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INTERNATIONAL ARBITRATION NEWSLETTER

January 2016 LW.com

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Managing the Costs of Transparency in ISDS: Lessons from *BSG v. Guinea*

By Catriona E. Paterson

UNICTRAL's Rules on Transparency in Treaty-based Investor-State Arbitration (the Transparency Rules) present challenges to manage the costs of compliance while avoiding the consequences of non-compliance.

Transparency in investor-State dispute settlement (ISDS) is not a new concept. However, the reality is that outside the context of the North American and Central American Free Trade Agreements (respectively, NAFTA and CAFTA) (both of which contain provisions on transparency), the mechanisms implemented to promote transparency in ISDS have only recently begun to be tested in arbitral practice. The Transparency Rules, still in their infancy, have only rarely been applied and then only by the disputing parties' agreement. Most recently, the Transparency Rules were adopted by party agreement (with some modification) in *BSG Resources Ltd. v. Republic of Guinea*.[1] This case gives some indication as to the future of transparency in ISDS and how to manage the associated costs.

The Transparency Rules

The UNCITRAL Transparency Rules came into effect on April 1, 2014. In summary, the Transparency Rules apply to investor-State arbitrations:

1. Initiated under the UNCITRAL Arbitration Rules under an investment treaty concluded on or *after* April 1, 2014, unless the parties to the treaty have agreed otherwise
2. Initiated under the UNCITRAL Arbitration Rules under a treaty concluded *before* April 1, 2014, if the parties to the arbitration or the State parties to the treaty have so agreed
3. In all other investor-State disputes, irrespective of the applicable arbitration rules, as the parties may so agree

Broadly, the Transparency Rules mandate that the parties to a dispute:

1. Make information regarding the dispute public, including the parties' names, the economic sector involved and the treaty under which the claim is made (Article 2)
2. Publish their written pleadings, a list of accompanying documentary evidence (but not the exhibits themselves), as well as transcripts of hearings and the arbitral tribunal's orders, decisions and awards (Article 3(1))
3. Upon request by any person, make any additional documents available, including expert reports and witness statements (Article 3(2))
4. Publish, at the discretion of the tribunal, any exhibits and other documents, on the tribunal's own initiative or following a request, from any person, and following consultation with the parties (Article 3(3))
5. Hold substantive hearings in public, subject to exceptions to protect confidential or otherwise protected information, as well as the integrity of the arbitral process (Article 6)[2]

A fuller explanation of the Transparency Rules' content and scope of application can be found in Latham's June 2014 International Arbitration Newsletter.

BSG Resources Ltd. v. Republic of Guinea

In *BSG Resources Ltd. v. Republic of Guinea*, the parties' agreement and tribunal's directions as to the applicable procedures for complying with the transparency obligations have been recorded in the tribunal's Procedural Order No. 2, issued on September 17, 2015. That Procedural Order, and the experience of arbitral tribunals applying transparency provisions under the NAFTA and CAFTA, provide the parties to future disputes some guidance as to the procedures they may adopt to comply with transparency obligations in ISDS, as well as the potential costs of compliance, including:

Communication with the repository

1. Who will act as the repository of published documents and information, how long will it make the case information and documents publicly available, what fees (if any) will it charge, and who will pay the fees in the first instance?

   The International Centre for Settlement of Investment Disputes (ICSID) indicated that it would be willing to act as repository and expects to charge the parties an annual fee of US$1,800-2,000 to cover the costs of administering a registry.[3]

2. Who will communicate with the repository?

   In *BSG v. Guinea*, the tribunal has assumed responsibility for communicating with, and sending documents to, the repository. This approach *prima facie* has pragmatic merit, but not every tribunal will be willing to accept this role, and the effectiveness of the approach will depend on the efficiency of the tribunal or the tribunal secretary.

3. Within what timeframe should documents be communicated to the repository?

4. What consequences will follow in the event of inadvertent communication to the repository and the repository subsequently publishing a confidential document or information?

