

# Arbflash

## New UNCITRAL Rules

The original UNCITRAL Arbitration Rules were adopted in 1976. They have been used in a wide range of disputes, particularly in ad hoc arbitration (where no arbitral institution is involved), investor-state disputes and state to state disputes. In 2006 it was decided that the Rules should be modernised to bring them in line with current arbitral practice and to enhance the efficiency of arbitration.

The revised UNCITRAL Rules were adopted by UNCITRAL on 25 June 2010 and will come into force on 15 August 2010. Key changes include:

- New provisions for multi-party arbitrations
- A requirement that the respondent(s) to an arbitration serve a response to the notice of arbitration within 30 days of receipt of such notice
- A procedure to object to experts appointed by the arbitral tribunal
- Provisions to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs and a review mechanism regarding the costs of arbitration
- More detailed provisions on interim measures

The increasing use of the UNCITRAL Rules in investor-state arbitrations had led to calls for increased transparency. The Working Group set up to review the Rules looked at this but encountered difficulties reaching consensus on a number of points.

Consequently, the revised Rules do not include provisions on transparency but UNCITRAL has confirmed that the Working Group will now commence work on that issue.

A copy of the new rules can be accessed via the UNCITRAL website:

<http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/pre-arb-rules-revised.pdf>.

## New SIAC Rules 2010

The Singapore International Arbitration Centre (SIAC) has issued new procedural rules (the new Rules) effective from 1 July 2010. This follows a consultation

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process where practitioners were invited to comment on the proposed changes and their experiences with the 2007 Rules.

The revisions aim to improve the speed and efficiency of arbitration and reflect best practice in international arbitration.

Key amendments include:

- **New expedited procedure.** The new Rules introduce an expedited procedure which a party can apply for if the amount in dispute does not exceed S\$5m, or if all parties agree, or in cases of

exceptional urgency. If the SIAC Chairman agrees that the expedited procedure may be used, then:

- the SIAC Registrar has the power to shorten any time limits under the Rules;
- the case shall be referred to a sole arbitrator (unless the Chairman decides otherwise);
- the award shall be made within six months from the date the Tribunal is constituted; and
- the Tribunal will only state the reasons for the award in summary form.

Other institutions, including the American Arbitration Association and the World Intellectual Property Organisation (but not the ICC or the LCIA) include similar provision for an expedited process. This is in part to address the growing concern that the traditional benefits of arbitration, namely speed, cost and efficiency, have been eroded.

- **New Emergency Arbitrator procedure.** In order to assist parties in obtaining emergency relief, the new Rules allow a party to apply for the appointment of an emergency arbitrator concurrent with, or following, the filing of a Notice of Arbitration but prior to the constitution of the Tribunal. An Emergency Arbitrator will be appointed by the SIAC Chairman within one business day of receipt of an application for emergency relief and must establish a schedule for consideration of the application within two business days of appointment. The Emergency Arbitrator shall have the powers of the Tribunal and may order any interim relief he deems necessary. After the Tribunal is constituted, the Emergency Arbitrator shall have no further power to act, and the Tribunal may alter any interim relief granted by the Emergency Arbitrator. Any order issued by the Emergency Arbitrator will cease to be binding if the Tribunal is not constituted within 90 days of the order, or when the Tribunal makes a final award.
- **Provisions to improve speed and efficiency.** Various further amendments have been introduced to assist with the speed and efficiency of arbitrations. For example, the time period by which a party must nominate an arbitrator has been shortened from 21 to 14 days if three arbitrators are to be appointed. There is also a revised procedure for appointment of three arbitrators where there are more than two parties to an arbitration. The amendment provides a more defined and efficient process to follow and is in line with the multiple party provisions for the appointment of three arbitrators in the ICC Rules.
- **New Tribunal powers.** The new Rules give the Tribunal various new powers, some of which have

been transferred from the Registrar. For example, the Tribunal, rather than the Registrar, will decide the seat of arbitration where the parties do not agree. Further, the Tribunal may now choose to hold a hearing for the presentation of evidence and/or for oral submissions, on its own initiative as well as at the request of the parties. The powers of the Tribunal set out in Rule 24 have also been expanded and clarified.

- **Removal of Memorandum of Issues.** The requirement for a Memorandum of Issues defining the issues to be determined in the arbitration has been removed. This will shorten the timetable of some arbitrations. However, the use of a Memorandum of Issues can sometimes assist in clarifying the issues to be decided so might still be useful in some arbitrations.

The new Rules will apply to all SIAC arbitrations commenced on or after 1 July 2010.

