arbitration. In such a case, the lawyer's duty to zealously represent a client's interests, and the arbitrator's duty to decide impartially, are directly at odds. A Dutch court confronted with this very situation at an early stage of the arbitration held – based on the issue conflict – that the individual concerned either must resign as arbitrator or withdraw as counsel. In that case, the issue conflict might not have been identified without the help of an investigator. The affected party might have lost the arbitration oblivious to the conflict and without the opportunity to challenge the arbitrator and seek his removal in accordance with the applicable arbitration rules. Arbitrator conflicts are best handled at the outset of a dispute. Effective risk management in this area may require meaningful due diligence investigations, appropriate interviews of proposed arbitrators and, above all, awareness by arbitrating parties and their counsel of the conflicts guidelines and their practical application.

Mark Bravin co-leads Winston & Strawn's International Arbitration Practice and teaches Investor-State Dispute Resolution at Georgetown Law. He has represented governments and private parties in international disputes for over 30 years. In 2012, Mr. Bravin obtained a U.S. judgment for McKesson Corporation against Iran for expropriation of a dairy McKesson founded in 1959. In December 2011, he assisted Romania to defeat a Greek investor's claim of expropriation of his food processing company, and win reimbursement of attorneys' fees. He successfully represented U.S. corporations at the Iran-US Claims Tribunal in The Hague in arbitrations with Iran involving a wide range of contracts and investments. Mark Bravin can be contacted via email at MBravin@winston.com.

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Life After Concepcion: Two Courts Reach Different Results

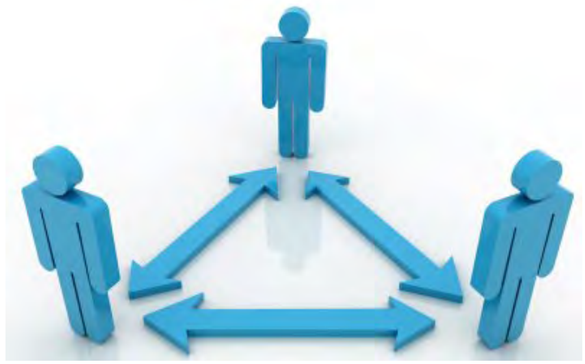
By Lee A. Rosengard

What is one to make of the Supreme Court's decision in AT&T Mobility LLC v. Concepcion, – U.S. – , 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and what are courts taking from that decision in making subsequent rulings? Two cases decided after remand by the Supreme Court following Concepcion come out in opposite directions, and leave companies that want their waiver-of-class-arbitration clauses to come within Concepcion and not fall outside its protection without predictability as to the enforceability of those clauses.

Concepcion held that § 2 of the Federal Arbitration Act requires enforcement of an arbitration agreement "save upon such grounds as exist at law or in equity for the revocation of any contract," and does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S.Ct. 1748. The Concepcions had purchased AT&T cell phone service that was advertised to include free phones. Upon being charged sales tax on the phones, they commenced a putative class action against AT&T. Id. at 1744. AT&T then moved to compel arbitration under the customer agreement, which "provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." Id.

The district court specifically found that the arbitration agreement "was 'quick, easy to use' and likely to 'promp[t] full or . . . even excess payment to the customer without the need to arbitrate or litigate.'" Id. at 1745. The district court also found that the provision of $7,500 premium in the event the consumer was awarded more than AT&T's final written settlement offer served as "substantial inducement" for the consumer to pursue individual as opposed to class-wide arbitration. Id.

Nonetheless, the district court ruled that the outcome was governed by the California Supreme Court's decision in Discover Bank v. Superior Court, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), which held that class arbitration waivers in consumer adhesion contracts were unconscionable and contrary to public policy when the "disputes between the contracting parties involved small amounts of damages, and when it is alleged that the party with the superior bargaining power has . . . deliberately cheat[ed] large numbers of consumers out of individually small sums of money." 30 Cal.Rptr. 3d at 87, 113 P.3d at 1110. The Ninth Circuit affirmed, holding that the Discover Bank rule was not preempted by the FAA because it was simply "a refinement of the unconscionability analysis applicable to contracts generally." Concepcion, 131 S.Ct. at 1745.



The Supreme Court held otherwise, ruling that "[r]equiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 1748. The Supreme Court continued that requiring class actions to be available was inconsistent with the principal purpose of the FAA, namely to ensure that private arbitration agreements are enforced "according to their terms." Id. It further held that state rules that required the availability of class-wide arbitration were inconsistent with the FAA's objective of "affording parties discretion" in designing arbitration processes to allow for efficient, streamlined, tailored mechanisms to address a dispute. Id.

In considering the impact of Concepcion, we examine two cases that the Supreme Court, at – U.S. – , 131 S.Ct. 2872, 179 L.Ed.2d 1184 (2011) (table), vacated and remanded following that decision. In Litman v. Cellco P'ship, 655 F.3d 225 (3d Cir. 2011), the governing arbitration agreement contained a clause that did not permit class arbitrations, even if authorised by the procedures of the two organisations under whose auspices the arbitration could take place, the American Arbitration Association or the Better Business Bureau. Id. at 227. The plaintiffs opposed the defendant's motion to compel individual arbitration, arguing that under the New Jersey Supreme Court's decision in Muhammad v. County Bank of Rehoboth Beach, Delaware, 189 N.J. 1, 912 A.2d 88 (2006), the class action waiver was unconscionable and therefore unenforceable under New Jersey law. Id. at 228. The defendant ("Verizon Wireless") did not challenge the applicability of Muhammad, but argued that it was preempted by the FAA. Id.

Importantly, as the district court opinion in Litman makes clear, both sides agreed that the plaintiffs' allegations involved low-dollar value consumer claims, complicated financial arrangements and multiple out-of-state entities that prevented plaintiffs from being able to vindicate the public interests in the absence of a class action proceeding. Litman v. Cellco P'ship, 2008 WL 4507573 at*4 (D.N.J. 2008). Plaintiffs relied on "the effect of the arbitration provisions to frame their unconscionability arguments: they 'contend that the provision is unconscionable because of what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis.'" Id. at 86, quoting Gay v. CreditInform, 511 F. 3d 369, 395 (3d Cir. 2007). The district court concluded, however, that the FAA nevertheless required it to uphold the arbitration provision in the plaintiffs' service agreement with Verizon Wireless, and compelled individual arbitration. Id. At 87. An appeal followed.

After the briefing in Litman in the Third Circuit was completed, the Third Circuit decided Homa v. American Express Co., 558 F.3d 225 (3d Cir. 2009), in which it held that the conclusion expressed by the New Jersey Supreme Court in Muhammad, invalidating class action waivers, was not preempted by the FAA. It reached this conclusion because, it reasoned, Muhammad provided a defense against "all waivers of class-wide actions, not simply those that also compel arbitration." Homa, 558 F.3d at 230. Based on its decision in Homa, the Third Circuit then vacated the district court's order compelling the Litman plaintiffs to arbitrate and remanded the case for further proceedings, which might have involved some class-wide dispute resolution. Litman, at 229.

Verizon filed a motion to stay the Third Circuit's mandate pending the filing of a petition for writ of certiorari. The Third Circuit allowed the stay, and Verizon filed its petition. The Supreme Court then decided Concepcion, granted Verizon's petition, vacated the Third Circuit's opinion and order, and remanded the case for review. Cellco P'ship v. Litman, 131 S.Ct. at 2872.

On remand, the Third Circuit concluded that Homa was abrogated by Concepcion and that Muhammad was preempted by the FAA. The court stated:

"We understand the holding of Concepcion to be both broad and clear: astate law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration is desirable for unrelated reasons. . . . It follows that the arbitration clause at issue here must be enforced according to its terms, which required individual arbitration and forecloses class arbitration."

Litman v. Cellco P'ship, 655 F.3d at 231 (internal quotations omitted.) The Third Circuit therefore affirmed the district court's order compelling individual arbitration of the appellants' claims. Id. at 232. Appellants' further petition for certiorari was denied. 132 S.Ct. 1046 (2012).

The Supreme Court of Missouri reached quite a different result on remand in Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. 2012). There, the plaintiff had borrowed $2,215 from the title company in a loan that was secured by her automobile and where the annual percentage rate was 300 percent. Id. at 487. After making two payments of more than $1,000, but seeing her loan principal reduced by six cents, plaintiff filed a class action petition against the title company alleging violation of a variety of statutes. Id. at 488. The trial court found the class arbitration waiver in the loan agreement unconscionable and unenforceable. Id. It further considered a number of the other aspects of the arbitration clause, finding that there was a disparity of bargaining power, that the provision was one sided because only the customer, and not the title company, gave up their rights to relief in the courts, and that the title company admitted that the provision that each party be responsible for its own costs and attorney's fees in arbitration placed a high burden on consumers. Id. It also found that these facts, too, rendered the agreement unconscionable when considered as an individual action. The court ordered the claim to proceed to arbitration to determine whether it was suitable for class treatment. Id. The title company appealed. The Supreme Court of Missouri held that the class arbitration waiver was unconscionable and struck the arbitration agreement in its entirety. Id. The title company petitioned for certiorari, which petition the United States Supreme Court granted and remanded the case for further consideration in light of Concepcion. Id.

On remand, the title company asserted that the FAA wholly preempted Missouri's common law of unconscionability. The Missouri Supreme Court disagreed. It read Justice Scalia's majority opinion in Concepcion, further informed by Justice Thomas' concurrence, as standing for the proposition:

"that the [FAA] generally does not permit a state to bar class action waivers by finding an arbitration agreement unconscionable on the basis of a class action waiver alone. The Scalia opinion does not state, however, that the [FAA] otherwise preempts traditional state law defenses to contract formation such as unconscionability, duress, fraud, and Justice Thomas is clear that he would apply those defenses. But Concepcion teaches these defenses cannot be used in a way that would hold otherwise valid arbitration agreements unenforceable for the sole reason that they bar class relief. That was what had happened in Concepcion." Id. at 488-89.

The Supreme Court of Missouri noted that the Discover Bank rule, which Concepcion found was preempted by § 2 of the FAA, did not include any finding "that the consumer is worse off under individual arbitration as opposed to class arbitration or that the individual terms of the arbitration agreement are otherwise onerous or unfair." Id. at 489. It continued:

"The practical effect of the Discover Bank rule, therefore, is to invalidate class arbitration waivers in most consumer contracts even if traditional factors of unconscionability are absent."

Id.Importantly, the Supreme Court of Missouri held that it did not follow that all state law unconscionability defenses are preempted by the FAA in all cases. Id. at 490.

It noted that the Discover Bank rule imposed a unique obstacle to arbitration" because it conditioned the enforceability of certain arbitration agreements on the available of class-wide arbitration, *"even if the arbitration contract at issue provides a consumer with more favorable terms in individual arbitration than in class arbitration."*

> *The Supreme Court of Missouri went on to find that the evidence in the case before it supported a determination that the agreement's arbitration clause was unconscionable.*

Id. It then found that holding that the § 2 saving clause preempts all state law unconscionability defenses *"would be inconsistent with both the saving clause and the majority's express recognition of unconscionability as one of the generally applicable contract defenses that retains vitality under the § 2 saving clause."* Id. Thus, it held, *"Concepcion permits state courts to apply state law defenses to the formation of the particular contract at issue."* Id. at 492.

The Supreme Court of Missouri went on to find that the evidence in the case before it supported a determination that the agreement's arbitration clause was unconscionable.

"There was evidence that the entire agreement – including the arbitration clause – was non-negotiable and was difficult for the average consumer to understand and that the title company was in a superior bargaining position, Brewer could not negotiate the terms of the agreement, including the terms of the arbitration clause. Indeed, the evidence further demonstrated that no consumer ever successfully had renegotiated the terms of the title company's arbitration contract."

Id. at 493. There was also evidence that the terms of the agreement were extremely one-sided, that no consumer had ever arbitrated a claim against the title company, and that, according to plaintiff's expert witnesses, it was unlikely that a consumer could retain counsel to pursue individual claims. Id. at 493-94.

Finally, the agreement was not bilateral, because while the consumer was bound to arbitrate her claims, the title company could seek judicial or other process. Id. at 494. Thus, the court found that the disparity in bargaining power, in addition to the disparity between the parties' remedial options, constituted strong evidence that the class arbitration waiver was unconscionable. It therefore held that the entire agreement was unenforceable. Id. at 496.

In examining these cases, we see that despite an onerous arbitration provision that both sides agreed was unconscionable, the Third Circuit followed the decision in Concepcion, compelling individual arbitration.

On the contrary, under similar circumstances, the Supreme Court of Missouri found reason to void the entire arbitration provision before it on the ground of unconscionability. Time will tell whether more courts will follow Litman, and enforce arbitration provisions that prohibit class claims, or follow Brewer, and try to find reasons to relieve consumers of their obligations to arbitrate under clauses that require individual arbitration and prohibit class treatment. The future impact of Concepcion remains to be seen.

Lee A. Rosengard is a partner at Stradley Ronon, where he has been a commercial litigator for 35 years. He serves as the firm's general counsel, is co-chair of the ADR Practice Group and is former chair of the Litigation Practice Group. He is a member of the CPR Institute Panel of Distinguished Neutrals, the American Arbitration Association Commercial Panel and Large Complex Case Panel, and also serves as a Judge Pro Tempore for the Philadelphia Court of Common Pleas Commerce Program. He is past chair of the Philadelphia Bar Association's Alternative Dispute Resolution Committee and a Lecturer in Law of the Faculty of Villanova University School of Law. Mr. Rosengard has been named a Pennsylvania Super Lawyer® consecutively since 2004. He was also recognised as a preeminent AV-rated attorney by Martindale-Hubbell.

Lee A. Rosengard can be contacted by phone on +1 215 564 8032 or alternatively via email at lrosengard@stradley.com

Posting Security As A Condition Of Obtaining An Interim Or Conservatory Measure

By Daniel Urbas & Robert J.C. Deane

In many arbitral disputes, the claimant may consider that unless the respondent is restrained from continuing its alleged misconduct or from taking a particular step on an interim basis, the final Award will ring hollow. For example, the assets in question may have been transferred to a third party, the claimant may suffer irreparable harm from the respondent's continuing breach of the substantive contract, the respondent may be taking active steps to obstruct enforcement of the eventual Award and so on. In those circumstances, and recognising the inevitable delay required before a fair final Award can be issued, the claimant may apply to the tribunal for interim or conservatory measures, which are intended to restrain the respondent from engaging in the problematic conduct.

