DEBEVOISE & PLIMPTON LLP

Arbitration Quarterly

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Editors' Remarks

Welcome to the fourth edition of Debevoise's Arbitration Quarterly, our collection of interesting and significant current developments in international arbitration. It has been a year replete with important developments for arbitral law and practice, and the last quarter was no exception.

In this issue we report on ten arbitration-related judicial decisions from courts spanning the globe. From US federal courts, we survey decisions concerning the enforcement of annulled awards, standards for vacating awards for arbitrator corruption, the availability of court-ordered arbitrator appointments, and the constitutionality of state-administered programs allowing judges to function as arbitrators in the courthouse. We discuss new pro-arbitration decisions in Europe, including a French Court of Appeal decision highlighting France's approach to *compétence-compétence* and an English High Court decision concerning the circumstances under which a court should grant an application for an interim injunction in connection with arbitral proceedings. Our survey continues to Asia and Africa, where we discuss two recent decisions of the Indian Supreme Court narrowing the grounds for challenging arbitral awards, a significant decision from the Singapore Court of Appeal clarifying the right to challenge a tribunal's decision on jurisdiction at the enforcement stage, and a Nigerian Court of Appeal decision limiting the circumstances under which a court can intervene in arbitration proceedings.

Alongside these decisions, we note recent initiatives from various institutions to promote best practices and strengthen regional arbitration centers. These efforts include recent pro-arbitration initiatives from Mauritius, the new optional appellate procedures from the American Arbitration Association, revised rules for administered arbitration from the Hong Kong International Arbitration Centre, an arbitration guide

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

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for parties to derivatives transactions from the International Swaps and Derivatives Association, and the launch of the International Centre for Energy Arbitration in Scotland.

As we mark the first year of Debevoise's Arbitration Quarterly, we hope you find this and future editions informative and engaging. If you wish to discuss any of the articles or topics featured in this edition or any other aspect of international arbitration or dispute resolution, we would be delighted to hear from you.

Very best wishes,

Mark W. Friedman

Carl Micarelli

and the International Dispute Resolution Group of Debevoise & Plimpton LLP

Bridging the Atlantic Divide? US Court Enforces Annulled Award

Enforcement of annulled arbitral awards by domestic courts has long been a hotly debated issue in the international arena. Various jurisdictions have employed different approaches, and so far international consensus has not emerged. French courts, as exemplified by the *Hilmarton* and *Putrabali* decisions, have repeatedly enforced annulled awards. French courts consider international awards to exist on an international plane unaffected by a national court annulment; in addition, French law does not recognize annulment as a ground for refusal of enforcement of domestic awards, and Article VII of the New York Convention allows these more favorable enforcement conditions to prevail. US courts, on the other hand, have been more reluctant to adopt such a delocalized approach.

Nonetheless, US courts have enforced annulled awards in some circumstances. In one of the earliest cases, *Chromalloy Aeroservices v. Arab Republic of Egypt*, the D.C. Circuit declined to grant *res judicata* effect to an Egyptian annulment decision on the grounds that to do so would "violate … clear U.S. public policy" in favor of enforcing arbitral awards. 939 F. Supp. 907, 913 (D.C. Cir. 1996). Decisions since *Chromalloy* have stepped away from this rationale, however, and toward a narrower public-policy approach focused more on the merits of the intervening annulment. For example, the D.C. Circuit's 2007 decision in *TermoRio* distinguished *Chromalloy* and refused enforcement of an annulled award, while accepting that a foreign

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judgment annulling an arbitral award could be disregarded under Article V of the New York Convention if it "violated any basic notions of justice to which we subscribe." *TermoRio S.A. E.S.P. et al. v. Electranta S.P., et al.*, 487 F.3d 928, 939 (D.C. Cir. 2007).

A recent decision by a United States district court enforcing an annulled award invokes the *TermoRio* standard and, in applying it, provides a specific example of when an annulment decision may be considered to violate "basic notions of justice." In a decision by District Judge Alvin Hellerstein, rendered on August 27, 2013, the United States District Court for the Southern District of New York enforced an arbitral award annulled by Mexican courts.[1]

The dispute arose out of contracts between COMMISA, a private corporation, and PEP, a Mexican state-owned entity, relating to the construction and installation of two offshore natural gas platforms. The contracts were governed by Mexican law and provided for ICC arbitration seated in Mexico. When the parties' relationship broke down, COMMISA initiated ICC arbitration and PEP responded by seeking administrative rescission of the contracts. Litigation ensued in Mexican courts regarding the validity of the rescission while the ICC arbitration proceeded in parallel.

The Mexican courts upheld the validity of PEP's rescission, while the ICC tribunal issued an award in favor of COMMISA. PEP sought annulment of the award in the Mexican courts. In New York, COMMISA obtained an order confirming the award but staying enforcement pending the outcome of the annulment proceedings. The Mexican court ultimately annulled the arbitral award, based in large part on a law that was enacted subsequent to the parties' dispute and which provided that disputes concerning the administrative rescission of contracts were not arbitrable. The Mexican court also determined that the arbitral tribunal lacked jurisdiction over the contract claims because the rescission claims were not arbitrable and were inextricably intertwined with the contract claims. PEP resisted enforcement of the award in the Southern District on the basis of the annulment, pursuant to Article 5 of the Inter-American Convention on International Commercial Arbitration (known as the Panama Convention), which mirrors Article V of the New York Convention.

The district court, however, declined to give deference to the Mexican court's annulment decision. The court noted that it had discretion to refuse enforcement on the basis of the annulment, but declined to recognize the Mexican court's annulment of the arbitral award because the court considered it "violated basic notions of justice" by applying a subsequently-enacted law retroactively. The district court found that the Mexican court had relied on the newly-enacted law even though the Mexican court had expressly stated that it was not applying the law retroactively.

The implications of the district court's decision remain to be seen; they may be limited by the decision's narrow holding closely tethered to the facts at issue.

In reaching its conclusions, the district court noted COMMISA's expectations that its dispute would be arbitrable and stated that the "unfairness" of the retroactive application of the law was "at the center of the dispute." The court noted that the effect of the law was to leave COMMISA without any remedy since the time limitations for bringing the dispute before the Mexican courts had already passed, and that the retroactive application of the law benefited the State party at the expense of the private party. Although the court also stated that it was "neither deciding, nor reviewing, Mexican law," it held three days of hearings to allow testimony from legal experts on substantive issues of Mexican law such as retroactivity.

The implications of the district court's decision remain to be seen; they may be limited by the decision's narrow holding closely tethered to the facts at issue. The court has continued the apparent trend in the US courts of analyzing the issue as one of when deference to a foreign court judgment is appropriate, in contrast to other jurisdictions (such as France) where courts do not examine the circumstances of the annulment decision at all. Although the decision provides an example of the kinds of considerations that could justify enforcement of an annulled award, consistent standards may be unlikely to emerge any time soon given the court's recognition that it is a matter of discretion.

The Southern District of New York may have occasion to consider the issue again in *Thai-Lao Lignite (Thailand) Co. Ltd v. Government of the Lao People's Democratic Republic*, 10 Civ. 5256 (KMV) (S.D.N.Y.). Judge Kimba Wood of the court granted enforcement of the underlying award in May 2011, but the Lao government has recently moved to vacate the enforcement on the grounds that the award was annulled by the Malaysian courts in March 2013. The court's ruling on the Lao government's

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1 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 U.S. Dist. LEXIS 121951 (S.D.N.Y. August 27, 2013).

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motion is pending. In the May 2013 issue of the *Arbitration Quarterly*, we reported on the decision of the Paris Court of Appeal in the same dispute, in which the court refused enforcement of the underlying arbitral award on the grounds that the arbitral tribunal lacked jurisdiction, without considering the intervening annulment by the Malaysian courts.

While the delocalized approach adopted by the French courts has its critics, it does at least offer a degree of predictability that may be more elusive for parties seeking enforcement in US courts. Although the approach of US courts continues to develop, it seems likely that US courts will continue to decide the issue by exercising their discretion on the basis of the facts and their appreciation of the equities surrounding the foreign court's annulment decision. Prevention may therefore be the best cure when an award debtor's assets are in the United States: parties should pay particular attention to choosing an arbitral seat with a low likelihood of annulment.

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AAA/ICDR Adopts New Optional Appellate Arbitration Rules

Effective November 1, 2013, the American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution, launched a new optional set of rules allowing parties, for the first time, to choose to permit appeals of arbitral awards to an appellate arbitral tribunal. Under the new Optional Appellate Arbitration Rules, parties can now appeal on the grounds that the underlying award is based on an error of law that is material and prejudicial or a determination of fact that is clearly erroneous.

According to the AAA, the rules were adopted to provide for an appellate arbitral panel that would apply a standard of review greater than that allowed by existing federal and state statutes. Traditionally, an arbitral award cannot be appealed before national courts. Instead, parties can ask a court to vacate the award only on limited grounds such as the tribunal's bias, where the award was procured by fraud, or where the arbitrators exceeded their powers or otherwise conducted the proceedings in a manner that deprived a party of substantial fairness. The AAA has stated that these optional rules were developed for "the types of large, complex cases where the parties agree that the ability to appeal is particularly important." The AAA estimates that the appeal procedure should take about three months.

Parties may make use of this appellate arbitral process only if there is an agreement between the parties to use the process. The agreement can be included in a pre-dispute arbitration agreement or in a stipulation after the dispute arises. The Optional Appellate Arbitration Rules in their introduction provide a sample clause that the parties can include in their contract if they want to use the appellate review. The parties may use the AAA's Optional Appellate Arbitration Rules even if the underlying arbitration was not conducted under AAA rules. The appellate rules do not, however, apply to an agreement between an individual consumer and a business.

Under the Rules, an appeal may be taken by filing a notice of appeal within 30 days after the award is submitted to the parties. The other party may file a notice of cross-appeal within seven days after the initial notice of appeal is filed. By adopting the Rules, the parties agree that when a notice of appeal is filed, the underlying award will not be considered final for purposes of any court actions to modify, enforce, correct or vacate the award. Unless all parties and the appellate tribunal agree otherwise, the place of the appeal is the same as the seat of the underlying arbitration.

The appellate tribunal by default consists of three appellate arbitrators unless

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Recognition: The 2013 Financial Times US Innovative Lawyers report has recognized Debevoise in the Litigation & Dispute Resolution category for securing a $2.3 billion award for Occidental Petroleum Corporation, the largest known arbitration award ever rendered under a bilateral investment treaty.

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the parties agree to use just one arbitrator. In the case of a domestic AAA arbitration, the appellate tribunal will be selected from the AAA's Appellate Panel and in the case of an international dispute, from its international Appellate Panel. Upon receipt of a notice of appeal, the AAA will send the parties a list of ten names of individuals from the international or AAA's Appellate Panel. If the parties cannot agree on the constitution of the appeal tribunal, the parties can strike the names of arbitrators to whom they object from the list. The AAA will then designate an appeal tribunal from the remaining candidates. The appeal is determined upon the written documents submitted by the parties, with no oral argument.

