Recent international arbitration developments

This e-bulletin contains summaries of the following recent developments in international arbitration:

1. **England** – Fulham Football Club v Sir David Richards and the FA Premier League - High Court confirms that shareholders' unfair prejudice disputes may be arbitrated
2. **France** – new arbitration law
3. **European Union** – the Commission publishes its long-awaited proposal on a replacement for the Brussels Regulation; proposes changes to the arbitration exception
4. **Venezuela** – international tribunal confirms that Article 22 of the Venezuelan Investment Law does not constitute consent to ICSID arbitration
5. **Hong Kong** – Court of First Instance comments on challenges to Chinese arbitral awards on public policy grounds
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8. **ICSID** – first two successful challenges by States under ICSID's summary dismissal procedure

1. **England** - High Court confirms that shareholders' unfair prejudice disputes may be arbitrated

In Fulham Football Club v Sir David Richards and the FA Premier League the High Court determined that the ability to bring an unfair prejudice petition before the English courts under the Companies Act 2006 ("CA 2006") was not an inalienable right and that parties could agree to refer disputes to arbitration that might otherwise be brought under such protection.

In 2009, Fulham Football Club was competing with Tottenham Hotspur Football Club to secure the transfer of Peter Crouch from Portsmouth Football Club. Fulham allege that Sir David Richards, the Chairman of the FA Premier League (the "FAPL"), interfered in the transfer negotiations and took action to facilitate the player's move to Tottenham in preference to a bid put forward by Fulham, thereby breaching the FAPL's Articles of Association and Rules.

Fulham sought to bring the matter before the courts by way of an unfair prejudice petition under section 994 of the CA 2006. In the petition, Fulham argued that Sir David Richards and the FAPL (as a result of its failure to take adequate action to prevent Sir David Richards' conduct) had acted unfairly as between its members by promoting the interests of one club over another. Fulham sought an injunction to restrain Sir David Richards from participating in future transfer negotiations and an order that Sir David Richards cease to be the Chairman or a director of the FAPL.

Sir David Richards and the FAPL applied for a stay of the unfair prejudice petition under section 9 of the Arbitration Act 1996 on the grounds that the issues raised in the petition fell within the scope of the arbitration agreements contained in...
Rules of the Football Association and the FAPL Rules respectively.

**Decision**

The judge identified the key question to be answered as "whether the statutory right of a member of a company to present an unfair prejudice petition under section 994 of the Companies Act 2006 can be removed or diminished by contract, or whether it is an inalienable right".

The judge was required to weigh up two directly conflicting first instance decisions. In Re Vocam Europe Limited [1998] BCC 396 the court had granted a stay of an unfair prejudice petition on the basis that the claims raised in the petition related to matters of dispute which were covered by an arbitration clause contained in a shareholders' agreement entered into between the parties.

By contrast, in Exeter City v Football Conference [2004] 1 WLR 2910 the court ignored the earlier decision in Vocam and concluded that the right to bring an unfair prejudice petition before the courts could not be altered or removed by contract. The judge in Exeter reasoned that there was no difference in principle between a winding up petition, which is recognised as being the sole preserve of the courts, and an unfair prejudice petition.

Having weighed up the conflicting first instance decisions, the judge in Fulham determined that, despite being the more recent of the two judgments, exceptional circumstances merited the conclusion that Exeter was wrongly decided and Vocam should be followed.

The judge concluded that a stay can and should be granted in favour of arbitration in situations where (i) a party has alleged unfair prejudice under section 994 of the CA 2006; and (ii) the disputes fall squarely within the terms of the arbitration agreement, provided that the relief sought is not of the type that would bind a third party or that an arbitrator could not grant due to considerations of public policy.

In the present case, the judge found that the remedy sought by Fulham was of the type that an arbitrator could grant and, although any relief granted would undoubtedly affect the other members of the FAPL, it did not seek to bind any third party. In particular, the remedies in the petition were sought only against Sir David Richards and the FAPL and did not require the other member clubs to do or refrain from doing anything. It was also accepted by the judge that the disputes raised in the petition fell within the scope of the arbitration agreements. On the basis of these factors the stay of the court action in favour of the arbitration agreement was granted.