In many cases, and sometimes even in the absence of an express request by the respondent, the tribunal will condition such an interim or conservatory measure on the claimant's posting of security sufficient to indemnify the respondent for its losses if, at the end of the procedure, the interim measure turns out to have been unnecessary or inappropriate. This note focuses on the circumstances in which, by particular reference to an ICC arbitration, a party may be required to post security as a condition of obtaining an interim or conservatory measure.

Rule 28(1) of the 2012 ICC Rules provides:

> *1. Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.*

Although relatively few Awards become publicly-available, experience suggests that tribunals typically consider certain factors when determining whether to require security to be posted, and when setting the amount of any such security. In particular, tribunals typically consider factors such as (1) the actual costs incurred by the respondent in complying with the measure, (2) the potential damages of the respondent if the measure is subsequently found to have been unnecessary or inappropriate, and (3) the financial capacity of the claimant to post security. Underlying the entire analysis is the tribunal's obligation to maintain the balance between the parties, and to avoid prejudging (or appearing to pre-judge) the substantive dispute.

ICC Case No. 7544 is often cited as the leading Award concerning the posting of security. In that case the claimant sought an interim measure mandating a provisional payment that it claimed it was entitled to under the contractual arrangement between the parties. The tribunal found it appropriate to require the claimant to guarantee repayment of the sum ordered in the interim Award, recognizing that the final decision might not be consistent with the interim Award. While that was a relatively straightforward case in that the amount of the respondent's potential loss could be quantified easily, cases in which the respondent's potential losses cannot be quantified so easily pose more difficult issues.

For example, ICC Case No. 3540 involved a dispute between a French contractor and its Yugoslavian sub-contractor concerning damages for faulty performance. The sub-contractor counterclaimed and sought interim payment of a fixed sum owed to it under the contract. The tribunal found that it could enter an interim Award for payment "upon the moving party giving adequate security, with damages between the parties to be liquidated definitively in the final Award."

Unfortunately, the amount of the "adequate security" is not recorded in the public version of the Award.

Some further general guidance is available in the UNCITRAL Model Law on International Commercial Arbitration, adopted in 2006 (the "Model Law"). Articles 17 and 17A establishes the power of an arbitral tribunal to order interim measures, provides a generic definition of interim measures and sets out the conditions for granting such measures. Article 17E of the Model Law stipulates that when requiring a party to provide security for interim measures granted to it, the security must be "appropriate" and "in connection with the measure".

Security may be an appropriate condition to the granting of interim measure where the resisting party faces some risk of loss as a result of the interim measure being granted against it. The security recognises that the tribunal may prejudice the resisting party's rights if the interim measure proves unjustified when the final Award is rendered in its favour.

Parties faced with an application for interim or conservatory measures should be aware of their right to seek, as a condition of any such measure, a requirement that the claimant post security.

While the circumstances in which security will be necessary and appropriate cannot be defined with precision, requiring security to be posted is a useful tool tribunals can use to maintain the balance between the parties pending the final Award, and to avoid the misapprehension that, in granting the interim measure, the tribunal has in any way prejudged the merits of the case.

With more than 750 lawyers, intellectual property agents, and other professionals working in six major Canadian cities, Borden Ladner Gervais LLP is the largest Canadian full-service law firm focusing on business law, litigation and intellectual property solutions. BLG provides bilingual services in virtually every area of law, and represents a wide range of regional, national and multinational organisations. For further information, visit www.blgcanada.com.

Daniel Urbas is a partner in Borden Ladner Gervais LLP's Montréal office, Daniel Urbas is regional leader of the Commercial Litigation Group and the International Trade and Arbitration Group, and national leader of the firm's IP Litigation Group. Practice focuses on international and domestic commercial arbitration, corporate and commercial litigation, class actions, product liability and IP & IT. A Fellow of the Chartered Institute of Arbitrators, Daniel also serves as counsel and arbitrator. He is experienced in coordinating multi-jurisdiction teams, navigating multiple venue dispute resolutions, and applying project management skills to advocacy. He is fluently bilingual, with civil law and common law degrees. He is also an active member of the Québec, Ontario and British Columbia Bars. AV Peer Review rated by Martindale-Hubbell and listed in The Canadian Legal Lexpert Directory.

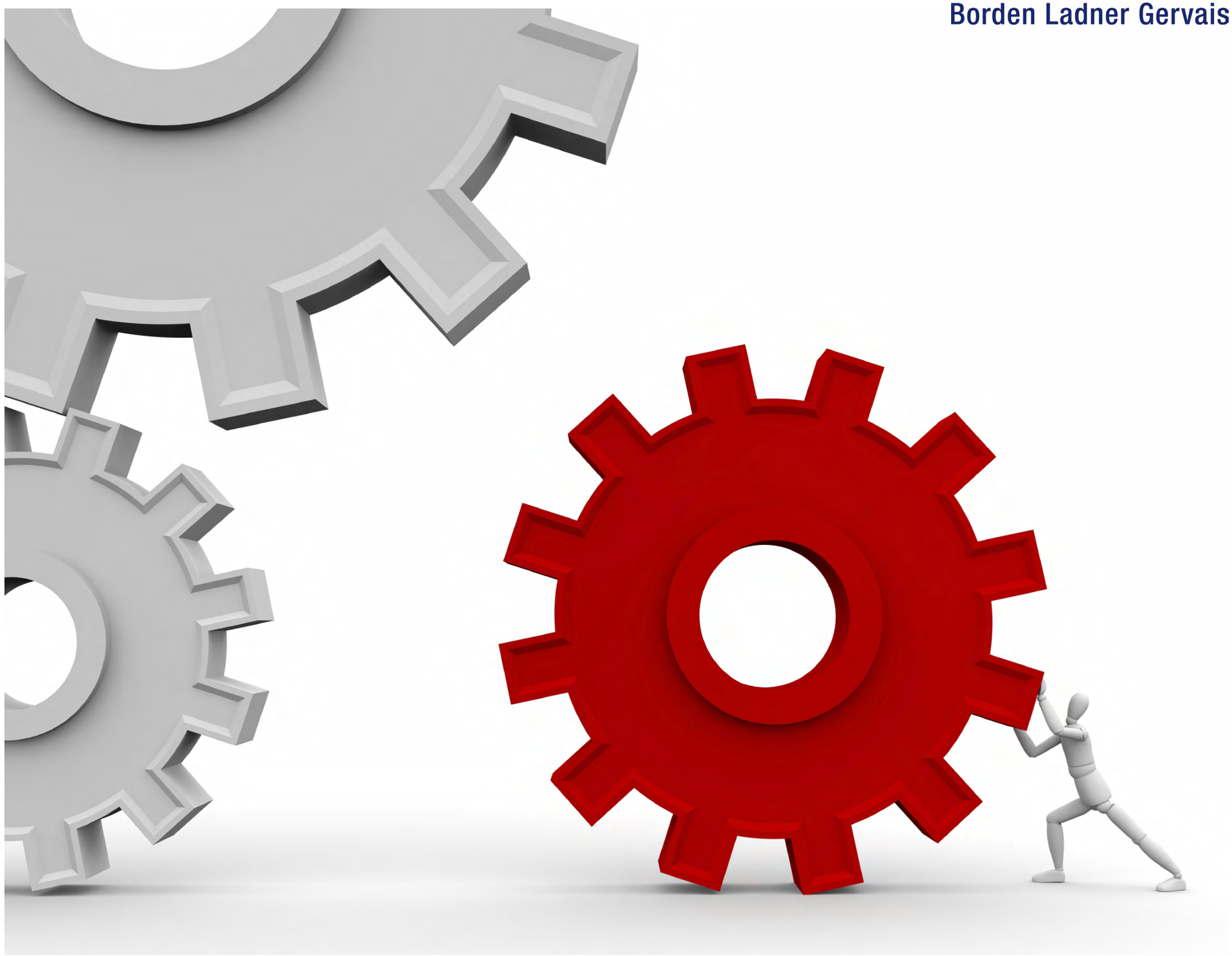
Daniel Urbas can be contacted by phone on +1 514 954 3149 or alternatively via email at durbas@blg.com

Robert Deane is a partner in the Vancouver office of Borden Ladner Gervais LLP. Robert practices in the areas of commercial litigation (including domestic and international commercial arbitration), general appellate litigation, privacy law, intellectual property litigation, and advertising/ competition law.

He is AV Peer Review rated by Martindale-Hubbell, is recognised in the 2012 edition of Chambers Global – The World's Leading Lawyers for Business for Dispute Resolution: Arbitration, and the 2012 edition of The Canadian Legal Lexpert Directory for International Commercial Arbitration, among other rankings.

Mr. Deane is a member of the Executive Committee of ICC Canada, and is the regional representative for North America (Canada) for the Young International Arbitration Group of the London Court of International Arbitration.

Robert Deane can be contacted by phone on +1 604 640 4250 or alternatively via email at rdeane@blg.com



CORPORATE LiveWire

Recent Developments In Arbitration & Alternative Dispute Resolution In The Cayman Islands

By Ross McDonough & Kirsten Houghton

Campbells

On 2nd July 2012, the Cayman Islands brought into force its newly enacted Arbitration Law 2012 ("the Law"). The Law repeals in its entirety the former Arbitration Law (2001 Revision) which had long outlived its usefulness, based, as it was, on the outdated provisions of the United Kingdom's Arbitration Act 1950, and brings into a force a regime for arbitration in the Cayman Islands based on the UNCITRAL Model Law. The Law is the result of over three years' work by the Cayman Islands' Law Reform Commission ("the Commission"), which published three draft bills over that period, and undertook a lengthy consultation amongst Cayman Islands' legal profession and other stakeholders. The Commission described its task as follows:

"The critical element of the modernisation relations to ensuring that [the Law] provides for party autonomy in the arbitration process while limiting judicial intervention… it was felt that a law formulated along the lines of the [UNCITRAL] Model Law would allow [the Cayman Islands] to become a jurisdictions in which arbitration practitioners can operate in a regime which accords with widely accepted international arbitration practices and development… with the reform of the legislative regime, the Cayman Islands would be seen as a jurisdiction which business parties would choose as the seat to conduct arbitral proceedings, thereby generally promoting Cayman as a regional centre for legal services and dispute resolution."[1]

These are noble aims, particularly as the Commission frankly acknowledged that the financial services industry, which comprises a large sector of our economy, does not, so far as is known, currently generate any international arbitration business which is actually conducted in the Cayman Islands. In fact, the vast majority of disputes concerning our financial services industry are determined in the Grand Court.

This is not surprising in one sense, because the majority of cases arise in the course of insolvency proceedings, but increasingly our courts are being presented with breach of contract, negligence and breach of fiduciary duty claims concerning funds and trusts and other businesses carried out abroad by companies which are registered here as "exempt" companies.

These disputes can, and sometime do, take a great deal of time to resolve, because of procedural posturing and lack of court availability (although this last has been improved by the institution of the Financial Services Division of the Grand Court), and can also generate damaging publicity for the protagonists. In addition, the Cayman Islands is actively seeking to attract a larger proportion of the insurance and reinsurance industry to establish businesses here.

That is a sector of the economy in which arbitration has always been an important, if not the primary, method of dispute resolution. If the Law plays a part in attracting even a modest percentage of the parties to these non-insolvency related commercial disputes to utilise a Cayman Islands' based arbitral procedure, it will have achieved its aim.

There may be teething problems – for example, one of the recommendations made by the Commission was that the Cayman Islands' authorities should aim to foster international arbitration business, in part by a liberalisation of immigration and other laws which might tend to restrict the movement of parties, arbitrators, witnesses and "advocates" into the Cayman Islands for the purpose of conducting arbitrations.

The Commission also recommended that the Cayman Islands should gradually work towards the establishment of a formal arbitration centre, funded partly by Government and partly by private investment. It is unlikely that this second recommendation will be adopted in the short to medium term by the Cayman Islands' Government, but it is possible that immigration procedures and legal practice requirements might be adapted to enable overseas participants in arbitration proceedings in the Cayman Islands to enter the Islands and conduct the proceedings more easily than is currently the case.

It is notable in this regard that one of the provisions of the Government versions of the bill (now enshrined in the new Law) which was significantly different from the version drafted by the Commission is section 34, which provides that a party to an arbitration may be represented by a "legal practitioner" (a term defined by Cayman Islands' law limited to local attorneys) or "any other person chosen by him", perhaps paving the way for the necessary changes to immigration and legal practice requirements.

The current requirements are definitely not insurmountable, but careful amendment of these requirements to encourage arbitration proceedings to take place more flexibly and cost effectively should be encouraged.

The Law is generally supported by the legal community in the Cayman Islands. Clearly there exists here wide expertise in dispute resolution before the courts. More recently, as a result of the efforts of a small number of lawyers and others, particularly Alistair Walters of Campbells, and the teaching faculty of the London School of Mediation, the legal profession and others have formed the Cayman Islands Association of Mediators and Arbitrators ("CIAMA"), a body which exists to promote mediation and arbitration as alternative methods of dispute resolution across a wide range of areas, including financial services, construction, insurance, family law, consumer and private disputes and, with the imminent introduction of the Bill of Rights, human rights.

> *"It remains to be seen whether the Law will bring about any of the effects desired by the Commission. However, there are certainly new options for dispute resolution available for clients in many areas of business..."*

The Cayman Islands also has a small but growing community of members, associates and Fellows of the Chartered Institute of Arbitrators, and several affiliates of AAA. Whilst it is not yet a large portion of our legal world in Cayman, interest is growing, and it is to be hoped that both arbitration and mediation will grow in prominence, particularly if added benefits of speedy resolution and lower cost can be achieved.

It remains to be seen whether the Law will bring about any of the effects desired by the Commission. However, there are certainly new options for dispute resolution available for clients in many areas of business which can now be looked at and advised upon with more confidence than formerly.

Ross McDonough has practised at the Cayman bar for 18 years and is currently ranked band 1 in Chambers and Partners Guide 2012. Ross specialises in commercial litigation (asset tracing claims, confidentiality matters, liquidations and receiverships, mutual fund and trust litigation, enforcement of foreign judgments). Appeared as lead Counsel in numerous reported cases before the Grand Court, Court of Appeal and Privy Council. Ross has also been instructed as an expert witness in Cayman law in a number of proceedings before courts in other jurisdictions.