The appeal tribunal can (i) adopt the underlying award as its own, (ii) substitute its own award for the underlying award, incorporating those aspects of the underlying award that are not vacated or modified, or (iii) request additional information and notify the parties that the tribunal is exercising its option to extend the time to render a decision, not to exceed 30 days. The appeal tribunal, however, does not have the power to order a new arbitration hearing or send the case back to the original arbitrators for corrections or further review. Once the appeal tribunal renders its decision, that decision becomes the final award for purposes of judicial proceedings.

The new rules are available on the AAA's website at http://go.adr.org/appellaterules.

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Singapore Court of Appeal Clarifies Right to Challenge Tribunal's Decision on Jurisdiction at the Enforcement Stage

In the recent decision of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and Others.* [2013] SGCA 57, the Singapore Court of Appeal has permitted a party to an international arbitration seated in Singapore – a so-called "domestic international arbitration" – to object to the enforcement of an award based upon the Arbitral Tribunal's purported lack of jurisdiction, even though that party had not exercised its right to appeal the Tribunal's ruling on jurisdiction or to seek the setting aside of the award on that basis. The Court of Appeal went on to find that the Tribunal's jurisdiction was indeed lacking over certain claimants, and as a result, it refused to enforce much of the Tribunal's award, reducing the total amount awarded from approximately US$250 million to approximately US$710,000.

The Dispute

The dispute arose from a failed joint venture between the Astro Group, a Malaysian media group, and the Lippo Group, an Indonesian conglomerate, to provide multimedia and television services in Indonesia. In October 2008, the Astro Group, consisting of eight separate companies, filed for arbitration seated in Singapore at the Singapore International Arbitration Centre under its 2007 rules, to recover sums invoiced to the joint venture. The relevant arbitration agreement was contained in a Subscription and Shareholders' Agreement, to which only five of the Astro companies were parties; the remaining three companies sought leave from the Tribunal to be joined to the arbitration. The Tribunal held a preliminary hearing to determine whether it had the power to join the additional companies as claimants and, if so, whether such power should be exercised. In an interim award, the Tribunal found that it had the power to join the parties as long as they consented to be joined, and it held that they should be joined because of the close connection between the various claims of the Astro companies and potential defenses of the Lippo Group.

The Lippo Group chose not to challenge the Tribunal's decision, as it was permitted to do under Article 16(3) of the UNCITRAL Model Law, which allows a party to challenge a tribunal's preliminary ruling on jurisdiction before the supervisory court within 30 days of the ruling. The Model

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Recognition: Debevoise has been shortlisted for International Arbitration Law Firm of the Year in the US Benchmark Litigation Annual Awards 2014.

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Law is incorporated into Singapore law by Section 3(1) of Singapore's International Arbitration Act (Cap 143A, 2002 Rev Ed). The Lippo Group also chose not to seek to set aside the final awards issued by the Tribunal, as it could have under Article 34 of the Model Law. When the Astro Group sought leave to enforce the awards in Singapore, however, the Lippo Group objected on the ground (among others) that there was no binding arbitration agreement between the Lippo Group companies and the claimants who were not parties to the underlying agreement, and therefore, the Tribunal lacked jurisdiction with regard to claims asserted by those parties.

The High Court Decision

After high-profile arguments before the High Court – in a rare occurrence, an English Queen's Counsel was admitted to argue on behalf of each party – the Court ruled in favor of the Astro Group, finding that the Lippo Group had waived its right to challenge the Tribunal's jurisdiction before the Court, having chosen not to do so within 30 days of the Tribunal's ruling on jurisdiction.

The basis for the High Court's decision was the result of a quirk in the International Arbitration Act. When Singapore adopted that Act it did not incorporate Chapter VIII of the UNCITRAL Model Law (consisting of Articles 35 and 36), which governs the recognition and enforcement of arbitral awards. Instead, Part III of the International Arbitration Act incorporates the provisions of the New York Convention to govern the recognition and enforcement of awards issued in other countries that are party to the Convention. As a result, the only provision of the International Arbitration Act that governs awards rendered in Singapore itself is Section 19, which states: "An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award."

The High Court found that the exclusion of Chapter VIII from the International Arbitration Act, and the grounds it provides to resist the enforcement of awards, meant that, subject to certain limited exceptions, the only means to challenge an international arbitration award rendered in Singapore is to appeal a ruling on jurisdiction under Article 16(3) of the Model Law, or to bring a set-aside proceeding under Article 34 of the Model Law. Since the Lippo Group had not availed itself of either remedy, and since the time limits to seek such remedies had long since passed, the High Court held that the Lippo Group could not now challenge the validity of the awards on the basis that the Tribunal lacked jurisdiction.

The Court held that the International Arbitration Act's primary purpose was to give effect to the UNCITRAL Model Law, thus the construction of Section 19 "must be consonant with the underlying philosophy of the Model Law."

Reversal by the Court of Appeal

On appeal, the Court of Appeal reversed the High Court's decision. The Court held that the International Arbitration Act's primary purpose was to give effect to the UNCITRAL Model Law, thus the construction of Section 19 "must be consonant with the underlying philosophy of the Model Law." It found that the system of "choice of remedies," whereby a party could elect whether to actively challenge an award – via appeal or set-aside proceedings – or passively resist its enforcement at a later stage, was at the "heart of [the] entire design" of the Model Law. It also considered this to be in line with the "seat-neutral" philosophy of the Model Law, which was intended to de-emphasize the importance of the arbitral seat, particularly when it comes to assessing remedies available at the enforcement stage. Addressing the exclusion of Chapter VIII from incorporation under Section 3(1) of the International Arbitration Act, the Court stated that had the Singapore Parliament intended to derogate from the aforementioned philosophy of the Model Law, it would have done so explicitly and not merely incidentally. Barring any evidence to the contrary, no such derogation had been intended. Further, the Court noted that the purpose of the exclusion of Chapter VIII was to ensure there would be no conflict between the Model Law regime and that of the New York Convention, since Singapore has adopted the optional reciprocity requirements of the latter, extending the protections of the Convention only to awards rendered in countries that also have adopted the Convention. The Court therefore held that giving effect to the philosophy of the UNCITRAL Model Law required that the same grounds for resisting enforcement under Article 36(1) must be equally available under Section 19.

Having found that the Lippo Group could resist enforcement of the awards, the Court of Appeal went on to determine whether an arbitration agreement between the Lippo Group and the additional parties was ever formed according to the law of

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Singapore. It found that one had not been formed and that joinder was improper because Singapore International Arbitration Centre Rule (SIAC) 24(b), upon which the Tribunal had relied in finding it had the power to join the additional Astro companies, did not permit joinder solely on the basis of consent of the parties to be joined. (The fifth edition of the SIAC rules, which came into force on April 1, 2013, amended Rule 24(b) expressly to state that third parties may be joined to an arbitration only if they are also party to the relevant arbitration agreement.) As a result, it found that the Lippo Group was entitled to resist the enforcement of the awards by the claimants who were not parties to the underlying agreement.

Comment

The High Court judgment, had it been allowed to stand, would have risked disadvantaging Singapore as an arbitral seat vis-à-vis other popular arbitral seats in the region. Hong Kong, in particular, explicitly recognizes the "choice of remedies" principle. The Court of Appeal, in reversing the High Court's judgment, recognized that the latter's judgment had "potentially far-reaching implications on the practice and flourishing of arbitration in Singapore." To this we may add that, due to its particularly in-depth analysis of the UNCITRAL Model Law and its *travaux préparatoires*, the Court of Appeal's decision could be of assistance to practitioners worldwide on questions concerning the "choice of remedies" principle of the UNCITRAL Model Law.

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HKIAC Announces New Administered Arbitration Rules

On June 12, 2013, the Hong Kong International Arbitration Centre (HKIAC) announced the adoption of revisions to its Administered Arbitration Rules, marking the conclusion of a lengthy drafting and consultation process involving both legal practitioners and arbitrators. The new rules came into force on November 1, 2013. This represents the first update to the HKIAC's Administered Arbitration Rules, which were adopted in 2008. The revised rules continue the HKIAC's "light touch" approach to administered arbitration, although they do give the Centre several new tools to help ensure the efficient conduct of arbitrations.

Many of the changes parallel the changes that arbitral institutions around the world have been implementing in recent years. Several of the new provisions, however, are truly on the cutting edge, placing the HKIAC at the forefront of institutional arbitration. The most significant changes to the HKIAC rules include the following.

Interim Measures of Protection

Provisions governing the issuance of interim relief have been expanded in Article 23. Modeled on the corresponding provisions of the UNCITRAL Arbitration Rules, these provisions add guidance on the circumstances that may merit granting interim measures and the type of relief that such measures may include. Factors that should be taken into account to determine whether to grant interim relief include whether the harm to the applicant can be adequately compensated by damages, whether the harm to the applicant outweighs any harm to the respondent, and the likelihood of the applicant succeeding in the merits of the claim. Forms of relief may include maintaining or restoring the *status quo* pending the outcome of the arbitration, preventing actions that would harm or prejudice the arbitration, and preserving assets and evidence.

Emergency Arbitrator

HKIAC's new rules also provide, in Article 23.1, an emergency arbitrator procedure that allows urgent interim relief to be granted prior to a tribunal's constitution. The procedure is set forth in Schedule 4 to the new rules. Under that procedure, an emergency arbitrator will be appointed by the HKIAC within two days of the HKIAC's receipt of a request for emergency relief. The emergency arbitrator then is required to issue a decision within 15 days after receiving the file from the HKIAC. To accommodate the emergency arbitrator procedure, the Hong Kong Arbitration Ordinance also was amended recently, introducing sections 22A and 22B, which permit the enforcement of relief granted by an emergency arbitrator in the same manner as an order or direction by a court.

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Joinder

The new rules greatly expand the provisions governing joinder of parties, which are contained in Article 27 of the new rules. Joinder is permitted so long as there is one or more arbitration agreements that bind all parties to the arbitration. A request for joinder must be submitted to the HKIAC, with all relevant parties having the opportunity to comment on the request. If the request is submitted prior to the tribunal's constitution, the HKIAC has the power to join an additional party if it determines that there is *prima facie* evidence that the additional party is bound by an arbitration agreement, although the tribunal, once constituted, retains its power to determine its jurisdiction over that party. More controversially, Article 27.11 provides that if the joinder is ordered before the confirmation of the arbitration tribunal, the parties are deemed to have waived their right to appoint an arbitrator and to have granted the HKIAC the right to appoint the tribunal. In such circumstances, the HKIAC may even revoke the appointment of arbitrators who have already been appointed. This provision is an innovative feature that is unique to the HKIAC.

Consolidation

The new rules also provide, for the first time, for consolidation of multiple arbitrations. Article 28 sets forth the three circumstances in which consolidation may be granted: (i) all the parties have agreed to consolidation; (ii) all the claims in the arbitrations arise under the same arbitration agreement; or, (iii) where there are multiple arbitration agreements, there is a common question of fact or law that arises in each arbitration, the rights to relief derive from the same transaction or transactions, and the HKIAC finds the arbitration agreements to be compatible. As with the joinder provision, if a request for consolidation is granted, the parties to the arbitrations are deemed to have waived their right to designate an arbitrator, and the HKIAC shall appoint the tribunal.

