DEBEVOISE & PLIMPTON LLP

Arbitration Quarterly

Issue No 1 – January 2013

Editors' Remarks

Welcome to this inaugural edition of the Arbitration Quarterly, Debevoise's new arbitration newsletter. Through the Debevoise Arbitration Quarterly, we will take the opportunity to share with you our insights into the most interesting and significant developments in international arbitration, by reporting on items carefully selected by our team of contributors, with a focus on their key implications for cross-border transactions and arbitration practice.

The final months of 2012 have been exceptionally eventful in the arbitration world and promising for the development of international arbitration, with noteworthy arbitration-friendly steps taken by courts and public authorities in a number of jurisdictions, from India with the overruling of *Bhatia International*, to Russia with the Higher Arbitrazh Court's tapering of public policy as a basis for the non-recognition of awards, and the European Union with *inter alia* the retention and clarification of the arbitration exception to the Brussels Regulation.

Investment treaty arbitration has also featured a number of welcome decisions this quarter, not least an ICSID tribunal's decision awarding Debevoise's client Occidental Petroleum more than US$1.77 billion plus interest in damages for Ecuador's expropriation of its oil exploration and exploitation rights in the Ecuadorian Amazon, in what is believed to be the largest damages award in investment treaty arbitration history.

Looking ahead to the coming year, there continues to be great momentum in the world of international arbitration, and we anticipate that 2013 will bring many further significant developments which we look forward to discussing with you.

We hope you will find this and future editions of the Arbitration Quarterly both relevant and interesting. We would be delighted to answer any questions you may have or discuss any of these developments – or any suggestions as to content – with you.

Very best wishes,

David W. Rivkin
Sophie J. Lamb
and the International Dispute Resolution Group
of Debevoise & Plimpton LLP

In This Issue

Ecuador Liable to ConocoPhillips Subsidiary for Occupation of Oil Blocks in the Ecuadorian Amazon, But Not for Law Imposing 99% Additional Participation or Auctions of Seized Oil

On December 14, 2012, in *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), an ICSID panel held that Ecuador's physical occupation of two oil blocks in the Ecuadorian Amazon expropriated the investment of ConocoPhillips' subsidiary Burlington Resources Inc in breach of the US-Ecuador BIT. However, a majority of the panel found that neither Ecuador's Law 42, establishing a 99 percent state participation in revenues resulting from oil prices exceeding those in effect at the time of the execution of the Production-Sharing Contract ("PSC"), nor the state's seizure and auction of oil to satisfy Burlington's unpaid Law 42 bill, constituted acts of expropriation.

The PSCs at issue in this case were signed by Burlington's Bermuda subsidiary in 2001, entitling Burlington to a minority share in approximately half of the oil revenues from Oil Blocks 7 and 21, and to the application of a "correction factor" should tax changes impact the

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David W. Rivkin Named a 2012 Global Lawyer of the Year by The American Lawyer

Debevoise & Plimpton LLP partner David W. Rivkin has been named a "Global Lawyer of the Year" by The American Lawyer's Am Law Litigation Daily for his successful representation of Occidental Petroleum Corporation ("Occidental") in its International Centre for the Settlement of Investment Disputes win over the Government of Ecuador. In October 2012, the ICSID arbitral tribunal, appointed pursuant to the United States-Ecuador Bilateral Investment Treaty, awarded approximately US$2.3 billion (including interest to date) to Occidental, making this one of the most influential dispute resolution matters of 2012 and the largest bilateral investment treaty award in history.

Mr. Rivkin is one of only two recipients of the award this year.

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Ecuador Liable to Conocophillips

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economy of the contracts. Perenco, a French company, was the majority partner. Beginning in 2002, global oil prices rose rapidly. On April 19, 2006 and October 18, 2007, Ecuador passed and amended its Law 42, ultimately imposing a 99 percent participation.

In February of 2009, Ecuador commenced *"coactiva"* proceedings against Burlington to collect unpaid Law 42 sums. The Burlington tribunal and the tribunal in the parallel *Perenco v. Ecuador* arbitration issued provisional measures orders barring Ecuador from enforcing *coactivas*. Ecuador nevertheless began seizing large amounts of oil from the Blocks and auctioning them to PetroEcuador, as the sole bidder, for half to two-thirds of the market value, to collect amounts Ecuador said were due under Law 42. At 2pm on the day of the planned suspension, Ecuador seized and occupied the Blocks. On July 20, 2010, Ecuador declared the PSCs terminated.

