Weil

World Arbitration Report

Dear Reader:

Welcome to the second edition of Weil's International Arbitration Newsletter, the Weil World Arbitration Report.

Whether negotiating an arbitration agreement, selecting a seat, seeking protection under a bilateral investment treaty, deploying witness evidence or attempting to enforce an award, arbitration practitioners are acutely aware that the ever-changing international arbitration landscape makes it vitally important to understand the legal nuances in each of the jurisdictions relevant to the matter at hand. In this edition, our lawyers and guest authors explore a number of significant recent legal developments that touch upon each of these aspects of international arbitration practice and procedure. The breadth and jurisdictional diversity of the articles that follow, which we are sure will be of interest to businesses and legal practitioners alike, serve to highlight the kaleidoscopic nature of international arbitration law, as well as the global reach and depth of expertise contained within our own practice. Please let us know if you have any questions or would like to discuss any of the issues raised in this edition. We look forward to working with you soon.

Juliet Blanch and Arif Ali
Global Co-Chairs,
Weil International Arbitration Practice

In This Issue:

Recent Developments Under English Law on Multi-Tier/Carve-Out Arbitration Clauses

By Christopher Marks

Introduction

Sophisticated commercial parties are increasingly choosing to incorporate complex, multi-tier dispute resolution provisions into their agreements. Rather than simply specifying the forum in which disputes will be resolved, these provisions typically require parties to submit to one or more alternative dispute resolution (ADR) processes (often including mediation, expert determination, or simple bilateral discussions between senior representatives of the parties). Compliance with these ADR processes is ordinarily expressed to be a prerequisite to commencing arbitration or litigation proceedings.

Although multi-tier dispute resolution provisions do appear to offer contracting parties (at least at the outset of their relationship) some assurance that any future disputes between them will be resolved in a proportionate and cost-effective way, they raise a number of potential issues. Most significantly, in addition to the overriding commercial issue of whether a party should agree to them at all, the English courts have traditionally been reluctant to enforce them. A number of recent cases have, however, helped to clarify the circumstances in which they will be enforceable under English law.

Further, an arbitral tribunal constituted in circumstances where the parties have failed to follow a contractual step apparently intended to be a prerequisite to the validity of the arbitration agreement (that is to say, where the parties have failed to follow the ADR process specified in the dispute resolution clause) may face challenges as to its jurisdiction. Not only do such challenges give rise to otherwise avoidable satellite litigation, they may ultimately cause an award to be invalidated.

Why Use a Multi-Tier Arbitration Agreement?

The option to negotiate a bespoke dispute resolution framework is often a compelling one, particularly for commercial parties who: (i) understand the need to plan for potential disputes from the outset of a contractual relationship; (ii) wish to avoid the time and expense of an arbitration; and (iii) are aware of the high proportion of commercial disputes successfully resolved by settlement.[1]

However, in most circumstances, parties wishing to engage in ADR are free to do so, regardless of any pre-existing agreement relevant to the resolution of their dispute; in fact, parties are often encouraged to do so, particularly by their legal advisors. Therefore, why seek to prescribe in advance the form(s) of ADR that the parties must put themselves through before having recourse to arbitration?

Compliance with these alternative dispute resolution processes is ordinarily expressed to be a prerequisite to commencing arbitration or litigation proceedings.

The most significant reason is that, unlike parties to proceedings before the English courts,[2] parties to an arbitration are not obliged to consider ADR as a matter of course.[3] Accordingly, incorporating ADR provisions in a multi-tier dispute resolution clause is the most straightforward way to ensure that the parties (at least) think about ADR.

Further, irrespective of the legal position surrounding the enforcement of a multi-tier clause (discussed below), many parties will nonetheless comply with its terms, and therefore submit to the ADR process set out in it. This is particularly true where the parties are keen to preserve their commercial relationship.

Conversely, where the parties' relationship has irreparably broken down, although they may be unlikely to participate in an ADR process voluntarily, such a process would perhaps be less likely to succeed even if their participation were compulsory. (For example, a multi-tier dispute resolution mechanism which requires a settlement meeting between the chief executives of two companies may seem sensible at the time of negotiating a contract, but may not prove to be an effective dispute resolution technique if the individuals in question have become entrenched in their positions with respect to one another and the relevant issues).

The Enforceability of a Multi-Tier Dispute Provision Under English Law

Until relatively recently, English law simply did not recognise agreements to mediate or to negotiate.[4] However, although English law still does not recognise agreements to negotiate in good faith[5] and the courts continue to adopt a relatively narrow approach to interpreting agreements providing for ADR,[6] a number of recent cases have helped to clarify when they will do so.

First, in *Sulamerica*,[7] the High Court rejected an argument that a multi-tier dispute resolution clause (which provided for mediation in advance of an arbitration) was enforceable, on the grounds that: (i) the contractual obligation to mediate was not sufficiently certain (as it did not constitute an unequivocal commitment to mediate); and (ii) the agreement did not specify in sufficient detail how the mediation was to operate (including how the mediator was to be selected). This decision was subsequently approved by the Court of Appeal.[8]

Several months later, in *Grant Thornton*,[9] the High Court again refused to enforce a multi-tier clause that provided for: (i) an "amicable conciliation" process; (ii) a further round of conciliation facilitated by a panel of three board members if the amicable conciliation process was not successful; and (iii) arbitration, if the additional round of conciliation was also not successful. The judge did not consider that the requirement for "conciliation" was sufficiently certain to constitute a condition precedent to arbitration.

The net effect of the courts' analysis in *Sulamerica* and *Grant Thornton* is that multi-tier arbitration clauses are conceptually no different from other contractual provisions. Otherwise put, the test for enforceability "*is not whether a clause is a valid provision for a recognised process of ADR; it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect*".[10]

In practical terms, to maximise the prospects of a multi-tier arbitration clause being enforceable, it is therefore prudent to consider the following principles:

- Keep the clause as clear and concise as possible.
- Avoid optionality. It is important that the parties be required to participate in the pre-arbitral stages (for example, use definitive language – "must" instead of "may" – and specify the time periods within which particular events must take place).

- Where relevant, ensure that the ADR process is set out in sufficient detail to avoid the need for further agreement. This may be best achieved by reference to a set of pre-existing rules (for example, the CEDR Model Mediation Procedure and Agreement). Also specify the process for appointing any person (for example, a mediator) necessary for the ADR process, including details of how they will be paid.
- Where possible, it is advisable to use (or adapt) one of the standard form multi-tier clauses published by the major arbitral institutions.

Hybrid/Carve-Out Arbitration Clauses

Hybrid and carve-out dispute resolution clauses are similar in structure to multi-tier clauses insofar as they contain multiple "layers" of dispute resolution procedure. However, instead of requiring both parties to proceed through a series of steps, they usually purport to permit one party to follow a different dispute resolution procedure to the other party. Naturally, this often results where parties are of unequal bargaining power (commonly the case in banking transactions), meaning that one party is able to insist upon much broader discretion as to the fora in which it is permitted to bring claims.

The enforceability of hybrid arbitration clauses has recently been the subject of much judicial analysis worldwide, the result of which varies markedly between jurisdictions. For example, the French Supreme Court[11], in the *Ms X* case, has held that, as a matter of French law, a clause in the following terms was unenforceable on the grounds that it gave the bank too wide a discretion to bring a claim in any venue of its choosing:

Rather than lead to the efficient and cost-effective disposal of disputes, a clumsily worded or ill-thought-through attempt to submit to compulsory pre-arbitration ADR can have the opposite effect entirely. In the worst-case scenario, it may also risk the integrity of an arbitral award.

"*Potential disputes between the client and the bank shall be submitted to the exclusive jurisdiction of the Luxembourg courts. The bank reserves the right to bring its claim before the courts of the client's domicile or any other competent court should it not make use of the clause provided for in the previous sentence*".

However, the English courts have proven more willing to enforce hybrid dispute resolution clauses. For example, in *Mauritius Commercial Bank*,[12] the High Court held that a one-way jurisdiction clause (permitting the claimant, a Mauritius-incorporated bank, to litigate wherever it chose) was valid. This is particularly striking in light of the factual similarities with the *Ms X* case decided by the French Supreme Court.

Conclusion

A dispute resolution clause that is not enforceable may as well not exist at all. Rather than lead to the efficient and cost-effective disposal of disputes, a clumsily worded or ill-thought-through attempt to submit to compulsory pre-arbitration ADR can have the opposite effect entirely. In the worst-case scenario, it may also risk the integrity of an arbitral award.

Therefore, it is important to think carefully before agreeing to a multi-tier dispute resolution provision and, when doing so, ensure that it is clearly and concisely drafted.

It is, of course, equally important to ensure that hybrid dispute resolution provisions are drafted with the same care. However, the enforceability of such provisions will depend heavily on the governing law of the relevant contract (even more so than is the case with a multi-tier dispute resolution clause) and the jurisdiction(s) in which claims may be brought.

English law does permit the enforcement of properly drafted multi-tier and hybrid dispute resolution clauses.

1 See, for example, *Corporate Choices in International Arbitration: Industry Perspectives, 2013 International Arbitration Survey, Queen Mary* (University of London), PwC. This study (compiled based upon a survey of 82 senior corporate counsel and arbitration practitioners) suggests that 57% of commercial disputes are settled through bilateral negotiations or mediation.