Documents submitted in the arbitration, and which are or may be subject to publication

5. By what procedure will the parties designate documents and information as confidential, and therefore, not subject to publication?

   In *BSG v. Guinea*, each party or third person will have 21 days from the filing of a document to notify the tribunal that it seeks protection for confidential or protected information in that document. In the absence of such notice, the tribunal is authorized to publish the document(s).

   As a practical matter, the submitting party should consider whether there is other evidence, of equal probative value, that could be submitted in place of a confidential document.

6. Can or should documents provided to the opposing party by way of document production be marked as confidential, even if not subsequently submitted in evidence?

7. Within what timeframe and by what process may a party object to the designation of a document or information as confidential or protected?

Public access to hearings

8. Does the proposed hearing venue have sufficient suitable space to accommodate an open hearing?

   For instance, many (if not all) of the hearing rooms available at the International Chamber of Commerce's hearing centre in Paris and the International Centre for Dispute Resolution in London would not have sufficient capacity.

9. If so, what (if any) additional security arrangements need to be implemented and what are the associated costs?

10. Under the circumstances, is broadcasting the hearing more appropriate (an approach adopted in *BSG v. Guinea* and several disputes proceeding under the NAFTA and CAFTA), and what are the associated costs?

    By way of example, ICSID informed UNCITRAL that, in the ICSID's experience with NAFTA and CAFTA disputes, it could accommodate public hearings through broadcast facilities in two ways, each with a different associated cost:

    a. Closed circuit television broadcast to a side room open to the public, at a cost of approximately US$4,550 per day or US$14,250 for five weekdays

    b. Live streaming over the internet at a cost of US$4,750 per day or US$15,750 for five weekdays[4]

11. If any oral presentations or testimony will be interpreted, how (if at all) is this to be accommodated in the context of an open hearing?

12. How will the parties address confidential documents and information during the course of the hearing, and during which the public may be excluded, without significantly disrupting the proceeding?

    In *BSG v. Guinea*, the live streaming will be delayed by 30 minutes, a solution with obvious pragmatic appeal as the delay should allow a party to refer to confidential documents or information without significantly interrupting the flow of the hearing.

The Cost of Non-Compliance

No universal rule exists for the allocation of costs in arbitration (including the arbitration costs and the parties' legal fees and expenses); however, under most modern arbitration rules, the tribunal has the power to impose costs sanctions for non-compliance with the applicable procedure. Accordingly, a tribunal likely will be able to impose costs sanctions on a party that fails to comply with the applicable rules on transparency or on a party who, in purported compliance, acts in a manner that is inefficient, leads to disruption of the hearing or wrongly over-uses the confidentiality designation.

Final Comments

In most, if not all cases, improving the transparency of the ISDS process will result in a more complex arbitral procedure and in higher costs for the parties. As with all aspects of an arbitration, carefully considering the issues related to the arbitral procedure can help ensure the procedures ultimately adopted are fit for purpose, and the time and cost consequences of complying with transparency obligations are managed efficiently.

The parties' agreement in *BSG v. Guinea* to apply the Transparency Rules (subject to some modifications) may be the precursor for more arbitral procedures applying these or similar rules. Although the Transparency Rules have yet to be tested in practice, the Procedural Order in *BSG v. Guinea* and the practice of tribunals acting under NAFTA and CAFTA can guide parties on the issues to consider at the outset and some of the likely costs of compliance.

FIRM NEWS

Latham & Watkins Procures Dismissal of Claims and Favorable Cost Award for the Republic of Macedonia

Tribunal declines jurisdiction over investment-related dispute in Latham's third success for Macedonia at the ICSID.