Expedited Procedure

The new rules improve HKIAC's expedited procedure process, in Article 41, by expanding the scope of arbitrations to which the expedited procedure applies. Previously, the procedure only applied by default in cases where the amount in dispute was less than US$250,000. That limit is now HK$25 million, or approximately US$3.2 million. In addition, even when the amount in dispute exceeds this threshold, the expedited procedure may still apply if the parties agree or if the situation is exceptionally urgent. Under the expedited procedure, a sole arbitrator is appointed and an award must be rendered within six months of the date the tribunal receives the arbitration's file from the HKIAC.

Arbitrators' Fees and Terms

The HKIAC previously calculated arbitrators' fees only on an ad valorem basis. That option remains; however, the option to pay arbitrators on an hourly basis, subject to a maximum rate set by the HKIAC, has been added and is now the default method by which arbitrators' fees are calculated. In addition, the new rules also provide standard terms of appointment for arbitrators, which will likely make the appointment of the arbitral tribunal a smoother and more efficient process.

Retroactive Application

Most of the new HKIAC rules will apply to all arbitrations where the arbitration agreement calls for arbitration administered by the HKIAC and where the Notice of Arbitration is submitted on or after November 1, 2013, even if the arbitration agreement was executed prior to November 1, 2013. However, Articles 23.1, 28, 29 and Schedule 4 – i.e., the emergency arbitrator, joinder and consolidation provisions – will only apply if the arbitration agreement was entered into after November 1, 2013, or if the parties separately agree to the applicability of those provisions.

The HKIAC's new Administered Arbitration Rules represent an important step in the field of administered arbitration. They provide useful updates and expanded procedures, while also introducing novel and progressive ideas that should help Hong Kong remain among the leading arbitration destinations in the world, and the HKIAC as one of the most popular centers for arbitration of international disputes.

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Recognition: Debevoise partner Lord (Peter) Goldsmith QC has been ranked in Band 1 for Dispute Resolution: International Arbitration by the 2014 Chambers UK guide.

Second Circuit Adopts "Abundantly Clear" Standard for Evidence of Corruption Under the Federal Arbitration Act

In a recent decision, the United States Court of Appeals for the Second Circuit established that an arbitral award may not be vacated for corruption of the arbitrator under Title 9 of the US Code, often called the Federal Arbitration Act, unless corruption is "abundantly clear."

In *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust et al.*, 729 F.3d 99 (2d Cir. 2013), the Second Circuit affirmed the decision of the District Court denying a motion to vacate an arbitration award. The case arose out of dispute between Kolel Beth Yechiel Mechil of Tartikov, Inc. and YLL Irrevocable Trust and Kochav S.A.R.L. over the ownership of life insurance policies. In accordance with an arbitration agreement, the parties submitted the dispute to a rabbinical arbitration panel appointed by the parties. No records of the arbitration proceeding were kept. On April 10, 2012, two of the three members of the arbitration panel entered an award directing the immediate transfer of insurance policies to Kolel. Thereafter, YLL moved to vacate the award, and Kolel moved to confirm the award. The District Court, in a decision by Judge Marrero, denied YLL's motion and granted Kolel's motion on July 27, 2012. The District Court also denied YLL's subsequent motion for reconsideration. YLL appealed and the Second Circuit affirmed the District Court's decisions on August 30, 2013.

YLL based its motion for vacatur on three provisions of Section 10 of the Federal Arbitration Act. Under § 10(a)(1), which provides that an award may be vacated if it is "procured by fraud, corruption, or undue means," and under § 10(a)(2), which allows for vacatur "where there was evident partiality or corruption in the arbitrators," YLL argued that one of the arbitrators, Rabbi Kaufman, was biased in favor of Kolel and corrupt. Under § 10(a)(3), which provides that an award may be vacated when "the arbitrators were guilty of misconduct … in refusing to hear evidence pertinent and material to the controversy," YLL argued that Kaufman's bias caused the panel to issue a premature decision without considering material and pertinent evidence.

In support of its arguments under §10(a)(1) and (2), YLL offered an affidavit by a non-party stating that he overheard Kaufman promising Kolel a favorable ruling. YLL also alleged that Kaufman cut off its first and only witness during his testimony and excluded its chosen arbitrator from the arbitration such that only two of the arbitrators entered the award. In support of its argument under § 10(a)(3), YLL alleged that Kaufman interrupted its witness's testimony and that only one witness testified during the proceedings.

The Second Circuit affirmed the District Court's denial of YLL's motion to vacate the award under all three provisions. In doing so, the Court articulated a new standard for vacatur due to arbitrator corruption under §10(a)(2). It also suggested a more rigorous test for vacatur due to arbitrator partiality under §10(a)(2). The Court did not announce new standards for vacatur under either §10(a)(1) or (3).

The Court held that a party must show that there is "abundantly clear" evidence of arbitrator corruption under §10(a)(2). The Court adopted the standard it employed in a much earlier case for corruption under §10(a)(1): an "award must stand unless it is made abundantly clear that it was obtained through corruption, fraud, or undue means." *Karppinen v. Karl Kiefer Mach. Co.,* 187 F.2d 32, 34 (2d Cir. 1951). The Second Circuit also held that proof of arbitrator "bias" under §10(a)(2) must be by "clear and convincing evidence." This holding builds on the Court's decision last year in *Scandinavian Reinsurance Co. Ltd. v. Saint Paul Fire and Marine Ins. Co.,* 668 F.3d 60, 64 (2d Cir. 2012), in which the Court stated that to vacate an award for "evident partiality" under § 10(a)(2) "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration."

In *Kolel,* the Court found that YLL did not satisfy the standards to vacate an award under either §10(a)(1) or (2). There was no "abundantly clear" evidence of corruption, as the YLL Court did not show how Kaufman "stood to gain" or had any "special connection" with Kolel that would give him a "plausible reason to corrupt his decision." Moreover, evidence of "evident partiality" was too "remote, uncertain, or speculative" and without a record of the proceedings, the parties' disagreement was nothing more than a "he-said, she-said factual dispute."

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Recognition: Debevoise has ranked in the Legal 500 Asia Pacific 2014 guide, the second year the guide has been published. In Hong Kong, Debevoise partner Christopher K. Tahbaz was noted in Dispute Resolution: International Arbitration.

"Abundantly Clear" Evidence of Corruption

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In addition, the Second Circuit denied YLL's appeal of the denial of its motion to vacate under § 10(a)(3) because YLL did not show how the arbitration panel violated "fundamental fairness" by hearing only one witness.

At times, the *Kolel* opinion is not clear on the distinctions between the concepts of "partiality" and "corruption" and the §10(a)(1) and §10(a)(2) grounds for vacatur. However, the overall impact of the *Kolel* opinion is clear. A party must meet a very high burden for the Court to vacate an award on the basis of corruption or partiality. Vacating an award for corruption – whether under §10(a)(1) or (2) – requires "abundantly clear" evidence. To vacate an award on the ground of partiality, the challenging party must establish that a "reasonable person" would conclude that an arbitrator was biased by "clear and convincing" evidence.

The Second Circuit stands apart from other US Courts of Appeals, which have not announced an evidentiary standard specific to vacatur due to "corruption" under § 10(a)(2). With the exception of the Fourth Circuit, which stated that corruption under § 10(a)(1) must be shown by "clear and convincing evidence," *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 858 (4th Cir. 2010), the other circuits also have not articulated a standard particular to "corruption" under § 10(a)(1).

The high burden borne by a party seeking to vacate an award for corruption and partiality under the *Kolel* decision may reflect public policy in favor of arbitration and the judiciary's great deference to arbitrators and reluctance to intervene in their decisions. The decision may also be the consequence of poorly developed facts, as the Court repeatedly bemoaned that it had no record of the arbitration proceeding on which to base its decision. Regardless, the decision makes the already narrow bases for vacating an award under § 10(a) appear even more circumscribed. It gives some confidence to the parties seeking to enforce arbitration awards in the Second Circuit that their awards will be respected. But without much guidance as to what "abundantly clear" evidence of corruption is, or what "clear and convincing evidence" of bias is, it remains to be seen what impact the *Kolel* decision will have on challenges to arbitration awards.

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The Application of the "Negative Effect" of the Principle of Compétence-Compétence under French Law: A Risk or a Solution for Coherence in International Arbitration?

Well-accepted in most jurisdictions throughout the world, the principle of *compétence-compétence* provides that an arbitral tribunal, rather than the court, has jurisdiction to rule on the arbitrability of the dispute. In France, this is commonly referred to as the "positive effect" of the principle. In addition, the principle of *compétence-compétence* as applied in France permits courts to refuse to adjudicate whether disputes are arbitrable in order to allow arbitral tribunals to determine their own competence. This application of *compétence-compétence* is known in France as the "negative effect" of the principle.

A decision of June 27, 2013 rendered by the Court of Appeal of Versailles[1] emphasizes the current French legal trend of giving full effect to the principle of *compétence-compétence*. The case is also one of the first applications of this principle since the implementation of the new law on arbitration, which entered into force on May 1, 2011, and more specifically of the new version of Article 1448 of the French Code of Civil Procedure, which states that "when a dispute is brought before a court of the state, the court shall declare itself not to have jurisdiction unless the dispute has not yet been brought before the arbitral tribunal and the arbitration agreement is manifestly void or inapplicable." The Court of Appeal's decision is also in conformity with the French case law that preceded the new law on arbitration.

In that case, the plaintiff, Valuefirst, agreed to distribute the software of the defendant, Visionael, pursuant to two contracts, one dated March 4, 2007, the other dated September 3, 2007. The earlier contract included an *ad hoc* arbitration clause, but the latter selected the courts in Versailles as the chosen forum.

1 Cour d'appel de Versailles, 13ème chambre, June 27, 2013, *SARL Valuefirst vs. Société Visionael Corporation*, R.G. N°12/07880.

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The Negative Effect of the Compétence-Compétence Principle

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A dispute arose between Visionael and Valuefirst with regard to fee arrears and the applicability of the liquidated damages clause. Valuefirst brought the dispute before the court of first instance of Versailles on the grounds that the March 4, 2007 contract was an interim agreement, and that the parties' relationship was governed by the September 3, 2007 contract. Visionael then challenged the jurisdiction of the court of Versailles, on the ground that the March 4 contract governed the dispute that was therefore subject to arbitration.

> The decision thus makes clear that only the manifest inapplicability (that is, *prima facie* inapplicability) of the arbitration clause can lead domestic judges to rule on the arbitrators' competence in advance of an arbitration.

The court of first instance declined to exercise its jurisdiction, invoking Article 1448 of the French Code of Civil Procedure. On appeal, the Court of Appeal confirmed the result. Both courts concluded that it was far from clear that the September 3, 2007 contract had even come into force. The decision thus makes clear that only the manifest inapplicability (that is, *prima facie* inapplicability) of the arbitration clause can lead domestic judges to rule on the arbitrators' competence in advance of an arbitration. The logic behind this rule is to prevent domestic courts from undertaking a substantive review of the contract or the arbitration clause.