2 The English Civil Procedure Rules require parties to consider ADR at various stages throughout a piece of litigation.

3 Certain arbitral institutions do, however, support or encourage the use of ADR alongside or prior to arbitration proceedings. For example, the LCIA, WIPO, CEDR, and ICDR all provide sample multi-tiered clauses.

4 Until the decision of the High Court in *Cable & Wireless v IBM UK* [2002] 2 All ER (Comm) 1041, such agreements were typically considered unenforceable on the grounds that they were mere agreements to agree.

5 Since *Walford v Miles* [1992] 2 AC 128

6 Compared, for example, to the courts in Singapore. See *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd [2012] SGHC 226*

7 *Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others* [2012] EWHC 42 (Comm)

8 *Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638

9 *Wah (Aka Alan Tang) and another v Grant Thornton International Ltd and others* [2012] EWHC 3198 (Ch)

10 *Grant Thornton*, per Hildyard J

11 French Supreme Court (*Cour de cassation*), First Civil Chamber, 26 September 2012, *Ms X v Banque Privée Edmond de Rothschild, No 11-26.022*

12 *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd and another* [2013] EWHC 1328 (Comm)

Witness Testimony in Arbitration: The Flashbulb Memory and Other Misconceptions

By Jamie Maples and Hayley Lund

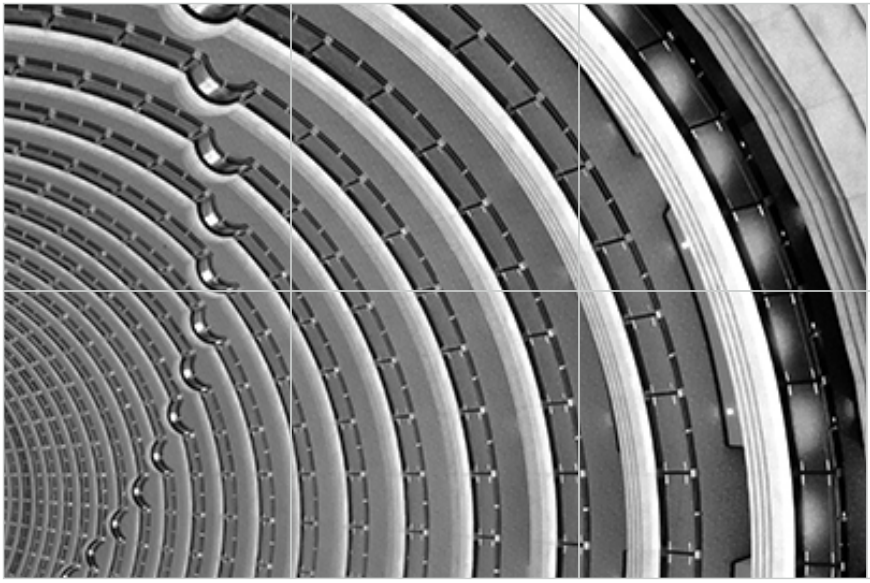
For some time now, the rising cost of arbitration has been a stalwart topic at conferences, seminars, and any other occasions when arbitration practitioners meet. But only infrequently do we discuss the value of one particular aspect of international arbitral practice which contributes significantly to its cost: the practice at hearings of questioning witnesses about their recollection of past events. In this article, we discuss a recent decision of the High Court in London which casts doubt on the reliability of memory and its recollection in the evidential process.

While international arbitral practice will vary from tribunal to tribunal and seat to seat, the dominant method of determining disputed factual matters is for individuals with contemporaneous knowledge of relevant matters to provide witness statements and attend a merits hearing at which they will be cross-examined on their evidence and asked questions by the tribunal. This is a process which necessarily involves considerable participation on the part of counsel such as ourselves, so it is with some reluctance that we call into question its value. But how often do cases turn on such witness evidence? Sometimes, certainly, but we suspect it is not the majority of cases, or even perhaps a substantial minority.

If that impression is correct, then it may suggest that tribunals already appreciate, consciously or otherwise, the problems concerning the reliability of memory which have been noted occasionally by arbitration commentators and, most recently, by Mr Justice Leggatt in *Gestmin SGPS S.A. v (1) Credit Suisse (UK) Limited and (2) Credit Suisse Securities (Europe) Limited*.[1] Whilst his observations in this regard were made in the context of court proceedings, they are equally applicable to prevailing arbitral practice.

The case concerned a failed claim for damages in respect of allegedly negligent investment advice. At trial, a total of ten witnesses of fact and three expert witnesses gave evidence. Before commenting on their testimony, Leggatt J made some remarks on the reliability of oral testimony in general. His observations are particularly pertinent to "document heavy" cases, including complex commercial disputes of which *Gestmin* itself is an example.

We comment on each of these observations in turn.



Only infrequently do we discuss the value of one particular aspect of international arbitral practice which contributes significantly to its cost: the practice at hearings of questioning witnesses about their recollection of past events.

"I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of witness testimony".

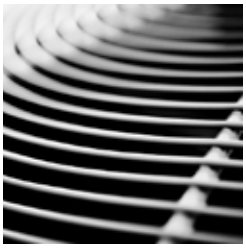
- Leggatt J echoed a concern recently expressed in Guidelines published by The British Psychological Society that "*the law generally is unaware of the findings from the scientific study of human memory*".[2]
- His specific observations mirror some of the points raised in the Guidelines, and will doubtless resonate with many practitioners.
- In his Kaplan lecture in December 2010, Toby Landau QC discussed memory and witness testimony in arbitration, raising certain of the concerns outlined in the Guidelines and making many remarks which were supported by or similar to those of Leggatt J in *Gestmin*. Specifically, Mr Landau QC urged those in international arbitration to approach evidential procedures by reference to the conclusions of psychological research.

"Psychological research has demonstrated that memories are fluid and malleable … [rather than]… a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time".

- Leggatt J expressed his views regarding the nature of memory, confirming that the commonly held idea of memory as a "flashbulb" or recording device can be misleading.
- Further, he emphasised that the accuracy of a memory should not be judged by the apparent strength of recollection, or by the confidence with which it is recalled.
- This chimes with a point made by Jennifer Kirby in her March 2011 speech at the Vienna arbitration days,[3] in which she cited Salvador Dali's observation that: "*the difference between false memories and true ones is the same as for jewels: it is always the false ones that look the most real, the most brilliant*".
- Both observations are borne out by psychological research.

"External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection".

- Witnesses' personal experiences, beliefs and thoughts can shape their perceptions, meaning that two witnesses can have different views, and therefore different recollections, of "facts" concerning the same event.
- We tend to remember events subjectively; for example, a reader may recall that an article was long if he or she found its contents dull.
- An additional explanation for misleading evidence given by witnesses may be that their perception of events is flawed in the first place, for example, as a result of interruptions, distractions, levels of attentiveness, and fatigue.
- Perception may also be affected by the unconscious automatic shortcuts which our brains use in order to process the huge amounts of information we are confronted with each day.



"Considerable interference with memory is also introduced ... by the procedure of preparing for trial".

The practical reality, however, is that witness statements produced in the vast majority of international arbitrations will have been the product of considerable input from counsel.

- A witness's memory may be influenced by disclosure insofar as it is refreshed by reference to contemporaneous documents or has gaps in recollection filled following a review of documents to which the witness may not have paid much attention, or even seen, at the relevant time.
- Memory may also be affected by the act of drafting a witness statement. Leggatt J recognised that a statement will inevitably go through "*several iterations*", will often be drafted by lawyers "*conscious of the significance for the issues in the case of what the witness does or does not say*" and will ultimately become the record of a witness's memory whether in fact it is true or false.
- The extent to which lawyers should participate in the preparation of witness statements, as well as the manner in which they should do so, is, of course, a contentious issue. The practical reality, however, is that witness statements produced in the vast majority of international arbitrations will have been the product of considerable input from counsel.
- Collectively, the disclosure process and the review of contemporaneous documentation which the preparation of witness statements typically entails may often lead to a witness's memory becoming based on that documentation (and the interpretation of that material by a witness's lawyer), rather than the witness's original experience of the event.

In conclusion, Leggatt J observed that "*the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections ... and to base factual findings on inferences drawn from the documentary evidence and known or probable facts*".

In our experience, typically this advice is already followed by tribunals making findings of fact in international arbitrations. Where a conflict arises, only rarely do arbitrators find against documentary evidence and in favour of witness recollection. That begs the question of whether the time and cost presently expended on the preparation of witness statements and cross-examination of witnesses is money well spent.

Leggatt J did see some value in the exercise, particularly as a tool to "*subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness*". But it might well be argued that there are less expensive ways of scrutinising relevant

documents, and that the personality and working practices of a witness may only infrequently be material in commercial disputes.

So what practical tips can parties and counsel glean from the observations of Leggatt J and the arbitration practitioners cited above?

- *Do not be afraid to limit the number of witnesses you call.* Although witness evidence may often be limited in its value, not calling any witnesses (when otherwise available) risks sending the wrong message. But parties and counsel should think hard about whether the evidence of each proposed witness is central to the issues in the case. If in doubt, leave them out.
- *Do not immediately "refresh" a witness's memory with documents.* As noted above, this practice can distort recollection, by supplanting existing memories with new (false) memories triggered unconsciously by reading contemporaneous documents. This can trip up witnesses in cross-examination, and make them appear unreliable through no fault of their own. Instead, interview witnesses first without the documents, allowing them time to think back to relevant events and give their recollection unaided, and untainted, by contemporaneous documents, which should only be shown to them subsequently.
- *Draft statements using the witness's language and anecdotes.* Arbitrators who suggest that lawyers should play no part in the drafting of statements would, we suspect, quickly recant were they forced to work from the resulting statements, meandering and unfocused as they would undoubtedly be. But for reasons both ethical and self-serving, counsel should strive to keep the voice of the witness alive in the statement, adding anecdotes where they give colour to a recollection or help explain why it was memorable. These, in turn, are the statements arbitrators remember and, understandably, find credible.