In an award of 22 September 2015 an International Centre for Settlement of Investment Disputes (ICSID) Tribunal declined jurisdiction over claims brought by Guardian Fiduciary Trust against the Republic of Macedonia. The case related to an investment in the financial services industry, and the claim was initially valued at more than US$600 million. The Tribunal chaired by Dr. Veijo Heiskanen and including Professor Andreas Bucher and Professor Brigitte Stern dismissed the claims brought under the Dutch–Macedonia bilateral investment treaty because the claimant, a New Zealand company, had failed to demonstrate that it was in fact controlled by a Dutch entity as is required under the treaty. Accordingly, the Tribunal declined jurisdiction *ratione personae* and awarded the Republic of Macedonia 80% of its legal costs.

Sebastian Seelmann-Eggebert and Charles Claypoole led the team representing the Republic of Macedonia. Seelmann-Eggebert commented: "This is an important and timely decision that demonstrates the ability of ICSID arbitration to dispose relatively efficiently of claims once it becomes clear that they are baseless." Claypoole confirmed that the State Attorney's Office of the Republic of Macedonia is very satisfied with the result, and he is "particularly happy that our client has been awarded the vast majority of its costs."

Latham & Watkins advised the Republic of Macedonia with a team led by litigation partners Sebastian Seelmann-Eggebert and Charles Claypoole, assisted by Latham associates Catriona Paterson and Robert Price and Angela Angelovska-Wilson of Reed Smith. This is the third ICSID arbitration in which Latham & Watkins has successfully represented the Republic of Macedonia.

Text of Trans-Pacific Partnership Agreement Released

By Jan Erik Spangenberg

Agreement between Pacific Rim countries to become the largest multilateral trade and investment treaty worldwide, covering approximately 40% of world trade.

On 5 November 2015, the Trans-Pacific Partnership (TPP) parties — Australia, Brunei Darussalam, Canada, Chile, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam — released the final text of the TPP agreement, which is still subject to legal review.

Apart from trade regulations covering a variety of subjects, the TPP, which the United States Trade Representative characterized as a "landmark 21st century agreement," also contains an investment chapter modelled in large part on existing United States Free Trade Agreements. Chapter 9 of the TPP provides the basic investment protections found in most other investment-related agreements, including national treatment, most-favored-nation treatment, full protection and security and the prohibition of expropriation that is not for a public purpose, without due process or without compensation. The TPP, however, tries to define some of these standards more narrowly:

- Article 9.6(2) requires that the fair and equitable treatment and full protection and security concepts prescribe nothing more than the customary international law minimum standard.
- Article 9.6(4) further clarifies that taking actions or failure to take actions that may be inconsistent with an investor's expectations does not constitute a breach of the fair and equitable treatment standard.
- Regarding the protection against unlawful expropriation, the TPP parties recorded in Annex 9-B their joint understanding that non-discriminatory regulatory actions designed and applied to protect public welfare objectives, such as health, safety and the environment, only in rare circumstances constitute an indirect expropriation.
- Article 9.5(3) clarifies that the most-favored-nation treatment standard does not encompass international dispute resolution mechanisms.

The TPP also continues to provide for Investor-State Dispute Settlement (ISDS). The TPP introduces, however, a limitation period of 3.5 years from the date on which the investor first knew or should have known of the alleged breach of the TPP. The TPP's ISDS provisions also contain a number of other modern dispute settlement provisions: Article 9.22(3) specifically allows admitting *amicus curiae* submissions, and Article 9.23 provides for transparency of the arbitral proceedings, including the publication of written submissions and public hearings.

The TPP still requires ratification of at least six of its signatories, which comprise at least 85% of the gross domestic product of all 12 members, to enter into force. Overall, the TPP follows the trend of modernized, but also more restrictive, investment protections that can also be found in the Comprehensive and Economic Trade Agreement between the EU and Canada (CETA), the current US model bilateral investment treaty and recent United States free trade agreements.

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English Courts Allow Enforcement of an Arbitral Award Despite Ongoing Set Aside Proceedings

By Catriona E. Paterson

***(IPCO (Nigeria) Ltd v Nigeria National Petroleum Corporation* [2015] EWCA Civ 1144)**

Court of Appeal enforces an arbitration award upon determining set aside proceedings at the seat of arbitration are significantly delayed.