Burlington initiated ICSID proceedings in the midst of the dispute, on April 21, 2008. In its decision on jurisdiction, the Tribunal, consisting of Gabrielle Kaufmann-Kohler (President), Brigitte Stern, and Francisco Orrego-Vicuña, found that, while it had jurisdiction over the expropriation claim, it did not have jurisdiction over Burlington's fair and equitable treatment claim. Therefore, the argument on liability focused on the question of expropriation. The Tribunal agreed that Ecuador's physical occupation of the oil blocks had directly expropriated Burlington's investment, on the basis that the occupation permanently dispossessed Burlington of its revenues and means of production and was justified neither by Ecuadorian law nor by any risks posed by a suspension of operations. The expropriation was unlawful because Ecuador had offered no compensation to Burlington.

However, Kaufmann-Kohler and Stern found that neither Law 42 nor the seizure and auction of oil were expropriatory, because, although they "considerably diminished" Burlington's profits, they did not make Burlington's investment "worthless and unviable." Orrego-Vicuña disagreed, reasoning that the majority's decision "convey[ed] the wrong message" that a state may use a tax or other measures to largely or entirely divert an investor's income to itself, attach and auction its remaining assets to satisfy the sums due, and terminate the investor's contractual rights, without being held liable for expropriation unless it "send[s] in the police or the army to take possession." The majority's determination that Law 42 did not breach the US-Ecuador BIT contrasts with the decision in *Occidental Petroleum*, rendered two months earlier, that the law breached the treaty's guarantee of fair and equitable treatment in the context of Occidental's contract.

The decision also contributed to the debate over whether BIT "umbrella clauses", which typically require the parties to "observe any obligation . . . entered into with regard to investments", have a privity requirement. Following certain past ICSID decisions, the majority found such a requirement, and it declined jurisdiction over Burlington's umbrella clause claims, because the PSCs had been signed not by Burlington but by its subsidiary. Orrego-Vicuña also dissented on this point, finding that there is inconsistency in the ICSID jurisprudence, and warning that reading a privity requirement into umbrella clauses would deprive indirect investments of protection and thus discourage joint ventures and other investments made through locally-incorporated companies.

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"Debevoise & Plimpton's premier arbitration group brings extensive experience in commercial and investment treaty disputes to its stellar practice. Its noted strength in New York is enhanced by significant global presence and the group includes both leading arbitrators and counsel."

Chambers USA

A Broader Approach to the "Investment" Requirement Under ICSID: Rejecting Salini

The recent jurisdictional award in *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v Bolivia* (ICSID Case No ARB/06/2) has seen another arbitral tribunal address the meaning and scope of the notion of "investment" under the ICSID Convention. The Tribunal comprised eminent arbitrators, with Professor Gabrielle Kaufmann-Kohler serving as President, along with Marc Lalonde, Q.C. and Professor Brigitte Stern.

In this case, Bolivia argued that the Tribunal lacked jurisdiction *ratione materiae* over the dispute because the Claimants had not made an "investment" in Bolivia within the meaning of Article 25(1) of the ICSID Convention. More specifically, it argued that the Claimants had not made a contribution to the economic development of Bolivia. In raising this objection, Bolivia was invoking the well known definition of "investment" articulated in *Salini Costruttori SpA v Morocco*, which has been relied upon by a number of tribunals in applying a more restrictive interpretation of the notion of "investment" in Article 25. Proponents of the *Salini* test argue that such an "economic development" requirement is mandated by the preamble to the ICSID Convention which calls for recognition of the "need for international cooperation for economic development, and the role of private international investment therein".

However, the Tribunal expressly rejected this requirement on the basis that the ICSID Convention and general international law required the application of an "objective" and "ordinary" definition of investment. In its view, the ordinary understanding of an investment denoted three things: (i) a contribution of money or a commitment of resources; (ii) an element of risk; and (iii) duration.

The Tribunal gave three main reasons for its rejection of the *Salini* approach. First, it argued that a contribution to the host State's economic development may be the consequence of a successful investment but was not a necessary constitutive element of an investment. It noted that what was key for identifying an investment was not "development", but a "contribution to the economy of the host State". The Tribunal further argued that an "economic development" requirement was unhelpful as it was difficult to establish. Finally, it held that the requirement was duplicative because it was "implicitly covered by the other elements" of the test. In short, the requirement was neither intuitive nor necessary.

This decision continues the lively discourse about the meaning of "investment" for the purposes of ICSID. While this decision does not resolve the uncertainty in this area of investment law, it advances the trend in the jurisprudence away from the *Salini* requirements. In so doing, the Tribunal has endorsed a broad and more inclusive approach to the concept of "investment".