1 [2013] All ER (D) 191 (Nov)

2 *Guidelines on Memory and the Law* (April 2010)

3 Published as *Witness Preparation: Memory and Storytelling*, Journal of International Arbitration (Kluwer Law International 2011, Volume 28, Issue 4)

New York Courts Revisit the Balance between Debtors and Creditors in Enforcement Proceedings

By Samaa Haridi and Meredith Craven

This article was originally published by the International Bar Association in "IBA Arbitration News," Volume 19 No. 1 in February 2014. The original article may be found on the IBA Arbitration Committee website at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx. Information on the International Bar Association can be found at www.ibanet.org.

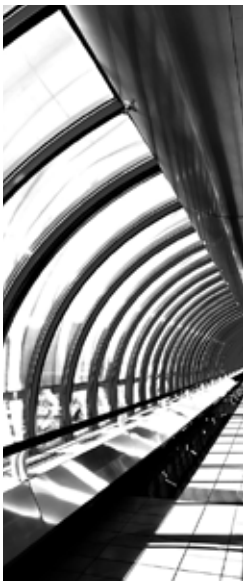
In the IBA Arbitration News September 2011 issue, Alden L. Atkins and Adrianne Goins of Vinson & Elkins discussed a New York Court of Appeals opinion that made New York a highly favorable venue for creditors to enforce and collect on judgments and awards.[1] In *Koehler v. Bank of Bermuda, Ltd.*,[2] a creditor sought turnover in New York of a Bermudan debtor's assets, which were held in Bermuda by the Bank of Bermuda. The highest court of New York State ordered the Bank of Bermuda to turn over the assets, even though New York had no connection to the underlying subject matter and no jurisdiction over the Bermudan debtor or his assets. The *Koehler* decision sparked concern that New York was overreaching its territory and becoming a "Mecca for creditors," which would prompt a mass exodus of global financial institutions.[3]

Since 2009, federal and state courts have struggled to interpret *Koehler* and its effects; however, earlier this year, the New York Court of Appeals clarified the scope of New York authority. The result limits *Koehler* significantly and appears to level the playing field between debtors and creditors in New York.

Enforcing Judgments and Arbitral Awards in New York

In New York, parties seeking enforcement of judgments and arbitral awards rely on the Civil Procedure Law and Rules (CPLR), Article 52 on the Recognition of Judgments, which controls enforcement of money judgments, including converted arbitral awards.

New York courts have interpreted the CPLR Article 52 to authorize turnover orders even where the judgment debtor's assets are held outside New York.[4] Likewise, if a third-party garnishee holds the judgment debtor's assets or owes a debt to the judgment debtor, the court can compel the garnishee to turn over the assets or pay the debt to satisfy the judgment.[5]



The *Koehler* decision sparked concern that New York was overreaching its territory and becoming a "Mecca for creditors," which would prompt a mass exodus of global financial institutions.

The *Koehler* Decision and the Separate Entity Doctrine

In *Koehler*, a judgment creditor sought to enforce a Maryland judgment against the assets of a Bermudan judgment debtor, held in Bermuda by the Bank of Bermuda. The creditor served the Bank of Bermuda, as well as its New York subsidiary, to compel turnover in New York. After ten years of litigation, the Bank of Bermuda consented to New York jurisdiction. The Court of Appeals found a turnover order proper, holding that a New York court required only personal jurisdiction over the garnishee to compel it to turn over the debtor's assets. There was no requirement that the assets or the debtor be subject to New York jurisdiction.

Naturally, this prompted concern. Given the somewhat murky circumstances of the Bank of Bermuda's consent to jurisdiction, some judges and commentators theorized that *Koehler* had abrogated New York's separate entity doctrine.[6]

Developed in the United States in the early 1900s, the separate entity doctrine considers each branch of a bank a separate entity from all other branches, without access to information or funds held by one another, for the purposes of judgment enforcement. The doctrine responded to three concerns: first, it was impracticable to require that each bank branch constantly monitor accounts held at sister branches; second, requiring banks to turn over, freeze or divulge information about foreign accounts could violate foreign banking laws; and third, a bank facing competing turnover orders in different jurisdictions might become doubly liable for the same debtor's funds.

Abrogation of the separate entity doctrine would mean that a judgment debtor's assets held by any bank in the world would be accessible through a New York turnover order, so long as the bank had a New York branch.

Koehler's Effects

Following *Koehler*, New York state courts and federal district courts in New York struggled to interpret the reach of New York law, resulting in a rift between federal and state judges interpreting state law.

The first few federal cases interpreting *Koehler* found that the separate entity doctrine had been abrogated, and the courts compelled New York bank branches to turnover funds and account information held abroad.[7]

In contrast, the vast majority of New York state courts found that the separate entity doctrine was alive, well and justified by the same comity concerns that prompted its development in the first place. In *Samsun Logix Corp. v. Bank of China*,[8] a judgment creditor served New York branches of Bank of China for turnover of "any property" of the judgment debtor held in Chinese branches. The Bank of China successfully argued that compliance with the New York turnover order would result in civil liability in China against the banks and criminal liability in China against their executives. The Supreme Court of New York County found the comity concerns that prompted the separate entity doctrine applicable, and held that the doctrine protected Bank of China from the turnover order. Furthermore, the *Samsun* court admonished that Article 52 requires judgment creditors to identify specific assets, held by specific garnishees. It does not authorize a worldwide fishing expedition to locate assets held by third parties.

Following *Samsun*, New York state courts continued to uphold the separate entity doctrine,[9] and eventually the Southern District of New York found in *Shaheen Sports, Inc. v. Asia Insurance* that the overwhelming evidence confirmed that the separate entity doctrine was never abrogated and remained a necessary fixture in New York enforcement law.[10] The federal court opined that the *Koehler* court did not need to assert jurisdiction over the Bank of Bermuda through its New York

branch, because the Bermudan branch itself consented to personal jurisdiction in New York. Thus, *Koehler* did not deal with the separate entity doctrine at all. In addition, the *Shaheen* court found that the Pakistani garnishee bank whose New York branch was served adequately demonstrated that it could be subject to liability in Pakistan for complying with the New York turnover order, and potentially double liability for the same assets, in light of litigation in Pakistan against the judgment debtor. Based on these comity concerns and a finding that *Koehler* did not deal with the separate entity doctrine, the *Shaheen* court upheld the legal distinction between the bank's Pakistani and New York branches and refused to order a turnover.

Some uncertainty remains for creditors wishing to enforce a judgment or award in New York, particularly with regard to the separate entity doctrine in New York.

Northern Marianas Islands

Finally, earlier this year, the New York Court of Appeals clarified the holding in *Koehler*. In *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce (CIBC)*,[11] the Commonwealth filed in New York to enforce two tax judgments against former citizens whose assets were held by CIBC First Caribbean International Bank (CFIB), a 92% owned Cayman Islands subsidiary of CIBC. The Commonwealth served CIBC's New York branch in an action to turn over those assets, arguing that CIBC had the power to compel CFIB to turn over the assets: CIBC was the majority owner of CFIB, shared overlapping personnel with CFIB and exercised oversight over CFIB's regulatory requirements. CIBC argued that it was a separate legal entity from CFIB, and could not access the accounts held at CFIB – or even information on those accounts – without a formal bank sharing agreement.

The Court of Appeals found that Article 52 of the CPLR on enforcement of foreign judgments permitted turnover orders only against garnishees that had *actual possession* of a judgment debtor's assets. Garnishees with mere *constructive control* over the assets are not subject to turnover orders under CPLR Article 52. In *Northern Marianas*, CFIB in Cayman was the entity with actual possession of the assets, and the New York courts did not have personal jurisdiction over CFIB; therefore a turnover could not be ordered.

In addition to limiting the reach of CPLR Article 52, *Northern Marianas* expressly rejected *Koehler*'s supposed abrogation of the separate entity doctrine in New York. According to the Court in *Northern Marianas*, *Koehler*'s only significance was to hold that "personal jurisdiction is the linchpin of authority under [CPLR] section 5225(b)."[12]

The Future of Enforcement in New York

Northern Marianas' "actual custody" holding tips the balance of New York enforcement law back, particularly in light of *Samsun*'s admonishment that CPLR Article 52 does not authorize international fishing expeditions for assets or information. With its ruling, the *Northern Marianas* court made clear that a judgment or award creditor may not use New York as a springboard to access undefined assets located anywhere in the world. Instead, an award creditor must locate a garnishee in actual possession of defined assets of the debtor, over whom New York can assert personal jurisdiction, before filing for a turnover order.

Where the garnishee is a bank, the "actual custody" standard is relatively clear: separate branches are separate entities, regardless of their corporate form. Thus, a subsidiary does not have actual custody of accounts and information held at a fellow subsidiary or a parent, nor does a parent have actual custody of accounts and information held by its subsidiaries.