**Comment**

The Fulham decision provides welcome clarification of the two conflicting decisions in this area and confirms the position that disputes which would otherwise be raised through an unfair prejudice petition before the courts can be referred to arbitration. The decision also reflects the established pro-arbitration stance of the English courts by recognising that parties should be free to agree as to how their disputes are resolved.

However, the decision leaves open a number of grey areas and parties seeking to rely on arbitration agreements contained in shareholders' agreements should not assume that the court will grant a stay of an unfair prejudice petition in all situations. The decision did not provide any guidance on the court's approach should one of the provisos the court referred to be present, for instance if relief is sought against a third party or if an order to wind the company up is requested in the unfair prejudice petition. Indeed, the judge stated that it was "beyond the scope of this judgment to consider what might happen if one or more such features were present".

We understand that the decision has been appealed to the Court of Appeal so further guidance on this area may be forthcoming.

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2. France - new arbitration law

In a decree dated 13 January 2011, France enacted a reform of its already arbitration friendly law of domestic and international arbitration. The reforms - described in more detail in earlier Herbert Smith e-bulletins (available here in both French and English) - confirm and strengthen the long-standing French pro-arbitration policy. The changes ensure that the French arbitration law remains one of the most modern, keeping in step with changes in arbitration since the previous law was introduced, and maintain France's status as a preferred venue for international arbitration.

3. European Union - the Commission publishes its long-awaited proposal on a replacement for the Brussels Regulation; proposes changes to the arbitration exception

On 14 December 2010 the European Commission published its proposals for the reform of the Brussels Regulation governing the recognition and enforcement of civil and commercial judgments (proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Brussels 14/12/2010 COM (2010) 748 Final 2010/0383 (COD)). The interface between litigation and arbitration under the Brussels Regulation has been a source of much discussion and debate among both academics and practitioners, especially in light of the European Court of Justice's decisions in Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc (C-185/07) and National Navigation Co v Endesa Generacion SA [2009] EWCA Civ 1397 (discussed in earlier Herbert Smith e-bulletins available here and here). The proposal introduces a new rule that a member state court seised of a dispute must stay its proceedings where its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been constituted or court proceedings have begun in the member state which is the seat of the arbitration. The new rule should reinforce the enforceability of arbitration agreements and reduce the possibility of abusive litigation tactics. The proposals will be sent to the European Parliament and the Council to be considered under the ordinary legislative procedure, with the new Regulation expected to be adopted within the next two to three years. The Commission's proposals are discussed in more detail in an earlier e-bulletin available here.

4. Venezuela - international tribunal confirms that Article 22 of the Venezuelan Investment Law does not constitute consent to ICSID arbitration

At the end of December 2010, in a decision that will be of interest to international companies doing business in Venezuela, an ICSID tribunal in the case of Cemex v. Venezuela (ICSID Case No. ARB/08/15) concluded that it did not have jurisdiction over claims brought pursuant to Venezuela's Investment Law. The tribunal concluded however that it did have jurisdiction over claims brought by the claimant companies pursuant to the Netherlands / Venezuela bilateral investment treaty.

In relation to the issue of jurisdiction pursuant to Venezuela's Investment Law, the tribunal had to consider whether Article 22 of the Investment Law provided the requisite consent to arbitration as required by Article 25 of the ICSID Convention. In doing so, it addressed three questions:

(i) What is the standard of interpretation for the Investment Law?
Venezuela had argued that, as part of its domestic law, the Investment Law should be interpreted according to Venezuelan legal principles. The claimants, in contrast, argued that the appropriate standard of interpretation was international law. The tribunal concluded that the Investment Law, as a possible unilateral declaration of consent to ICSID jurisdiction, represented an instrument of international law, and should therefore be interpreted by reference to
international law.

(ii) What is the content of the international law standard of interpretation? In considering this question, the tribunal concluded that an analogy could be drawn with International Court of Justice (ICJ) case law on the interpretation of unilateral declarations of compulsory jurisdiction made under the framework of Article 36(2) of the ICJ's Statute. Relying on such cases, the tribunal concluded that the content of the interpretative standard under international law comprised the following:

• First, the Investment Law, as a unilateral declaration, "must be interpreted as it stands, having regard to the words actually used", in a "natural and reasonable way".

• Second, due regard must be had to the intention of the state concerned. If the text is not clear, the court will look at the relevant context and evidence regarding the preparation and purpose of the declaration. The intention of the state should prevail and can only be defeated by a fundamental defect which vitiates the instrument by failing to conform to a mandatory legal requirement.