Ross McDonough can be contacted by phone on +1 345 949 2648 or alternatively via email at rmcdonough@campbells.com.ky

Kirsten Houghton has practised at the Cayman Bar for over 6 years, and previously at the English Bar for over 15 years. She has a broad commercial dispute resolution practice including international and domestic commercial disputes, Funds' litigation, insurance and reinsurance, company and shareholder disputes, construction and property related matters, information technology, pre-emptive remedies and all aspects of commercial professional negligence. She is an experienced advocate before the Cayman Islands' courts and is also a Chartered arbitrator and a founder member of the Cayman Islands Association of Mediators and Arbitrators.

Kirsten Houghton can be contacted by phone on +1 345 949 2648 or alternatively via email at khoughton@campbells.com.ky

Snapshot – Litigation

Environmental Litigation: Chevron Appeals $18bn. Pollution Ruling

Way back in February 2011 an Ecuadorian Court ordered Chevron to pay $18 billion in compensation over environmental damage to the Amazon Rainforest caused by oil pollution between 1972 and 1990 by Texaco, which Chevron bought in 2001.

In February 2012 it was announced that the world's second largest oil company had filed an appeal seeking review by Ecuador's National Court of Justice of local and appellate court decisions in addition to serving the government of Ecuador with a notice of arbitration for alleged breaches of the United States-Ecuador Bilateral Investment Treaty.

Meanwhile the Ecuadorean plaintiffs have begun their campaign to collect the money, filling a lawsuit against the company at an Ontario court in May as part of a planned series of lawsuits in 30 countries on four continents where Chevron has assets.

Patent Litigation: AT&T Settles $215m Patent-Infringement Dispute with TiVo

In the past year TiVo has successfully used litigation to make money from licensing fees with a $500 million victory against Echostar Corp, and the digital video recorder (DVR) company has followed that up by striking an agreement with AT&T Inc. in which the American multinational communications company has agreed to pay a minimum of $215 million and additional monthly licensing fees to settle a patent-infringement lawsuit.

However, in the past month the global patent wars have continued to hot up with Cisco Systems Inc. filing a lawsuit to void four TiVo Inc patents related to digital video recorders, escalating a battle over who has the right to profit from sales of the popular machines. Likewise Verizon Communications have bought forward a patent case against TiVo with a trial for the case likely to begin in October unless the two companies settle.

Antitrust Litigation: EU Antitrust Regulators Crackdown on 'Pay-for-Delay' Deals

EU antitrust regulators charged French drug-maker Servier, Israel's Teva and four other firms on Monday July 30, with blocking the entry of a cheaper generic medicine to market as part of a crackdown on a key business practice in the pharmaceutical industry.

The European Commission claim that Servier's patent settlement agreements and acquisition of key competing technologies were aimed at delaying or preventing the market entry of cheap generic versions of perindopril, in violation of EU antitrust rules and if found guilty they could be fined up to 10 per cent of its global turnover.

In July 2012, the European Commission had flagged the move after charging nine drug companies including Germany's Merck and Danish peer Lundbeck for a similar offence related to another generic medicine. Regulators on both sides of the Atlantic have warned drugmakers against 'pay-for-delay' deals, where brand-name companies pay generic companies to abstain from putting their rival medicines on the market.

Class Action Litigation: Chinese Drywall Settle $80m Class Action Settlement

A global settlement has been reached in a class action litigation involving all drywall imported to the U.S. from China. The litigation claims that Chinese drywall causes property damage, including damage to fixtures, electrical wiring, corrosion of pipes, and damage to or destruction of air conditioners, HVAC systems, refrigerators and other appliances. Some people have also claimed that they suffered bodily injury as a result of exposure to Chinese drywall.

The companies being sued are distributors, suppliers, builders, developers and installers who were associated with Chinese drywall. Some of these companies (Participating Defendants) and some of their insurance companies (Participating Insurers) have agreed to a settlement. The Participating Defendants and Participating Insurers deny they did anything wrong.

The $80 million from the builders and installers' insurance companies will complement another $55 million settlement reached by Banner Supply over the course of the last year as well as $800 million to $1 billion settlement agreed to by Knauf, a German company that made drywall in China.

Recent Developments In European Mediation & ADR

By Johan Billiet & Dilyara Nigmatullina

Court proceedings quite often are costly and time-consuming. Alternative Dispute Resolution methods, in particular mediation, bring constructive solutions to existing disagreements, saving time and money and helping to maintain and even strengthen the relationship between disputing parties.

1. The EU Directive on Mediation

The EU Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters adopted on May 21, 2008 and in force since May 21, 2011 ("Directive") became a major step in establishing mediation in Europe. The Directive applies to cross-border disputes. However, nothing prevents Member States to extend its application to domestic disputes as well, which has been done by a number of countries, including France, Greece, Italy, Portugal, and Belgium.

1.1 Objective of the EU Directive on Mediation

The objective of the Directive is threefold

First, it aims to reinforce the quality and security of mediation by encouraging initial and further training of mediators and adherence to voluntary codes of conduct by mediators and organizations providing mediation services as well as guaranteeing confidentiality of mediation and enforceability of settlement agreements resulting from mediation.

Second, the Directive purports to promote mediation as an autonomous dispute resolution process by authorising a court to invite parties to attend an information session on the use of mediation or to use mediation in order to settle the dispute or making the use of mediation compulsory or subject to incentives or sanctions, provided the parties are not prevented, thereby, to exercise their right of access to justice.

Third, the Directive sets up minimum rules to ensure a balanced relationship between mediation and judicial proceedings, by providing that parties choosing mediation are not subsequently prevented from initiating judicial proceedings due to the expiry of limitation periods.

1.2 Implementation of the EU Directive on Mediation

The implementation process has been completed in the majority of Member States. However, the infringement proceedings for failure to comply on-time with the Directive were initiated in respect of nine countries. Thus, in July 2011 "letters of formal notice" were sent to Czech Republic, Spain, France, Cyprus, Luxembourg, the Netherlands, Finland, Slovakia and the United Kingdom.

Finland, Slovakia and the United Kingdom notified the Commission about national measures taken for transposing the Directive, whereas the other six countries failed to do so and received a reasoned opinion, as per the announcement of the Commission on November 24, 2011.

1.3 Recent Studies on Mediation

1.3.1 Quantifying the Costs of not Using Mediation

In April, 2011 the European Parliament submitted a paper based on the final results of the project funded by the European Commission: "The Cost of Non ADR-Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation". This European Parliament paper has aimed at exploring and quantifying the impact that litigation has on the time and costs to the 26 Member States' judicial systems and at suggesting possible ways of making mass implementation of mediation by discussing various incentives and regulations.

One of the conclusions of the study is that training and promotion of mediation are not adequate to increase the usage of mediation across the EU member states. The suggested incentives and regulations which will help encourage mediation are force of law (mandatory law approach), tax incentives and reimbursement of dispute fees and incentives for judges.

For more details regarding the study please consult AIA Newsletter of March 2012 available on AIA website.

1.3.2 Mediation as Part of Other Access to Justice Mechanisms

Mediation is likely to be integrated in other access to justice mechanisms. This is the conclusion of a position paper by Barbara Baarsma of SEO economic research and HiiL academic director Maurits Barendrecht prepared for the Dutch Mediation Institute and the Dutch Ministry of Justice. Baarsma and Barendrecht investigated potential explanations for the low number of mediated cases in Netherlands and elsewhere. Mediation may be an unknown product, transparency of quality and costs may be a problem and positive external effects are not fully internalised in the price. But the most likely cause it does not sell is that a mediator needs two buyers who are unlikely to agree on a way to resolve their conflict.
For more details regarding the position paper please consult.

1.3.3 Efficiency of Legislation and Awareness of Mediation

The Irish Joint Committee on Justice, Defence and Equality held public hearings in relation to the Scheme of the Mediation Bill and published a report in that respect in June 2012. The Committee concluded, among other things, that awareness of mediation and its benefits had to be increased for the legislation to be as effective as possible.For more details please consult the report of the Committee here.

1.4 AIA Activities in Cross-Border Mediation

With a grant from the EU Commission, AIA arranged with the University of Warwick and HUB Brussels the first European Mediation Training for Practitioners of Justice (EMTPJ) in 2010. The course sets criteria for those willing to be European cross border mediators. The third edition will be organised during September 3 to 15, 2012 at Brussels. For further information check: www.emtpj.eu

AIA also represents a European Network of Mediation Centres which is aimed at sharing information and good practices to promote the use of cross-border mediation, increase the quality of mediation and mediators. For more details please consult AIA website.

2. Legislative Proposals on ADR for Consumer Disputes

Considering that lack of harmonisation of ADR processes across the EU inhibits the effectiveness and the uptake of ADR schemes, the Committee on Legal Affairs of the European Parliament adopted the report on alternative dispute resolution in civil, commercial and family matters on October 10, 2011 and invited the Commission to submit a legislative proposal on the use of alternative dispute resolution for consumer matters in the EU by the end of 2011.

On November 29, 2011 the European Commission published a Communication on Alternative dispute resolution for consumer disputes in the Single Market and two legislative proposals for a Directive on ADR for consumer disputes (Directive on consumer ADR), and a Regulation on online dispute resolution for consumer disputes (Regulation on consumer ODR).

The legislative proposals for the Directive on consumer ADR and the Regulation on consumer ODR aim at making it easier for consumers to secure redress in the Single Market whether they are buying online or offline and, therefore, they effectively contribute to growth and economic stability through enhanced consumer demand.

The two proposals complement each other. The implementation of the Directive will make quality ADR entities available across the EU for all consumer complaints related to contractual disputes arising from the sale of goods or the provision of services, which is a key requirement for the functioning of the ODR platform which will be set up by the Regulation.

> *"The legislative proposals for the Directive on consumer ADR and the Regulation on consumer ODR aim at making it easier for consumers to secure redress in the Single Market whether they are buying online or offline .."*

The proposed legislation covers contractual disputes between consumers and traders arising from the sale of goods or the provision of services. This includes complaints filed by consumers against traders but also complaints filed by traders against consumers. However, the proposals do not cover disputes between businesses.

The European Parliament and the European Council have committed to adopting both proposals into law by the end of 2012. The IMCO Committee of the European Parliament voted for the proposals on July 10, 2012. After the adoption, EU Member States will be given 18 months to implement the ADR Directive. The EU-wide platform for online dispute resolution will become fully operational in early 2015.

Johan Billiet is a lawyer at the Brussels Bar and deputy judge. He is an arbitrator and accredited mediator in civil and commercial matters, appointed as arbitrator by different arbitration institutes and he often takes part in ad hoc arbitration. He is at present the President of AIA, lecturer at the Vrije Universiteit in Brussels (international business arbitration) and the Managing Partner at Billiet & Co, Brussels. He has published over 30 papers in arbitration matters.

Johan Billiet can be contacted by phone on +32 2 643 33 01 or alternatively via email at johan.billiet@billiet-co.be.

Dilyara Nigmatullina holds a cum laude law degree from MGIMO University, Moscow and an LLM in International Commercial Arbitration from Stockholm University. Dilyara manages the daily activities of AIA and assists in arbitration related cases at Billiet & Co. She regularly publishes in English and Russian on ADR issues and comments on recent arbitration related cases. She is registered as Mediator at the Belgian Federal Mediation Commission.

Dilyara Nigmatullina can be contacted by phone on +32 2 643 33 01 or alternatively via email at dilyara.nigmatullina@arbitration-adr.org.

Association for International Arbitration

For over a decade, the Association for International Arbitration as a non-profit organization has dedicated to promotion of ADR mechanisms worldwide. AIA's monthly newsletter, "In Touch," gives more than 55.000 readers worldwide the latest news about developments in ADR. The organization's book series represent the compilation of papers presented at the international conferences organized by AIA at least twice per year and are meant to enhance the knowledge and understanding of ADR. In addition to its commitment to arbitration, AIA is also involved in mediation through its Network of Mediation Centres. For further information please visit www.arbitration-adr.org

Mediation In Greece, Romania & Albania: Different Stages of Evolution in Southeast Europe

By Panagiotis Drakopoulos, Adrian Roseti, & Gjergji Gjika

Drakopoulos Law Firm
ATHENS BUCHAREST TIRANA

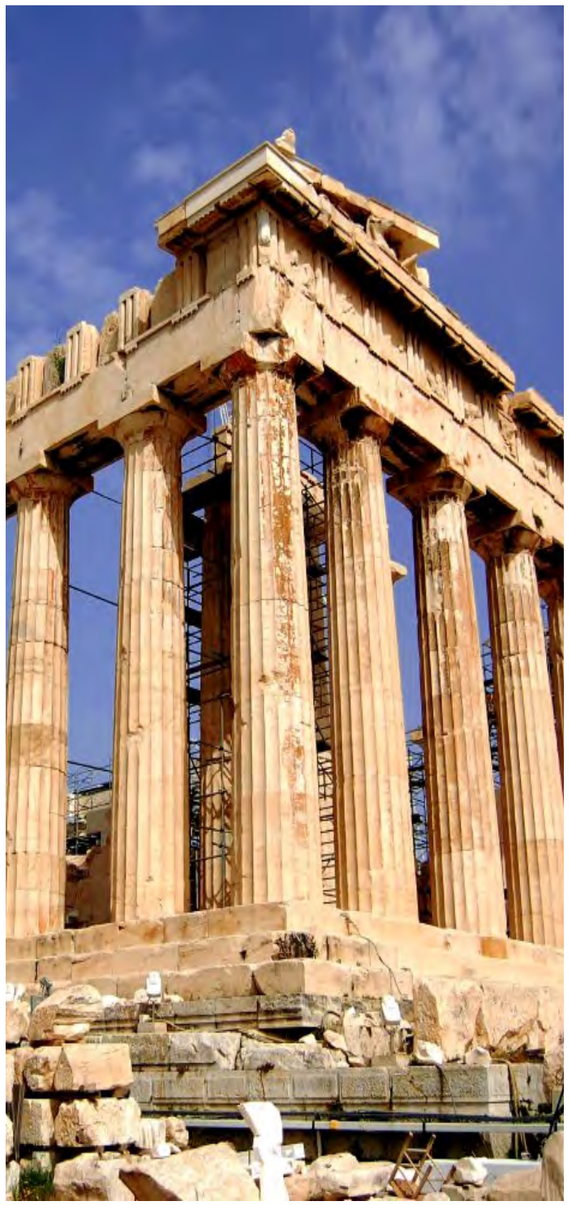
Greece, Romania and Albania could be handpicked as three countries representing three different "evolution" stages towards EU membership: Greece is a "mature" EU member state, Romania a relatively "young" member, while Albania is a non-member, aspiring to become one in the near future.