Nonetheless, some uncertainty remains for creditors wishing to enforce a judgment or award in New York, particularly with regard to the separate entity doctrine in New York. On 14 January 2014, facing two appeals from the Southern District of New York where the court refused to order

turnovers against two garnishee banks, the Second Circuit certified to the New York Court of Appeals two questions, asking the Court of Appeals to explicitly clarify the scope of the separate entity doctrine in judgment enforcement proceedings.[13] In addition, the present case law provides no guidance on the liability of foreign garnishees with subsidiaries in New York that are not financial institutions.

In response to both *Koehler* and *Northern Marianas* and in the interest of international comity, the New York legislature has proposed legislation to limit New York courts' extraterritorial reach under Article 52 to assets and information held within the United States.[14] This legislation has not yet passed, and the standard that will apply to non-bank garnishees remains uncertain.

The status of the separate entity doctrine in judgment enforcement remains undecided. Nonetheless, it would appear that contrary to fears that New York would become a creditor "Mecca" from which financial institutions would flee, at least as far as garnishee banks are concerned, the pendulum is swinging back into balance: a New York court can only compel transfer of a debtor's assets into the state to enforce a judgment if the court has personal jurisdiction over the entity that possesses those assets.

1 Alden L. Atkins & Adrianne Goins, *New York courts make it easier to seize assets to satisfy an award*, IBA Arbitration Newsletter, September 2011, v. 16, p. 143.

2 *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y. 3d 533 (N.Y., 2009) (*Koehler*).

3 David D. Siegel, *'Koehler': Creating Mecca for Creditors or Anti-Mecca for Garnishees?*, N.Y. L.J., July 28, 2009.

4 *See* CPLR 5225(a) *Gryphon Domestic VI, LLC. v. APP Intern. Fin. Co., B.V.*, 41 AD3d 25, 31, 836 N.Y.S.2d 4, 9 (N.Y. App. Div. 2007) (interpreting CPLR 5225(a)) ("In *Miller v. Doniger*, 28 A.D.3d 405, 814 N.Y.S.2d 141 (2006) and in *Starbare II Partners L.P. v. Sloan*, 216 A.D.2d 238, 239, 629 N.Y.S.2d 23, 23 (1995), this Court squarely held that the defendant judgment debtors could be ordered to turn over out-of-state assets to a New York sheriff").

5 CPLR 5225(b) ("Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest…the court shall require such person to pay the money…to the judgment creditor…"); CPLR 5227 ("Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity…").

6 *JD Oilfield Equipment, LLC. v. Commerzbank AG*, 764 F.Supp. 2d 587, 595 (S.D.N.Y. 2011).

7 *JW Oilfield Equipment, LLC v. Commerzbank AG*, 764 F.Supp. 2d 587 (S.D.N.Y. 2011); *Eitzen Bulk A/S v. Bank of India*, 827 F.Supp. 2d 234 (S.D.N.Y. 2011).

8 31 Misc. 3d 1226A (Sup. Ct. New York County 2011).

9 *Global Technology v. Royal bank of Canada*, 943 N.Y.S.2d 791 (Sup. Ct. 2012); *Parbulk II AS v. Heritage Maritime SA*, 935 N.Y.S.2d 829 (Sup. Ct. 2011).

10 *Shaheen Sports, Inc. v. Asia Insurance Co.*, 2012 WL 919664 (S.D.N.Y. 2012), app. dismissed 2012 WL 4017287 (2d Cir. 2012).

11 *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013).

12 21 N.Y.3d 64.

13 *Tire Eng'g & Distribution L.L.C. v. Bank of China Ltd.*, 13-1519-CV, 2014 WL 114285 (2d Cir. 2014) ("First, whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to turn over a debtor's assets held in foreign branches of the bank; and Second, whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank").

14 S5734, 2013-2014 S., Reg. Sess. (N.Y. 2013).

Mediation in Europe: The Most Misunderstood Method of Alternative Dispute Resolution

By Roman Rewald

Of all the methods of alternative dispute resolution (ADR), mediation appears to be the least expensive, most attainable, and most "alternative". The other ADRs are generally related to some form of arbitration, a solution in which a judgment is cast not by judges but by selected lawyers or laymen. Mediation, in its essence, does not produce a judgment but seeks a voluntary solution that is acceptable to all the parties involved in a dispute. For the mediation to be successful, there are a very few basic conditions that need to be satisfied. First, the law must provide a neutral mediator whose confidentiality must be protected so that the settlement negotiations with the participating mediator may not be used in subsequent litigation or arbitration. Second, and this is very important, mediation must be able to be stopped at any time by either party dissatisfied with the process. Finally, mediation must toll the Statute of Limitations, otherwise people may be reluctant to use it for fear of running out of time to commence litigation.

Mediation is a more cost-efficient and quicker form of dispute resolution than any other. As well, it fosters continuing relationships between the quarrelling parties due to its amicable style. This may be especially valuable in cases when a relatively minor dispute arises in the course of a long-standing relationship. A court action or even an arbitration proceeding may aggravate the relationship to the extent that there may be no more room for further cooperation. Mediation is therefore potentially devoid of this threat of permanent damage to communication between the parties.

Mediation, therefore, appears to be a perfect ADR and can provide a solid solution to a commercial dispute. The question is, why is it so rarely used in Europe? The answer lies in the title of this article. Mediation is the most misunderstood form of ADR in Europe. Let's take a look at the example of a vulnerable version of mediation, that of commercial disputes in a large European country: Poland.

Mediation has been on the books in Europe and Poland for a number of years, but is not widely practiced in these territories. In Poland alone, statistics on mediation use are dramatically low. The total number of commercial mediations initiated by Polish courts during the period of 2006–2011 was only 3,541, whereas Polish courts register approximately 1.25 million commercial cases annually.[1] Out of these numbers, even fewer mediations take place in commercial disputes.

There is a great need for a solution that would ease the overburdened court system in Poland and in the whole of Europe.[2] Arbitration is providing much-needed relief, but is still not considerably lowering the backlog of cases. Although arbitration allows for a less formal judgment procedure, in recent years arbitration proceedings have increasingly resembled court proceedings without the corresponding solid guidance of systematic court rules.[3]

Mediation in Europe

In Europe the need to fight the long backlog of court actions and to lower the expenses of litigation was recognized in the beginning of the millennium.[4] It intensified in 2002, when the Council of Europe's *Recommendation of the Committee of Ministers* was adopted on 18 September 2002 (REC 2002), which encouraged member states to clarify the mediation process within their legal systems. Further, in 2004 the European Commission's Directorate of Justice and Home Affairs adopted a *Code of Conduct for European Mediation Services* and a proposal for legislation to ensure uniform practices and standards (SEC 2004/0251) (COD). This was followed in 2008 by the European Union *Directive 2008/52/EC of the European Parliament and of the "Council of Certain Aspects of Mediation in Civil and Commercial Matters*" providing a framework for cross-border mediation. This directive, which has been in force since 13 June 2008, required the European member states to implement necessary laws, regulations, and administrative provisions on cross-border mediation by 20 May 2011. In 2011 the European Parliament entered a *Resolution regarding the implementation of the 2008 Directive* (2011/2026 (INI)). In effect, individual states must regulate mediation in their own systems in order to meet the requirement for regulation of cross-border mediation.

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Accordingly, most European countries adopted appropriate legislation regarding mediation. Adoption of laws, however, does not necessarily result in a broader understanding of mediation to the extent that attorneys would be comfortable suggesting it as a method of conflict resolution. Moreover, such a suggestion, once it is made by a party, may not be fully understood by the other side as to the intention of the proposal.

Mediation in Poland

In Poland, mediation as an ADR dates back to 1991, when the first labor-related mediations began. Mediation was adopted for criminal proceedings in 1997, for consumer matters in 2000, and finally for civil and commercial disputes in 2005.[5]

There was a long struggle by Polish mediation supporters to encourage the Polish legislature into understanding that arbitration is not the only solution to the courts' backlog. Poland eventually followed the European Union's initiative and adopted the necessary laws laying the groundwork for the deployment of mediation as a common ADR. So, following the requirements of EU law, Poland's legislature adopted mediation-related rules by amending the Code of Civil Procedure in 2005. It provides that mediation can be initiated three different ways: either by parties executing an agreement on mediation, by one party applying for mediation with the other party consenting to it, or, finally, by a court order with no party objecting. It appears that the law definitely favors a voluntary mediation, accepted by both parties. The court's powers are, however, limited in this regard. In a court-induced mediation, a judge has the power to issue an order for commencement of mediation only until the end of the first hearing in the case. Further, after the first hearing the court may order mediation if both parties apply for it.[6] Under the Code of Civil Procedure, a court may order mediation only once during the proceedings. This is unfortunate, because in other jurisdictions the judges are free to order mediation whenever there is an issue that the judge would consider to be appropriate for this type of resolution. This limitation denies a Polish court the flexibility to direct

The most common mistake in understanding mediation arises from the fact that a lot of professionals associate mediation with arbitration.

a separate litigation issue to an *in promptu* mediation, which may be very beneficial for speeding up a court proceeding.