• Third, the tribunal qualified the content of the standard by noting that both domestic law and the international law of treaties should not be completely ignored. The domestic law, for example, might inform the intention of the State that made the declaration.

(iii) Pursuant to this standard, how should Article 22 of Venezuela's Investment Law be interpreted?

Applying this standard to the Venezuela Investment Law, the tribunal was unable to conclude from what it felt was the "obscure and ambiguous" text of Article 22 that Venezuela consented unilaterally to ICSID arbitration for all disputes potentially covered by the ICSID Convention. The tribunal therefore concluded that Article 22 did not provide a basis for its jurisdiction.

Perhaps unsurprisingly, given that they were both presided over by former ICJ Judge, Judge Gilbert Guillaume, the tribunal's reasoning and conclusion in Cemex was similar to that of another tribunal earlier in 2010 in Mobil v. Venezuela (ICSID Case No. ARB/07/27)

Conclusion

Although a number of States have national investment laws in place referring to international arbitration amongst the dispute resolution options, there are relatively few cases where tribunals have interpreted those laws. The Mobil and Cemex decisions therefore not only provide useful guidance to investors in Venezuela, but to those seeking to interpret or rely on similar laws in other jurisdictions.

Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/08/15)

5. Hong Kong - Chinese award challenged on public policy grounds in Hong Kong

The enforcement of an arbitral award issued in mainland China in relation to a share transfer dispute has been challenged recently in the Hong Kong Courts in Gao Hai Yan and another ("Gao and Xie") v Keeneye Holdings Ltd and others HCCT 41/2010 on grounds that it would be contrary to public policy.

Background

In this case, Keeneye Holdings Ltd and New Purple Golden Resources Development Ltd - both Chinese-owned holding companies and the Claimants in the arbitration ("Keeneye") - alleged that one of the arbitrators, together with the General Secretary of the Xian Arbitration Commission (the "General Secretary"), had held a private meeting with one of their representatives less than three months before the award was issued. Keeneye claimed that they were informed...
at the meeting that the tribunal would issue an award in their favour, but that they must compensate "other parties" with a payment of RMB250 million. Keeneye refused and the tribunal subsequently found in favour of Gao and Xie.

Under Section 40E(3) of the Hong Kong Arbitration Ordinance (Cap 341) currently in force, enforcement of a Mainland arbitral award may be refused if doing so would be contrary to public policy. Keeneye argued that the private meeting amounted to seriously improper interference, including unwarranted communications, by the General Secretary with the tribunal. Although Gao and Xie denied Keeneye's version of events, they nevertheless suggested that the procedure adopted by the arbitrator and the General Secretary constituted part of a valid mediation process under the Xian Arbitration Commission's practice and procedure.

**Preliminary decision of the Court of First Instance**

In its preliminary decision, the Court of First Instance stated that the basic notions of morality and justice in Hong Kong would not permit ex parte communications between a member of an arbitral tribunal and a party once an arbitration process has commenced. Justice Saunders considered that "... it is an extraordinary proposition that a member of the Tribunal, in the course of hearing an arbitration, could be involved in a mediation process, ... ".

The Court considered the leading authority in Hong Kong on using public policy as a basis for refusing enforcement of an award, *Hebei Import & Export Corp v Polytek Engineering Company Ltd* (1999) 2 HKCFAR 111. In this case, the Court of Final Appeal stated that where parties agreed to procedures that differ from those which would ordinarily apply in Hong Kong, such as the CIETAC Arbitration Rules and the PRC Arbitration Law, the Court must take into account these circumstances. Nevertheless, Saunders J observed that arguably the facts in *Gao Hai Yan* were "significantly more egregious" than those in *Hebei Import* - where an inspection of the Respondents' equipment by the chief arbitrator, and experts appointed by the tribunal in the absence of the Respondents, were procedures that may be considered unacceptable in Hong Kong.

On this basis, the Court in *Gao Hai Yan* declined to reject Keeneye's application to set aside the award forthwith as proposed by Gao and Xie, and instead set the case down for a full evidentiary hearing to take place in the coming months. While this decision is awaited, when agreeing to arbitrate using procedures (such as CIETAC Arbitration Rules) which are in some respects very different from those adopted by other international arbitration institutions, parties need to be careful that the procedures are not so different that they would be unenforceable in Hong Kong, if enforcement in that jurisdiction is required.