Equally, the implementation and use of ADR procedures seem to follow the same trend, in terms of their evolution in each country, with the EU member states being certainly more advanced in their approach towards establishing Mediation as a well-spread ADR practice in their respective legal environments.

In Greece, recent developments at the legislative and administrative levels (the Law 3898/2010, which implemented the EU Mediation Directive 2008/52/EC, the appointment of the "Mediation Certification Committee", which at the end of June 2012 announced the beginning of the accreditation of mediators certified abroad) are being pursued also at a practical level, with the Bar Associations around the country organising seminars throughout the recent years, in order for attorneys to become familiar with the procedure.

Furthermore, Mediation as a new ADR procedure was embraced by the Greek Companies Associations, which, as early as in 2006, established the Hellenic Center of Mediation and Arbitration, with a view to introduce and establish Mediation in a quick and effective manner, by educating disputing parties and legal practitioners alike. During the last years the Hellenic Center of Mediation and Arbitration has also begun to organise regular training and accreditation courses for mediators, in collaboration with institutions such as the UK-based Chartered Institute of Arbitrators and the Centre for Effective Dispute Resolution.

The congestion in courts, with cases taking even eight to ten years to be resolved, coupled with the economic crisis, is naturally paving the way towards Mediation being more and more the medium of choice in Greece, when it comes to dispute resolution.



Equally, in Romania, moves towards establishing Mediation as an ADR procedure are also well underway: the law on Mediation (Law 192/2006) and the Mediation Council (an independent body elected by the mediators) have been established since 2006.

Recently, important legislative steps have been taken in Romania, including a new Civil Code, which has repealed also the Commercial Code, enacted back in 1887, and a new Civil Code of Civil Procedure, effective as of September 1, 2012. These changes have been aiming, inter alia, at decreasing substantially the trials duration and easing the burden of the courts, which currently have up to 100 cases per day.

It is no wonder that, in these circumstances, Mediation is more and more shaping from a practice relatively unknown to the public (and even to professionals in the legal field) to a legal practice welcomed by those involved.

Although Romania is in the beginning of this path, compared to mature European jurisdictions, the measures that have been implemented until the present, as well as those that can be foreseen, are likely to transform Mediation into a strong tool for the management of large volumes of litigation; this is also supported by institutional efforts towards educating disputing parties, as well as by active measures in this respect, which range from conferences on the topic to explicit recommendations of the courts of law that the parties should try mediation in certain cases.

Furthermore, the fact that a large number of Romanian lawyers also act as mediators has helped in sending the message of Mediation and has made its advantages well known in the business environment, so that parties often times include in their agreements the obligation of resorting to Mediation before initiating court proceedings.

On the contrary, things are not nearly as progressed, at least for the moment, in Albania. The only centre providing arbitration and mediation for dispute settlement, the Arbitration and Mediation Center ("MEDART"), has ceased its activity since 2009, due to lack of business, and has not been replaced to date.

This unfortunate turn of events is mainly due to the mentality of disputing parties in Albania, which, coming from an immature, pre-emerging market, are reluctant in resorting to any medium other than the courts, when it comes to dispute resolution.

However, Law 10385/2011 "On mediation in dispute resolution", was passed recently, implementing directive 2008/52/EC, and the Ministry of Justice has established early this year the National Mediation Chamber and the Mediation Licensing Commission, which has already accredited 24 mediators.

3333 - Albania seems to have recently started being on the right track, in terms of establishing Mediation, from a legislative and administrative point of view; however, a lot of work will be required in terms of educating the relevant stakeholders (the parties in dispute, the lawyers, and even the judges) in way as to promote and implement Mediation as a cost effective, fast way of dispute resolution.

Perhaps, in line with the trend outlined above, getting closer to EU membership will result in Mediation being established also in practice in the legal environment of Albania.

Panagiotis Drakopoulos has an extensive and proven track record in domestic and international litigation, with key strengths his ability to handle complex matters involving multiple disciplines and take decisions in fast-paced environments.

He has handled hundreds of large-scale transactions of all types of commercial and corporate law matters from their initiation to completion/settlement stage, many of which have required Mr Drakopoulos' outstanding mediation and negotiation skills; Mr Drakopoulos has represented multinational parties before various national and international Courts and ADR Organizations, including the WIPO, the ICC, the Greek Competition Commission and the Greek Telecommunications and Post Committee.

Adrian Roseti has been involved in litigation for over 15 years, engaging in various litigation related activities, spanning from pre-trial proceedings and negotiations to international ADRs and milestone cases before the High Court of Cassation of Romania.

Having served as a legal expert in the Romanian Parliament and as President of the Relations with the EU Committee of the Bucharest City Council, Adrian has acquired an in-depth understanding of trends in the legal reality of Romania, both from a local and international perspective.

Adrian Roseti can be contacted by phone on +40 21 3000154 or alternatively via email at aroseti@drakopoulos-law.com

Gjergji Gjika is a seasoned litigator and negotiator, with several years of experience in handling disputes, on behalf of both Albanian and multinational clients. Equiped with an acute business sense, Gjergji has managed to successfully represent clients in disputes involving negotiations, arbitration and court proceedings alike.

An ardent supporter of Mediation, Gjergji consistently strives to achieve smooth settlements through negotiations, and believes that ultimately an extended ADR local practice will be key in making Albania more attractive to foreign investment.

Gjergji Gjika can be contacted by phone on +355 42 400900 or alternatively via email at ggjika@drakopoulos-law.com

Russia's Supreme Commercial Court Holds Sole Option Clauses Void

By Noah Rubins & Maxim Kulkov

Freshfields Bruckhaus Deringer

A recent decision by the Supreme Commercial Court invalidates dispute resolution clauses that give one party the right to bring a claim either in arbitration or in court, while limiting the other party to arbitration. Such clauses in agreements with Russian counterparties may need to be renegotiated.

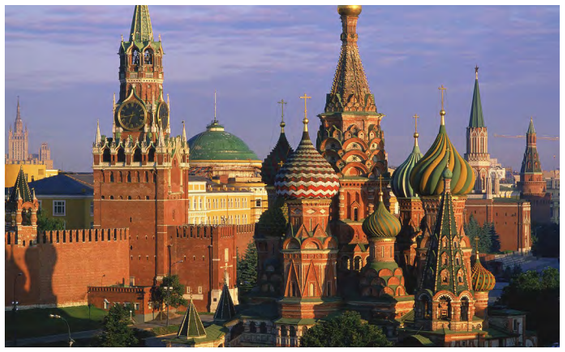
On 19 June 2012, the Supreme Commercial Court, Russia's highest court for commercial disputes, held that "sole option" or "hybrid" clauses, which grant one party the option of initiating either court litigation or arbitration, while limiting the other party to a single dispute resolution forum (usually arbitration), are contrary to Russian law.

The decision of the Supreme Commercial Court was rendered in a dispute between OOO Sony Ericsson Mobile Communications Rus (Sony Ericsson), a Russian subsidiary of the Swedish mobile telephone manufacturer, and ZAO Russkaya Telefonnaya Kompaniia (RTK), an affiliate of Russia's largest mobile operator, MTS.

RTK originally brought a claim against Sony Ericsson before the Moscow Commercial Court under a contract for the sale of mobile telephones, alleging that the goods supplied were of poor quality. The contract included a clause providing for arbitration of disputes in London under the ICC Rules, with Sony Ericsson additionally given the option, with respect to payment for goods supplied, to claim before any court of competent jurisdiction.

The Moscow Commercial Court refused to hear RTK's claim, on grounds that the contract contained a valid arbitration clause. The decision of the Moscow Commercial Court was confirmed by both the Commercial Court of Appeals and Commercial Court of Cassation. But the Supreme Commercial Court disagreed with their reasoning and sent the case back to the Moscow Commercial Court for reconsideration.

The full decision of the Supreme Commercial Court will only be released in August 2012, and therefore the reasoning remains unclear. It is expected that the decision will follow the arguments set forth in the decision of a panel of Supreme Commercial Court judges, which referred the case to the plenary in March 2012. These judges noted that the sole option clause gave Sony Ericsson an advantage over RTK, putting the parties on unequal footing. In their view, this was contrary to the Russian law principle of equal procedural treatment, as well as to the procedural safeguards of the European Convention on Human Rights. The judges concluded that RTK was free to bring a claim against Sony Ericsson before national courts (in this case Russian courts), which would effectively balance the situation.



Two very different possibilities remain with respect to the reasoning of the Supreme Commercial Court: either the Court invalidated the entire dispute resolution clause, or held that it should be interpreted to offer both sides the same right to choose between courts and arbitration.

In the first scenario, from the perspective of Russian law, both parties would lose the right to submit disputes to arbitration. The only remaining option would be to bring a claim before a court competent by virtue of applicable conflict of law rules. The situation would be further complicated by the fact that most other legal systems recognise the full validity of such clauses, blocking access to most national courts besides those in Russia.

In the second scenario, both parties would have the same right to choose between arbitration and litigation in a competent court (again, so far as Russian law is concerned). While this outcome would be less dramatic in terms of its impact on the parties' agreement, it would create some uncertainty where one party commences arbitration and the other launches a claim before a national (presumably Russian) court. While an arbitral tribunal applying a governing law other than Russian law should disregard parallel litigation (as would most national courts), enforcement of the resulting award in Russia is unquestionably made more difficult.

In either case, the party who held the "sole option" would lose any assurance that it would be insulated from lawsuits in Russian courts.

The Supreme Commercial Court's decision is likely to have significant consequences for dispute resolution clauses with Russian parties. Until now, sole option clauses have often been included in financing agreements between foreign lenders and Russian borrowers, as well as in other commercial contracts with Russian counterparties. Such clauses were previously upheld by the Russian courts.

For example, in VR Global Partners L.P. v ZAO Factoring Company Eurokommerz (2009), the Federal Commercial Court of the Moscow District confirmed the validity of a dispute resolution clause providing one party with the right to choose whether to arbitrate or litigate, but limiting the other side to litigation in the English courts.

Although a more precise recommendation will be possible only after the Court's full decision is published, it already appears likely that dispute resolution clauses involving Russian parties may have to be amended to achieve sufficient reciprocity to survive Russian court scrutiny.

Noah Rubins is partner in the international arbitration and public international law groups in Paris, and the head of Freshfields' CIS/Russia Dispute Resolution Group. Having worked in the US Embassy in Moscow and in the NGO sector in Central Asia during the mid-1990s, he is fluent in Russian, as well as French. Noah has advised and represented clients in more than 100 arbitrations under all major rules systems, and frequently sits as arbitrator in commercial and investment cases as well. Noah received a Masters degree in dispute resolution and public international law from the Fletcher School of Law and Diplomacy, a J.D. from Harvard Law School, and a bachelors degree in international relations from Brown University.Noah Rubins can be contacted by phone on +33 1 44 56 29 12 or alternatively via email at noah.rubins@freshfields.com

Maxim Kulkov heads up the dispute resolution practice in Moscow. He has over 15 years' extensive experience in domestic and international litigation and arbitration on investments, contractual disputes, IP disputes, international trade, conflict of laws, jurisdictional disputes and competition law issues. For the last few years, The European Legal 500, Chambers & Partners and PLC Which Lawyer? have recommended Maxim as one of the best-known Russian dispute resolution specialists. Maxim is widely published in the field of litigation and arbitration, and he is a frequent conference speaker. Maxim graduated from Moscow University and attained LL.M. at Nottingham University, joined Moscow Region Bar in 2002.

Maxim Kulkov can be contacted by phone on +7 495 785 3083 or alternatively via email at maxim.kulkov@freshfields.com

Arbitration In Russia: Recent Trends

By Ivan Marisin & Vasily Kuznetsov

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Overview

Dispute resolution through international arbitration is rapidly developing in Russia. As many other countries, the Russian Federation is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In addition to the New York Convention, Russia is a party to the 1961 European Convention on International Commercial Arbitration and the 1972 Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation with the latter intended for COMECON countries and being rarely applied.

International arbitration in Russia apart from international treaties is governed by the Russian Federation Law "On International Commercial Arbitration" dated 7 July 1993 (the "ICA Law"). The ICA Law is based on the UNCITRAL Model Law on International Commercial Arbitration and, in particular, mirrors the grounds for setting aside and non-enforcement of the awards provided by the Model Law.

Recently, there have been a number of positive trends in the international arbitration development in Russia. At the same time, there are still some areas where further arbitration-friendly steps would be required. For instance, there have recently been a number of statements of Russian high-ranking officials and court decisions which demonstrate controversial and cautious attitude in Russia to arbitration. A brief overview of the recent trends in international arbitration and alternative dispute resolution in Russia is set out.

Arbitrability

One of the most important recent trends is a more detailed regulation on precisely what disputes are arbitrable.

Generally, all commercial and other civil law disputes (with some exceptions) are arbitrable in Russia, but public law cases, e.g. bankruptcy and tax matters, are not.

Previously, Russian courts held that disputes related to rights to the real estate registered in Russia were non-arbitrable (e.g. ZAO Kalinka Stockmann v. Smolensky Pasazh). On 26 May 2011 the Constitutional Court issued a decree clarifying that domestic arbitral tribunals could resolve real estate disputes. This approach, according to practitioners, can also be applied to international commercial arbitrations.

At the same time, there remains an issue with arbitrability of corporate disputes. On 30 January 2012 the panel of 3 judges of the Supreme Arbitrazh Court in the Maximov v. NLMK confirmed that the lower courts had correctly set aside an award of the International Commercial Arbitration Court at the RF Chamber of Commerce and Industry ("ICAC") on the basis that a dispute arising out of non-payment under a sale purchase agreement of shares in a Russian company as well as other corporate disputes could not be resolved by arbitration and that in general corporate disputes were not arbitrable. The subject matter of the ICAC dispute was a non-payment under the share purchase agreement.

However, it seems that the question of arbitrability of corporate disputes has not been finally resolved, taking into account comments from the court practitioners and the recent complaint filed in the matter with the Constitutional Court.

Public Policy

Public policy as a ground for refusal of recognition and enforcement of foreign arbitral awards in Russia could be construed rather broadly and that in some instances led to reconsideration of awards on the merits by Russian state courts.

An important trend, exemplified by a recent remarkable case before the Supreme Arbitrazh Court (Stena RoRo v. Baltiisky Zavod), is a narrower application of the public policy concept and restriction of Russian courts from reconsideration of the tribunal's findings on the issue of the validity of a contract.