Even court-ordered mediation may not go through if one of the parties objects, or, as the rule states, "refuses to agree to mediation" within a week of the court's order.[7] The court issuing an order for mediation determines how long the mediation should last, but no more than one month, unless the parties apply for extension of this time.[8]

The basic conditions for a successful mediation, namely an impartial mediator and confidential proceedings, were provided for in the civil procedure code.[9] The confidentiality applies only to the mediator, who, not unlike a lawyer in an attorney-client relationship, may be released from this obligation only by the parties.[10] The parties, although not obliged to keep the proceedings confidential, are prevented from bringing up in any subsequent litigation or arbitration any statements made during the mediation. This provides mediating parties with the freedom to make compromise proposals without fearing that they may be used against them in a subsequent, related dispute.[11]

Under Polish law, a settlement agreement achieved during mediation could be sanctioned by the court. This happens in both court-induced and voluntary mediation. In the latter case, even though no court proceedings are involved, a court of appropriate jurisdiction would be asked to sanction the mediated settlement by issuing an appropriate court order. Accordingly, the settlement agreement reached in mediation, when confirmed by the court, may acquire the legal force of a judgment reached by a court.[12]

Discussion of the effectiveness of the Polish legislation on mediation is still ongoing. But the issue does not appear to be in the legislation. As in many social and legal areas, new legislation is not always a solution. Sometimes, it perpetuates the problem. The solution is the practice and enforcement of the existing law rather than any new legislative activities. There are some needed corrections but not anything major.[13]

At the end, how it is practiced determines whether mediation becomes popular, because unless legal professionals embrace mediation, it will never succeed. This relates to both judges and attorneys in Poland, many of whom show a deep aversion to mediation for the following reasons: (a) there is a general lack of understanding of the existence of mediation as an effective ADR; and (b) there is a misunderstanding of the process due to sometimes unfortunate prior experiences with less than professional mediators who did not know how to handle the assigned mediation.

To alleviate misunderstandings and promote the proper development of mediation, sufficient training of mediators is required. Mediation's success often lies in the competence, talent, and wisdom of the mediator.[14] A mediator who does not fully understand the role he or she plays or who is unprofessional in any way could create lasting damage to the mediation process. Parties left disappointed by an unprofessional mediator might never again consider mediation as a viable path. Professional conferences and seminars are full of horror stories detailing how an ineffective mediator would just ask assembled parties to do their best to settle the dispute and leave it at that. A trained and well-respected mediator would never do this. There is much more to mediation than simply bringing the parties together.

For lawyers wanting to become mediators, the basic introductory mediator training should involve at least 30 to 60 hours of lectures and workshops. Appropriate training is available at law schools, through professional legal organizations and numerous mediation centers.

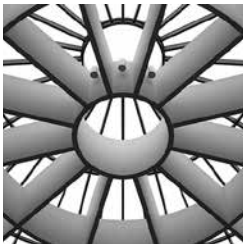
Mediation Must Be Understood to Be Effective

For a successful commercial mediation, one must have the consent of both parties and an excellent understanding on the part of participating lawyers of the process and its value. As Michael McIlwrath (*et al.*) comments, in international mediation it is always a guessing game as to whether the mediation will be successful. It is more likely to be successful when the lawyers involved in the case may confidently suggest mediation as the best way to solve a particular dispute. Further, it is successful when the other side knows exactly what is being proposed, because their lawyers are familiar with the mediation process in their respective legal systems and their practice.[15]

Many judges and attorneys do not confidently promote mediation because of a widespread uncertainty as to how mediation works in practice. There are various reasons for misunderstanding of mediation, most of them stemming from a lack of practical knowledge with the matter as well as a tendency to confuse mediation with other ADRs. In the following sections we will try to debunk these misunderstandings.

Mediation Is Not Arbitration

The most common mistake in understanding mediation arises from the fact that a lot of professionals associate mediation with arbitration. This means that people do not distinguish between the ambience of a mediation, where the mediator is withholding his or her own opinion on the resolution, with that of an arbitration, where the arbitrator makes a distinct judgment. Instead, the job of the mediator is to bring the parties to a common resolution, mostly by posing well formulated questions. Accordingly, the mediator is not preset to give a judgment. This important distinction must be understood by all the parties involved in the dispute as well as the professional mediator running the proceedings. Without proper and extensive mediation training, this condition might not be observed, as people involved in the dispute resolution may fall into a tendency of casting judgments or, at least, binding suggestions. Even well experienced lawyers (and maybe lawyers especially) must undertake extensive training in order to understand and properly practice the role of a mediator in commercial disputes.



Even well experienced lawyers (and maybe lawyers especially) must undertake extensive training in order to understand and properly practice the role of a mediator in commercial disputes.

Mediation Is Not Just a Settlement Negotiation

Many people would say – why should we use a mediator when it is in reality just a settlement negotiation? In commercial matters, the parties usually believe that they can negotiate themselves and do not need a third-party mediator. These and similar erroneous opinions may be greatly responsible for deficiency in implementing the mediation concept. A mediator who is properly equipped with true neutrality and the protection of his/her confidentiality might be uniquely helpful in the negotiations and could be the difference between a successful resolution and the negotiations crumbling into litigation. Crucially, any propositions for compromise made during the mediation process may not be used by the parties in any subsequent litigation in case the mediation fails and litigation ensues. Also, a mediator, unlike an arbitrator, is allowed to meet with the parties separately to examine their position with properly posed questions. Accordingly, a mediator may suggest solutions that a party itself might be reluctant to put forward, in case the other party considered the compromise proposition to be a sign of weakness in their adversary. This protection and confidentiality is not available to parties if they merely conduct settlement negotiations.

Aversion to Pre-Litigation Dispute Resolution Clauses

Mediation may be at its best when it is used in its facilitative form, before the parties resort to litigation. At the litigation stage, mediation becomes more of an evaluative exercise, where the

In Europe, all the significant efforts to bring it up to the prominence it enjoys in America have not yet been successful, because mediation is grossly misunderstood by European legal professionals.

mediator must bring each party to a realization as to how strong or weak their case against the other party is. Once the parties come to a conclusion that the only way to gain profit from the relationship is through a favorable judgment/award mechanism, mediation as a condition precedent to the filing of a lawsuit or arbitration claim may draw severe criticism, especially when executed in a less than careful manner.[16] Unlike arbitration, which is a well understood and widely used ADR, mediation may be viewed in a similar way to a pre-litigation dispute resolution clause (PDRC), which invites the negative response of legal practitioners, due to the fact that PDRCs are recently, and justifiably, suffering a wave of bad publicity.

PDRCs, originally thought a healthy concept of contract clauses that should prevent the parties from hastily seeking arbitration or a lawsuit at the first sign of a dispute, are becoming a substantial problem. Unfortunately, pre-litigation settlement too often turns into a technique of avoiding commencement of litigation, sometimes in the context of statute of limitations to the benefit to one of the parties. Accordingly, contractual pre-litigation settlement clauses (which have been known to often constitute a substantial portion of the contract itself), only invite elaborate legalities that take precious resources and time away from the actual court resolution, and therefore damage the concept of ADRs in general.[17] A badly drafted pre-litigation settlement clause, even one introducing mediation, may be a problem that causes unnecessary delays in the actual dispute resolution. This could be easily prevented if mediation is used in its proper form, as a process that may be stopped by any party at any time. The concept of commercial mediation is built on the mutual consent of the parties to commence and continue mediation. Most established mediation centers in many jurisdictions have regulations which provide that mediation should end immediately upon the request of one of the parties. This should also be clearly stated in a contract's mediation clause as well as in any subsequent mediation agreement.

Therefore, elaborate PDRCs could be easily replaced with provisions for mediation at one of the reputable mediation centers, whereby the fact that mediation could be stopped at any time without need for explanation or without a cause by one of the parties could be found either in the contractual mediation clause itself or in the appropriate regulation of the selected mediation center. This could prevent unnecessary litigation over the pre-litigation settlement clauses.[18]

Conclusion

Mediation is a well-developed, tested, and litigated method of resolving disputes in the United States and Australia. In Europe, all the significant efforts to bring it up to the prominence it enjoys in America have not yet been successful, because mediation is grossly misunderstood by European legal professionals. It is either not even considered as a viable option for lack of basic familiarity with it as a practice, or it is mixed with other pre-litigation actions that are known as tactics designed to get in the way of the better-known ways of resolving a dispute, such as through a court or arbitration process.

Having concluded this, we can only urge legal professionals involved in the practice of law, as well as business activists concerned with the delays and costs of conventional litigation, to drop their prejudices and familiarize themselves with mediation as a form of ADR through self-education and a pursuit of its implementation in a day-to-day practice.

1 Sylwester Pieckowski, *Założenia polskiej ustawy o mediacji i mediatorach*, Arbitraż i Mediacja, Sad Arbitrażowy przy KIG, Warszawa 2012, p 405, while Polish courts register @ 1,25 mln of commercial cases yearly: *Mediacje w sprawach gospodarczych*, http://edroga.pl/drogi-i-mosty/inne/7980-mediacje-w-sporach-gospodarczych.

2 Rzeczpospolita, *Lawina spraw w sądach*, 12 Oct. 2013. http://prawo.rp.pl/artykul/1053437.html

3 Jerzy Rajski, *Polubowne aspekty arbitrażu w sprawach gospodarczych*, a lecture given at the Conference, Dowody i postepowanie dowodowe w arbitrażu, University of Warsaw, on 13 Feb 2013

4 Ewa Gmurzynska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym – zastosowanie w Europie*, Warszawa 2007, p 257

5 Sylwester Pieckowski, *Założenia polskiej ustawy o mediacji i mediatorach*, Arbitraż i Mediacja; Sad Arbitrażowy przy KIG, Warszawa 2012, p 404

6 Code of Civil Procedure Art. 1838: "§ 1. The court may refer parties to mediation until the end of the first scheduled hearing. After the end of such hearing, the court may refer the parties to mediation only upon a joint petition from the parties.