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EU Confirms Transitional Arrangements for BITs

On December 12, 2012, the EU Parliament and Council jointly adopted a Regulation which confirms that existing bilateral investment treaties ("BITs") between Member States and third countries will remain in full force and effect until replacement agreements are put in place.

This welcome move was brought about by Regulation No. 1219/2012, establishing "transitional arrangements for bilateral investment agreements between Member States and third countries", which came into force on January, 9 2013. The Regulation brings an end to the uncertainty which has been building regarding the status of such BITs since 2009, when the Lisbon Treaty brought foreign investment policy, including the negotiation of BITs, within the exclusive competence of the EU, but failed to explain how this affected the more than 1,200 BITs with third countries that Member States were already parties to.

As well as making clear that existing BITs between Member States and third countries will remain in force until the EU reaches new agreements with third countries (and subject to various duties of cooperation upon Member States if the Commission considers that existing BITs constitute a serious obstacle to it being able to negotiate BITs with third countries), the Regulation confirms that Member States will be able to continue to amend existing, or conclude new, BITs with third countries although this will be subject to various conditions.

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In effect, Member States will have to obtain the permission of the Commission if they wish to open formal negotiations with a third country to amend an existing, or conclude a new, BIT. Such permission may be refused if the Commission considers that the negotiations would: (i) be in conflict with Union law; (ii) be superfluous because the Commission has submitted or has decided to submit a recommendation to open negotiations with the third country concerned; (iii) be inconsistent with the Union's principles and objectives for external action; or (iv) constitute a serious obstacle to the negotiation or conclusion of BITs with third countries by the Union. Similarly, Member States must seek the authorisation of the Commission prior to signing and concluding any amendments to existing, or new, BITs.

The Regulation is good news for investors who may rely on the continued certainty and predictability of the large body of existing BITs with EU member states as a tool for planning and protecting their investments. Unfortunately, investors who have been waiting for similar clarity regarding the position of the roughly 190 BITs concluded between Member States will have to continue to wait. Whilst the Commission has adopted the position that all such BITs conflict with the jurisdictional monopoly of the Court of Justice and as such must brought to an end, the situation remains uncertain.

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Indian Supreme Court Decision Signals Pro-Arbitration Turn

In an important reversal of precedent, the Supreme Court of India has held that Indian courts may not exercise supervisory jurisdiction over foreign-seated arbitrations pursuant to the Arbitration and Conciliation Act, 1996 (the "ACA 1996"). The ruling, issued on September 6, 2012 in *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Co.*, Civil Appeal No. 7019 of 2005, marked a welcome pro-arbitration turn by the judiciary and will likely soften the image of India as an "arbitration-hostile" jurisdiction, where judicial intervention in international arbitration had caused increasing concern amongst the international business and legal community.

Bharat Aluminum directly overturns the Supreme Court's prior decision in *Bhatia International v. Bulk Trading S.A. & Anr.*, [2002] 1 LRI 703, which had given Indian courts expansive authority to supervise international commercial arbitrations taking place outside India. It also invalidates decisions that had relied on *Bhatia*, including *Venture Global Engineering v. Satyam Computer Services Ltd.*, [2008] 4 SCC 190, a much-criticized ruling that allowed Indian courts to annul foreign arbitral awards if they violated Indian statutory law or "public policy".

The decision in *Bharat Aluminum*, like the earlier *Bhatia* ruling, concerns the scope of India's domestic arbitration legislation. At issue was whether Part I of the ACA 1996, whose provisions apply "where the place of arbitration is in India," extends to international commercial arbitrations seated in foreign countries (ACA 1996, § 2(2)). If the provisions of Part I apply, Indian courts enjoy statutory authority to supervise the arbitration's conduct and review the tribunal's award on the merits. (id. chs. III, V-VII). If the provisions of Part I do not apply, the Indian courts' supervisory authority is limited.

In *Bhatia International*, the Supreme Court had held that Part I of the Indian ACA 1996 applied to all arbitrations, including international commercial arbitrations held outside India, unless the parties expressly or impliedly excluded all or any of its provisions. The result was to give Indian courts the same supervisory authority over foreign arbitral proceedings as over domestic arbitral proceedings.

The ruling in *Bharat Aluminum* appears to end the interventionist trend seen in *Bhatia* and *Venture Global*. In Bharat Aluminium, the five judge panel of the Supreme Court confirmed that Part I of the ACA 1996 only applies to arbitrations with their seat in India. The Supreme Court adopted the "territoriality principle" (the notion that the juridical place of an arbitration should determine which body of law will govern the proceedings) and confirmed that the ACA 1996's reference to the "place of arbitration" indeed means the arbitral seat, as chosen by the parties or the relevant arbitral institution. Accordingly, Part I of the ACA 1996 has no application

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Donald Francis Donovan has been elected as the President of the American Society of International Law, 2012-2014.