The underlying dispute concerned payments allegedly due under a turnkey contract for the design and construction of a petroleum export terminal in the Port Harcourt area of Nigeria. The dispute was referred to arbitration, and in October 2004, an arbitral tribunal seated in Nigeria awarded IPCO (Nigeria) Ltd (IPCO) US$152 million plus interest. The Respondent, Nigeria National Petroleum Corporation (NNPC), made a timely application to the Nigerian courts to set aside the award on several grounds. In 2008, NNPC further alleged that the award had been procured by fraud.

In November 2004, in spite of the set aside proceedings, IPCO applied to the English courts to enforce the award. Under the English Arbitration Act 1996, which incorporates the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), a court may exercise its discretion to enforce an arbitral award notwithstanding that the courts of competent jurisdiction have set aside the award or that the award is the subject of set aside proceedings. The English courts, however, have in practice been reluctant to exercise their discretion to enforce in these circumstances. The adopted approach is that "the more plausible the challenge to the validity of the award the less disposed will the court be to enforce it or grant security; the greater the prejudice arising from non-enforcement the less likely will the court be to refuse it without ordering security; and vice versa in each case."[5] In line with this approach, the IPCO-initiated enforcement proceedings were stayed pending resolution of the set aside proceedings.

In the intervening years, IPCO applied several times (unsuccessfully) to the courts to overturn the stay of enforcement. The Commercial Court initially rejected IPCO's most recent application in 2012, a decision IPCO appealed. The Court of Appeal articulated in its 10 November 2015 judgment that marginal changes in a challenge's plausibility are unlikely to lead to enforcement if such enforcement has been denied in the past. Moreover, "if a *prima facie* case of fraud remains, the court will be very reluctant to order immediate enforcement." The court was also conscious of the need for comity between the courts of foreign States, expressing that to "keep some sort of watching brief over the curial court and revisit its assessment of the merits if there is any change in the apparent cogency of the challenge" was not appropriate[6].

Counterbalancing these concerns, however, was the now significant delay in the set aside proceedings, and persuasive evidence IPCO submitted indicating the proceedings before the Nigerian courts were unlikely to be resolved for "up to a generation."[7]

On the facts, the court faced what it described as a stark choice:

1. Allow enforcement of an award that may subsequently be set aside for reasons of fraud, and notwithstanding that NNPC had shown that (i) there was a *prima facie* case that the award had been obtained by fraud, and (ii) given IPCO's financial situation, it was unlikely NNPC would recover any sums paid to IPCO; or

2. Decline to order enforcement, such that if the award was subsequently upheld, IPCO would not receive the damages it was owed for a significant period of time.

On balance, the Court of Appeal weighed in favor of enforcement. A significant influencing factor was the New York Convention (to which both the UK and Nigeria are State Parties) objectives of securing expeditious resolution of commercial disputes and timely enforcement of awards. The court saw the extensive delay in the resolution of the set aside proceedings before the Nigerian courts as at odds with these objectives. The court accordingly concluded the now extensive delay constituted a significant change in circumstances that warranted a fresh consideration of whether to enforce the award. The matter was remitted to the Commercial Court for reconsideration. As to the allegation of fraud, the Court of Appeal noted that it remained open to the Commercial Court to deny enforcement if the Commercial Court were persuaded that enforcement would be contrary to English public policy.

The Court of Appeal's decision is noteworthy for two reasons. First, the decision is a rare example of the English courts enforcing an arbitral award that is the subject of pending set aside proceedings. Second, the decision is the first time the courts have considered that enforcement may be warranted if there has been an extensive delay in set aside proceedings, and notwithstanding there was a *prima facie* case that the award had been procured by fraud.

Hong Kong: Law Reform Commission Recommends Allowing Third-Party Funding for Arbitration

By Ing Loong Yang and Simon Powell

The Commission advocates amending the Arbitration Ordinance to permit TPF; invites submissions to establish safeguards.