## **New draft legislation to reform Spanish arbitration law**

In February 2010, the Ministry of Justice submitted for approval draft legislation to reform the current Arbitration Act. The aim of the draft is to increase legal certainty and efficiency of the arbitral process, in order to encourage greater use of arbitration in Spain and consequently reduce the courts' workload.

The key revisions include:

- the transfer of jurisdiction over the appointment of arbitrators, the annulment of awards and the enforcement of foreign awards from the first-instance and appeal courts to the superior courts of justice of Spain's administrative regions;
- restricting arbitrations decided according to equitable principles rather than legal ones to international arbitrations where the parties have expressly consented to that;
- removing the requirement for the arbitrator to be a practising lawyer. In domestic arbitration proceedings with three arbitrators appointed, only one is required to be a practising lawyer;
- requiring arbitrators and arbitration courts to purchase insurance to cover their potential liability for loss caused by negligence or wilful misconduct; and
- introducing a new procedure designed to deal with internal disputes among the Public Administration and its bodies.

The draft text also includes reforms relating to the Insolvency Act, providing that the declaration of

insolvency of a company will not affect the validity and enforceability of any arbitration agreements entered into by that company.

The Public Limited Companies Act would also be modified by the new legislation, in order to regulate the use of arbitration proceedings as a means of challenging corporate decisions.

### **New IBA Rules on the taking of evidence in international arbitration**

The IBA Rules, adopted in 1999, are commonly used to supplement institutional or ad hoc rules that parties have agreed to apply to their arbitration. They accommodate both common law and civil law approaches to taking evidence in international commercial arbitration and are particularly useful in dealing with witness evidence and document production. After conducting a survey in 2008, the IBA reviewed its rules and produced new rules which were adopted on 29 May 2010. The new Rules will apply to all arbitrations in which the parties agree to apply the IBA Rules from 29 May 2010.

The key revisions include: early consultation by the tribunal in relation to evidential matters; guidance to the tribunal in relation to document requests (including "e-disclosure"); expansion of confidentiality protections; greater clarity in relation to the contents of expert reports; an obligation on witnesses to appear for oral testimony at a hearing only if their appearance has been requested by a party or the tribunal; specific guidance in relation to privilege; and incorporation of an express requirement of good faith in taking evidence (along with powers of the tribunal to reflect the lack of good faith in the awarding of costs).

To access a copy of the rules see the IBA website: <http://www.ibanet.org/Document/Default.aspx?DocumentUId=68336C49-4106-46BF-A1C6-A8F0880444DC>.

### **Contractual provisions in relation to service will bind the parties**

The English High Court decision in *Anglian Water Services Ltd -v- Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 highlights the problems that can arise when parties include, in a contract providing for arbitration, contractual provision for service of communications. The court held that, where a contract provides for service of communications at a particular address (including a party's "last known address"), service to an alternate address will not be valid unless the receiving party has subsequently notified that alternate address as the address for service. This will be the case even where a party serves a notice of

arbitration on the other party's solicitor – service will not be valid unless the party being served has authorised service on their solicitors.

Although it is common to see service of process clauses in contracts incorporating jurisdiction clauses, they are less common where arbitration is the chosen forum. In this case, the clause covered a wide range of communications relating to the contract, not just those relating to the arbitration, and the judge considered that to allow alternative service of the arbitration notice would undermine the contractual certainty provided by the service provision. Parties should follow these clauses if they are included in the contract, unless they can agree an alternative service address.

### **State immunity and arbitration: drafting issues**

A recent decision of the Hong Kong Court of Appeal raises issues generally concerning the drafting of waiver of state immunity clauses.

Two ICC awards, together worth US\$104m, were issued in France and Switzerland in favour of FG Hemisphere Associates LLC (FG Hemisphere), a US-based distressed debt fund, against the Democratic Republic of Congo (DRC). FG Hemisphere sought enforcement in Hong Kong against payments which were due to the DRC from China Railways, the Chinese state-owned company. Earlier this year the Hong Kong Court of Appeal held that state immunity from enforcement would not protect the assets of a state (here its right to receive payment from China Railways) if the state intended to use those assets for commercial purposes.

The Hong Kong Court of Appeal granted permission to the DRC to appeal its decision. It is hoped that the case will clarify Hong Kong law on the matter of state immunity and enforcement, which has been uncertain following the 1997 transfer of sovereignty to China.