On 13 September 2011, the Supreme Arbitrazh Court annulled the lower courts' decisions that refused recognition and enforcement of an SCC award on the public policy ground holding that enforcement of an award for a substantial amount would lead to bankruptcy of Baltiisky Zavod (a strategic Russian enterprise), which would jeopardise the interests of Russia, and that the arbitration clause in the contract had not been validly concluded, as there was no formal consent of Stena RoRo board of directors to enter into the contract. The Supreme Arbitrazh Court noted that the question of validity of the contracts was considered by the arbitral tribunal and could not be reconsidered at the enforcement stage by the state court.

The case is also exceptional by the fact that the Presidium of the Supreme Arbitrazh suspended proceedings until the Swedish Svea Court of Appeal considered an application for setting the award aside.

Interim Measures

Russian law provides for possibility to grant interim measures in support of a pending arbitration in situations where the court believes that a failure to do so could render the enforcement of the award impossible, or would substantially complicate enforcement or cause the applicant to incur substantial damage.

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Recently there have been several instances when interim measures in support of international arbitration were granted by the state courts. A good example of this is the case of Edimax Limited v. Shalva Chigirinsky (2010), where Russian arbitrazh courts granted interim measures to support an LCIA arbitration.

Another remarkable example is the case of Enka v. KMKI Dobrininskiy (2011) where we managed to obtain attachment of land lease rights over a state-owned land plot in support of a pending ICC construction arbitration.

Impartiality Of Arbitrators

In 2010 the RF Chamber of Commerce and Industry has adopted Rules on Impartiality and Independence of Arbitrators ("Rules") based, inter alia, on the IBA Guidelines on Conflicts of Interest in International Arbitration. While the court practice on application of the Rules has yet to be established, the Rules have already become a ground for setting aside the ICAC award (Ruling of Supreme Arbitrazh Court of 30 January 2012 in Maximov v. NLMK).

The fact that the arbitrators did not disclose that they were employees of the same education and scientific institutions with experts who provided legal opinions to the tribunal has caused doubts for the courts in impartiality of arbitrators.

Mediation

In addition to arbitration, another positive signal of the overall development of alternative dispute resolution mechanisms is the adoption of the set of rules aimed at regulating mediation in Russia entered into force on 1 January 2011. It includes Federal Law "On Alternative Procedure of Dispute Settlement with Participation of Mediator (Mediation Procedure)" (the "Mediation Law") and a separate set of amendments to the Russian procedural laws designed to incorporate mediation into the already existing procedures.

Disputes for which a mediation procedure is possible are limited to civil, labour (except for collective employment disputes) and family law save when they affect public interests or rights and legitimate interests of the third parties that are not participants to the mediation.

Quinn Emanuel Urquhart & Sullivan, *LLP is the largest law firm in the world that specialises in litigation and arbitration. The firm represents many of the world's leading companies in virtually all types of business related disputes, including contract, antitrust (competition), intellectual property, white collar, partnership and joint ventures, and numerous other types of matters. We are over 600 lawyers in 11 offices located in 5 countries: New York, London, Los Angeles, Silicon Valley, San Francisco, Chicago, Washington, D.C., Tokyo, Mannheim, Hamburg and Moscow. Our global capabilities give the companies we represent an edge in transnational disputes. Our record of success in adversarial proceedings is unparalleled. Our lawyers have tried or arbitrated more than 1,500 cases in their careers and have won over 90%.*

Ivan Marisin is "Universally respected" (Chambers Global) and "a widely recognised expert and a very good litigator who generates great respect for his practice" (Chambers Europe), Ivan Marisin has represented domestic and international clients in more than 100 major litigations and arbitrations worldwide, and has acted for Russian and foreign clients on corporate, banking and foreign investment matters over the last 20 years. He has also advised on numerous commercial cases involving the recognition and enforcement in Russia of foreign judgments and awards. Ivan Marisin is the managing partner of Quinn Emanuel Moscow office and a European Chair of the International Arbitration Practice. He is a member of the Moscow Bar and an accredited arbitrator at the International Commercial Arbitration Court at Chamber of Industry of the Russian Federation (ICAC), International Arbitral Center in Vienna and other leading arbitration centres. He is listed as a top-tier dispute resolution practitioner in Russia by Chambers Global, Chambers Europe, Legal 500 EMEA and PLC Which Lawyer?

Ivan Marisin can be contacted by phone on +7 499 277 1002 or alternatively via email at ivanmarisin@quinnemanuel.com

Vasily Kuznetsov, is "a rising star, who is personable and hard-working" and "dynamic practitioner" (Chambers Global). He has been representing domestic and international clients in major litigations and arbitrations since 2002, including in commercial cases involving the recognition and enforcement in Russia of foreign judgments and awards. Vasily Kuznetsov has been recognised by Chambers and The Legal 500 EMEA.

Vasily Kuznetsov can be contacted by phone on +7 499 277 1002 or alternatively via email at vasilykuznetsov@quinnemanuel.com

Snapshot – Dispute Resolution

Arbitration: Venezuela Hit With $600 Million Of New Arbitration Claims

The administration of Venezuelan President Hugo Chavez faces new demands for compensation worth at least $600 million at the World Bank after companies rushed to present their claims before the South American nation pulled out of the arbitration system.

Venezuela's government officially requested to leave the Washington-based ICSID on January 25 after 19 years, and companies faced a July 25 deadline to file new suits. The court was already considering more than 20 claims filed by companies against Venezuela, stemming mainly from the seizure of private assets by the state.

We have now learnt that Spain's Valle Verde Sociedad Financiera SL, which had a stake in the Casa Propia Entidad de Adhorro y Prestamo lending and savings bank shut down by Chavez last year, is seeking $200 million in compensation, while Barbados-based companies Blue Bank Internationa & Trust Ltd ($100m claim) and Transban Investment Corp. ($300m claim) have also met the deadline, filing separate claims to the bank's International Centre for Settlement of Investment Disputes.

Mediation: Apple Claims $2.5 Billion Damages In Samsung Patent Case

After failing to resolve their differences before a judge and court-ordered mediation ended without a resolution in sight, a jury will now hear the patent dispute between the world's largest consumer electronics companies.

For some 18 months now Apple and Samsung have been at loggerheads over claims that Samsung have breached the patents for technology used in smartphones and tablets, such as the iPhone and the iPad while Samsung has accused Apple of attempting to 'stifle legitimate competition and limit consumer choice to maintain its historically exorbitant profits'.

Billions of pounds worth of damages are now being contested in this high-stakes battle as the two parties begun trial before a jury in San Jose, California on July 30.

Negotiation: Verizon Agrees To Meditation In Contract Negotiations With CWA, IBEW

During the summer of 2011, Verizon Communication employees went on strike before returning to their jobs despite failing to reach a new agreement on a contract that expired on August 7. Since then, contract negotiations have continued to stall and now Verizon has agreed to federal mediation with unions governing 45,000 workers.

Thanks to mediation, Verizon and the unions aren't expected to reveal intricate details of the dispute publicly while the federal mediator seeks to assist the two sides in reaching an agreement and although a mediation is not a binding process, unlike a federal judge or arbitrator, the two parties are more likely to have a better chance of meeting somewhere in the middle after months of on-going negotiations failed to yield an accord.

Arbitration for Sport: One Who Does, One Who Doesn't

The Olympic Games are now in full swing, but The Court of Arbitration for Sport was kept busy in the build up to the global phenomenon.

Steeplechaser Angel Mullera won his legal case to be reinstated to the Spanish Olympic team after he faced doping allegations after it was ruled that his exclusion "did not constitution 'technical reasons."

Meanwhile, The Court of Arbitration for sport dismissed the Irish boxer Joseph Ward's appeal to be invited to London 2012 ahead of a rival from Montenegro as they had no jurisdiction to handle the case and that 'the application would have to be dismissed on the merits too'.

Ward argued that the Montenegrin fighter Bosko Draskovic was not eligible for the one invitational place. But a panel consisting of officials from boxing's governing body AIBA, the IOC and the Association of National Olympic Committees dismissed that claim.

Contractual Advice – Inserting Dispute Resolution Clauses into Business Agreements

By Peng Shen

Dispute resolution clauses form an essential element of a business agreement. In the event of a dispute, the validity, enforceability and meaning of each article of the agreement rests upon the court or arbitration body appointed by the dispute resolution clause. Careful consideration should therefore be given to the dispute resolution clause when drafting an agreement. This article focuses on China-related agreements and discusses special considerations when drafting dispute resolution clauses and the impact of recent developments in Chinese civil procedure law.

Special Considerations When Drafting Dispute Resolution Clauses of a China-related Agreement

First, consider the benefits and limitations of selecting arbitration as a mechanism for resolving disputes.

Our observation is that when entering into an agreement with a PRC company, most foreign companies prefer to select overseas arbitration for resolving their disputes. This preference could be due to the non-transparency of the PRC court system, the potential political influence and regional protectionism, all of which are reasonable concerns. However, overseas arbitration has its limitations in solving a problem inside China. For example, if an overseas arbitration is chosen, it is impossible for a party under the agreement to lodge any legal action, or seek any injunction prior to completion of the overseas arbitration proceedings. Assuming the overseas arbitration takes one year or even longer to run, this means the injured party will have no access to any immediate or timely judicial remedies. We have seen in some cases, due to the lack of any timely judicial remedies, foreign companies have had to make big compromises even though they have strong legal prospects.

Accordingly, Chinese arbitration bodies, including CIETAC (China International Economic and Trade) might be an alternative, because PRC courts can enforce an interim arbitration order issued by the domestic arbitration body. That is, a party can request a property preservation award from the arbitral panel immediately after the case is filed, and then request the court to enforce the interim award. However, in practice, we note that the courts are reluctant to enforce such intermediate orders issued by CIETAC.

Second, it is important to decide whether the dispute resolution clause should cover all disputes that may arise in connection with the agreement or only certain types of dispute.

In most agreements, we have seen parties using formal language to set out the arbitration clause. For example "Any controversy or claim arising out of or relating to this contract, or the breach therefore shall be settled by arbitration…." Considering the issue discussed above, it may be advisable to split disputes into two categories, some for arbitration and the rest for the court litigation. This allows us to exclude from the arbitration all potential disputes which may be better to leave to local courts. Suggested wording includes the phrase "without prejudice to the arbitration, the parties agree to submit the following issues to the competent court…" Such a clause which includes both arbitration and litigation methodology is called a "mixed clause".

In addition, to avoid any doubt, it is suggested that adding a phrase like "regardless of the nature of the disputes" ensures that the opposing party will not use "tort" as a claim to avoid the arbitration. In some cases, we note that PRC courts have allowed the PRC Company's claims based on tort law, even though the parties had agreed to resolve the disputes by arbitration.

Impact of Developments in PRC Civil Procedure Law

The Draft Amendments of PRC Civil Procedure Law ("Amendments") were published on 31 October 2011 and have yet to be finally confirmed by the National People Congress. The Amendments will have a significant impact on China-related disputes, including the application of the dispute resolution clause.

Amongst other things, after the Amendments become effective, pre-arbitration injunctions will be available under the PRC regime. This means that even if there is an arbitration clause, parties will be able to seek urgent judicial remedies before the arbitration commences unless the parties expressly waive their rights in the dispute resolution clause. This amendment is well recognised as arbitration-friendly progress, allowing the potential applicant in arbitration proceedings to enjoy pre-action judicial remedies similar to a plaintiff under a court litigation procedure. The right to a pre-arbitration injunction, however, only applies to domestic arbitrations, not foreign arbitrations.

Practical Tips

First, it is advisable to consider using a "mixed clause" to gain the advantage of timely juridical remedies.

Second, it is important to clearly stipulate the arbitration institution and place in the dispute resolution clause. Otherwise, the court may determine that the clause is not valid because of the uncertainty of the contents of the clause.

Third, if selecting PRC courts, do select courts in the developed areas, like Beijing, Shanghai, Zhejiang and Guangdong. It is best to avoid selecting a court in the northwest or northeast areas.

Peng Shen is an associate of Baker McKenzie LLP's Dispute Resolution Group.

Peng can be contacted on + 86 01 6535 3932 or by email peng.shen@bakermckenzie.com

Civil Litigation in Indonesia – Overview & Recent Trends

By Dr. Mohamed Idwan Ganie

Civil Litigation Process

Generally, the litigation process in a civil case in Indonesia proceeds as follows: (i) the plaintiff registers a suit with the District Court's clerk's office; (ii) the court then informs the defendant along with an order to appear in court on the first hearing day; (iii) on the first hearing day the judge orders the parties to select a mediator in order to resolve the dispute through mediation; (iv) if the mediation process fails to resolve the legal dispute, the mediator returns the matter to the judge in order to make a ruling thereof; (v) the defendant is then ordered to tender a response to the plaintiff's claim; (vi) after receiving the defendant's response, the plaintiff is given the opportunity to submit a rejoinder in order to respond to the defendant's response; (vii) after receiving the plaintiff's rejoinder, the defendant is given the opportunity to respond to it in a counterplea; (viii) after the response and counter response process stages have been completed, the judge will order the plaintiff to submit the relevant evidence, including, if so desired, witnesses in support of the arguments of the claim; (ix) the defendant is then given the opportunity of rebuttal by means of written evidence or witness testimony; (x) each of the parties is given the opportunity to submit their closing arguments; (xi) after receipt of the closing arguments, the court renders its judgment and announces it at the final hearing.

In accordance with Supreme Court rules, a civil case must be resolved and ruled upon by a District Court within a period of six months. If for whatever reason a case cannot be completed within a period of six months, the Chief Justice of the District court must report the reasons to the Chief Justice of the relevant High Court.

Appeals from the District Court proceed to the High Court, and then to the Supreme Court at the Cassation stage, and in certain circumstances to a further Case Review stage. For certain types of disputes, a number of specialist courts exist that replace the District Court (and sometimes appeal directly to the Supreme Court) in the process described above, some of these are the Commercial Court for bankruptcies, the Labor Court, and the Administrative Court.

Lawsuit Basis: Breach of Contract & Tort

In general, a civil suit filed in the District Court must be based on one of the two following legal reasons: breach of contract or unlawful acts (tort).

The suit must be brought in contract if a contractual relationship exists between the parties, and one of the parties believes that they have incurred damages as a result of violations of contractual provisions. On the other hand, if there was no prior contractual relationship between the parties, then if one of the parties believes that they have incurred damages through actions of the other party, the claim must be based on tort. Alternative claims in contract and/or in tort are not possible.