As the *Valuefirst* case demonstrates, the negative effect of principle aids in avoiding a delay in the proceedings caused by the parties who wish to postpone the start of arbitration by submitting questions on the jurisdiction of arbitral tribunals to a domestic court.

More importantly, the French view of arbitral competence allows the French courts to prevent what foreign courts that do not recognize the negative effects of *compétence-compétence* may allow: parallel proceedings, one before an arbitral tribunal, and the other before a domestic court, if both entities declare themselves competent. The application of Section 1448 avoids the possibility that the domestic court and the arbitral tribunal could make conflicting decisions regarding their competence and the merits of the case, without either tribunal having to stay the proceeding in deference to the decision on competence made by the first tribunal seized of the matter.

The threat of parallel or conflicting proceedings remains, however, in international disputes in which a non-French court may rule on the competence of an arbitral tribunal. That risk will be reduced only if the French application of the principle of *compétence-compétence* is adopted by other jurisdictions worldwide.

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International Centre for Energy Arbitration Launches in Scotland

On October 2, 2013, Scotland's First Minister Alex Salmond announced the launch of the new International Centre for Energy Arbitration in Edinburgh. This project promises to be of interest to all players in the energy sector, a sector in which disputes frequently arise and where the preferred forum for resolving those disputes has long been international arbitration.

The new Centre is a novel initiative. Its initial purpose is to consult with the energy industry, both within the British North Sea area and internationally, to research attitudes to and desired requirements for dispute resolution in the energy sector. The intention is that this research will form the basis of a new set of arbitration rules specifically tailored to energy disputes.

The project is still in its early stages, and no proposals have been made as to what such arbitration rules may include. It is likely, however, that they will aim to address parties' concerns as to efficiency and cost-effectiveness. The rules may also take account of the frequent desire of parties in the energy sector for appointment of arbitrators with specialty energy expertise, with an offering similar to the AAA National Energy Panel.

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Energy Arbitration Center Launches
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The project is a joint venture between the Scottish Arbitration Centre, itself only recently founded in 2011, and the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee, a graduate school well known in the field of energy law and policy. The launch follows on from work undertaken jointly by those two organizations since April 2012 on a project targeted at attracting energy arbitration to Scotland.

It is therefore likely that future activity of the International Centre for Energy Arbitration will focus on arbitrations having a Scottish seat, to be governed by the new arbitration rules that the Centre expects to adopt and the Arbitration (Scotland) Act 2010 – a new statute adopted by the Scottish legislature in 2010 to govern all domestic and international arbitrations seated in Scotland. Any such arbitration would also benefit from recognition under the New York Convention, to which the UK is a signatory, and from ready access to UK lawyers and experts familiar with and skilled in resolving energy disputes. We await further developments and the outcome of the Centre's initial research.

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Fifth Circuit Refuses to Appoint Arbitrator in Dispute Brought Under the International Arbitration Rules of the International Centre for Dispute Resolution

The Federal Arbitration Act allows district courts to intervene in cases where there has been a "lapse" in the appointment of an arbitrator. Recently, the Fifth Circuit in *Sutherland Global Services, Inc. v. Adam Technologies International S.A. de C.V.*, 729 F.3d 443 (Sept. 5, 2013), upheld a district court decision refusing to grant such relief, where the arbitral rules selected by the parties provided that the administering institution should resolve challenges to the appointment of an arbitrator. The decision is consistent with the limited existing jurisprudence on the Federal Arbitration Act's appointment provision, where courts have found lapses only when there has been a "mechanical breakdown" in the appointment process. The Court's decision also emphasizes the statutory scheme's deference to the arbitral rules selected by the parties.

Section 5, applicable to both domestic and international arbitration, provides in part that "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed[,]" but that "if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire," the district court shall appoint an arbitrator or arbitrators pursuant to the relevant arbitration agreement upon application from a party to the dispute. As the Ninth Circuit stated in *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324 (9th Circ. 1987), Section 5 of the Federal Arbitration Act thus furthers US federal policy by "spur[ring] the arbitral process forward, rather than [letting] it stagnate into endless bickering over the selection process."

In this case, the parties' agreement contained an arbitration clause that called for arbitration under the rules of the International Centre for Dispute Resolution (ICDR), the international arm of the American Arbitration Association. Sutherland instituted arbitration proceedings against Adam, alleging that Adam failed to pay for services pursuant to the parties' agreement. Adam first attempted, but failed, to obtain a court order staying arbitration on the ground that a different agreement (antecedent to the parties' agreement with the arbitration clause) governed the dispute, and that the antecedent agreement did not provide for arbitration. Thereafter, the parties pursued mediation; unable to come to a resolution, the parties then pursued arbitration.

The parties' arbitration agreement provided for a sole arbitrator; because the parties were unable to reach consensus on that appointment, their agreement called for each party to appoint arbitrators, who in turn were to select the third, presiding arbitrator. After each party appointed an arbitrator, Sutherland then challenged Adam's selection under Articles 7 and 8 of the ICDR's International Arbitration Rules on the ground that Adam's appointed arbitrator had *ex parte* communications with the parties and was formerly involved in the dispute by serving as the parties' mediator. Adam resisted the challenge on the ground that it was untimely under ICDR Rules. The ICDR ultimately required Adam to appoint another arbitrator. Adam then attempted to arbitrate the removal of its arbitrator, which the ICDR denied on the basis

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Fifth Circuit Decision on Arbitrator Appointment

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that its prior decision was administrative and not subject to arbitration. Despite receiving two extensions, Adam ultimately did not appoint another arbitrator, and thus the ICDR appointed a second arbitrator pursuant to its Rules. The panel was constituted after the two arbitrators selected the third arbitrator.

While the arbitration was pending, Adam brought a motion to appoint an arbitrator under Section 5 of the Federal Arbitration Act in the same action in which Adam had unsuccessfully sought to stay arbitration. Adam contended that the disqualification of its arbitrator was untimely and thus procedurally faulty, as well as substantively without merit. It further argued that the ICDR's appointment of a second arbitrator ran afoul of the ICDR Rules. Adam petitioned the District Court to remove two of the arbitrators, reinstate its disqualified arbitrator, and have the third arbitrator selected by Sutherland's and Adam's appointed arbitrators. The District Court dismissed the motion, contending that it presented procedural questions within the sole purview of the ICDR. Adam appealed the District Court's decision to the Fifth Circuit of Appeals, and while the appeal was pending, the panel rendered its decision in the dispute and awarded Sutherland US$900,000. On appeal, Adam requested that the award be vacated.

The Fifth Circuit affirmed the District Court's decision after rejecting a jurisdictional challenge to the appeal. Adam first claimed that the District Court should have appointed an arbitrator because the parties' specific procedure for appointment of arbitrators had broken down and resulted in a lapse. In rejecting that claim, the Fifth Court interpreted "lapse" as requiring a "mechanical breakdown" to warrant the court's intervention – similar to other circuits, including the Second and Third circuits, that have addressed this issue. The Court held that no such breakdown occurred. First, the Court read the ICDR's decision to appoint an arbitrator as an indication of Adam's own noncompliance with the parties chosen rules. Second, the Court held that no mechanical breakdown occurred because, at the time that Adam brought its Section 5 motion, a tribunal had already been empaneled and had set a hearing date – in other words, the arbitration was proceeding as planned.

Next, Adam claimed that, because the ICDR did not, in its view, follow the parties' agreed procedure for appointing arbitrators, the District Court was required to intervene to effectuate the parties' agreement as to arbitrator appointment. Citing the US Supreme Court's seminal decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), where the Supreme Court held that gateway procedural issues are presumptively for the arbitrator's determination, the Fifth Circuit found Adam's argument unavailing as a challenge that went to arbitral procedure, not a question of arbitrability presumptively for the Court's determination. That presumption was confirmed by the parties' arbitration agreement, which, by incorporating the ICDR Rules, assigned challenges to arbitrators to the ICDR. The Court further added that it was without statutory authority to reach the merits of Adam's argument.

The Court also observed that Adam's motion to appoint an arbitrator necessarily required the Court to remove two arbitrators. That result, the Court held, was not permitted under the Federal Arbitration Act, which does not contain any provision for removal of arbitrators by the courts. Nor could Adam challenge the disqualification of its appointed arbitrator under ICDR rules, as the challenge amounted to a procedural one to be decided by the ICDR.

Section 5 reflects a careful balancing of respecting the parties' agreement to arbitration – including the parties chosen method for appointing arbitrators – while permitting courts to intervene where the parties reach a deadlock on such appointments. Section 5 also pays respects to the parties' chosen arbitration procedure, such that the Court may intervene only in a manner consistent with the parties' agreement. Here, the Fifth Court's decision emphasized the parties' chosen arbitration rules, and one party's refusal to comply with them. The Fifth Circuit's decision is thus a helpful reminder for practitioners of the high threshold for seeking court-ordered appointments, and the deference that courts will show to the arbitration procedure designated by arbitration agreements.

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Appointment: Debevoise associate Joshua Fellenbaum has been appointed to the global advisory board of the International Centre for Dispute Resolution's under-40 group.

ISDA Adopts New Arbitration Guide

The International Swaps and Derivatives Association (ISDA) released its first Arbitration Guide on September 9, 2013 following a two-year consultation process with members. The guidance relates to the incorporation of an arbitration clause in either of the two standard ISDA Master Agreements, which are the standard international forms for over-the-counter derivatives transactions. The Arbitration Guide is another step toward establishing more frequent and consistent use of arbitration in international financial transactions.

Growth of Arbitration in Financial Disputes

Financial contract disputes have traditionally been the preserve of the courts, typically in London or New York. Given the experience of the judges of these courts and the volume of jurisprudence, there has been little incentive to shift to other forms of dispute resolution. There is growing recognition, however, that arbitration may provide significant advantages for the financial sector. PwC's International Arbitration Survey this year confirmed that most corporations in the sector view arbitration as "well suited" to the resolution of disputes.

Recent initiatives such as the Panel of Recognised International Market Experts in Finance (PRIME Finance), established in the Netherlands last year, have responded to the financial sector's interest in adopting arbitration as the primary means of dispute resolution. PRIME Finance has developed, among other things, a set of arbitral rules to be administered by it. The ISDA Arbitration Guide is another encouraging development for parties who may wish to incorporate arbitration in financial contracts and will undoubtedly promote greater use of arbitration by the sector.

Benefits of Arbitration Clauses in Financial Contracts

The key advantage offered by arbitration in the context of financial transactions is enforcement. Many parties to derivative transactions are located in emerging markets in which it is difficult to enforce a foreign judgment, or where the local courts may be ill-equipped to deal with such disputes. Enforcement of an arbitral award under the New York Convention, to which there are almost 150 contracting states, gives parties more confidence that the award will be enforceable worldwide.

Additionally, arbitration may be attractive to parties to derivative contracts because of its procedural flexibility, the expertise of arbitrators, the possibility of accelerated timetables in certain situations (for example, for low-value claims), privacy and confidentiality, finality of arbitral awards and the limited rights of appeal, more restricted document production requirements, and the opportunity under some institutional rules to appoint emergency arbitrators and obtain rapid interim relief.