On 19 October 2015, the Hong Kong Law Reform Commission published a Consultation Paper recommending Third-Party Funding (TPF) for arbitration seated in Hong Kong be permitted under Hong Kong law, and invited interested parties to comment on the financial and ethical safeguards that should be put in place.

TPF has been described as the "funding of claims by commercial bodies in return for a share of profits." The practice involves a "third person" to the proceedings providing financial "assistance or support to a party" to the proceedings.[8]

While some jurisdictions — including Australia, the United States and England — allow TPF, the question of whether the doctrines of maintenance and champerty prohibit TPF in an arbitration taking place in Hong Kong remains undecided.

In its recent Consultation Paper, the Law Reform Commission unanimously concluded that reform of Hong Kong law is needed to clarify that TPF is permitted for arbitrations taking place in Hong Kong, provided that parties comply with appropriate financial and ethical safeguards.

To this end, the Law Reform Commission recommended the Arbitration Ordinance be amended to permit TPF for arbitrations taking place in Hong Kong, and invited submissions as to the applicable ethical and financial standards that will eventually govern TPF.

The consultation period for submissions from the public will end on Monday, 18 January 2016. Any interested party can contact Simon Powell or Ing Loong Yang for further information or to provide comments for onward submission to the Law Reform Commission.

For a fuller examination of the debate on the use of TPF and the topics on which the Law Commission has invited comments, please see Latham & Watkins' *Client Alert* Hong Kong: Law Reform Commission Recommends Allowing Third-Party Funding for Arbitration.

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India Overhauls Arbitration Law

By Jan Erik Spangenberg

New Arbitration and Conciliation (Amendment) Ordinance proposes significant changes for domestic and international arbitration in India.

On 23 October 2015, the Indian government promulgated the Arbitration and Conciliation (Amendment) Ordinance (the Ordinance). The Ordinance amends the Arbitration and Conciliation Act of 1996 (ACA), and implements long-anticipated changes to modernize and further grow arbitration as a dispute resolution method in India.

One of the Ordinance's main goals is to minimize state courts' intervention in arbitration proceedings. Under Section 8 of the amended ACA, state courts must refer the parties to arbitration upon application by one party if an arbitration agreement exists, unless the court finds *prima facie* the arbitration agreement is invalid. Under Section 9 of the amended ACA, state courts are no longer allowed to grant interim relief once the arbitral tribunal has been constituted, unless the court finds that the tribunal does not provide effective relief. Interim orders that arbitral tribunals issue under Section 17 of the amended ACA have the same effect and enforceability as state court orders. The Ordinance also clarifies the limited scope of review in annulment proceedings for domestic arbitral awards, and allows setting aside awards on conflict with public policy grounds only if the award (i) was induced or affected by fraud or corruption; (ii) violates the fundamental policy of Indian law; or (iii) violates the most basic notions of morality or justice. The Ordinance clarifies that the courts' review of contradictions with the fundamental policy of Indian law does not entail a review of the dispute's merits.

The Ordinance also introduces new provisions to speed up the arbitration process. According to newly introduced Section 29A of the ACA, the arbitral award must be made within 12 months of the tribunal's constitution. The parties can extend this period for a maximum of six months. If an award is not rendered within the set timeframe, the arbitrators' mandate is terminated, unless the competent court extends the mandate. In doing so, the court may, however, reduce the arbitrators' fees if the court finds the delay is attributable to the arbitral tribunal. The Ordinance also introduces a new fast track procedure in Section 29B of the ACA, under which an arbitration can be resolved without an oral hearing within a six-month period.

The Ordinance has temporary effect and will be transformed into a permanent act upon Indian parliament approval at the parliament's next session. If the Ordinance is not approved, the government may promulgate it again. Parties involved in arbitrations in India will therefore need to continue monitoring the situation and how the courts receive the changes the Ordinance has introduced. Overall, the Ordinance is certainly a step forward for arbitration in India. It remains to be seen, however, whether all new elements stand the test of everyday practice. In particular, the relatively short timeframe to render arbitral awards may be too ambitious for voluminous and complex arbitrations.