*Gao Hai Yan and another v Keeneye Holdings Ltd and others HCCT 41/2010*

6. India - arbitration law reform on the way

The Indian Ministry of Law and Justice (the "Law Ministry") has recently published a consultation paper which proposes far-reaching amendments to the existing Indian Arbitration and Conciliation Act 1996 (the "Arbitration Act"). The Arbitration Act is based on the UNCITRAL Model Law and was designed to bring Indian arbitration law in line with international practice. However, since 1996, a number of "arbitration-unfriendly" decisions in the Indian courts have raised questions about India's commitment to arbitration and prompted demands for reform. The consultation paper recognises that certain decisions of the Indian courts "have interpreted the provisions of the Act in such a way which defeats the main object of [the] legislation" and seeks to rectify the problems caused by excessive judicial intervention. Notable proposals in the consultation paper include:

• Restricting the application of the Arbitration Act to cases where the place of arbitration is in India. This proposal is intended to insulate arbitrations seated outside India from interference by the Indian courts.
A narrower meaning to "public policy" as a ground for setting aside arbitral awards. The Law Ministry's proposal expressly aims to "nullify" the decision of the Indian Supreme Court in ONGC v Saw Pipes (2003) in which the court held that an award could be set aside on grounds of public policy if it is contrary to Indian law.

A greater role for arbitral institutions in the appointment of arbitrators.

Making institutional arbitration mandatory for "high-value disputes" unless expressly excluded by the parties.

Promod Nair, a senior associate in the international arbitration group at Herbert Smith in London, has analysed the background to and likely effect of the proposed amendments in an article recently published in the Global Arbitration Review. Click here to read this article.

7. Investment Treaty - failure to observe treaty's cooling off period results in tribunal declining jurisdiction

In a decision in December 2010, an ICSID tribunal in Murphy v Ecuador ruled that it did not have jurisdiction due to the claimants' failure to comply with the six month "cooling-off" period specified in the US-Ecuador BIT. This decision highlights the importance of considering compliance with such cooling off periods carefully before commencing an arbitration.

Background

Two subsidiaries of Murphy International ("Murphy"), the claimant, were part of a consortium involved in a service contract with the Republic of Ecuador for the exploration and exploitation of hydrocarbons in the Ecuadorian Amazon.

In 2006, Ecuador passed a law requiring contractor companies (such as the consortium) to grant the Ecuadorian state a participation of at least 50% (later increased to 99%) of extraordinary income arising from price differences in oil selling. This law brought a number of oil companies operating in Ecuador, including the consortium, into conflict with the Government.

The consortium, led by Spanish company Repsol, entered into negotiations with the Government, and on 12 November 2007 Repsol notified Ecuador of a dispute under the Spain-Ecuador BIT.

On 29 February 2008, Murphy notified Ecuador of a dispute under the US-Ecuador BIT, referring to the earlier negotiations led by Repsol, and on the following Monday, 3 March 2009, Murphy filed its claim with ICSID. In 2009 an agreement was reached between the consortium and Ecuador, and the original service contract was modified. Murphy's claim however continued.

Ecuador objected to jurisdiction on two grounds:

Ecuador's first challenge: alleged withdrawal of consent under Article 25(4) of ICSID

Ecuador argued that it had withdrawn its consent to arbitrate a type of disputes, such as the present one brought by Murphy, pursuant to a notice made under Article 25(4) of the ICSID Convention. However, on this point the tribunal rejected Ecuador's challenge, ruling that the consent given in a BIT must be withdrawn under the provisions of that BIT, and not by way of Article 25(4) of the ICSID convention, and that therefore Ecuador's consent under the BIT remained valid.

Ecuador's second challenge: non-compliance with "cooling-off" period

Ecuador argued that Murphy had not complied with the six month negotiation and consultation period specified in Article VI of the US-Ecuador BIT, and that the tribunal therefore had no jurisdiction.