The case is also a useful reminder of the important distinction between a waiver of immunity from the substantive proceedings and a waiver of immunity from enforcement. The first type of waiver will not extend to the second and so contracting parties should make sure that the waiver clause is drafted widely to cover both. In addition, the terms on which a state will be held to have waived immunity from suit will vary from jurisdiction to jurisdiction. For example, under English law an agreement to arbitrate is regarded as an effective waiver of immunity from the substantive proceedings; in other jurisdictions, this will be insufficient by itself. This is therefore another drafting

consideration to be aware of when choosing the seat of the arbitration. (Cases CACV 373/2008 & CACV 43/2009)

## Investment treaty update

**Tribunal has jurisdiction in Mobil case against Venezuela:** On 10 June, the ICSID tribunal in *Mobil Corporation and others -v- Bolivarian Republic of Venezuela* issued its decision on jurisdiction, stating whether it was empowered to hear Mobil's claims for compensation resulting from the nationalisation of oil concessions by the Venezuelan Government. Mobil's claims are valued at around US\$10bn and the decision raises several important points.

The first issue contested by Venezuela was the question of whether it had validly consented to investment treaty arbitration, either via its domestic investment legislation, the relevant bilateral investment treaty (between Venezuela and The Netherlands, referred to as the BIT), or both. The tribunal decided that the domestic legislation did not by itself represent a general consent to arbitration. However, it did have jurisdiction over certain of Mobil's claims as a result of the BIT.

A fundamental requirement of arbitration under the ICSID Convention (as with other forms of arbitration) is consent. The Convention itself only requires that this is given in writing. A general, "unilateral" consent may be given by states either by treaty (a bilateral or multilateral investment treaty) or by domestic legislation, and these may in some circumstances require nothing further from the state before the investor is able to pursue investment treaty arbitration. However, this case demonstrates that there are some cases where, in addition to the general "offer to arbitrate", a specific consent in relation to the particular investment is also required before investment treaty arbitration will be available.

The second issue was whether Mobil should be allowed to make use of the BIT at all, in circumstances where it had only acquired the protection of the BIT via a corporate restructuring which made the relevant Mobil companies Dutch-owned. On this point, the tribunal noted that Mobil had admitted that "*the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT.*" The tribunal concluded that "*this was a perfectly legitimate goal as far as it concerned future disputes.*" However, Mobil could not make use of the BIT in respect of claims which already existed: this would be "*an abusive manipulation of the*

*system of international investment protection under the ICSID Convention and the BITs.*"

State parties frequently raise jurisdiction challenges at the outset of investment treaty arbitrations; the additional cost and time involved can act as a significant deterrent to the private party. There is inherent vagueness in many of the requirements which are fundamental for a jurisdiction claim to be brought (such as the definition of "investment"), and the inconsistent treatment by tribunals of other issues, such as foreign control, creates scope for jurisdictional arguments.

(Case: *Mobil Corporation and others -v- Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/27))

**Sempra award against Argentina annulled:** An ICSID Annulment Committee recently annulled the award granted in favour of the claimants in *Sempra Energy International -v- Argentina*. The decision is highly significant given the number of investment treaty arbitrations which arose in the same circumstances, namely the Argentine financial crisis during 2001-2002 and in the context of the current global economic climate.

Sempra filed claims against Argentina on 11 September 2002 in relation to its investments in two privatised gas companies which held gas licences in the country. It alleged that, in the wake of its financial crisis, the Government had by its actions in respect of the licences held, breached its obligations of fair and equitable treatment toward Sempra, and breached the umbrella clause under the United States-Argentina BIT. An award in Sempra's favour was granted on 28 September 2007.

Argentina argued before the original tribunal that it had acted out of necessity due to the magnitude of the financial crisis, relying on Article XI of the BIT: "*This treaty shall not preclude the application by either Party [the US and Argentina] of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential interests.*" The annulment committee found that the original tribunal had failed to interpret correctly the term "necessary" within Article XI, when considering the Argentine Government's actions. This was in the view of the annulment committee a manifest excess of powers, which required the award to be annulled.

It is important to note that an ICSID annulment committee is not empowered to act as an "appeal" from the original arbitral tribunal. It is only able to

annul an award, either in whole or in part, or to uphold it. As a result, the committee did not issue a replacement decision, and so the case would now need to be reheard.

Argentina has been defendant to at least 51 investment treaty claims, more than any other state.

(Case: *Sempra Energy International -v- Argentina* ICSID Case No. ARB/02/16)

**Charter of a ship an "investment":** An ICSID tribunal in a dispute between German companies and the Ukraine recently determined that a suite of contracts for the charter of a ship can constitute an "investment" for the purpose of an investment treaty claim. The case provides an interesting example of the wide range of commercial situations where parties contracting with states can rely on investment treaty protection.