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to international commercial arbitrations seated outside India, so Indian courts do not have power to set aside foreign awards and, importantly, may not grant interim relief in respect of arbitrations with their seat outside India.

Although the *Bharat Aluminium* decision applies only prospectively, to arbitration agreements concluded after the ruling on September 6, 2012, the decision has potentially far-reaching positive implications for arbitration law in India and the region.

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Russian Higher Arbitrazh Court Releases Long-Awaited Draft Information Letter on Public Policy

Russian courts are well-known for their broad interpretation of public policy as a basis for the non-recognition and non-enforcement of foreign judgments and arbitral awards. However, several recent Russian court decisions demonstrate their increasing willingness to depart from this interpretation, and to bring the notion of public policy closer in line with that of pro-arbitration jurisdictions.

This series of court decisions has culminated with the Russian Higher Arbitrazh Court's publication in December 2012 of a draft Information Letter on the Practice of the Arbitrazh Courts in Cases in Which Public Policy is Applied as a Ground for Refusal of the Recognition and Enforcement of Foreign Court Decisions and Arbitral Awards (the "Information Letter"), which approves of this recent court practice and provides further guidance to subordinate courts on the interpretation of the definition of public policy.

The draft Information Letter defines public policy as the fundamental legal principles which are strongly imperative, universal, have crucial social and public importance, and form the basis for the economic, political and legal system of the state. The violation of public policy includes, in particular, actions which are directly prohibited by internationally mandatory rules, if such actions cause harm to the sovereignty or safety of the state, affect the interests of large social groups, or infringe upon the constitutional rights and freedoms of individuals.

The draft sets forth a number of important guidelines:

- the evaluation of potential infringement of Russian public policy by the Russian courts should not lead to the re-examination of the merits of the case;
- the Russian state courts should not invoke public policy where other grounds for the non-enforcement of the foreign decision or award apply;
- the application in the foreign judgment or award of foreign legal concepts or rules which are not known to Russian law should not of itself constitute a violation of Russian public policy;
- the respondent may only rely on violation of public policy rules if the relevant rules of public policy were enacted in order to protect the respondent itself or the group within which the respondent falls; and
- minor errors and mistakes in a foreign award or judgment which do not affect the essence of the award or decision should not be regarded as a violation of public policy.

The Information Letter is expected to be enacted in spring 2013, after certain amendments are made to the draft, including amendments further to the first public discussion of the draft Information Letter which took place in the Higher Arbitrazh Court on December 20, 2012 amongst scholars and legal practitioners.

Although information letters are formally non-binding, the lower courts generally follow their guidelines as they reflect the legal position taken by the court of highest instance. The draft Information Letter can already be regarded as an authoritative document, as the Russian courts of lower instance are expected to pay due regard to the legal propositions which the Higher Arbitrazh Court intends to set out in the Information Letter.

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Legal 500 UK 2012,
International Arbitration

English Commercial Court Provides Guidance on Whether an Issue Has Been Dealt With by a Tribunal

Over 16 years after the enactment of the Arbitration Act 1996, the precise limits of the scope of judicial intervention with the arbitral process continue to be the subject of vigorous debate before the English courts. One of the provisions under which awards remain open to challenge is section 68, which provides that a party may challenge an award on the basis of serious irregularity, such as the tribunal's failure to deal with all the issues which were put to it, and that the court may remit the award to the tribunal for reconsideration (in whole or in part), set the award aside or declare the award to be of no effect.

In *Petrochemical Industries Company (KSC) v The Dow Chemical Company* [2012] EWHC 2739 (Comm), the applicant ("PIC") challenged an ICC award, primarily on the basis that the tribunal had failed to consider an issue which had been put to it. The issue, PIC argued, was that the claimant ("Dow") could not recover over US$2 billion in consequential losses arising out of a refinancing which it had undertaken due to PIC's failure to complete under a joint-venture agreement, and specifically that PIC could not fairly be said to have assumed responsibility for such losses given Dow's assurances that failure to complete would not require it to refinance.

In a judgment handed down on October 11, 2012, giving the word "issue" its ordinary and natural meaning, and rejecting the view that an "issue" would need to be of the nature of what would be included in an agreed list of issues being prepared for the purpose of a case management conference, Andrew Smith J found that the assumption of responsibility question was an "issue" within the meaning of section 68, rather than a mere "argument" advanced, "point" made by a party to an arbitration or a "line of reasoning" or "step" in an argument, including because "fairness demanded that the question be 'dealt with' and not ignored or overlooked by the Tribunal, assuming it was put to them."