The Model Clauses

The ISDA Arbitration Guide includes Model Arbitration Clauses for inclusion in Master Agreements. The Model Clauses set out the law governing the Master Agreement (and in appropriate cases, the law governing the interpretation of the arbitration clause), delete the existing jurisdiction clause, and amend other provisions of the Master Agreement to reflect the choice of arbitration as opposed to the jurisdiction of the courts.

In 2011, the ISDA circulated a memorandum to members setting out the advantages and disadvantages of arbitration in derivative disputes and seeking comment. One particular issue raised in the memorandum was how best to address developing jurisprudence in arbitral awards though, as noted below, the Guide does not address this matter. Overall, responses were received from more than 60 financial institutions and trading firms worldwide, in addition to specialized feedback including from law firms and the academy. The Model Clauses have been based on this feedback.

The Guide sets out recommended clauses with various combinations of governing laws, arbitral rules and seats. The options include the International Chamber of Commerce Rules (ICC), London Court of International Arbitration Rules (LCIA), American Arbitration Association – International Centre for Dispute Resolution Rules (AAA-ICDR), Hong Kong International Arbitration Centre Rules (HKIAC), Singapore International Arbitration Centre Rules (SIAC), Swiss Rules of International Arbitration, and the PRIME Finance Rules, as shown in the following table:

Appointment: Jean-Marie Burguburu, of counsel in Debevoise's Paris office, has been elected as President of the Conseil National des Barreaux (CNB).

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Arbitration Guide for Financial Sector

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Rules	Seat	Governing Law of the Master Agreement
ICC	London	English
	New York	New York
	Paris	English or New York
LCIA	London	English
AAA-ICDR	New York	New York
HKIAC	Hong Kong	English or New York (arbitration clause governed by Hong Kong law)
SIAC	Singapore	English or New York (arbitration clause governed by Singapore law)
Swiss Arbitration	Zurich or Geneva	English or New York
PRIME Finance	London	English
	New York	New York
	The Hague	English or New York (arbitration clause governed by Dutch law)

Depending on the nature of the rules selected, the Model Clauses may provide an option for either one or three arbitrators as well as the process for appointment.

The Guide also considers the finality of an arbitration award under the various seat options and gives examples of the grounds for appeal. Challenges to awards are heard by the courts of the seat and governed by the relevant arbitration law of the seat. For example, under the English Arbitration Act 1996, a challenge may be brought on jurisdictional grounds or on the basis of a serious procedural irregularity giving rise to a substantial injustice (sections 67 and 68). A party is also granted a limited right of appeal on a point of law, but this can be excluded by agreement (section 69) (of the London-seated arbitrations in the Guide, the ICC Rules and the LCIA Rules contain provisions excluding this right of appeal; the PRIME Finance Rules do not). With respect to arbitrations conducted in Paris, the parties are provided the choice of expressly waiving the right to set aside an award in certain circumstances, as authorized by Article 1522 of the French Code of Civil Procedure.

Further, the Model Clauses expressly extend to disputes relating to non-contractual claims arising out of or in connection with the Master Agreement.

It must be remembered that the Arbitration Guide is exactly that: a guide. The nature of a particular transaction including the location of the parties to it will often necessitate specific and comprehensive legal advice as to the most appropriate way of incorporating (and, if necessary, tailoring) the Model Clauses.

Comment

Tailoring the Model Clauses

Parties may wish to tailor the Model Clauses to the specific transaction concerned and are of course free to choose a different seat and/or set of rules. As the Guide explains, however, the choice of seat is important as the arbitration proceedings will be subject to the arbitration law of that jurisdiction. Thus, the procedure will be governed by that law and the courts of the seat will have certain powers, such as the power to hear challenges to an arbitrator alleged to be biased and the power to hear an application to annul an award. The award will be treated as having been made at the seat so it must be made in a state which is a party to the New York Convention.

There are other provisions parties may consider including, such as a requirement that the arbitrators possess certain expertise or qualifications and provisions dealing with confidentiality.

Developing a Body of Jurisprudence

Although the 2011 ISDA memorandum to members raised the prospect of persuading parties to agree to the anonymized publication of awards, the Guide does not address the issue. That notwithstanding, there are already moves toward developing a body of such jurisprudence. Article 34(5) of the PRIME Finance Rules, for example, allows the institution to publish excerpts of awards in anonymized form if neither party objects (and full awards by consent).

Conclusion

The prevalence of cross-border finance transactions involving at least one party located in an emerging market has put into sharp focus the benefits of arbitration in such transactions. The ISDA Arbitration

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Arbitration Guide for Financial Sector

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Guide is therefore welcome news for the financial sector, which is evidently moving toward more frequent use of arbitration.

While the importance of enforcement of awards and judgments appears to be driving this shift – indeed the Guide is clear recognition by the financial community of the New York Convention's appeal – certainty and predictability in respect of standard contracts such as the ISDA Master Agreements are equally important. To this end, the Guide is silent; however, given the interest expressed by the ISDA in its initial memorandum to members and the PRIME Finance Rules' attempt to establish a body of jurisprudence, readers would be encouraged to watch this space.

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Indian Supreme Court Narrows Grounds for Challenging Awards

Two recent decisions of the Supreme Court of India mark further important steps towards reducing judicial interference in the process of enforcement of foreign arbitration awards. In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, the Supreme Court of India narrowed the scope of potential challenges to foreign awards on "public policy" grounds, reversing its own prior precedent that had held that "patent illegality" was a public policy ground for refusing enforcement of a foreign award. The Supreme Court also dismissed an appeal of *Vale Australia Pty Ltd. v. Steel Authority of India Ltd.*, a case involving a challenge to an ICC award issued in India.

Enforcement Regime in India in the Post-*BALCO* Era

Last year, the international arbitration community welcomed the landmark decision of the Supreme Court of India in *Bharat Aluminum v. Kaiser Aluminum Technical Services, Inc. (BALCO)*, which symbolized a departure from earlier precedents blurring the lines between two enforcement regimes in India – one applicable to domestic arbitration awards (under Part I of the Arbitration and Conciliation Act, 1996) and the other applicable to foreign arbitration awards (under Part II of the Act). In broad terms, the *BALCO* ruling drew the distinction based on the "site" of arbitration. Such a distinction is crucial because Part I confers wider authority upon domestic courts to review arbitration decisions. Unlike Part II, Part I also allows a losing party to file an application to "set aside" the award (often used as a preemptive strike by losing parties against a prospective enforcement of an award), thus delaying the award's finality in the eyes of the Indian judicial system.

An important limitation of the *BALCO* judgment is that it applies by its own terms only to arbitrations conducted pursuant to agreements concluded after September 6, 2012. As such, the enforcement of any foreign award issued pursuant to an arbitration agreement signed before September 6, 2012 is left open to potential challenges under both Part I and Part II of the Act.

Shri Lal Mahal: Limitation of the "Public Policy" Doctrine

The significance of the recent decision in *Shri Lal Mahal* is that it reinforces the differences between Part I and Part II for arbitration agreements concluded before September 6, 2012. In overruling its prior decision in *Phulchand Exports Ltd v. OOO Patriot*, the *Shri Lal Mahal* Court specifically emphasized that Part II implies a much narrower application of the "public policy" doctrine, which, unlike Part I, does not include challenges based on "patent illegality."

Background

The *Shri Lal Mahal* dispute arose over a 1994 contract in which an Indian company agreed to sell durum wheat to an Italian company. At the time of the delivery, the seller had obtained a certification verifying the quality of the wheat. Nevertheless, the buyer contended that the seller breached the contract by delivering soft common wheat instead of durum wheat. Pursuant to the arbitration clause in the contract, the buyer commenced an arbitration with the Grain and Feed Trade Association (GAFTA). The GAFTA arbitral tribunal rejected the seller's argument that the certification was sufficient evidence to establish that the seller had not breached its contractual obligations. The GAFTA arbitral tribunal found in favor of the buyer and awarded it damages. The seller appealed to the GAFTA Board of Appeals as authorized by the GAFTA

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arbitration rules. In 1998, the Board of Appeals again found in the buyer's favor.

Under Part II of the Act, the buyer commenced and won the enforcement suit before the Delhi High Court. The seller appealed to the Supreme Court on the grounds that the underlying foreign awards were contrary to the "public policy" of India and must not be enforced by virtue of Article 48(2)(b) of Part II of the Act. Citing *Phulchand Exports*, the seller contended that the phrase "public policy of India" must be interpreted broadly to prevent the enforcement of foreign awards contrary to the contract between the parties and/or "patently illegal."

Supreme Court Ruling

The Supreme Court disagreed and held that enforcement of a foreign award would be refused under "public policy" grounds of Section 48(2)(b) of the Act only if enforcement would be contrary to: "(1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality."

The Supreme Court found that none of the seller's objections fell within these three "public policy" subcategories and dismissed the seller's appeal. Notably, the Supreme Court specifically held that "patent illegality" could not be raised as a "public policy" ground to challenge enforcement of foreign arbitration awards.

It is, however, unclear if and how *Shri Lal Mahal*, which arose under Part II, may apply to pre-*BALCO* cases under Part I (and why the Supreme Court chose not to unequivocally close the precarious loophole created by *BALCO*). The possibility thus remains for pre-*BALCO* foreign arbitration awards to be vulnerable to "set aside" tactical strikes under Part I of the Act, including based on a broader definition of the "public policy." Such tactics could lead to wider scrutiny by domestic courts and longer procedural delays. It is worth pointing out that such "set aside" proceedings are far from being theoretical and might gain further traction depending on the outcome of the pending appeal to the Supreme Court of the recent Delhi High Court decision in *Union of India v. Reliance Industries* allowing a "set aside" petition against a foreign arbitral award from the pre-*BALCO* era under Part I while potentially expanding the scope of the application of Part I.

In conclusion, under *Shri Lal Mahal*, enforcement of a foreign award (regardless of the date of the underlying arbitration agreement) should only be subject to a narrower Part II scrutiny, unless a losing party in a pre-*BALCO* foreign arbitration award commences a "set aside" proceeding under Part I, in which case, the Part I broader scrutiny may be applicable to a foreign arbitration award.

Vale Australia: Section 34 Proceeding is Not an Appeal

In August, the Supreme Court of India also dismissed an appeal of a Section 34 challenge to an ICC award in *Vale Australia*, thus further reinforcing its stance of non-interference with the arbitral process. As the appeal was based on a "set aside" petition filed pursuant to Section 34 of Part I, *Vale Australia* complements the *Shri Lal Mahal* decision discussed above.

Background

In this case, a single-member ICC tribunal (seated in New Delhi) awarded Steel Authority of India Ltd. damages in the amount of over US$150 million against Vale Australia Ltd. ("Vale"). Vale filed a "set aside" challenge under Section 34 of Part I, claiming, *inter alia*, "patent illegality" of the award. The Delhi High Court rejected all of Vale's objections to the award, refusing to engage in an appellate review process.