§ 2. The court may refer parties to mediation only once in the course of proceedings.

§ 3. A relevant decision may be issued in camera. No mediation shall be conducted if a party does not express its consent to mediation within one week from the day on which a decision to refer the case to mediation is announced or served on a party.

§ 4. The provisions of § 1 shall not apply to order for payment proceedings or proceedings by writ of payment."

7 Code of Civil Procedure Art. 1838 §3: "§ 3. A relevant decision may be issued in camera. No mediation shall be conducted if a party does not express his consent to mediation within one week from the day on which a decision to refer the case to mediation is announced or served on a party."

8 Code of Civil Procedure Art. 18310: "§ 1. When referring parties to mediation, the court shall determine the period of such mediation of up to one month, unless the parties jointly request a longer period for mediation. In the course of mediation, such period may be extended upon a joint petition from the parties.

§ 2. The presiding judge shall schedule a trial after the lapse of the period referred to in § 1, or before the lapse of said period, if at least one party represents that it does not consent to mediation."

9 Code of Civil Procedure Art. 1833 ("A mediator shall remain impartial in conducting mediation.") and 1834 ("§ 1. Mediation shall not be open to the public.

§ 2. A mediator shall keep any facts disclosed to them in connection with mediation confidential, unless released from this obligation by the parties.

§ 3. Any proposed settlements, mutual concessions or other statements made in mediation shall have no effect when invoked in the course of proceedings before a court or court of arbitration").

10 Waiver of confidentiality by only one of the parties would defeat the purpose of this limitation, so all the parties must agree to release the mediator's confidentiality obligation.

11 Full confidentiality by the parties may be secured by the mediation agreement or bylaws of the mediation facility. In addition the confidentiality of mediation could be accorded a civil code confidentiality protection appropriate for good faith negotiations in KC art. 721. See: S. Pieckowski, *Mediacja w sprawach cywilnych*, Warszawa 2006, p. 12 i 35; R. Morek, *Alternatywne metody rozwiązywania sporów (ADR) w sprawach gospodarczych*, Warszawa 2004, p. 2-3).

12 Polish Code of Civil Procedure Art. 18315: "§ 1. A settlement reached before a mediator, once validated by the court, has the binding effect of a settlement reached before the court. A settlement reached before a mediator that was validated by issuing a writ of execution is an enforceable title.

§ 2. The provisions of § 1 shall be notwithstanding the provisions on a specific form of acts in law".

13 The unconscionably low cap on mediators' fees in court-referred mediation, and the issue of whether a settlement must be notified to a court even if the mediation was not court-related, (18313) need to be re-legislated.

14 Joanna Wasik, Court Delays in Poland. *Mediation as a Way Forward in Commercial Disputes*. 43 Geo. J. Int'l L. 959 2011–2012, also: William E. Davis & Madeleine Crohn, *Lessons Learned: Experiences with Alternative Dispute Resolution* 1, 84 (1996) (unpublished discussion paper), available at http://usaid.gov/pdf_docs/PNADM511.pdf.

15 *Finishing Before You Start: International Mediation*, Michael McIlwrath, Elpidio Villarreal and Amy Crafts, International Litigation Strategies and practice/ by Barton Legun [et al.], Chapter 6, p.42

16 Elizabeth M. Weldon and Patrick W. Kelly; *Prelitigation Dispute Resolution Clauses: Getting the Benefit of Your Bargain*, Franchise Law Journal, Vol 31, No 1, Summer 2011

17 *Id.*

18 Tania Sourdin, *Resolving Disputes Without Courts: Measuring the Impact of Civil Pre-action Obligations*, March 2012, Monash University (unpublished discussion paper), available at http://www.law.monash.edu.au/centres/acji/projects/acji-pre-action-background-paper-mar2012.pdf.

ICDR Releases Revised Arbitration Rules Geared Towards Expediting the Arbitral Process

By Samaa Haridi, Marguerite C. Walter, and Marihug Cedeño

This article was previously distributed as a Weil Client Alert on April 10, 2014, available at http://www.weil.com/files/upload/Intl_Arb_Trade_Alert_April_2014_v5.pdf.

The International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), recently released its revised rules. The new rules became effective in May 2014, and provide mechanisms to facilitate increased efficiency and cost savings in arbitrations conducted under the ICDR Rules, as well as new procedures to ensure arbitrator impartiality. Some of the key revisions are discussed below. The rules are available at http://www.weil.com/files/upload/International_Rules_1.pdf.

New expedited procedures

One notable feature of the revised rules is the introduction of International Expedited Procedures. These procedures provide parties with the option of a simplified arbitration process designed to reduce the time, cost and complexity of international arbitration. (See Articles E-1-E-10). Under the revised rules, any case with a claim or counterclaim of $250,000 or less will automatically be expedited. The rules also presume that any case involving disputes valued at $100,000 or less will be decided on written submissions. Other advantages to the abbreviated process include: an early preparatory conference call with all parties and the arbitrator to determine the procedure of the case; an expedited schedule and an oral hearing limited to just one day; and a 30-day deadline for a final award to be handed down. These new provisions address parties' concerns that arbitration may be too expensive or too slow to provide a practical and effective means of resolving disputes where the claims at issue are of relatively low value.

Greater encouragement of mediation

Article 5 of the revised arbitration rules gives the Administrator (i.e., the ICDR) discretion to invite the parties to mediate once the answer is submitted. Parties can agree to mediate at any stage of the case, and unless the parties agree otherwise, any mediation will proceed concurrently with the arbitration with a separately appointed mediator. As a result, the arbitration and mediation rules now complement one another and encourage parties to resolve their disputes through mediation even after

the arbitration has begun, without the danger of adding time and expense to the arbitration should the mediation not succeed.

Joinder of additional parties

Article 7 of the revised rules now allows parties to join additional parties by submitting a Notice of Arbitration against any additional parties before the tribunal is constituted. Subsequently, consent is required from all parties, including the party sought to be joined. The rules continue to apply as to any other party; thus, for example, the additional party must submit an answer, and may raise its own claims and counterclaims. This provision is meant to make it easier for all relevant parties to be included in an arbitration, in recognition of the complex business relationships that frequently are involved in international disputes.

Consolidating multiple arbitrations

In addition, Article 8 of the revised rules provides a method for a party to request the consolidation of two or more pending arbitrations administered by the AAA or the ICDR from a consolidation arbitrator, to be appointed by the Administrator. Consolidation may be ordered where the parties have expressly agreed to consolidate, or where all of the claims and counterclaims are made under the same arbitration agreement. If there is more than one arbitration agreement, consolidation may occur where the arbitration involves the same parties and the disputes arise in connection with the same legal relationship. The rule provides that any party may request that a consolidation arbitrator be appointed who will ultimately decide whether or not to consolidate the cases. However, if the consolidation arbitrator orders that the proceedings be consolidated, each party is considered to have waived its right to appoint an arbitrator for the resolution of the dispute. Instead, the consolidation arbitrator or the Administrator appoints the arbitrator(s).

Impartiality and independence of arbitrators

Articles 13 and 14 include additional procedures to help preserve arbitrator impartiality and independence. One notable innovation is established by Article 13, which imposes a duty on parties to disclose any circumstances that may give rise to doubts as to an arbitrator's impartiality. A failure to disclose constitutes a party's waiver of its right to challenge an arbitrator based on those circumstances, preventing parties from waiting to challenge an arbitrator for strategic reasons rather than (arguably) a genuine concern for the integrity of the process. On the other hand, Article 14 preserves the anonymity of any party challenging an arbitrator's impartiality or independence, thus giving comfort to the party raising a challenge that it will not be penalized by any member of the tribunal for having made the challenge.

Expedited award

Finally, in recognition that users of arbitration have become increasingly concerned by delays in the resolution of their disputes, Article 30 requires arbitrators to make final awards no later than 60 days after the close of the proceedings.

UNICITRAL Rules on Transparency in Treaty-based Investor-State Arbitration Now in Effect

By Marguerite C. Walter & Marihug Cedeño

The United Nations Commission on International Trade Law ("UNCITRAL") Rules on Transparency in Treaty-based Investor-State Arbitration ("Transparency Rules") came into effect on April 1, 2014. UNCITRAL adopted the Transparency Rules in July 2013, after three years of negotiations by the UNCITRAL Working Group on Arbitration. The Transparency Rules are intended to enhance public access to information about investor-state arbitrations, in recognition of the public interest in investor-state disputes where state policy is often at issue. The Transparency Rules will automatically apply to arbitrations conducted under the UNCITRAL Rules of Arbitration that are commenced under treaties concluded after April 1, 2014. The Transparency Rules will apply in arbitrations under previously concluded treaties only if the disputing parties or the states parties to the treaty agree to their application. Disputing parties may also choose to apply the Rules in other institutional or ad hoc proceedings. Information to be made public pursuant to the Rules will be maintained by UNCITRAL and made available to the public via a Transparency Registry available on the UNCITRAL website.[1]

We highlight below some of the key provisions of the Transparency Rules that may be of interest to parties considering using the Transparency Rules and others.