The application was denied, however, on the basis that the tribunal had in fact dealt with the issue, "admittedly succinctly", in a sentence which read: "Accordingly, PIC should reasonably have been expected to be held liable for costs associated with its failure to close". The judgment relies on authorities which establish that a tribunal does not have to set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration, and that a tribunal does not fail to deal with an issue that it decides without giving reasons. The judgment sets out additional considerations, including that:

- a tribunal does not fail to deal with an issue if the issue does not arise in view of its decisions on the facts or their legal conclusions (or is disposed of because of the tribunal's decision on a logically anterior point);
- a tribunal may deal with a number of issues in a composite disposal of them; and
- the court may take account of the parties' submissions when deciding whether, properly understood, an award deals with an issue.

This judgment brings welcome clarification and pragmatism to the interpretation of section 68, and the further considerations set out by Andrew Smith J may prove particularly helpful to arbitrators in determining the manner in and extent to which they are required to address issues in their awards.

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Debevoise & Plimpton LLP received the 2012 Chambers USA International Arbitration Award and the Chambers & Partners 2012 International Arbitration Award for International Counsel in Latin America.

Singapore High Court Decision Requires Parties to Proactively Challenge Jurisdictional Rulings and to Set Aside Awards Pre-Enforcement

In an important development relating to the enforcement of Singapore awards in Singapore, the Singapore High Court established in its October decision in *Astro Nusantara International BV v. PT Ayunda Prima Mitra* [2012] SGHC 212 that Singapore's International Arbitration Act ("IAA") requires parties to arbitrations seated in Singapore to challenge jurisdictional rulings in the local courts during the arbitration and to seek to set aside awards on jurisdictional grounds in order to preserve all defences against later enforcement in Singapore.

The decision was issued in the context of a dispute that arose out of a failed joint venture between the Malaysian Astro Group and the Indonesian Lippo Group relating to pay TV services in Indonesia. In October 2008, the Astro Group referred the dispute to arbitration in Singapore, which resulted in a May 2009 award upholding jurisdiction and four subsequent awards on the merits, largely in favour of the claimant companies, totalling some US$300 million. The claimants sought enforcement orders from courts in Hong Kong, Malaysia and Singapore.

In Singapore, where the courts had supervisory jurisdiction, judgments were rendered against the respondents, which then brought applications challenging *inter alia* enforcement on jurisdictional grounds. The IAA adopts Articles 16 and 34 of the UNCITRAL Model Law on International Commercial Arbitration, which specify time limits for review of rulings on jurisdiction as a preliminary issue and for setting aside of an award. Critically, it does not adopt Article 36. Here, the time limits had elapsed. The High Court considered whether enforcement may be resisted on jurisdictional grounds when no prior applications were made under Articles 16 or 34. Due to the complexity and importance of the issues, the High Court granted *ad hoc* admission to two Queen's Counsel to represent the parties. It heard oral argument in July 2012 and issued its decision in October. It held that, once the statutory time limits have elapsed, the IAA does not permit a party to resist enforcement in Singapore on jurisdictional grounds when no prior challenges were pursued under Articles 16 or 34.

This decision establishes that the only recourse in Singapore against a domestic international arbitration award is a pro-active challenge to a jurisdictional ruling during the arbitration or application to set aside an award on jurisdictional grounds within strict time limits. Challenges to Singapore awards on jurisdictional grounds may, of course, be possible where enforcement is sought outside Singapore. The High Court commented that Singapore "favours the summary enforcement of a domestic international award which has been recognised" and that "[b]y privileging party autonomy over judicial control of arbitrations, the IAA was thus intended to *reduce* the amount of curial intervention". It described this approach as being "in line with numerous other civil law jurisdictions and jurisdictions which have adopted the Model Law". The High Court described the English approach as being one of "increasing judicial intervention", inconsistent with other countries. It opined that "any sensible discussion of the Model Law must draw heavily from arbitration law in civil law jurisdictions".