Delhi High Court Ruling

In its reasoning, the Delhi High Court, relying on prior precedents from the Supreme Court of India, reconfirmed that "[i]llegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy." Notably, the decision also emphasized the limited scope of the Section 34 scrutiny – "[t]he scope of the present proceedings under Section 34 does not allow this Court to go over the entire evidence again and come to a different conclusion only because it is possible to do so." As such, the Court concluded that the mere fact that a different conclusion could be drawn from the available facts and testimonies, "by itself does not constitute a valid ground for a court to interfere under Section 34 of the Act."

The dismissal of Vale's appeal of the Delhi High Court by the Supreme Court thus further underscores the Supreme Court's increasing reluctance to interfere with the enforcement process.

In addition, following upon the earlier discussion of the dangers of "set aside" strikes, it is worth pointing out that *Vale Australia* followed many precedents by requiring the "set aside" challenger to make a substantial deposit (almost the entire award

The recent decisions in *Shri Lal Mahal* and *Vale Australia* suggest that the Indian Supreme Court's recent inclination toward bolstering international commercial arbitration is a trend with some lasting power.

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amount) along with its "set aside" petition. Such deposit requirement is essential from the point of view of ultimate recovery, expedited timing of the appeal process and discouraging frivolous challenges.

Further Considerations

The recent decisions in *Shri Lal Mahal* and *Vale Australia* suggest that the Indian Supreme Court's recent inclination toward bolstering international commercial arbitration is a trend with some lasting power. However, the enforcement regime in India remains in a state of flux and, hence, certain further broader considerations are worth noting:

Potential Lack of Interim Measures under Part II

Part I of the Act provides Indian courts the authority to grant certain interim measures in aid of arbitration. However, because *BALCO* Part I does not apply to foreign-seated arbitrations, one potentially unfavorable outcome of *BALCO* is that Indian courts may no longer be able to grant interim relief in support of foreign arbitrations. This could be a significant cause of concern in foreign arbitrations where the foreign party is a minority owner of an Indian joint venture company or the assets in India are under the control of the Indian party who could theoretically expropriate or waste away the assets in a bid to hinder recovery. Investors should note this risk when deciding where to seat arbitrations, as the risk of delayed and protracted litigation in Indian courts may be counterbalanced by being able to obtain interim orders in certain instances.

Public Policy Doctrine Still Well and Alive

While the *Shri Lal Mahal* ruling narrowed down the meaning of the "public policy" doctrine as applicable to foreign arbitration awards, such doctrine can still be utilized by losing parties unwilling to honor such awards.

Beyond New Delhi

It should be also noted that the recent rulings in *Shri Lal Mahal* and *Vale Australia* stem from the Delhi High Court, which has become quite familiar with the process of and confounding precedents related to the enforcement of foreign arbitration awards under the Act. The courts in other parts of India, particularly the lower courts in jurisdictions where assets may be located, might still view foreign arbitration awards with a certain degree of caution and unfamiliarity.

Adjudication Timeframes in India

Last but not least, despite its overall positive outcome and precedential value, *Shri Lal Mahal* accentuated one of the most fundamental concerns about the Indian judicial system – the extraordinarily long timeframe of the Indian adjudication process. In this case, the awards became final in September 1998 and were brought for enforcement before the Delhi High Court soon thereafter. Nonetheless, the Supreme Court judgment was not issued until July 2013. As also highlighted by the renowned case of *White Industries v. India*, a decade-long queue for the Supreme Court verdicts may result in pyrrhic victories.

* * *

Please note that Debevoise & Plimpton LLP does not practice or give advice on matters of Indian law. If you require such advice, we recommend that you contact an Indian law firm and would be happy to assist you in doing so.

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International Arbitration in Africa: Round-Up of Recent Developments

Foreign direct investment (FDI) in African countries is on the rise. According to the United Nations Conference on Trade and Development (UNCTAD), while global FDI fell last year by 18 percent, FDI to African countries increased by 5 percent. Unsurprisingly, the increase in FDI in recent decades has corresponded with the escalating relevance of international arbitration. Investor-state arbitration is no exception to this trend. Forty-four out of the fifty-four African countries are signatories to the ICSID Convention. Out of the 454 cases registered with ICSID as of December 1, 2013, 104 have been against an African state, with the most claims being brought against Egypt (23), the Democratic Republic of Congo (nine) and Niger (five). African states also have been among the first to initiate claims against investors and to assert counterclaims within the ICSID system.

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Recent Arbitration Developments in Africa

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Four recent developments provide foreign investors with cause for both celebration and caution. We summarize below Mauritius's efforts to become the premier destination for international arbitration in Africa, a Nigerian Court of Appeal's judgment that promises to reduce judicial interference in arbitral proceedings, the cautious accession of the DRC to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, and South Africa's termination of more bilateral investment treaties.

New International Arbitration Rules in Mauritius

This year saw the most recent step in Mauritius's determination to establish itself as an international arbitration center. Building on a foundation of a stable government and a business-friendly environment, Mauritius has strengthened its arbitration legal framework and administrative capabilities in a bid to establish itself as an attractive, neutral dispute resolution forum.

In 2008, the government passed the Mauritius International Arbitration Act (MIAA). Largely based on the UNCITRAL Model Law on International Commercial Arbitration, the MIAA featured a few novel adaptations, including a reference to arbitration unless there is *prima facie* a "very strong probability" that the arbitration agreement is ineffective, the principle that "no court shall intervene" except as provided by the MIAA, and the allocation of authority for arbitral appointments and other administrative functions to the Permanent Court of Arbitration at The Hague. In addition, the MIAA created a specially-constituted panel of three judges, chosen from six designated judges, to resolve any international arbitration matter at first instance. An appeal from the designated panel lies directly to the Privy Council in London, without an intermediate appeal stage. This special procedure guarantees access to specially-trained judges of the highest court of Mauritius and an expedited appeal process.

In July 2011, the Government of Mauritius, the London Court of International Arbitration (LCIA), and the Mauritius International Arbitration Centre (MIAC) established LCIA-MIAC, a dedicated arbitration center in Mauritius. The LCIA-MIAC is organized to administer arbitrations using the same services and similar rules as the LCIA, and plans to develop dedicated hearing facilities in the near future. The Permanent Court of Arbitration (PCA), in turn, established the PCA Mauritius Office to carry out the functions assigned to the PCA under the MIAA. The PCA representative in Mauritius can resolve a number of issues relating to the appointment of the tribunal without protracted court proceedings.

Together, the LCIA-MIAC and the PCA have undertaken a series of projects to promote the settlement of international disputes in the region, including the training of local and regional judges and counsel and the biennial Mauritius International Arbitration Conference. Mauritius will also host the International Council for Commercial Arbitration Congress in 2016.

In its more recent advance, on June 1, 2013, Mauritius adopted a specially tailored set of court rules for international arbitration matters. To expedite the resolution of cases, the Supreme Court (International Arbitration) Rules 2013 emphasize written submissions over oral evidence and require swift timetables for final hearings. In their totality, these reforms have significantly increased the desirability of Mauritius as a center for arbitration and raised the country's profile in the arbitration world.

Pro-Arbitration Decision in Nigeria

Recent developments in Nigeria are also encouraging. On July 12, 2013, the Court of Appeal of the Lagos Judicial Division issued a final judgment in *Statoil (Nigeria) Ltd. et al. v. The Nigerian National Petroleum Corporation et al.* The dispute arose as a result of a tax disagreement relating to a production-sharing contract between the Nigerian National Petroleum Corporation (NNPC) and Nigerian subsidiaries of Statoil and Chevron. NNPC obtained an *ex parte* injunction to prevent the arbitration commenced by Statoil and Chevron from moving forward, on the basis that the Nigerian Tax Appeal Tribunal had exclusive jurisdiction over tax disputes and that the dispute was not arbitrable. Statoil and Chevron appealed the *ex parte* injunction.

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Although skepticism remains as to the ability of the international arbitration system to address the concerns of developing countries, recent developments demonstrate that the significance of international arbitration for Africa will only continue to grow in the coming years.

Recent Arbitration Developments in Africa

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The Court of Appeal overturned the injunction on two grounds. First, the Court of Appeal found that NNPC had failed to comply with requirements for an *ex parte* injunction, including failing to demonstrate urgency and irreparable harm. The Court also noted that NNPC had failed to disclose that it had advised the arbitral tribunal that it would not be necessary to bifurcate the proceedings to consider the issue of arbitrability separately.

Second, and of particular interest to the arbitration community, was the Court's holding on the interpretation of Section 34 of Nigeria's Arbitration and Conciliation Act. Section 34 of the Act provides that "a Court shall not intervene in any matter governed by this Act except where so provided in this Act." The private claimants argued that the Act did not allow a court to intervene in arbitral proceedings by issuing an *ex parte* anti-arbitration injunction, whereas NNPC maintained that such a power derived from the Constitution and the courts' inherent power to supervise arbitrations. The Court of Appeal held that Section 34 was mandatory and that courts could only intervene in arbitration proceedings in the limited circumstances mentioned in the Act. "Where there is no provision for intervention," the Court held, "this should not be done."

The Court of Appeal, which has multiple divisions throughout the country, is the second highest court in Nigeria. Its rulings are binding on lower courts, and a judgment by the Lagos Judicial Division is usually binding on the other divisions of the Court of Appeal. If widely adopted by other courts in Nigeria, *Statoil*'s non-interventionist reading of Section 34 of the Arbitration Act could significantly reduce judicial interference in arbitration proceedings.

Accession of the DRC to the New York Convention

Signaling another pro-arbitration turn, albeit a more cautious one, on June 26, 2013, President Joseph Kabila authorized the accession of the DRC to the New York Convention. The accession will take effect 90 days after the accession instrument is deposited with the United Nations, which has yet to occur. Upon accession, the DRC will become the 33rd African state to accede to the New York Convention.

The DRC's adoption of the New York Convention will facilitate the enforcement of awards in the DRC and enforcement abroad of awards issued in the DRC. It continues the DRC's encouraging engagement with international arbitration, as announced by the DRC's membership in the *Organisation pour l'Harmonisation en Afrique du Droit des Affaires* (OHADA) last year.

Nonetheless, two of the reservations accompanying the DRC's accession may limit its value to certain investors. First, the DRC has specified that the Convention will apply only to awards issued after DRC's accession. Second, the accession will be of limited benefit in mining disputes because the accession law provides that the Convention will not apply to "disputes concerning immovable assets situated in [the DRC] or rights relating to said assets." Under the Congolese Mining Code, property rights in deposits of mineral substances are an immovable asset, and awards in mining disputes may therefore not fall within the scope of the New York Convention as limited by the DRC's restrictions.

Given that minerals and metals account for the vast majority of the DRC's exports and represent the country's single largest source of FDI, this reservation potentially represents a significant missed opportunity to make the DRC a more attractive country for investment.