A German company, Inmaris, and its affiliates (together, Inmaris) entered into a charter agreement and related contracts with an agency of the Ukrainian Government, for the purposes of operating the ship for sailing tours in the Black Sea. Subsequently, Inmaris brought a claim under the Bilateral Investment Treaty between Germany and Ukraine (the BIT), claiming that the Ukrainian Government had by its actions deprived it of the enjoyment of the contracts. These actions included an alleged refusal to permit the ship to sail until Inmaris provided a €50,000 non-repayable loan, and a refusal to permit the signing of Inmaris' annual accounts.

Article 1 of the BIT states "*The term 'investment' shall comprise all kinds of assets, in particular: ... (b) Shares in companies and other kinds of participations in companies; (c) Claims to money which has been used to create a material or intangible value or claims to any performance having an economic value...*". The tribunal held that the contracts created sufficient "claims to performance" in the hands of Inmaris so as to constitute an investment under this definition.

(Case: *Inmaris Perestroika Sailing Maritime Services GMBH and others -v- Ukraine* (ICSID Case No ARB/08/8))

**Deposits in a Ponzi scheme not an investment:**

The ICSID tribunal in the case of *Alasdair Ross Anderson and others -v- Republic of Costa Rica* determined in May that it did not have jurisdiction over a claim to recover deposits invested in an illegal Ponzi scheme in Costa Rica. The claimant investors alleged that Costa Rica had breached various obligations under the Canada-Costa Rica bilateral

investment treaty (the BIT), including the obligation to provide full protection and security, and to ensure fair and equitable treatment of foreign investors.

The tribunal was required to consider the definition of "investment" under the BIT. It found that the deposit of funds with the Costa Rican party did constitute an "asset", which was capable of being an "investment" for the purposes of the definition under the BIT. However, that definition also required that any "investment" must also be made in accordance with the law (specifically, the Organic Law of the Central Bank of Costa Rica). On the facts, the claimants' deposits of funds had not been made in accordance with the law, and so the entire claim failed.

(Case: *Alasdair Ross Anderson and others -v- Republic of Costa Rica* (ICSID Case No ARB(AF)/07/3))

## International news

### Scottish and Irish Arbitration Acts now in force

The Arbitration (Scotland) Act 2010 and the Irish Arbitration Act 2010 came into force on 7 June 2010 and 8 June 2010 respectively. Both are based on the UNCITRAL Model Law, and remove the previous distinction between domestic and international arbitration.

### CEAC amends model arbitration clause

The new Chinese European Arbitration Centre (CEAC) model arbitration clause, amended to incorporate the need to have China-related arbitration proceedings administered by an arbitration institution, now reads as follows:

*"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration in Hamburg (Germany) in accordance with the CEAC Hamburg Arbitration Rules of the Chinese European Arbitration Centre".*

### PCA and ACICA co-operation agreement

Dispute resolution in the Asia-Pacific region has potentially been strengthened by the recent co-operation agreement signed between the Permanent Court of Arbitration (PCA) and the Australian Centre for International Commercial Arbitration (ACICA). The agreement includes provisions for the sharing of facilities, services, information and expertise, the aim being the facilitation of arbitration hearings in the Hague and Australia.

### Arbitrators are employees

The English Court of Appeal has held that, for the purpose of the Employment Equality (Religion or

Belief) Regulations 2003, arbitrators are employees. A clause in an arbitration agreement that stipulated that all appointed arbitrators must be members of the Ismaili Community was therefore void (*Nurdin Jivraj -v- Sadruddin Hashwani* [2010] EWCA Civ 712).

### **Singapore: validity of arbitration agreement in standard terms**

In a recent case between Danish shipbuilders and a Singaporean investment group for the construction of a "superyacht", the Singapore High Court considered the enforceability of an arbitral award, where the underlying arbitration clause was contained in an unsigned set of standard terms. Taking a pragmatic approach, the Court held that a valid arbitration agreement existed in the circumstances, and granted enforcement.

The original arbitration was heard by a tribunal at the Danish Arbitration Institute, which awarded ca. €400,000 to the shipbuilders in respect of payments claimed under the contract. Despite not having challenged the jurisdiction of the tribunal during the

Danish arbitration, the Singaporean company attempted to resist enforcement in Singapore on the basis that the standard terms (which included the arbitration clause) were unsigned and had not been enclosed with the contract. The Court, relying on a previous rescinded version of the contract in which the same standard terms had been signed, considered that the Singaporean party had agreed to refer disputes to arbitration. The Court also noted Article II (1) of the New York Convention on the Recognition and Enforcement of Arbitral Awards, which requires a written agreement to arbitrate but makes no strict requirement for a signature.

The Singapore Courts are considered to be arbitration-friendly and so this is not a surprising decision. However, the decision reflects the wider trend that courts should lean towards recognition of arbitration clauses. The incorporation of arbitration clauses by reference to another agreement is today permitted under many developed arbitration regimes.

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