Articles 3, 7 and 8 – Access to Documents and the Transparency Registry

Under Article 3 of the Rules, documents to be published include all pleadings; all statements and submissions by disputing parties and non-disputing third-parties; hearing transcripts; and orders, decisions and awards rendered by the tribunal. Expert reports and witness statements are to be made available upon request. Article 7 provides for certain limitations on the publication requirement where issues of confidential or protected information are concerned. However, it is the tribunal, in consultation with the parties, that will make any determinations concerning the existence of confidential information that needs to be protected and what protections are appropriate. For example, the tribunal may order documents published with certain redactions or other protections in place. Where the tribunal declines to order a document withheld, or orders that it be published only with redaction, the party that introduced the document into the record may voluntarily withdraw it from the record rather than permit its public disclosure. In addition, Article 7(5) provides that no respondent state shall be required to make public any information the disclosure of which "it considers to be contrary to its essential security interests," an exception that seems likely to lead to disagreements between claimants and respondents if invoked. Articles 7(6) and 7(7) also permit

the tribunal to "restrain or delay" the publication of information if disclosing it could undermine the integrity of the arbitral process, such as by causing impediments to further gathering of evidence or creating a risk of witness intimidation or harassment.

In order to facilitate public access to such information, Article 8 provides that the Secretary-General of the UN, or an institution to be named by UNCITRAL, will function as the repository of published information pursuant to the Transparency Rules. As noted above, UNCITRAL has created an online Transparency Registry with a searchable database for ease of access to this information.

Article 6 – Public Access to Hearings

In a notable departure from the practice in investor-state arbitrations outside the context of those conducted under some free trade agreements, Article 6(1) provides that all hearings held for purposes of presenting evidence or oral argument shall be public. The arbitral tribunal is obliged to make necessary arrangements to facilitate public access through options such as video links and other tools, as has been done in recent years in arbitrations under NAFTA or CAFTA, for instance. Hearings may nevertheless be held partially in private to the extent necessary to protect confidential or protected information. They may also be held in private if the tribunal determines, in consultation with the parties, that providing public access to the hearings is not feasible for logistical reasons.

Articles 4 and 5 – Third-Party Submissions

The arbitral tribunal has the discretion, after consulting with the parties, to allow written submissions from third parties who wish to address matters within the scope of the dispute. In determining whether to allow such submission, Article 4 requires the tribunal to take into account whether the third party has a "significant interest" in the dispute, as well as the extent to which the submission would assist the tribunal in reaching its determination as to a specific fact or legal issue by providing a point of view that is different from those of the parties.

Article 5 permits non-disputing states parties to the treaty to make submissions on issues of treaty interpretation as a matter of right, as some states have done recently in the CAFTA context. As with other types of third-party submissions, third-party submissions from non-disputing states should provide a point of view that does not merely endorse the position of one or the other of the parties, and in particular, Article 5(2) cautions that such submissions should not be used to support the claim of a state's investor in a way that would be "tantamount to diplomatic protection." Moreover, where either type of third-party submission is concerned, the tribunal must ensure that the submissions do not "disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party."

* * *

Insofar as they encapsulate a number of issues raised in recent years concerning the legitimacy and efficacy of investor-state arbitration as a means of settling investment disputes, the Transparency Rules provide a useful new tool for the continued development of this area of law. By providing public access, not only to awards and decisions, but also to the parties' written and oral pleadings and evidence, they will further contribute to the elaboration of consistent practices and a jurisprudence constante that will no doubt provide greater certainty for parties on both sides of such disputes. Moreover, by allowing input from interested third parties, the Rules strengthen the legitimacy of investor-state arbitration for resolving what are often very contentious and public high-value disputes that implicate, not only private rights, but the public policies of host states. The Transparency Rules are thus well-placed to provide a key contribution to the evolution of investor-state arbitration.

1 *See* https://www.uncitral.org/transparency-registry/registry/index.jspx.

The US Supreme Court Rules That Courts Must Apply a Deferential Standard of Review to a Tribunal's Determination of Its Jurisdiction Under a Bilateral Investment Treaty

By Marguerite C. Walter

On March 5, a majority of the US Supreme Court rendered a decision confirming that a court must apply a deferential standard of review to a tribunal's determination of its own jurisdiction under a bilateral investment treaty (BIT) rather than reviewing the award *de novo*, at least where the respondent's challenge to jurisdiction rested on procedural rather than substantive grounds.

The issue arose in *BG Group v. Argentina*,[1] which concerned competing petitions for enforcement (BG) and *vacatur* (Argentina) of an award rendered in BG's favor under the UK-Argentina BIT according to the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"). BG's claims arose from what it claimed was the negative impact on BG's investment in a natural gas distribution company in Argentina of laws passed by Argentina in 2001 and 2002 to address its financial crisis.

During the arbitration, Argentina argued, among other things, that there was no jurisdiction because BG had failed to comply with a provision of the BIT requiring investors to submit their claims to Argentine courts for resolution for at least 18 months prior to resorting to arbitration under the treaty. The tribunal found, however, that Argentina had effectively waived this requirement because it had taken a series of actions in 2002 allegedly making it more difficult for investors to obtain relief from Argentine courts, including issuing a decree staying execution of final judgments for 180 days, and initiating a renegotiation process that was only available to investors that were not in litigation or arbitration. The tribunal awarded BG US$185 million for breach of the fair and equitable treatment provision of the BIT.

In March 2008, BG filed a petition in the District Court for the District of Columbia requesting recognition and enforcement of the award under the New York Convention and the FAA. At the same time, Argentina petitioned the Court for *vacatur* of the award on the ground that the tribunal lacked jurisdiction. The District Court confirmed the award, but was reversed by the Court of Appeals for the District of Columbia Circuit.[2] According to the DC Circuit, the tribunal's jurisdiction must be determined *de novo* because the local litigation requirement was a condition to Argentina's consent to arbitrate the dispute. The DC Circuit went on to find that Argentina's actions had not waived that requirement, and that the tribunal therefore did not have jurisdiction to hear BG's claims.

A majority of the Supreme Court reversed the decision of the DC Circuit because it found that the local litigation requirement in the BIT was a procedural one that determined when arbitration may begin, but not whether the parties had consented to arbitration. In reaching this conclusion,

Practitioners in the arbitration community have welcomed the court's ruling as an important statement on the appropriate standard of review for investment treaty awards.

the Court first examined the issue as if the agreement to arbitrate were embodied in a contract, and then found that the fact that it was contained in a treaty did not change the analysis. Justices Roberts and Kennedy dissented from this decision, arguing that the fact that the instrument of consent was a treaty and not a contract was a crucial element of the analysis. Unlike a contract, a standing offer to arbitrate contained in a treaty was not a perfected agreement to arbitrate, because the investor is not a party to the agreement. In the view of the dissenting justices, Argentina's standing offer to arbitrate disputes was conditional upon the fulfillment of the local litigation requirement, and BG could only accept that offer in the form it was given. Because the issue of jurisdiction raised by Argentina hinged on a question of consent to arbitration (and not a mere procedural requirement), the dissenting justices argued, it was an issue for the courts and not the arbitrators to decide. Thus, in their view, the tribunal's award should be reviewed *de novo*. The justices did not, however, appear convinced by the Circuit Court's conclusion that the tribunal had erred in finding that it had jurisdiction, noting that the Court seemed to have "simply taken it for granted" that BG's failure to submit the dispute to the local courts rendered the award against Argentina invalid.

Practitioners in the arbitration community have welcomed the Court's ruling as an important statement on the appropriate standard of review for investment treaty awards. The ruling should, moreover, provide comfort to investors who seek resolution of their disputes outside the ICSID context and may want to seek enforcement in the US. One reason investors frequently choose ICSID over other fora, such as arbitration under the UNCITRAL rules, is a perception that it may be more difficult to enforce an award under the New York Convention than under the ICSID Convention. The majority's ruling in *BG Group v. Argentina* confirms that, unless there is a jurisdictional objection raising the issue of the parties' consent to arbitrate, a US court should accord deference to such awards rather than reviewing them *de novo*. On the other hand, the Supreme Court's distinction between "procedural" preconditions to arbitration and substantive conditions on the State's agreement to arbitrate leaves substantial room for future debate on when preconditions are procedural, and when they are conditions to the State's consent to arbitrate investment disputes under a treaty.

1 *BG Group Plc v. Republic of Argentina*, 572 U.S. ___ (2014).

2 665 F.3d 1363 (2012).

Guest Article:
The Increasing Number and Methods of Arbitration Claims Brought Against Spain for Its Renewable Energy Measures

By Jose Luis Iriarte and Lupicinio Rodriguez

LUPICINIO ABOGADOS
INTERNATIONAL ATTORNEYS

Traditionally Spain has rarely been the defendant in international investment protection disputes. Arbitration claims in this area were limited to a couple of cases and a small number of parties. However this has changed dramatically over the last few years as arbitration has proliferated, and continues to do so, with actions brought by foreign investors against the Kingdom of Spain heading to arbitration to challenge laws that have been passed in the renewable energy sector.

Roughly a decade ago, Spain began a concerted policy to support the development of renewable (such as wind, solar, and thermal) energies. This commitment to the production and consumption of clean energy had, in principle, some very positive objectives. Firstly, it involved energy production from domestic sources that, for a country like Spain that has always been dependent on imported energy, was crucial in securing a certain level of energy independence. Secondly, it was a good way to contribute to the research and development of certain technologies in which certain Spanish companies had begun to excel. And finally, there were the ever-important environmental objectives of combatting such problems as global warming and dwindling fossil fuels.