With this decision, the High Court has placed Singaporean jurisprudence at odds with that of England and possibly that of Hong Kong. Like the IAA, Section 83 of Hong Kong's new Arbitration Ordinance expressly provides that Article 36 of the Model Law has no effect. In Section 86(2)(c), however, the Arbitration Ordinance – which came into effect on June 1, 2011 – introduces one ground for refusal of

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"Debevoise is well known for its leading international arbitration practice...Sources confirm that 'the firm interacts seamlessly between the various geographies' and see it as being 'truly international'"

Chambers UK 2013, International Arbitration

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enforcement of non-Convention, non-Mainland awards in addition to those found in the New York Convention. It permits the court to refuse enforcement for "any other reason the court considers it just to do so." This provision gives the Hong Kong judiciary a wider discretion in determining whether to enforce such awards. It has been suggested by commentators that Section 86(2)(c) may allow a party to resist enforcement in Hong Kong of a Hong Kong award having failed previously to proactively challenge a jurisdictional ruling, though it must be noted that this would be inconsistent with Hong Kong's purported strong pro-enforcement bias.

As it requires parties to proactively challenge jurisdictional rulings, the decision of the Singapore High Court in *Astro Nusantara* has been praised for promoting international arbitration, the enforcement of arbitral awards and party autonomy and for its consistency with Singapore's much publicised pro-arbitration stance. Though it has been speculated that this decision may disincentivise the selection of Singapore as a seat due to party preference for retention of both active and passive remedies, greater finality and certainty may in fact prove an incentive to parties. It remains to be seen whether the decision will meet with the approval of the Supreme Court, to which Lippo Group's solicitors were reported to be considering an appeal.

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Arbitration Exclusion Preserved and Clarified Under Recast Brussels Regulation

On 20 December 2012, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the "Regulation (recast)"), was published in the Official Journal of the European Union. The Regulation (recast) is a revision of Council Regulation (EC) No 44/2001 of December 22, 2000 ("Regulation No. 44/2001"), which allocates jurisdiction in civil and commercial matters before the courts of EU Member States and provides for mutual recognition of judgments, subject to limited exceptions.

Lord Goldsmith QC, a partner at Debevoise & Plimpton LLP, was part of the taskforce of arbitration specialists convened by the European Commission in 2010 during the Regulation No. 44/2001's consultation period to advise on the interface between the Regulation and arbitration.

A prior proposal by the European Commission to bring all arbitration-related court proceedings (and judgments) within the scope of Regulation No. 44/2001 was ultimately rejected. The rationale for the arbitration exclusion is that the recognition and enforcement of arbitral agreements and awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention") to which all Member States are parties. Thus, the final version of the Regulation (recast) achieves the following in respect of arbitration:

- preservation of the express exclusion of arbitration from the scope of the application of Regulation No. 44/2001 under Article 1(2)(d);
- clarification on the scope of the exclusion under the recitals, including that:
  - the Regulation (recast) does not prevent a Member State court first seised of an action relating to an arbitration agreement from referring the parties to arbitration, staying or dismissing such proceedings or determining the validity of the arbitration agreement;
  - the Regulation (recast) is not applicable to any action or ancillary proceedings relating to, in particular,

Lord Goldsmith QC was part of the taskforce of arbitration specialists convened by the European Commission in 2010 during the Regulation's consultation period to advise on the interface between the Regulation and arbitration.

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Arbitration Exclusion Preserved and Clarified

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the establishment of an arbitral tribunal, arbitrators' powers, the conduct of, or other aspect of, any arbitration procedures nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitration award;

- any ruling given by a Member State court on the validity of an arbitration agreement is not subject to the recognition and enforcement regime of the Regulation (recast);
- a Member State court is not prevented from making a determination on the substance of a matter under the Regulation (recast) where that court has previously held an arbitration agreement to be invalid, inoperative or incapable of being performed, and that any such substantive determination may be recognised or enforced under the Regulation (recast)'s regime;

- express preservation of Member States' obligations under the New York Convention, specifically that the Regulation (recast) does not affect the application of the New York Convention, which takes precedence.

The retention of the arbitration exclusion and the clarification as to the scope of the exclusion under the Regulation (recast) is to be welcomed. The Regulation No. 44/2001 had previously provided no guidance as to the extent of the arbitration exclusion and the interpretation of this provision had given rise in recent years to significant doctrinal debates as to its scope, meaning and effects, as demonstrated by the European Court of Justice's controversial decision in *Allianz SpA v West Tankers* (Case C-185/07) in 2009. It is hoped that the wording of the Regulation (recast) will go some way to resolve this uncertainly.

The Regulation (recast) is, however, not without its flaws and the current recital wording still allows for the possibility of contrary Member State decisions on the validity of arbitration agreements and the risk of parallel proceedings pending an enforceable arbitration award.