In unlawful acts, a plaintiff must prove the following: the occurrence of an unlawful act, the occurrence of fault or negligence, the occurrence of a monetary loss and the existence of a casual relationship between the unlawful act and the loss suffered by the plaintiff.

Indonesian law permits plaintiffs to file claims for material and immaterial damages. Material damages include economic losses, costs and financial losses incurred. Immaterial damages include suffering due to the loss. Indonesian courts possess a very broad authority to grant compensation for damages of these types, in amounts deemed proper based on the requests of the plaintiffs, the arguments, and the evidence submitted by the parties.

There is a time limit for plaintiffs to be able to bring a suit in Indonesian courts. The principle is that a lawsuit may be filed within 30 years of the occurrences of the intended incident. This time limit of 30 years is valid for a large portion of the cases of unlawful acts based on fault or negligence in Indonesia.

Evidence & Witnesses

Documentary evidence is the one most frequently used. The parties are however free to submit various forms of other permitted types of evidence, which support their positions. The parties may for example submit expert testimony, which can provide evidence to the judicial panel on matters that are technically complicated, and may be subjected to cross-examination.

Indonesian courts do not recognise a "pre-trial discovery procedure." However, the rules of civil procedure permit the parties to obtain specific evidence. If the opposing parties disregard these orders, then a court may draw the conclusion that such items of evidence are not favorable to the parties who disregard such orders.

Even though there is no pre-trial discovery, the parties have the opportunity to examine the evidence submitted by the opposing parties during the evidence stage.

The possibility exists to question the origins and legality of written evidence submitted by the opposing parties, and based on this procedure, courts may examine and determine whether the documents, the legality of which is being questioned, may or may not be used as evidence. Indonesian courts also have the power to summon witnesses to give testimony in court or to order the submission of certain documents to be entered as evidence.

> *"Foreign plaintiffs often have a perception that they lose cases in Indonesia due to inappropriate conduct by the courts, while, in fact, the reasons are usually more closely linked to a lack of understanding of the Indonesian legal system and insufficient documentary preparation."*

Issues & Considerations

Foreign plaintiffs often have a perception that they lose cases in Indonesia due to inappropriate conduct by the courts, while, in fact, the reasons are usually more closely linked to a lack of understanding of the Indonesian legal system and insufficient documentary preparation.

As such, it is increasingly important for foreign plaintiffs to understand the Indonesian dispute resolution process rather than attempting to import western legal concepts that are often not recognised by the Indonesian legal system.

Due to the differences of legal systems and legal realities, foreign clients need to have a close working relationship with their Indonesian counsel to better understand any legal impact and options available under Indonesian law (which might not be similar to the impact and options in their own jurisdictions in the same situation), so that results and options can be realistically analysed and also commercially "translated".

Considering this, it is important to work with counsel who can help make a realistic analysis of the legal position and how Indonesian courts would decide the relevant legal issues. And, in case a dispute does arise, ensure that the client is involved, and obtains reports, on all stages and developments of the proceedings in order to issue instructions as and when needed. Whilst, the traditional approach adopted by Indonesian litigation firms was, and more often than not still is, that once the lawyer has been instructed, reports are very rare and the lawyer will act as he deems necessary based on his own discretion, and might as a result commit clients to legal liabilities without further, or confirming, instructions.

Mohamed Idwan ('Kiki') Ganie is the Managing Partner of Lubis Ganie Surowidjojo (LGS). He graduated from the Faculty of Law of the University of Indonesia and holds a PhD in Shipping Law from the University of Hamburg. Dr. Ganie has more than 30 years of legal experience, and specialises in commercial transactions and commercial litigation, including alternative dispute resolution and has acted as an expert in a number court and arbitration proceedings. His expertise covers general corporate/company law, banking law, finance, bankruptcy and restructuring, mining, investment, acquisitions, infrastructure projects/project finance, antitrust, and shipping/aviation, with a particular focus on corporate governance and compliance.

Mohamed Idwan Ganie can be contacted by phone on +62 21 831 5005, 831 5025 or alternatively via email at ganie@lgslaw.co.id

Investor-State Arbitration – A New Chapter in India

By Vikram Nankani and Madhur Baya

Investor-State disputes are as old as Foreign Direct Investment ("FDI"). All FDI chases high returns, or at the very least, returns higher than those in the Home Country. Every state, irrespective of its status – developed, developing, in-transition or LDC, etc., welcomes FDI, as it is reflective of investor confidence in the country and helps secure the most vital developmental resource – capital.

India, since 1994 after its economic liberalisation kick-off in 1991, India has signed 83 Bilateral Investment Treaties ("BIT") and 14 other International Investment Agreements ("IIA")1. It is presently said to be negotiating another 10 Agreements. In 2011, India's Inbound FDI was of the order of $32 billion, even as its Outbound FDI grew to $14.8 bn.2 Clearly, BIT and IIA have assumed critical importance for India.

Can Court delays result in Treaty claims?

There is a Latin maxim which says that an act of a Court does no harm to any person3. Yet this became the cause of first Treaty claim against India. In the past nine months, more than ever before in India Investor-State disputes have come in sharp focus, courtesy the White Industries v/s India4 award;

The Tribunal in the White Industries case held ibid, that the known delays in India's Courts resulted in a denial of fair and equitable treatment, or that India was in breach of its treaty obligations for its Courts having entertained a challenge to the ICC Award that White was seeking to enforce. The delays in Indian Courts did not affect only White, but they affect all investors from all countries, including Indian nationals, equally. White was aware, or at the very least, was deemed to be aware of this fact and for good and valid reasons, made its 'investment'. Secondly, just as an arbitral tribunal has the exclusive power to determine its jurisdiction, national Courts are vested with the authority by the Constitution of India to determine matters that arise in or are connected with India.

White was seeking to enforce an ICC Award in India, and the enforcement was resisted, apart from the Award itself being challenged. In both streams, White had submitted itself to the jurisdiction of Indian Courts, and the decision of the Courts was in consonance with the position at Indian law then obtaining5. Finally, nothing prevents a party who has been unsuccessful in enforcing an award on the ground that the award is in conflict with the public policy of the Host State, from suing the Host State. This would amount to an unwarranted interference in the framing and implementation of public policy, which, indisputably cannot be identical for all countries. In matters of policy, in democracies such as India, even national courts seldom interfere. For an international arbitral tribunal to do so would undermine the power of national courts, which is also obviously undesirable.

The 2G Effect

The Supreme Court of India's cancellation of Unified Access Service Licences in the telecom sector6 granted on after 10th January, 2008, resulting in the invocation of BIT/IIA arbitration by ByCell Holding AG7, Mauritian Axiata group8, Norway's Telenor ASA9, Russia's Sistema10; and the retrospective amendment to India's Income Tax law, aimed at undoing the Indian Supreme Court's judicial pronouncement11 in the US$2.2 billion dollar tax demand on the acquisition of Hutchison Whampoa's stake in the Indian telecom operator Hutchison-Essar by the Dutch subsidiary of Vodafone inviting the most recent notice of arbitration12.

There is also a threat of The Children's Investment Fund ("TCI") of UK suing India for the interference by the State in the matter of pricing of coal produced by Coal India Limited, where TCI has a 1.01% shareholding.

Although the award in White Industries case has invited sharp comments on both sides from the arbitration community and obviously criticised heavily in India. It has, nonetheless, become a forerunner for many such claims. While India is liable to answer those investors who bona fide invested in India's telecom sector on the basis of the supposed validity of the stated policy, on facts, some of them in the telecom sector a Telenor may have to overcome the hurdle of its investee being one of the named perpetrators of the fraud that ultimately led to the Supreme Court cancelling the UASL. Some of the telecoms like Telenor may have a valid claim in personam against their joint venture partners for having caused the loss, but that, by itself may well fall short of a valid and sustainable claim against India.

A lot of what might be said of decisions of India's national courts in White and the Telecom matters is likely to be based on SaipemS.p.A. vs.The People's Republic of Bangladesh13. On Saipem, it only needs to be said that the decision proceeds on an insinuation that national courts were "collusive" and that their acts were "illegal". That this is un-stateable, is obvious, and so would its corollary! In addition, in the telecom matters, there could not be any collusive or illegal act on the part of the national courts that any of the investors can rely on.

These events raise important public policy questions – can a sovereign be prevented from formulating its public policy on the considerations of the greatest common good of its nationals, and if so, to what extent and by what mechanism? The national constitutional framework of each country vests this power in the national courts, and it must stay with the national courts alone. The only exception must be discriminatory or bad faith actions of the sovereign or national courts.

Otherwise every country risks facing arbitration even when its acts are, so obviously, in public interest. A case in point is FTR Holding S.A., Philip Morris Products S.A. and AbalHermanos S.A. vs. Oriental Republic of Uruguay14, where the challenge is, in the main, to the health ministry's directive for a graphic warning on the package of the dangers associated with smoking and to increase in tobacco taxes.

Having said which, while there has been speculation that in its future IIA, India will specifically exclude arbitral awards and that it may seek revision of its existing BIT and IIA, what India really needs is to follow the model of its Comprehensive Economic Cooperation Agreement ("CECA") with Singapore15, which emphasises national treatment as the primary standard and the dispute resolution process covers only the breaches of an obligation under the treaty.

Vikram Nankani is a Partner and heads the Dispute Resolution and Litigation practice at Economic Laws Practice. Vikram is consistently acknowledged by Legal500 as a leading individual practitioner in Dispute Resolution and Indirect Taxes in India.

Vikram is an India-qualified lawyer, at the Bar since 1986. An LL.M from Government Law College, Mumbai, he is a Fellow of Chartered Institute of Arbitrators (CIArb), London, Member of International Bar Association, Director, CIArb-India, Co-convenor of IPBA Dispute Resolution Committee, Panel Arbitrator of Singapore International Arbitration Centre (SIAC) and Kaula Lumpur Regional Centre for Arbitration.Vikram has appeared as a Counsel in LCIA, ICC, LMAA and KCIAB International Commercial Arbitrations and has also successfully represented the interest of several Indian and foreign clients in arbitrations under ICC, UNCITRAL, LCIA, LMAA GAFTA, SIAC, KCIAB, ICA and Ad-hoc arbitrations. He also regularly acts as an arbitrator in commercial arbitrations.

Vikram was invited as an Expert on Indian law in a suit before the Singapore High Court which is reported as Adani Wilmar Limited Vs. Cooperatieve Centrale Raiffeisen-Boerenleenbank BA ("Rabobank Nederland"), [2002] 2 SLR 216 (SGHC).He also regularly represents clients before the various High Courts and the Supreme Court of India, regulatory authorities in the field of power (electricity), environmental and pollution control, securities laws (SAT/SEBI), foreign exchange and foreign trade. Vikram has represented clients in Court proceedings in the U.S., the U.K., The Netherlands, Hong Kong and Bangladesh.

Vikram Nankani can be contacted by phone on +91 22 6636 7000 or alternatively via email at VikramNankani@elp-in.com.

Madhur Baya is a partner at Economic Laws Practice where he has worked since 2003. He is dual-qualified and admitted to practice as an Advocate in India and a Solicitor in England & Wales.

International Commercial Arbitration expert - conducted arbitration in UK, Singapore, Germany, India under various institutional rules, notably ICC, LCIA, LMAA, GAFTA, SIAC, and UNCITRAL Rules for large Indian and Foreign MNCs.

Madhur is currently handling a disputes portfolio of over US$ 5 billion, primarily in the Oil & Gas, Engineering and Construction, Telecom and Services sectors. Apart from various High Courts in India, conducted court litigation at Antwerp, Thailand, Saudi Arabia and Pittsburgh in association with local law firms.His specialties include International Commercial Arbritration, Oil & Gas, Construction, Shipping and Telecom.

Madhur Baya can be contacted by phone on +91 22 6636 7000 or alternatively via email at MadhurBaya@elp-in.com.

1 - Source: UNCTAD World Investment Report 2012, released 05th July 2012

2 - Source: UNCTAD World Investment Report 2012 ibid

3 - Actus curae neminem gravabit

4 - White Industries Australia Limited v/s Republic of India - UNCITRAL Award, published 30th November 2011, under the India-Australia BIT

5 - White Industries' Appeal pending before the Supreme Court of India was listed as part of the group of Appeals which were heard by a 5-Judge Constitution Bench over 20 days until 29th February 2012 and where the Judgement is expected in the next few weeks. Hearings widely reported as Bharat Aluminium Company v/s Kaiser Aluminium Technical Services Inc.

6 - Centre for Public Interest Litigation v/s Union of India, (2012) 3 SCC 1, Judgment dated 02nd February 2012

7 - India-Russia BIT and India-Cyprus BIT.ByCell Holding AG, is incorporated in Switzerland and is 97% owned by Cyprus-based Tenoch, which is owned by two Russian nationals.On 27th July 2012, the Indian Government's Department of Telecom (DoT) has taken the view that ByCell cannot claim protection under any bilateral investment treaty because security concerns override all commitments, and ByCell'slicences were cancelled due to security concerns.

8 - India-Mauritius BIT

9 - India-Singapore Comprehensive Economic Co-operation Agreement. India doesn't presently have a BIT with Norway, though it is negotiating a Trade and Investment Agreement with EFTA (Iceland, Norway, Liechenstein and Switzerland. Telenor's investments in its Indian JV were routed through a Singapore subsidiary.

10 - India-Russia BIT

11 - Judgment dated 20th January 2012 in Vodafone International Holdings B.V. v/s Union of India [Civil Appeal 733 of 2012]

12 - India-Netherlands BIT

13 - ICSID Case No.ARB/05/07.

14 - ICSID Case No.ARB/10/7, registered on 26th March 2010

15 - Articles 6.3.1, 6.10, 6.11, 6.12 and 6.21.1 of the India-Singapore CECA contain certain important scope limitations and exceptions –

ARTICLE 6.3: NATIONAL TREATMENT
1. Each Party shall accord to investors of the other Party, and investments of investors of the other Party, in relation to the establishment, acquisition or expansion of investments in the sectors listed at Annex 6A and Annex 6B, treatment no less than that it accords in like circumstances to its own investors and investments. Any subsequent establishment, acquisition or expansion of investments by an enterprise that is incorporated, constituted, set up or otherwise duly organized under the law of a Party, and which is owned by an investor of the other Party, shall be regarded as an investment of the other Party, for the purpose of determining the applicable treatment to be accorded under this paragraph.