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Arbitration Round-Up: New Developments at the ICC and LCIA

By Catriona E. Paterson and Stéphane Lheure

ICC to provide reasons for its decision, and both ICC and LCIA issue reports on arbitration costs.

ICC Court to Communicate Reasons for Administrative Decisions

The Court of Arbitration (Court) of the International Chamber of Commerce (ICC) has recently announced it will communicate reasons for many of the administrative decisions the Court is called on to take under the 2012 ICC Rules of Arbitration (ICC Rules). This policy, introduced in response to growing user demand, was adopted at the Court's annual working session in October 2015 in Paris, and is intended to increase transparency in ICC arbitrations.

According to the ICC's press release, this additional service the Court offers applies to decisions:

- Made on the challenge of an arbitrator (Article 14 of the ICC Rules)
- To initiate replacement proceedings and subsequently to replace an arbitrator on the Court's own motion (Article 15(2) of the ICC Rules)
- On consolidation of arbitration proceedings (Article 10 of the ICC Rules)
- On jurisdiction (Article 6(4) of the ICC Rules)

This new policy is effective immediately in new arbitrations, and will apply in ongoing cases if all parties to the dispute agree.

The ICC Court's new policy is, however, to be read in conjunction with Article 11(4) of the ICC Rules, which provides that "[t]he decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated."

In addition, the ICC Court will maintain its discretion to accept or reject a request to communicate reasons, and it may subject communicating reasons to an increase of the administrative expenses "normally not to exceed US$5,000."

ICC Report on Decisions on Costs in International Arbitration

The ICC has published a report on the allocation of costs between parties to an arbitration. The report, released on 1 December 2015, sets out cost allocation considerations and approaches applied by arbitral tribunals, and considers how arbitrators and parties may use these approaches to achieve fairness and efficiency during proceedings. The full report is available online.

Under the ICC Rules, tribunals have broad discretion in cost allocation. Tribunals can consider circumstances they deem relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

In considering decisions on costs, the ICC did not restrict itself to ICC awards but also considered reports from eight other major arbitral institutions, and reports on national approaches to costs from more than 40 ICC national committees.

The report shows that the majority of tribunals order the losing party to pay the arbitration costs and winning party's legal fees and expenses as a starting point, even if the applicable arbitral rules (such as the ICC's) are silent on allocation of costs.

Tribunals then adjust the cost allocation based on various considerations, including the parties' relative success and failure, and whether the parties have adequate proof of costs.

Notably, tribunals will also consider the costs' reasonableness, based on how they were incurred and the proportionality to the amount in dispute. The tribunal may consider the number and level of fee-earners working on the case, the level of specialist knowledge and seniority required, the time spent on various phases of the arbitration and any disparity between the parties' incurred costs.

Further, tribunals may allow the recovery of costs in-house counsel have incurred if such costs are necessary, reasonable in amount, do not unreasonably overlap with outside counsel fees and are sufficiently distinguishable from ordinary staffing expenses.

Another consideration is the parties' conduct throughout the proceedings. Examples of conduct a tribunal has sanctioned through a costs award include: parallel court proceedings in breach of an arbitration agreement; post-formation conflicts aimed at destabilizing the tribunal; and deliberately destroying or failing to preserve admissible documents.

The report proposes using cost allocation to control time and costs at every stage of the arbitration, including at the outset (*e.g.*, in the Terms of Reference), throughout proceedings (through interim costs awards or orders), and in final or interim awards (to sanction improper conduct). However, to prevent prejudice to any party with cash-flow difficulties, the report proposes that interim costs orders and awards are made payable pursuant to the final award.

LCIA Publishes Data on the Costs and Duration of LCIA Arbitrations

The London Court of International Arbitration (LCIA) has released information on the average costs and duration of an LCIA arbitration. The full report is available online.[9] The data indicates that the LCIA's hourly rate system is cost competitive with the largest institutions that operate on an *ad valorem* basis.