As set out above, a substantive determination by a Member State court where it has previously ruled that an arbitration agreement is invalid, inoperative or incapable of being performed may be recognised or enforced under the Regulation (recast). This leaves scope for a Member State court to make a decision contrary to that of an arbitral tribunal on the issue of an arbitration agreement and to subsequently issue a determination on the substance of the matter. Further, as the determination of a Member State court on the validity of an arbitration agreement is not required to be recognised and enforced under the same regime, there remains open the possibility that, until an enforceable arbitral award is issued, parallel proceedings may be issued in different Member States, which could result in contrary determinations on the validity of the arbitration agreement or parallel litigation proceedings.

Mark W. Friedman has just completed his term as co-Chair of the International Bar Association Arbitration Committee.

It should also be noted that, with the exception of the procedural provisions under Articles 75 and 76, the Regulation (recast) does not come into effect until January 10, 2015, meaning the current regime will continue to apply in the interim period.

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Debevoise partners Catherine M. Amirfar and Sophie Lamb were named in the "45 under 45" leading arbitration specialists by Global Arbitration Review 2012.

Implied Arbitration Clause Prevails Over Express Court Jurisdiction Clause

In *Interserve Industrial Services Limited v Zre Katowice S.A.* [2012] EWHC 3205 (TCC), the English High Court considered a settlement agreement which provided for the English court to have exclusive jurisdiction over disputes, but determined that, in the circumstances, the parties had in fact agreed to refer disputes to arbitration.

The parties had contracted to perform certain works at a power station. The works contract contained a dispute resolution clause providing for ICC arbitration. Following a dispute between the parties, a separate settlement agreement was concluded containing a provision that "the courts of England and Wales shall have exclusive jurisdiction in respect of any dispute arising under this agreement". The Claimant brought a claim in the High Court to enforce the settlement agreement and the Defendant, relying on the works contract, applied for the claim to be stayed in favour of arbitration under section 9 of the Arbitration Act 1996.

The High Court granted the stay. HHJ David Grant said that the settlement agreement was not a true settlement of claims, but was a variation of the works contract. He said that it was common in construction contracts for the parties to agree variations, but that it would not usually be the case that different dispute resolution provisions would apply to such varied terms. On the evidence, the judge held that the parties had not intended to abrogate the arbitration agreement in the works contract. Instead, he held that it was an implied term of the settlement agreement that all disputes would be referred to arbitration in accordance with the works contract.

The judge explained that this conclusion was not inconsistent with the express terms of the settlement agreement. Relying on *Paul Smith Ltd v H&S International Holding* [1991] 2 Lloyds' Rep 127 and *Axa Re v Ace Global Markets Limited* [2006] EWHC 216 (Comm), the judge held that the term in the settlement agreement only confirmed that the curial law applicable to the arbitration would be English law; that is, disputes would be resolved by arbitration and the English courts would have supervisory jurisdiction.

This judgment confirms English law's commitment to upholding arbitration agreements and expands the principle in *Paul Smith* and *Axa Re*, by making clear that an arbitration clause can prevail over what appears to be an exclusive court jurisdiction clause, even where the arbitration clause must be implied. It also comes as a reminder that care should always be taken when drafting dispute resolution clauses, ensuring that the parties' agreement on the method of dispute resolution is clearly and unequivocally expressed, particularly if more than one method is to be adopted.

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Tools for Effective Dispute Resolution

For advice on drafting effective arbitration agreements, please contact any of the editors or article authors for a copy of the Debevoise & Plimpton "Annotated Model Arbitration Clause for International Contracts".

Please also see the Debevoise & Plimpton Protocol to Promote Efficiency in International Arbitration: www.debevoise.com/arbitrationprotocol

Recent and Forthcoming Events

Peter Goldsmith QC, who co-chaired the ICC Task Force on States and State Entities, spoke at the ICC Commission on Arbitration Launch of the Report on **States, State Entities and ICC Arbitration** at Debevoise's London Office on December 13, 2012.

David W. Rivkin gave the annual Clayton Utz International Arbitration Lecture, titled "The Impact of International Arbitration on the Rule of Law" on November 13, 2012 in Sydney. http://www.claytonutz.com/ialecture/2012/