ARTICLE 6.10:MEASURES IN THE PUBLIC INTEREST
Nothing in this Chapter shall be construed to prevent:
(a) a Party or its regulatory bodies from adopting, maintaining or enforcing any measure, in a non-discriminatory basis; or
(b) the judicial bodies of a Party from taking any measures;
consistent with this Chapter that is in the public interest, including measures to meet health, safety or environmental concerns.

ARTICLE 6.11: GENERAL EXCEPTIONS
1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of a Party in the territory of the other Party, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:

(a) necessary to protect public morals or to maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter including those relating to:
(i) the prevention of deceptive and fraudulent practices to deal with the effects of a default on a contract;
(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
(iii) safety;
(d) imposed for the protection of national treasures of artistic, historic or archaeological value;
(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

ARTICLE 6.12: SECURITY EXCEPTIONS
1. Nothing in this Chapter shall be construed:
(a) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable and fusionable materials or the materials from which they are derived;
(ii) in time of war or other emergency in international relations;
(iii) relating to the production or supply of arms and ammunition; or
(iv) to protect critical public infrastructures, including communication, power and water infrastructures, from deliberate attempts intended to disable or degrade such infrastructures; or

(c) to prevent a Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. Nothing in this Chapter shall be construed to require a Party to accord the benefits of this Chapter to an investor that is an enterprise of the other Party where a Party adopts or maintains measures in any legislation or regulations which it considers necessary for the protection of its essential security interests with respect to a non-Party or an investor of a non-Party that would be violated or circumvented if the benefits of this Chapter were accorded to such an enterprise or to its investments.

3. Paragraph 2 shall be interpreted in accordance with the understanding of the Parties on security exceptions as set out in their exchange of letters, which shall form an integral part of this Agreement.

4. This Article shall be interpreted in accordance with the understanding of the Parties on non-justiciability of security exceptions as set out in their exchange of letters, which shall form an integral part of this Agreement.

ARTICLE 6.21: INVESTMENT DISPUTES
1. This Article shall apply to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former under this Chapter which causes loss or damage to the investor or its investment, except any dispute arising under Article 6.3.

The Rising Importance Of Commercial & Investment Arbitration In India

By Zia Mody & Shreyas Jayasimha

AZB & PARTNERS
ADVOCATES & SOLICITORS

Courts in India are valiantly battling a staggering litigation overload with the Supreme Court alone having over 63, 000 cases pending as of June, 2012 1. While courts in India have to be approached for constitutional and statutory matters, parties are at liberty to opt for arbitration for commercial disputes. This article deals with an overview of trends in commercial arbitration and the increase of investment arbitration pertaining to India.

India is not a member of the International Centre for Settlement of Investment Disputes ("ICSID"), but has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), due to which Indian courts implement awards of foreign tribunals to a greater degree than the recognition given to judgements of foreign courts.

The Arbitration and Conciliation Act, 1996 ("Act") is based on the UNCITRAL Model Law on International Commercial Arbitration ("'Model Law").

Part I of the Act deals with the procedure to be followed in instances where the place of arbitration is in India. Part II makes provisions for the recognition and enforcement of foreign arbitral awards in India. Although Part I of the Act primarily deals with arbitration in India, courts in India have expanded its scope to international arbitrations seated outside India.

In Bhatia International v Bulk Trading S.A.2 the Supreme Court extended the powers of domestic courts in India to make interim awards in respect of arbitrations seated outside India by holding that Part I would continue to apply unless excluded by the contracting parties.

This ratio famously culminated in opening all foreign arbitral decisions to the scrutiny of Indian courts under Section 34 of the Act3, apart from allowing Indian courts to hear applications to appoint arbitrators in overseas arbitrations. There have also been a plethora of decisions on what constitutes exclusion of Part I and various High Courts have differed in their approach. The Supreme Court is currently reconsidering Bhatia International and Venture Global amongst other decisions in Bharat Aluminium Company Limited v Kaiser Aluminium Technical Service Inc.4 and its decision is eagerly awaited.

Guidance on Drafting of Commercial Arbitral Clauses

Foreign companies doing business in India are well advised at the first instance to have an offshore arbitration seat and to exclude the application of Part I of the Act. This is despite decisions of Courts that have held that a foreign governing law and a foreign seat would act as an implied exclusion of Part I of the Act. In cases where interim relief from Indian Courts is necessary or where witnesses or evidence are located in India, it would be prudent to retain the applicability of Section 9 and Section 27 of the Act.

In choosing a foreign seat, care must be taken that the chosen country has been notified in India as a reciprocating country for the enforcement of foreign awards. Currently the most popular seats are Singapore, London, Paris and New York and it is still to be seen whether the recent notification of China would see more clauses with Hong Kong as the seat. If all contracting parties are Indian companies then the governing law has to be Indian law but a foreign seat is often chosen. Institutional arbitration is the norm in foreign seated arbitrations although there are a few ad hoc foreign arbitrations. If offshore arbitration is not possible, it is highly recommended that the parties choose an arbitral institution of repute to conduct the arbitration in India. Currently the vast majority of domestic or India seated arbitrations are ad hoc in nature and there are legitimate concerns over the efficiency of arbitrations without institutional oversight. In addition, foreign parties often draft clauses that require chairpersons of arbitral tribunals to be of neutral nationality.

Irrespective of domestic or international arbitration, parties must bear in mind the expansive interpretation of 'public policy' in considering challenges to arbitral awards. Further, decisions of the Supreme Court such as N. Radhakrishnan v. Maestro Engineers5 tend to aid recalcitrant respondents by holding that allegations of fraud are in some cases inherently not arbitrable. Lastly, delay in enforcement in India rather than lack of enforcement is the experience of most foreign parties.

Impact Of Investment Arbitration On Structuring Of Investment Into India

Although it has long been known that while Double Taxation Avoidance Agreements can help protect the tax efficiency of an international investment and real protection for the investment itself is provided through Bilateral Investment Protection Agreements, the latter are often not given the importance they deserves in articles on investing in India.

The earlier experience of foreign investors scurrying for investment treaty protection for their investments in the Dhabol power project had receded in memory till the utility and indeed criticality of such protection was brought to the fore in White Industries Australia Limited v. Republic of India6 ("White Industries").

The recurring theme of judicial delay again played a part in India's first loss in investment arbitration. The claimant in White Industries invoked the provisions of the India-Australia bilateral investment treaties ("BIT") and its most favoured nation ("MFN") clause to incorporate beneficial protections available under the India- Kuwait BIT that protected a right to 'effective means'.

Although White Industries had earlier succeeded in a commercial arbitration against an Indian State-controlled company, it argued that the many years of delay in enforcement and consideration of the challenge to the arbitral award constituted denial of effective means as protected under BITs. Another factor was the use of an 'umbrella clause' to elevate contractual claims to investment disputes.

The investment arbitration that ensued held in the claimant's favour thus highlighting the strategic importance of structuring investments through countries protected by BITs.

India is signatory to 82 BITs7, most of which are in force and some of the more popular ones include the Netherlands-India BIT and Mauritius-India BIT. Many economic cooperation agreements and free trade agreements also contain clauses that permit claims of which, the Singapore-India Comprehensive Economic Cooperation Agreement (CECA) is prominent. Recently, several notices have been issued by claimants against India.

Most famous of these is Vodafone which has sent a notice to enforce its rights under the India-Netherlands BIT pursuant to the Government's efforts to amend the income tax law making all indirect transfers involving underlying assets in India liable to tax with retrospective effect. In addition, Russia' Sistema and ByCell, Norway's Telenor and Malaysia's Axiata, have initiated actions under various BITs and the CECA, pursuant to the 2G spectrum allocation dispute. The Children's Fund has threatened action against India to protect its investments in the State controlled company Coal India.

In light of the recent events apart from the careful drafting of commercial dispute clauses, it is imperative for long term or large value investors into India to structure investments so as to take full advantage of BIT protections.

Zia Mody is the Founder and Senior Partner of AZB & Partners and one of India's foremost corporate attorneys. She holds degrees in law from the University of Cambridge and from Harvard Law School. Zia is a non-executive director of the HSBC, Hong Kong. She is a Vice President and member of the London Court of Arbitration (LCIA). Among her many awards, Zia has received the "Best M&A Lawyer of the Year – 201 2" award at the Legal Era Awards and she has been voted as "Business Woman of the Year, 2010" and as one of the country's most powerful CEOs (2004 to 2008), and as one of the 15 most powerful Indian women leaders in 2010 by the Economic Times.

She has been selected as one of the 25 most powerful women in business by Business Today in 2004, 2006, 2007, 2009 and 2010. AsiaLaw Profile hailed her as one of 'The Leading Lawyers - India' in the fields of Mergers & Acquisitions, General Corporate Practice, Dispute Resolution, Corporate Governance and Capital Markets & Corporate Finance for 2010 and 2011, while Asia Pacific Legal 500 and Chambers Global, have identified her as a leading individual in the Corporate Mergers & Acquisition, Private Funds, Private Equity, Litigation and Infrastructure Sectors. "Zia Mody is an obvious choice for many clients involved in large international M&A transactions" states IFLR.

Zia Mody can be contacted by via email at zia.mody@azbpartners.com

Shreyas Jayasimha Partner at AZB & Partners, read law at National Law School of India University and was a Chevening Scholar at the University of Warwick. His principal practice areas include litigation, arbitration and regulatory investigations and he has been trained as mediator and has been appointed as arbitrator. Shreyas is listed in the Who's Who of International Arbitration, is Regional Editor (South and Central Asia) of the Newsletter of the IBA Arbitration Committee and has published several articles, including co-authoring the India Chapter for Oxford's Guide to Arbitration in Asia (2011).

Shreyas Jayasimha can be contacted via email at shreyas.jayasimha@azbpartners.com

1 - Supreme Court of India Monthly Statement of Pending Cases as on June 30, 2012
http://supremecourtofindia.nic.in/pendingstat.htm

2 - [2002] 4 SCC 105

3 - Venture Global v. Satyam Computer Services AIR 2008 SC 1061

4 - Civil Appeal No 7019 of 2005
5 - (2010)1SCC72
6 - UNCITRAL Arbitration in Singapore dated November 30, 2011
7 - http://www.finmin.nic.in/bipa/bipa_index.asp

CORPORATELiveWire

Dispute Resolution: Recent Trends & Legislative Issues From An Indian Perspective

By Kirit S. Javali

Introduction

India's legal system is well established with a hierarchy of courts and specific tribunals (i.e. Customs & Excise, Competition Commission and Telecom etc.) have been created to provide an effective resolution of disputes.

India's Arbitration and Conciliation Act, 1999 provides for domestic as well as international disputes to be settled by arbitration.

Alternative Dispute Resolution ("ADR") techniques, such as mediation and arbitration are being employed by the courts in India. Recent amendments to the Code of Civil Procedure provides the parties to a dispute the option to exercise arbitration and/or mediation as an ADR technique, with some of the courts in India even establishing mediation centres with specific rules governing the procedure aspects of mediation.

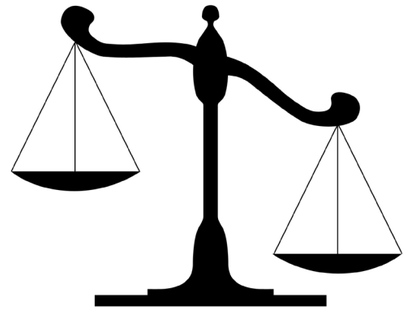
Commercial Issues That Affect Foreign Investors Operating In India

Some of the commercial issues that affect foreign investors operating in India are adequate handling of statutory legal compliances by the Indian partner, management control i.e. (Indian corporate laws over ride any private contractual terms between the joint venture partners, unless such terms are addressed and reflected in the Articles of Association of the company) and protection of intellectual property rights, and double tax issues. Foreign investors may take pre-emptive steps against frivolous litigation (criminal charges) by including suitable arbitration clauses in their agreements.

Thus a practical aspect to consider may be uniformity and alignment between applicable law, rules, venue and forum for arbitration, enforcement of foreign judgments and awards in India, apart from logistics of perhaps having to manage multi-jurisdictional legal teams, including costs.

Companies Bill, 2011

The existing Companies Act, 1956 was enacted by the Indian Legislature over half-a-century ago. In the ensuing years, much has changed in the nature of businesses and the manner in which they are conducted both domestically and internationally. Hence there is a requirement to develop a legislation that is compact, amenable to clear interpretation, and able to adequately respond to the needs of the ever evolving economic activities and business models of India Inc. – all the while nurturing a positive environment conducive to investment and growth.



The Companies Bill 2011 provides for Compromises, Arrangements and Amalgamations which are likely to have an impact on restructuring transactions. While some of the proposals are intended to make it easier for companies to implement the scheme, others impose checks and balances to prevent possible abuse of these provisions by companies.

One of the key provisions in the Bill permits Indian companies to merge into companies located in specific foreign jurisdictions (to be notified) and vice versa. The Bill also permits any shareholder, creditor or other "interested person" to object to a scheme of arrangement, however subject to an onerous requirement that only persons holding at least 10% of the shares of the Company or at least 5% of the total debt outstanding in the Company are eligible to raise an objection.

This provision is likely to substantially erode the power of minority shareholders and creditors in case of restructuring schemes. However, the Bill seeks to protect the interest of minority by introducing the concept of exit opportunities to dissenting shareholder in case of any restructuring, which may be insufficient protection.

Corporation Can Have A Guilty Mind

In India, the Courts have finally started recognising that a corporation can have a guilty mind but were reluctant to punish them since the criminal law in India does not allow this action as to whether a company can be convicted for an offence where the punishment prescribed by the statute is imprisonment and fine. Under Sec.420 of the Indian Penal Code the punishment is imprisonment but the question that is always asked is how can a company be indicted for such an offence and be given such a punishment. This confusion was firs addressed in M.V.Javali Vs. Mahajan Borewell & CO. and Others where the court held that mandatory sentence of imprisonment and fine is to be imposed where it can be imposed but where it cannot be imposed, namely on a company fine will be the only punishment. In Standard Chartered Bank & Ors. Vs. Directorate of Enforcement and Ors (2005), the court held that the legislative intent should be considered and all penal provisions should be construed like all other statutes fairly to bring out the legislative intent expressed in the enactment.

Electronic Commerce - Alternative Dispute Resolution (ADR) Mechanism To Resolve E-Commerce Disputes In India

E-commerce regulations and laws in India are limited in nature and this does not allow use of ADR mechanisms and technology driven solutions. Online dispute resolution (ODR) in India is still not known.