Under the LCIA's system, the tribunal's fees are calculated on the basis of an hourly rate, in contrast to the *ad valorem* basis for cost calculations some other arbitral institutions apply, such as the ICC, Singapore International Arbitration Centre (SIAC) and Hong Kong International Arbitration Centre (HKIAC). Currently, the LCIA's normal hourly rate for an arbitrator is £450 per hour. In specifying the hourly rate, the circumstances of a case, including the value of a claim, are considered.

In conducting its analysis, the LCIA looked at arbitrators' fees and the LCIA's administrative costs incurred (but not legal fees and expenses of the parties) in LCIA arbitrations in which final awards were issued between 1 January 2013 and 15 June 2015.

Based on the available data, the LCIA has concluded:

- The median duration of an LCIA arbitration is 16 months, and the median cost is US$99,000. As comparable statistics for the duration of proceedings at other institutions are not available, the LCIA was not able to generate a comparative analysis of the duration of proceedings.
- If the amount in dispute is less than US$1 million, the costs of an LCIA arbitration are comparable with the estimated costs of ICC and SIAC arbitration, but higher than those of the HKIAC (using each institution's cost calculator to provide the estimate).
- If the amount in dispute exceeds US$1 million, LCIA costs are lower than the estimated ICC and SIAC costs, and comparable to those of the HKIAC.

There is a long-standing debate as to whether hourly or *ad valorem* rates are most effective in practice. While the *ad valorem* method is sometimes said to give the parties greater certainty regarding costs of the arbitration from the outset, the amount in dispute is not a measure of the complexity of the issues in dispute, and an hourly rate may more accurately reflect the complexity of the case and the time the tribunal members actually spent on the matter. An *ad valorem* system, for example, may result in an expensive arbitral procedure in a high-value but straightforward dispute.

While the LCIA's data is unlikely to resolve this debate, it does ensure that parties to a dispute, or who are drafting an arbitration clause, have more information on likely costs of the arbitration at their disposal, and are accordingly able to make more informed choices when choosing the most appropriate arbitration forum.

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Endnotes

1 *BSG Resources Limited v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 2 on Transparency dated 17 September 2015.

2 In addition, the Transparency Rules contain provisions allowing for submissions and access to information or documents by third parties or the non-disputing State party to the treaty. An analysis of these parts of the Transparency Rules is outside the scope of this article.

3 UNCITRAL, 56th Session of Working Group II (Arbitration and Conciliation), 6-10 February 2012, *Comments by arbitral institutions regarding the establishment of a repository of published information (registry)* (13 December 2011) UN Doc A/CN.9/WG.II/WP.170/Add.1 at page 4.

4 UNCITRAL, 56th Session of Working Group II (Arbitration and Conciliation), 6-10 February 2012, *Comments by arbitral institutions regarding the establishment of a repository of published information (registry)* (13 December 2011) UN Doc A/CN.9/WG.II/WP.170/Add.1 at page 5.

5 At para. 124.

6 At para. 125.

7 At para. 167.

8 *Uhruh v. Seeberger* (2007) 10 HKCFAR 31, at para. 118 (*per* Ribeiro PJ).

9 http://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx

INTERNATIONAL ARBITRATION NEWSLETTER

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Latham & Watkins International Arbitration team is comprised of approximately 70 lawyers based across Latham's global network advising clients on multi-jurisdictional disputes, international commercial arbitration, investment treaty arbitration and public international law. For more information about the practice, please visit: http://www.lw.com/practices/InternationalArbitration.

About the Publication
Latham & Watkins International Arbitration Newsletter is a regular publication produced by the firm's global International Arbitration team designed to highlight important news, legal issues and developments in a practical and informative way.

If you have any questions about this publication please contact a lawyer on the editorial team, Sebastian Seelmann-Eggebert, Philip Clifford, Catriona E. Paterson, Jan Erik Spangenberg and Stéphane Lheure.

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