Murphy argued that it had complied with the negotiation and consultation requirement under the BIT through its indirect involvement in the negotiations led by the consortium operator, Repsol. The tribunal however concluded that Murphy
could not rely on those negotiations because (i) they were led by Repsol on behalf of the legal persons composing the consortium (Murphy's subsidiaries) and not on behalf of those companies' shareholders (such as Murphy), and (ii) they were carried out under the Spain-Ecuador BIT, whilst Murphy's claim was brought under the US-Ecuador BIT. Because Murphy was claiming a breach of the US-Ecuador BIT, the dispute should have been notified to Ecuador as a breach of the US-Ecuador BIT and negotiated on that basis. There was, found the tribunal, no notification of the dispute until Murphy's notice on 29 February 2009, 3 days before the claim was commenced.

Murphy sought to argue that the requirement for consultation and negotiation was procedural in nature, and should not therefore act as a bar to the tribunal's jurisdiction. The tribunal rejected this argument, and ruled that it was not possible to ignore the existence of norms contained in the BIT regarding the obligation of the parties to attempt negotiations in order to resolve their disputes. The tribunal stated that "cooling-off" periods are not "mere formalities", but amount to something more serious: an essential mechanism enshrined in many BITs which compels parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration.

Murphy also argued that negotiations with Ecuador would have been futile. The tribunal however concluded that the obligation is not one of results, but of means, and thus, the parties were required to at least initiate negotiations. Having rejected Murphy's arguments on this point, the tribunal (by majority) concluded that because Murphy had not complied with the six month "cooling-off" period required in the US-Ecuador BIT, it did not have jurisdiction over Murphy's claim. The dissenting arbitrator, whilst not disputing that "cooling off" periods such as that in the US/Ecuador BIT must be complied with, concluded that through its involvement in the negotiations led by Repsol the "cooling off" period had been complied with.

Conclusion

Although there is no system of precedent in investment arbitration, and previous tribunals have adopted a less strict approach to "cooling off" periods, this case highlights the importance of considering such periods carefully before commencing an arbitration. Claimants should exercise caution before seeking to rely on negotiations which did not follow formal notification of a claim, or which were conducted by other group companies or affiliates, rather than the claimant itself.

Murphy Exploration and Production Company International v Republic of Ecuador (ICSID Case No ARB/08/4)

8. ICSID - first two successful challenges by States under ICSID's summary dismissal procedure

In 2006, the ICSID Rules were amended to introduce Rule 41(5), which allows a party to raise a preliminary objection that claims brought against it are "manifestly without merit". In two recent cases, for what is thought to be the first time, applications under Rule 41(5) have been upheld, leading to claims against the Ukraine and Grenada being dismissed.

In the first decision, in Global Trading Resource Corpn and Globex International Inc v Ukraine, the tribunal held that poultry sale contracts could not constitute an investment for the purposes of Article 25 of the ICSID Convention, which sets out the jurisdiction requirements for ICSID claims, including the requirement that disputes arise "directly out of an investment". As a result of this jurisdictional defect, the tribunal concluded the claims were manifestly without merit and dismissed them.

In the second decision, in RSM Production Corporation and others v. Grenada, the tribunal ruled that the issues raised by the claims had already been resolved in an earlier arbitration, and that under the doctrine of collateral estoppel it was bound by the findings on those issues by the earlier tribunal. The tribunal found that in order for any of the claims to succeed it would need to re-litigate and decide in the claimants favour conclusions of fact or law already resolved against
the claimant by the prior tribunal, which it was not permitted to do, and as a result
the new claim was manifestly without legal merit and was therefore dismissed.

From these (and earlier unsuccessful challenges in Trans-global Petroleum Inc v
Jordan and Brandes Investment Partners, LP v. Venezuela) a set of principles as
to when Rule 41(5) may be satisfied is emerging. The standard is a high one. An
objection under Article 41(5):

• may go either to jurisdiction or the merits;
• must raise a legal, not a factual, impediment to a claim;
• must be established clearly and obviously, with relative ease and dispatch;
• in the face of such an objection, a claimants' Request for Arbitration should be
  construed liberally, and any doubt or uncertainty as to the scope of allegations
  should be resolved in favour of the claimant.

Despite the high standard required for success under Rule 41(5), these two
successful challenges highlight the possibility that, where a contrived or wholly
unmeritorious claim is brought, respondent states may be able to dispose of such
a claim relatively quickly under the Rule 41(5) process.

Global Trading Resource Corp. and Globex International, Inc v Ukraine (ICSID
Case No. ARB/09/11)
RSM Production Corporation and others v. Grenada (ICSID Case No. ARB/10/6)

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