South Africa Withdraws from Bilateral Investment Treaties with Spain, Germany and Switzerland

In contrast with the pro-international arbitration developments described above, on June 23, October 23, and October 30, 2013, South Africa served notices of termination of its bilateral investment treaties (BITs) with Spain, Germany, and Switzerland, respectively. These BITs will continue to protect existing investments for the next twenty years (or, in the case of the Spain BIT, ten years), but will not apply to new investments after their terminations. The withdrawals follow South Africa's termination of its investment treaty with the Belgo-Luxembourg Economic Union in 2012.

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Hire: Andy Y. Soh, a lawyer specializing in internal investigations, complex commercial litigation and arbitration disputes, and government enforcement defense, joined Debevoise in October 2013 as International Counsel based in the firm's Hong Kong office. He was previously Executive Counsel for Asia-Pacific Litigation and Investigations at General Electric International.

Recent Arbitration Developments in Africa

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The terminations are part of South Africa's response to a claim in 2007 by investors from Italy and Luxembourg who alleged that South Africa's Black Economic Empowerment policy, a nationwide program to redress Apartheid inequalities, violated protections under applicable investment treaties. Although that dispute was eventually settled, the claim led South Africa's Department of Trade and Industry (DTI) to conduct a review of the country's bilateral investment treaties in 2009.

The DTI concluded that the "first generation" of treaties, concluded between 1994 and 1998, could potentially preclude South Africa from advancing the public good through regulatory and legal changes. In 2012, the Minister of Trade and Industry, Dr. Rob Davies, declared that these first-generation treaties "pose a risk and limitation on the ability of the Government to pursue its Constitutional-based transformation agenda." Davies announced that South Africa would not be entering into any new bilateral investment treaties except for "compelling economic and political circumstances" and that the government would consider terminating or renegotiating first-generation treaties that were nearing expiration.

In response to criticism over these policy changes, South African officials have remained adamant that traditional bilateral investment treaties are inopportune for both states and investors, and that South Africa would replace the terminated BITs with domestic legislation, which would protect investors, the public interest, and constitutional obligations. On November 1, 2013, the South African government published the promised legislation for public comment. The Promotion and Protection of Investment Bill of 2013, as currently proposed, would extend basic investment protections to all investors, including foreign and domestic investors not currently protected by existing BITs. The Bill obligates South Africa to ensure national treatment for foreign investors, to protect the security of investments, and to pay timely, just and equitable compensation for expropriation in the public interest. However, the Bill does not contain some of the most attractive protections commonly found in BITs. For example, the Bill provides for disputes to be resolved in national courts, not international arbitration; excludes a number of governmental acts from the definition of expropriation; and does not explicitly contain an obligation of fair and equitable treatment. The legal and dispute resolution framework for foreign investment in South Africa is undoubtedly changing, but the consequences of these changes for foreign investors are not yet clear. In the end, the transformation may produce additional protections for some investors and a reduction of rights for others.

* * *

International arbitration is already an important element of how business is done in Africa. Although skepticism remains as to the ability of the international arbitration system to address the concerns of developing countries, recent developments demonstrate that the significance of international arbitration for Africa will only continue to grow in the coming years.

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English High Court Defers to Arbitral Tribunal in Connection with Grant of Interim Relief

In *Barnwell Enterprises Ltd. and others v. ECP Africa FII Investments LLC* [2013] EWHC 2517 (Comm), the English High Court recently denied an application for an interim injunction in connection with arbitral proceedings out of deference to the arbitrators' authority to rule on the application. The decision demonstrates that the courts of England and Wales remain sensitive to the independence of international arbitral tribunals when deciding whether to grant interim relief.

The Dispute

The dispute arose out of an investment by the Respondent, ECPA, in a Mauritian company owned by the owners of the Applicant companies. The parties entered into two relevant agreements: a Put Option Agreement and a Share Pledge Agreement. A dispute arose under the Put Option Agreement, which led to ECPA claiming US$22,446,525 in LCIA arbitration proceedings seated in London. ECPA then sought to exercise its rights to the shares under the Share Pledge Agreement on the basis that there was a valid and unpaid debt under the Put Option Agreement. The Applicants sought to restrain such an

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Deference to Arbitral Determination

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exercise, contending that an exercise by ECPA of its rights under the Share Pledge Agreement would prejudge and determine the issue in the arbitration.

The Applicants applied on a number of occasions to both the arbitral tribunal and the Mauritian court, but did not obtain the relief that they were seeking. The Tribunal ruled, in particular, that "the interim measures requested cannot be granted, as to do otherwise would *prima facie* be to modify the terms of what was previously agreed between the Parties."

The Applicants then applied to the English High Court for an interim injunction, seeking to restrain ECPA's exercise of any rights or purported rights under or derived from the Share Pledge Agreement, pending the final determination of the arbitration proceedings. The application was made under both Section 44 of the English Arbitration Act 1996 and Section 37 of the Senior Courts Act 1981. The High Court refused to grant the injunction sought, holding instead that the question of interim relief ought to be referred back to the arbitral tribunal. The court did, however, grant temporary relief pending the arbitral tribunal's decision on the renewed application for interim relief.

Analysis

The decision is notable for two reasons. First, it provides an indication that English courts will step outside of the bounds of section 44 of the Arbitration Act when granting interim relief in arbitration-related cases only in exceptional cases. The Supreme Court in *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 established that, in cases concerned with arbitration, the court is not limited to the powers set out in Section 44 of the Arbitration Act, but instead remains possessed of the general power granted by Section 37 of the Senior Courts Act to grant interim relief when it is "just and convenient to do so." In deciding not to use the broad power in Section 37, the High Court heeded the warning of the Supreme Court in *Ust-Kamenogorsk* that this power ought to be exercised "sensitively" in cases where arbitration is pending or contemplated.

The second point of interest is the decision to refer the question of interim relief back to the arbitrators. Section 44(5) of the Arbitration Act provides that a court may exercise its powers to grant interim relief under Section 44 only if the arbitral tribunal either has no power to act or is unable for the time being to act effectively. It was a matter of considerable debate in the present proceedings as to whether, in giving the ruling set out above, the tribunal had held (i) that it had no power to act, or (ii) that it did have the power to act, but that the interim relief requested ought not to be granted. Rather than reach its own view as to what the tribunal had decided, the Court held that the most appropriate approach was to refer the question back to the tribunal to clarify the terms of its previous decision. The Court was only prepared to reach its own decision if the tribunal were to hold explicitly that it did not have power to act.

The Court's willingness to defer to the arbitral tribunal runs against the tide of recent decisions. There had been a number of arguable indications in recent years that interim relief in arbitration cases was to be dealt with in exactly the same way as every other such application. Proponents of this view could point not only to the decision in *Ust-Kamenogorsk*, but also to decisions such as *Permasteelisa Japan KK v. Bouyguesstroi and another* [2007] EWHC 3508 (TCC), in which Mr. Justice Ramsey held that "the court should generally act as it would if the same dispute were before it in court, rather than attempting to adopt a different test so as to hold the position pending a future application to the arbitral tribunal." In holding that the arbitral tribunal ought to have the final say, the present decision indicates something of a change of approach. In the process, it strengthens the argument that England and Wales remains an arbitration-friendly jurisdiction.

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New Partner: Debevoise has announced that Tony Dymond will join the firm as the sixth litigation partner in the firm's London office. Mr. Dymond is joining us from Herbert Smith Freehills LLP, where he was co-head of the firm's Seoul office. Mr. Dymond has spent the last 20 years in London, Hong Kong and Seoul advising an international client base on complex, multi-jurisdictional disputes in both litigation and arbitration. He has a broad commercial practice with a focus on high-value construction and engineering disputes in the energy and infrastructure sectors.

US Appeals Court Strikes Down Delaware's Court-Administered Business Arbitration Program

On October 23, 2013, the US Court of Appeals for the Third Circuit struck down the Delaware Court of Chancery's court-sponsored arbitration program in *Delaware Coalition for Open Government v. Strine*, 733 F.3d 510 (3d Cir. 2013), finding that it violated the constitutional right of public access to the courts guaranteed by the First and Fourteenth Amendments to the US Constitution.

The program, which allows parties to agree to an arbitration procedure conducted entirely within Delaware's Court of Chancery, was created in 2009 in an attempt by the State of Delaware to maintain its preeminence as a preferred jurisdiction for business incorporation and corporate dispute adjudications. In particular, the program seeks to capitalize on the widely-touted expertise of the state's Court of Chancery judges in matters of corporate law.

The program was designed to wed the relative flexibility, confidentiality, speed, and finality associated with arbitrations with the more traditional powers and prestige of a permanent court. The Delaware Chancery Court program differs markedly from the court-annexed alternative dispute resolution procedures that are common throughout the United States in that the proceeding results in a binding decision by a judge of the court. Under the enacting statute and the Court of Chancery's implementing rules, a judge of the court (the Chancellor or one of the four Vice-Chancellors) is appointed as sole arbitrator, with all proceedings administered by and carried out within the Court of Chancery. The parties are free to revise the arbitration procedures by agreement as they see fit, and the entirety of the proceedings, including all filings, is confidential. The eventual award issued by the judge acting as arbitrator is enforceable in the same manner as any other judgment of the Court of Chancery, but it is not subject to a normal appeal and may be reviewed by the Delaware Supreme Court only on the narrow grounds for vacating or modifying an arbitral award under the Federal Arbitration Act.

Though the Delaware program has generally won the support of the business community, open-government groups have criticized it as assisting large corporations in keeping their disputes secret at the expense of shareholders and the general public, who are shut out and kept uninformed. Following this line of objection, the Delaware Coalition for Open Government sued the State of Delaware, the Delaware Court of Chancery, and the individual Chancery judges in federal court in 2011, requesting that the arbitration program be enjoined as an unconstitutional infringement on the public's First Amendment rights. Federal jurisprudence on the rights to freedom of expression and freedom of the press under the First Amendment to the Constitution has historically upheld the public's right to access civil trials, with the right being extended in a more limited fashion to criminal trials, immigration hearings, and other proceedings.

> The majority opinion reveals a level of judicial discomfort with too close an intermarriage of state institutional power and arbitration proceedings.

In 2012, the US District Court for the District of Delaware agreed with the plaintiffs that the arbitration program impermissibly barred public access to proceedings that were very similar to civil trials in nature, whatever they might be labeled, and the injunction was granted. The defendants immediately appealed the decision, but lost in October of this year when the Third Circuit affirmed the lower court's decision. Consistent with precedent, that court turned to "experience and logic" to examine whether the public has historically enjoyed a right of access to the kind of proceedings at issue and whether public access plays a significant positive role in the proceedings' functioning.

The ruling was not unanimous. In fact, the three judges who formed the bench for the appeal produced not one but three opinions: a majority opinion for two judges striking down the arbitration program, a concurring opinion by one of those two judges clarifying that the problem lay only with the confidentiality of the program and not the general notion of judge-run arbitrations, and a dissenting opinion that advocated upholding the program in its entirety.