Forthcoming Events

- Dietmar W. Prager will be the co-chair of, and moderate a panel at, the 25th ITA Workshop in Dallas on June 20, 2013 on "International Arbitration from the Arbitrator's Perspective."
- Catherine M. Amirfar will speak on "Seeking Assistance of US Courts With International Arbitration" at the Practising Law Institute's International Arbitration 2013 conference, on June 10, 2013.
- David W. Rivkin will speak at the IBA Corporate Counsel meeting in Paris on April 15, 2013.
- David W. Rivkin will speak on "Law and Globalization" at Yale Law School, New Haven on April 8, 2013.
- Donald Francis Donovan, as President of the American Society of International Law, will speak at ASIL's 107th Annual Meeting on April 3-6, 2013 in Washington, DC.
- David W. Rivkin will speak on "Sports Arbitration" at Queens Mary College, London on March 12, 2013.
- Mark W. Friedman will be sitting on the Organising Committee for the 16th Annual IBA International Arbitration Day to be hosted on February 21-22, 2013 in Bogota.
- Dietmar W. Prager will be speaking on February 20, 2013 at the Young ICCA Conference in Bogota on "Effective Advocacy - Opening and Closing."
- Dietmar W. Prager will be speaking on February 19, 2013 at a Hong Kong International Arbitration Centre event in Bogota on "Arbitration in Asia and Latin America – Similarities and Differences."
- Catherine M. Amirfar will speak at the 2013 Santa Clara Journal of International Law Symposium: The Law and Politics of Foreign Investment on "Statistical Approaches to Dispute Resolution Under Investment Treaties" on February 2, 2013.
- David W. Rivkin will speak on "Deliberations" at the Swiss Arbitration Association Annual Conference in Zurich on February 1, 2013.

Recent Events

- Peter Goldsmith QC spoke on "The Power to Control the Costs" at Vienna Arbitration Days on January 25-26, 2013.
- Catherine M. Amirfar spoke on "Developments in International Dispute Resolution" at the 2013 Annual CPR Meeting in California on January 17, 2013.
- Antoine F. Kirry spoke on "Korea: International Arbitration Summit and the New Hub of Asia" at the 1st Annual International Arbitration Summit on December 4, 2012 in Seoul.
- Peter Goldsmith QC spoke at the Ukranian Bar Association Kiev "Arbitration Days 2012" for a panel on "The Battle – Cross-examination" on November 16, 2012.

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Recent and Forthcoming Events

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- Donald Francis Donovan spoke on "Mass Claims/Class Claims: Their Effect on Modern Arbitration" at the ICDR-ICC-ICSID Joint Colloquium titled "The Frontiers of Arbitration" in Washington, DC on November 2, 2012.
- Dietmar W. Prager spoke on "The International Arbitrator's Roundtable: What are the Issues: What Really Works?" at the ICDR International Arbitration Conference on October 23, 2012 in Bogota.
- Donald Francis Donovan spoke on "When Transactional Business Deals Go Sour: The Challenges and Opportunities of International Arbitration" at the ASIL Midyear Meeting and Research Forum on October 19-21, 2012 in Atlanta and Athens, Georgia.
- Jessica Gladstone spoke on "The Emergency Arbitrator" at the International Arbitration Congress on October 19, 2012 in Barcelona.
- Peter Goldsmith QC spoke at the GAR Live 2nd Annual Asia Conference at the HKIAC in an Oxford-style debate, "India and International Arbitration" Motion: 'This House Believes that India Refuses to Become a Modern International Arbitral Jurisdiction' on October 17, 2012.
- Peter Goldsmith QC spoke on "Arbitration Agreement – Does Freedom of Contract Have Meaning in Asia?" on October 17, 2012 at ADR in Asia 2012 held in Hong Kong.
- Suzanne Grosso spoke at the meeting of the ABA Section of International Law – 2012 Fall Meeting on October 17, 2012 in Miami.
- Dietmar W. Prager spoke on "Deliberations and Issuance of Arbitral Award" at the Ninth Annual Seminar on International Commercial Arbitration on October 4, 2012 in Washington, DC.
- Mark W. Friedman, as out-going co-chair of the IBA International Arbitration Committee, spoke at the IBA Arbitration Committee Dinner on October 3, 2012 in Dublin.
- Donald Francis Donovan spoke on the Investment Arbitration Panel at the IBA Annual Conference held on October 2, 2012 in Dublin.
- Catherine M. Amirfar, Donald Francis Donovan, Mark W. Friedman, and David W. Rivkin spoke at the IBA Annual Conference held October 1-5, 2012 in Dublin. Mr. Friedman served as Session Organizer of the conference's Arbitration Committee Town Hall.
- Mark W. Friedman gave the keynote address at the Young Arbitration Practitioners Symposium, titled "So You Want a Career in International Arbitration? The Ten Things Young Practitioners Need to Know" on October 1, 2012 in Dublin.
- Jessica Gladstone spoke at the Africa International Legal Awareness (AILA) Investment Arbitration Seminar on Annulment and Challenge of Awards on September 28, 2012 in London.
- David W. Rivkin and Catherine M. Amirfar spoke at the GAR Live Americas Conference on September 19, 2012 in New York.

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