Similarly, establishment of e-courts in India can also facilitate early and effective e-commerce disputes resolutions in India. However, till February 2012 we are still waiting for the establishment of first e-court in India. E-courts and ODR in India are urgently required to reduce backlog of cases and for reducing increasing pressure upon traditional courts. E-courts and ODR can also help in e-commerce disputes resolutions in India.

Some of the areas where we must pay special attention include technology related dispute resolution in India, film, media and entertainment industry dispute resolution in India, cross border e-commerce dispute resolution in India, etc. E-courts and ODR can be effectively used for all the above mentioned purposes.

In recognition of the increasingly multinational character of today's commercial transactions and negotiations, Jafa & Javali has actively, over the years, worked and interacted with leading international law firms and transnational overseas entities involving cross-border business operations, and in local and international dispute resolution in almost every industry or sector, including for the enforcement of judgments and awards, injunctions, protection and enforcement of intellectual property rights, competition law, civil and constitutional laws and provides a complete range of possibilities and solutions. Members of the firm hold formal overseas legal qualifications and regularly contribute articles to leading newspapers and journals, and lecture on a variety of current legal issues. The Firm has been regularly featured in Asia Pacific Legal 500.

Kirit S. Javali can be contacted by phone on +91 11 416 41757 or alternatively via email kirit@jafajavali.com

Litigation in Egypt in Commercial Matters

By Dr. Tarek Riad

Kosheri, Rashed & Riad Law Firm

Egypt has a system of law that is based upon the European continental legal system, except in personal matters which are subject to the Sharia Law.

A principle division under Egyptian Law is between Private and Public Law which is primarily based upon the difference between private relationships and relations in which the State and Public Juristic persons are parties and in which they act as a sovereign power.

Therefore the Egyptian legal system has ordinary civil and commercial Courts which decides the disputes between private persons as well as the disputes which involve the State and the Public Juristic persons when they act as private persons on one hand, and on the other hand, the administrative Courts of the Council of State which view the disputes in which the State and the Public Juristic persons act as a sovereign power, and which include-interalia- disputes relating to the so called Commercial "administrative contracts" in which one of the parties is the State or a Public Juristic person, that is linked to a public service and that includes conditions - in favour of the public party - that are not common in private law relationships.

The ordinary Civil and Commercial Courts include the Courts of urgent matters, the summary Courts, the Courts of first instance, the Courts of appeal and the Court of Cassation, and an important factor that should be noted is that in cases other than those before the Court of Cassation, the Courts often refer the cases to the Experts Department of the Ministry of Justice - which is composed of civil servants - and which is entrusted with the task of presenting to the Courts reports about the questions of facts relating to the cases, and the conclusions of those reports are usually adopted by courts.

Law No 13 of 1986 concerning Civil and Commercial procedures (the "Law") provides for the rules relating to the International Jurisdiction of the Courts, and the following has to be noted in this respect that:

1: Without prejudice to the exclusively territorial jurisdiction provided for in matters related to real estate (cases pertaining to immovables), Article 28 of the Law provides that Egyptian courts have the jurisdiction/ competence to adjudicate the Lawsuits filed against an Egyptian, whether domiciled or not in Egypt.

Furthermore, Article 30 of the Law provides that Egyptian Courts have jurisdiction/ competence to adjudicate certain categories of lawsuits filed against foreigners non- domiciled or residing in Egypt. Such categories include - interalia- the following:

(I) Cases concerning an asset situated in Egypt, or an obligation that originated, or that was executed, or that should have been executed in Egypt; or a bankruptcy that was registered in Egypt.

(II) Cases in which one of the defendants has a domicile or residence inside Egypt; i.e. extending the judicial competence to other defendants of foreign nationalities, not domiciled or residing in Egypt once they are co-defendants in the same lawsuit to a national involved in the same contractual or delictual Liability.

(III) Furthermore, whenever a lawsuit is filed in front of the Egyptian Courts - that have jurisdiction/ competence to adjudicate it - those courts are entitled to extend their jurisdiction/competence to deal with all preliminary matters and interlocutory demands relating to the original case, as well as all submissions linked thereto which are deemed necessary for rendering justice within the course of the pending judicial proceedings.

Therefore, it is likely that if a plaintiff brings court proceedings in Egypt against (I) an Egyptian defendant and (II) a foreign defendant, the Egyptian Court declares itself having competence to adjudicate the claim against both defendants, whenever the claim against them is based on identical or closely connected facts.

2: The general rule is that a defendant who objects to the Jurisdiction of an Egyptian Court has to raise that objection at the beginning of the proceedings before getting in the merits. Otherwise, he will be considered having waived his objection, implying a voluntary submission to jurisdiction. However, once the objection is raised in due time, the Court may pass judgment concerning this plea at the outset or at the end of the proceedings, as it considers appropriate according to the circumstances of the case.

3: A general rule provided in Article 63 of the Law is that the legal action is brought at the request of the plaintiff by a notice of action that is deposited at the concerned court's clerk office.

This notice of action must contain the following:

- The full name of the plaintiff, his occupation, domicile, and the full name, profession and domicile of his representative.
- The full name of the defendant, his occupation and domicile, and his last domicile in case his present domicile is unknown.
- The date when this legal action is brought.
- The court before which the legal action is brought.
- The elected domicile of the plaintiff in the city where the court is situated in case he has no domicile therein.
- The facts of the case, the requests of the plaintiff and their basis.

4: The proceedings commence within days once the Court's clerk sends to the defendant through the Bailiff a copy of the official Notice of Action, informing him about the filing of the judicial requested action and providing him with the name of the plaintiff, his claims, and the date of the Court's session at which the judicial action will start being adjudicated.

> *Article 30 of the Law provides that Egyptian Courts have jurisdiction/ competence to adjudicate certain categories of lawsuits filed against foreigners non- domiciled or residing in Egypt.*

From the defendant's side, he becomes required to deposit his defence memorandum and his supporting documents at the Court's clerk office, at least three days before the date fixed for the Court's first session as indicated in the Bailiff's Notice of Action.

However, it should be noted that on many occasions defendants prefer not to follow said rule, due to the fact that no sanction is provided for in the above mentioned Law if the defendant does not follow that rule.

Thus, they wait to submit their defence in front of the Court during the proceedings taking place thereafter.

5: As a general rule, the Court's proceedings in Egypt are not confidential. All sessions and hearings are held in public, unless the Court decides in exceptional circumstances that the public is not entitled to attend a given case that requires secrecy. As to the documents filed, copies thereof can only be obtained by the other parties appearing in the same case and these copies can be photocopied by the Court's clerk, without any possibility to displace the file.

6: Judges in Egypt do not have the right to refer the parties in pending proceedings to arbitration/ mediation.

On the other hand, Article 12 of the Egyptian Arbitration in Civil and Commercial Matters Law no 27 of 1994 provides that the court before which an action is brought concerning a disputed matter which is subject to an arbitration agreement shall judge that this action is inadmissible, provided that the defendant raises this objection before submitting any demand or defence on the merits of the case.

Dr. Tarek Riad is a managing partner of Kosheri, Rashed and Riad, Professor and Chairman of the Business Law Department at the German University in Cairo, Counsel for numerous multinational corporations such as Philip Morris, Caterpillar, Lockheed Martin, Four Seasons, Samsung, Colgate, AT&T etc. He is also a member of the BOT and EC of the Dubai International Arbitration Center and alternate Member of the ICC Court of Arbitration.He has also had numerous publications including 'The Applicable Law in Transnational Arbitrations' (Harvard 1985) and 'Egyptian Business and Commercial Laws' Yearbook of Islamic and Middle Eastern Law, 2012. Dr. Riad can be contacted by phone on +20 2 2795 4795 or alternatively via email at tarek.riad@krr-law.com

Expert Directory - The Americas

Canada
Borden Ladner Gervais LLP
Daniel Urbas
+1 514 954 3149
durbas@blg.com

Robert Deane
+1 604 640 4250
rdeane@blg.com
www.blg.com

USA
Fulbrook Management
Selvyn Seidel
sseidel@fulbrookmanagement.com
www.fulbrookmanagement.com

USA
Skadden
Gregory A. Litt
+1 212 735 2159
Greg.Litt@Skadden.com
www.Skadden.com

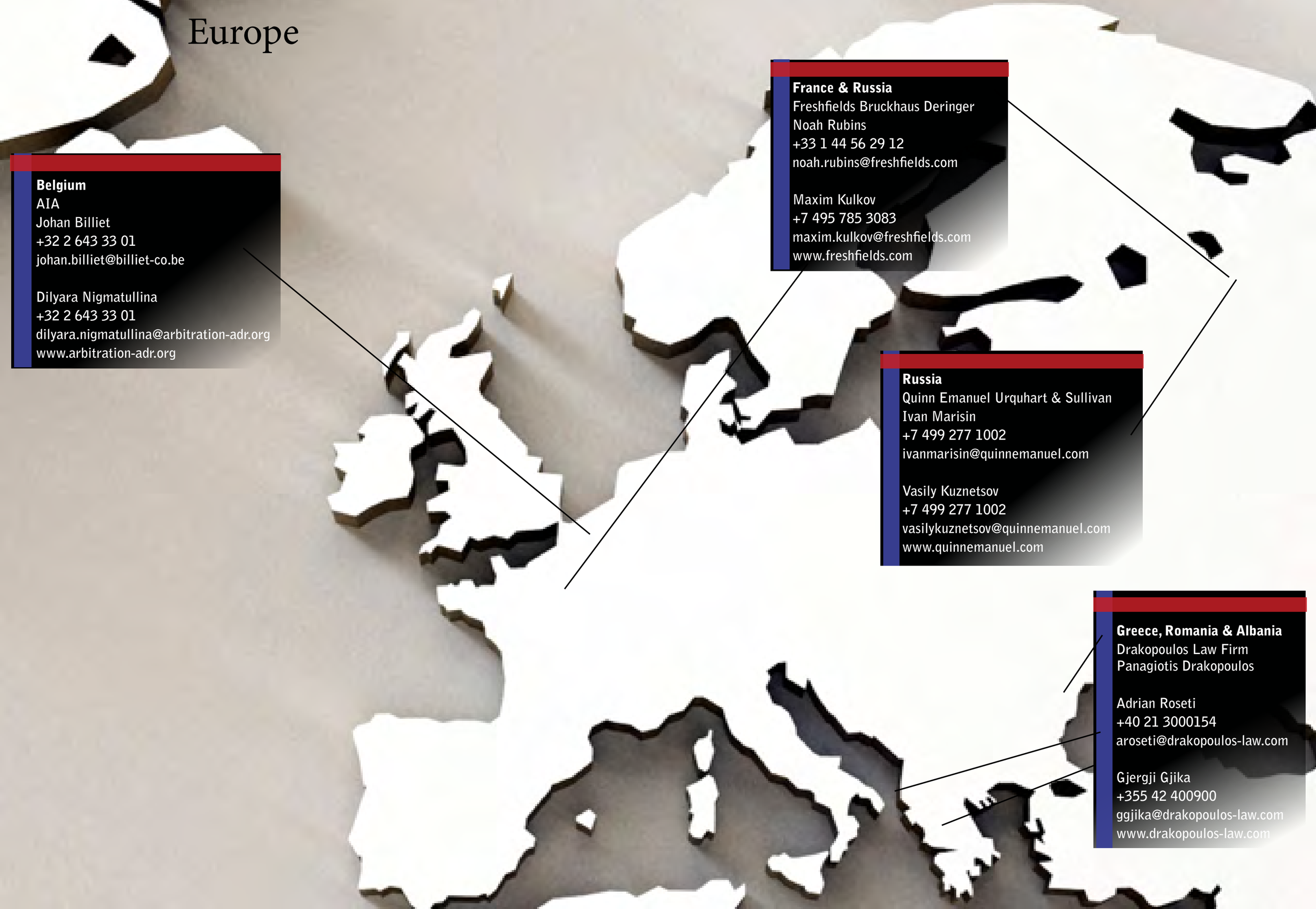
USA
Winston & Strawn
Mark Bravin
MBravin@winston.com
www.winston.com

USA
Stradley Ronon Stevens & Young
Lee A. Rosengard
+1 215 564 8032
lrosengard@stradley.com
www.stradley.com

Cayman Islands
Campbells
Ross McDonough
+1 345 949 2648
rmcdonough@campbells.com.ky

Kirsten Houghton
+1 345 949 2648
khoughton@campbells.com.ky
www.campbells.com.ky

Europe



Belgium
AIA
Johan Billiet
+32 2 643 33 01
johan.billiet@billiet-co.be

Dilyara Nigmatullina
+32 2 643 33 01
dilyara.nigmatullina@arbitration-adr.org
www.arbitration-adr.org

France & Russia
Freshfields Bruckhaus Deringer
Noah Rubins
+33 1 44 56 29 12
noah.rubins@freshfields.com

Maxim Kulkov
+7 495 785 3083
maxim.kulkov@freshfields.com
www.freshfields.com

Russia
Quinn Emanuel Urquhart & Sullivan
Ivan Marisin
+7 499 277 1002
ivanmarisin@quinnemanuel.com

Vasily Kuznetsov
+7 499 277 1002
vasilykuznetsov@quinnemanuel.com
www.quinnemanuel.com

Greece, Romania & Albania
Drakopoulos Law Firm
Panagiotis Drakopoulos

Adrian Roseti
+40 21 3000154
aroseti@drakopoulos-law.com

Gjergji Gjika
+355 42 400900
ggjika@drakopoulos-law.com
www.drakopoulos-law.com

Asia

India
Economic Laws Practice
Vikram Nankani
+91 22 6636 7000
VikramNankani@elp-in.com

Madhur Baya
+91 22 6636 7000
MadhurBaya@elp-in.com
www.elplaw.in

India
Jafa & Javali Advocates
Kirit S. Javali
+91 11 416 41757
kirit@jafajavali.com
www.jafajavali.com

India
AZB & Partners
Zia Mody
zia.mody@azbpartners.com

Shreyas Jayasimha
shreyas.jayasimha@azbpartners.com
www.azbpartners.com

China
Baker & McKenzie
Peng Shen
+86 01 6535 3932
peng.shen@bakermckenzie.com
www.bakermckenzie.com

Indonesia
Lubis Ganie Surrowidjojo
Mohamed Idwan ('Kiki') Ganie
+62 21 831 5005, +62 21 831 5025
ganie@lgslaw.co.id
www.lgsonline.com

Africa

Egypt
Kosheri, Rashed & Riad
Dr. Tarek Riad
+20 2 2795 4795
tarek.riad@krr-law.com
www.krr-law.com

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