A key difference between the Third Circuit judges was the type of proceedings the court should consider when evaluating whether historical "experience" favored public access. If the court looked to the history of civil trials, it was clear that the public had traditionally enjoyed a right of access; but if the court looked to the history of private arbitrations, the tendency ran much more strongly toward confidentiality. The majority opinion, written by Judge Dolores Korman Sloviter, found that the

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Delaware Arbitration Program

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Delaware arbitration procedure shared important characteristics with civil trials: "Although Delaware's government-sponsored arbitrations share characteristics such as informality, flexibility, and limited review with private arbitrations, they differ fundamentally from other arbitrations because they are conducted before active judges in a courthouse, because they result in a binding order of the Chancery Court, and because they allow only a limited right of appeal." The majority therefore placed great weight on the history and functioning of civil trials, and held that the "experience and logic" test militated in favor of the proceedings being open to the public. Indeed, the majority opinion seemed to accept the plaintiffs' antagonistic view toward the program, criticizing the fact that the program was limited to disputes over $1 million on the ground that the "the numerous advantages" of arbitration should not be limited "to rich businesspersons."

The concurring judge, Judge Julio M. Fuentes, joined the majority opinion but wrote separately to emphasize that "we do not express any view regarding the constitutionality of a law that may allow sitting Judges to conduct private arbitrations if the system set up by law varies in certain respects from the scheme before us today." This suggests that Judge Fuentes may have been concerned that Judge Sloviter's more general criticisms of the program might be read too broadly.

The dissenting opinion, by Judge Jane Richards Roth, strongly disagreed with the majority, arguing that the appropriate history under the "experience and logic" test was that of private arbitrations between consenting parties, and that this history involved little or no tradition of public access. Judge Roth also accused the majority of failing to understand the difference between "adjudication and arbitration," and reviewed the benefits of the Delaware arbitration program with approval, characterizing it as "a set-up [that] creates a perfect model for commercial arbitration."

Commentators have already flagged the case as significant with respect to state involvement in arbitration. The majority opinion reveals a level of judicial discomfort with too close an intermarriage of state institutional power and arbitration proceedings. The case, however, also demonstrates the importance of the rise in arbitration as a preferred method of resolving business disputes. Without that trend, Delaware's lawmakers most likely never would have entered the arbitration business to maintain the state's competitive edge as a business haven.

It remains to be seen whether the Delaware program will survive with only the confidentiality rules excised, and if so, whether any businesses will avail themselves of its services. The defendants have not yet announced whether they will seek review of the Third Circuit's ruling in the Supreme Court of the United States, but they have stated that the option is being considered.

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Relocation: The London office of Debevoise & Plimpton LLP has relocated to new premises at 65 Gresham Street, London EC2V 7NQ. The move comes in the wake of significant growth for the firm in the UK. Debevoise first moved to London in 1989, and later moved to offices in Tower 42 in 1998. At the time, the office had a total of 13 lawyers, including 4 partners. Today, the firm has more than 80 lawyers in its London office, led by a group of 19 partners and 11 international counsel.

Recent and Forthcoming Events

- On October 3, Debevoise partner Christopher K. Tahbaz spoke in New York at an event organized by the Hong Kong International Arbitration Centre. The event was titled "Highlighting Hong Kong: A World Class Arbitral Venue."
- On October 7, Debevoise hosted a reception at the Isabella Stewart Gardner Museum in Boston in connection with the Annual Conference of the International Bar Association.
- On October 7, Debevoise partner Lord (Peter) Goldsmith QC spoke in Boston during the Annual Conference of the International Bar Association. He spoke at the Dispute Resolution Showcase Session Panel, titled "What Price Justice? Predicting, Managing and Funding the Costs of International Dispute Resolution."
- On October 7, Frederick T. Davis, of counsel in Debevoise's Paris office, participated in a panel discussion on "Journalism, the Media and Criminality" in Boston during the Annual Conference of the International Bar Association.
- On October 8, Debevoise partner Mark W. Friedman co-chaired a session titled "Back to the Future?" in Boston during the Annual Conference of the International Bar Association. The session featured a discussion with leading arbitrators on the origins of arbitration and lessons for the future, as well as a debate on the regulatory and liberal models of arbitration.
- On October 10, Debevoise partner Christopher K. Tahbaz moderated a panel discussion in Boston during the Annual Conference of the International Bar Association, titled "Resolving International Business Disputes: Using the World Trade Organization, Bilateral Investment Treaties, International Commercial Arbitration and European Union Courts."
- On October 21, Debevoise partner David W. Rivkin spoke on the delegation of powers to arbitral institutions at a round table titled "The Number of Arbitrators & The Challenges of Efficiency and Legitimacy: Cross Perspectives." The event took place in Paris at a conference jointly organized by the Corporate Counsel International Arbitration Group and the International Chamber of Commerce Institute for World Business Law.
- On October 23, Debevoise partner Lord (Peter) Goldsmith QC participated in a debate at the ADR in Asia Conference organized by the Hong Kong International Arbitration Centre. The topic was whether an arbitral tribunal should have the power to remove counsel when the integrity of the process is jeopardized.
- On October 24, Debevoise partner Lord (Peter) Goldsmith QC participated in a debate on the motion "This house believes international arbitration needs 'philosophy' like a fish needs a bicycle" at the 3rd Annual Global Arbitration Review Live Asia event in Hong Kong.
- On October 25, Debevoise partner Donald Francis Donovan gave the keynote address at the International Law Weekend at Fordham Law School, organized by the International Law Students Association and the American Branch of the International Law Association. Mr. Donovan's address was titled "The Advocate in the Transnational Justice System."
- On October 30, Debevoise partner Lord (Peter) Goldsmith QC gave a keynote speech in Hong Kong on Britain's future in the European Union at an insurance seminar organized in-house by Debevoise & Plimpton.
- On October 31 and November 1, two Debevoise partners presented at the Midyear Meeting of the American Society of International Law (ASIL). Donald Francis Donovan, ASIL President, moderated a panel titled "A Conversation on the Art of Judging," featuring President Peter Tomka and Judge Joan Donoghue of the International Court of Justice and Judge John Walker of the US Court of Appeals for the Second Circuit. William H. Taft V, co-chair of the Midyear Meeting, moderated a panel titled "Making It Count: Recent Trends in the Enforcement of Arbitral Awards and Foreign Judgments."

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Recent and Forthcoming Events

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- On November 12, Debevoise partner Lord (Peter) Goldsmith QC spoke at Columbia Law School on "The Last Great Human Rights Challenge? Global Decriminalization of Homosexuality through Constitutional Law," at an event organized by the Human Rights Institute, Columbia Outlaws and Social Justice Initiatives.

- On November 13, Debevoise partner David W. Rivkin moderated a panel on the differences between investment and commercial arbitration at a Joint Conference in Tokyo on "Cross-Border Legal Services in the Asia Region," co-presented by the International Bar Association and the Japan Federation of Bar Associations.

- On November 19, Debevoise partner Lord (Peter) Goldsmith QC was a guest speaker at Columbia Law School's Seminar on International Lawyering for Governments, where he offered his insights on comparative approaches to international government lawyering.

- On November 22, Debevoise partner Christopher K. Tahbaz spoke on a panel on building a successful and satisfying legal career in a conference titled "Changing Times: Legal Trends in the Asia Pacific Region." The conference, held in Seoul, Republic of Korea, was organized by the International Bar Association Young Lawyers' Committee, the International Bar Association Asian Pacific Regional Forum and the Korean Bar Association.

- On November 27, Debevoise partner Sophie Lamb chaired the International Chamber of Commerce UK Annual Arbitrators' Forum in London. Debevoise partner Lord (Peter) Goldsmith QC delivered the keynote address titled "Are There International Norms of Behavior in International Arbitration?"

- On December 2, Debevoise partner David W. Rivkin was one of the lead speakers on a panel titled "Rethinking Commercial Arbitration" at the Singapore International Arbitration Forum 2013. He spoke about the role of arbitrators as "town elders" who play active roles in the proceedings.

- On December 5, Debevoise partner David W. Rivkin presented at a conference on international arbitration in the Asia Pacific region organized by the International Bar Association Arbitration, Australian Centre for International Commercial Arbitration, and the Law Council of Australia. Mr. Rivkin spoke about the road blocks to efficiency and economy in international commercial arbitration.

- On December 6, Debevoise partner David W. Rivkin gave the opening remarks in Sydney to the inaugural meeting of the International Bar Association Asia Pacific Arbitration Group.

- On December 6, Debevoise partner David W. Rivkin presented at a symposium sponsored by the Asia-Pacific Forum for International Arbitration. As the guest speaker, Mr. Rivkin spoke on "Creative Approaches to Arbitrating Disputes."

- On December 9, Debevoise associate Alexey I. Yadykin spoke in Moscow at a young arbitrators' forum organized by the International Chamber of Commerce. The forum was titled "Arbitration in Emerging Markets."

- On December 10, Debevoise partner Alyona N. Kucher spoke on arbitration courts reform at a conference in Moscow titled "Russia as a Place for Dispute Resolution: Anticipating the Changes," organized by the International Chamber of Commerce Russia.

- On December 16-17, Debevoise partner Alyona N. Kucher gave a speech titled "What Kind of Arbitration Courts Reform do Russian Businessmen Need?" at a conference in Moscow titled "100 Steps Towards Favorable Investment Climate: Achievements and New Challenges," organized by the Vedomosti newspaper.

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Recent and Forthcoming Events

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- On January 16, 2014, Debevoise partner Donald Francis Donovan will speak at Stanford Law School on "The Practice of International Law."
- On February 13, 2014, Debevoise partner Catherine M. Amirfar will lead a discussion on developments in international arbitration at the Young Practitioners' Symposium in Paris, in her new role as co-chair of the newly launched IBA Arb 40, a subcommittee of the International Bar Association Arbitration Committee.
- On February 14, 2014, Debevoise partner David W. Rivkin will speak in Paris at a conference titled "Advocates' Duties in International Arbitration: Has the time come for a set of norms?" This conference is organized by the International Bar Association Arbitration Committee, and Debevoise partner Mark W. Friedman is a member of the organizing committee. Mr. Rivkin will address the issue of whether arbitration counsel owe a duty of honesty in relation to their submissions, and if so, when and to whom.
- On February 20, 2013, three Debevoise partners will participate in the Annual Meeting of the International Institute for Conflict Prevention and Resolution in Charleston, South Carolina. Catherine Amirfar, co-chair of the Annual Meeting, will speak on the issue of divergence in global alternative dispute resolution practice. David W. Rivkin will moderate a discussion on "Big Data" and its implications for alternative dispute resolution, and David H. Bernstein will address the impact that changes in US law are having on alternative dispute resolution relating to intellectual property.
- On February 21, 2014, Debevoise partner Mark W. Friedman will present in Houston at the Winter Forum on International Energy Arbitration, jointly organized by the Institute for Transnational Arbitration and the Institute for Energy Law. Mr. Friedman's speech is titled "Can State Counterclaims Salvage Investment Arbitration?"
- On April 8, 2014, Debevoise partner Catherine M. Amirfar will speak in Miami at the 2014 International Council for Commercial Arbitration Congress. Ms. Amirfar will speak on "Treaty Arbitration: Is the Playing Field Level and Who Decides Whether It Is Anyway?"

Debevoise International Dispute Resolution Group

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