However, a key problem was that the implementation of these renewable and clean energy sources inevitably required a huge economic investment with only very long-term expected returns. In the face of this challenge, the Spanish authorities offered very favorable conditions in order to encourage potential investors, in particular through bonuses which greatly incentivized investment in this sector. An example of the laws designed to protect and attract such investment is Royal Decree 661/2007 of May 25, 2007, which addressed the regulation of electricity production. Many domestic and foreign investors were drawn to the attractive opportunities and invested in Spanish renewable energy, in many cases borrowing heavily to do so. Obviously, given the nature of the industry, the amount of investment, and the debt taken on, it was imperative that these incentives be maintained over a long period of time.

The economic crisis that broke out in 2008 disrupted all these efforts. The urgent need of the Spanish Tax Administration to raise more money and the enormous growth of the energy sector's tariff deficit forced the government to take various measures. These measures included reducing the amortization period, introducing new taxes, abolishing or reducing bonuses, and increasing tariffs, which seriously and negatively affected the investments in renewable energy.

Different investors, alleging enormous legal uncertainty generated by the policy changes as well as the retrospective nature of the new laws, proceeded to challenge them in the Spanish courts.

Different investors, alleging enormous legal uncertainty generated by the policy changes as well as the retrospective nature of the new laws, proceeded to challenge them in the Spanish courts. But the Spanish Supreme Court rejected their claims on the basis that they had assumed a regulatory risk, were highly sophisticated, and had access to quality technical and legal advice.

For its part, the Spanish legislature has continued reforming the system with a maelstrom of incomprehensible laws that have further deteriorated the initial legal landscape that brought increased investments in green energy in the first place.[1] This is despite the fact that entrepreneurs, starting with the Spanish, have continually insisted on the need for a clear, secure, and stable legal framework. A number of foreign states have even notified the Spanish authorities, more or less officially, of their distress and concern regarding what remains of the commercial interests of their nationals.

As for the foreign investments, the practices followed by the Spanish authorities could certainly be considered indirect expropriations insomuch as they comprise acts attributable to the public authorities that cause a significant depreciation in the value of investments. Alternatively they could even be regarded as "creeping expropriations," since they have been brought about through a succession of laws and favorable judicial decisions which have been slowly and progressively undervaluing investments.

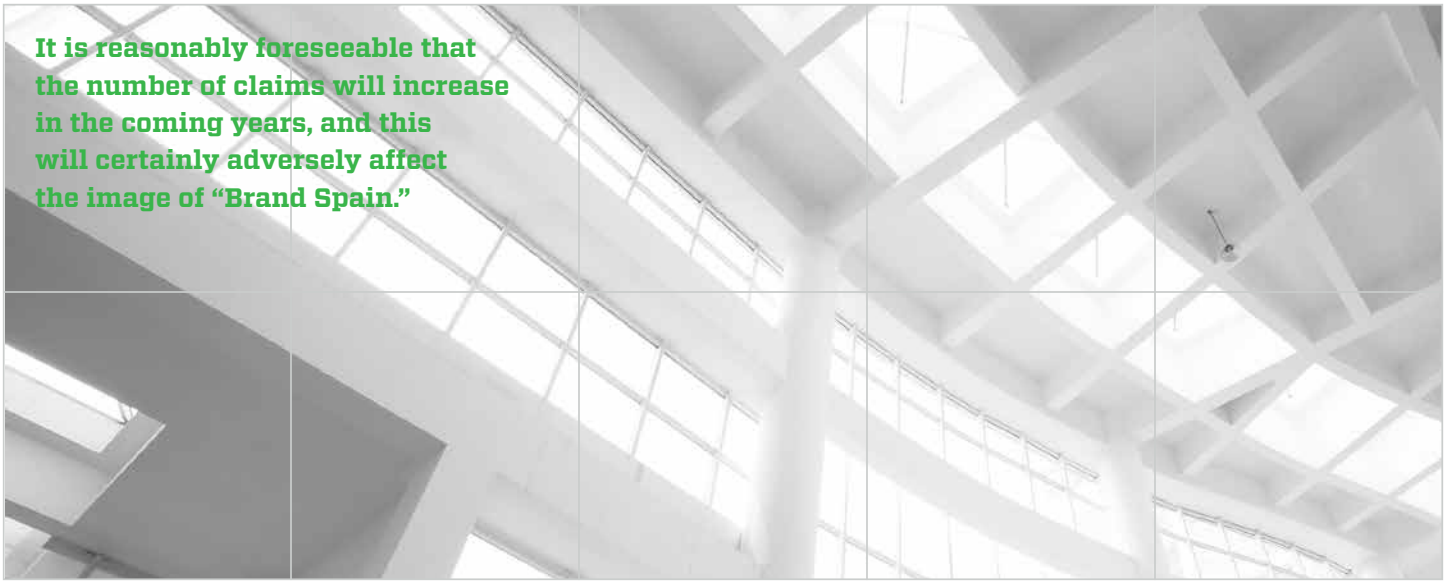
For these reasons more and more foreign investors have been bringing actions against the Kingdom of Spain, tending to cite the Energy Charter Treaty signed in Lisbon on December 17, 1994 (published in the Spanish State Bulletin on May 17, 1995). But in some cases their claims may also be covered by the Agreements for the Promotion and Reciprocal Protection of Investments that Spain has signed over the years, as well as the provisions of the Washington Convention of March 18, 1965, on the resolution of investment disputes between states and nationals of other states, which set up the International Centre for Settlement of Investment Disputes (ICSID) (published in the State Bulletin on September 13, 1994).

The Energy Charter Treaty regulates the promotion and protection of investments in great detail, with the underlying principle that it acts as a "floor" for protection that does not prevent the parties from agreeing or adopting other more favorable international conventions or laws for the benefit of their investors or investments. In this manner fair and equitable treatment is guaranteed, as is complete security and protection, so that no member state can adopt unreasonable or discriminatory measures which harm the management, maintenance, use, enjoyment, or disposal of investments. National treatment is also guaranteed, including compensation for losses due to armed conflict, riots, or other such events. Crucially, the transfer of payments related to the investment (including initial capital, returns, contract payments, remuneration of expatriated staff, and liquidation of the investment) is assured, as are dispute settlement payments, and those payments arising from expropriation compensation.

Article 10.1 is particularly important for these purposes. It expressly states that "Each Contracting Party shall observe any obligations it has entered into with an investor or an investment of an investor of any other Contracting Party."

The Treaty places special emphasis on the fact that investments shall not be subject to nationalization, expropriation, or measures having equivalent effect, except where such expropriation is for a purpose within the public interest; where the expropriation is not discriminatory; where due process of law is observed; and where prompt, adequate, and effective compensation is paid. The amount of compensation must be equivalent to the fair market value of the expropriated investment immediately before the expropriation or notice of the intention to expropriate if this would affect the value of the investment. The investor has the right to request a court or other competent authority review the case, payment, and valuation.

The Energy Charter Treaty also regulates the settlement of disputes in detail. As is typical for these types of conventions, there is a specific article dedicated to the differences between the signatory states, an issue that is beyond the scope of this discussion. What is important here are disputes between an investor and the ECT state where that investment was made. It is provided that the parties to a dispute will try to resolve it amicably within a period of three months, and after this period the investor will be able to choose from three causes of action: a) sue through



the courts or administrative tribunals of the state involved in the dispute; b) begin the method of dispute resolution previously agreed upon by the parties; or c) bring an arbitration claim. If the investor opts for this last option, he will have three forums in which to bring the claim: a) ICSID arbitration, provided both the investor's state and the state receiving the investment are parties to the Washington Convention of March 18, 1965 (although if one of the countries is not party to the Convention, application may be made to the ICSID Secretariat to use the Additional Mechanism procedures); b) arbitration before a single international arbitrator or an *ad hoc* arbitration tribunal established under the UNCITRAL Arbitration Rules; or c) arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).

Of these three arbitral forums, the third was the least prevalent in Spain until the onset of the current problems. Spanish companies, especially larger ones, have gone to ICSID arbitration to protect their interests against states that have acted against their investments, an issue that has occurred with some frequency in Latin America, and *ad hoc* arbitration under the UNCITRAL Rules has been primarily used by Spanish companies in commercial litigation, but not so much in investment disputes. Whereas it is true that Spanish companies already had some experience in proceedings before the SCC, it is only now that this has really come to the fore as a result of the problems emerging with renewable energy. We must remember that this institution used to perform an important role in trade relations with socialist Eastern European states, and nowadays it continues to occupy an important position in investment and energy dispute arbitration, especially among former Eastern Bloc countries. The parties that usually turn to the SCC do so because they prefer to maintain the confidentiality of the proceedings. Its regulations contain flexible and adaptable rules

that can fit the particular nature of each case, together with the regulation of arbitration proceedings offered by the "Expedited SCC Rules" which set down a faster and simpler procedure that is highly suited to small claims. Furthermore, the arbitral awards of the Stockholm Chamber of Commerce are recognized and enforced by the New York Convention of June 10, 1958 (published in the State Bulletin on July 11, 1997, and rectified on October 17, 1986), which in Spain has effect *erga omnes*.

The various parties that have brought claims against the Kingdom of Spain for allegedly being harmed by the legislative reforms on renewable energy have used all the options afforded to them by the Energy Charter. According to the data currently available, there are four claims before ICSID: three are in Stockholm before the SCC, and one, the first, is in New York in *ad hoc* proceedings in accordance with the UNCITRAL Rules. These cases will only be the start of an avalanche of claims challenging the inflexibility of the Spanish authorities and their lack of clear objectives.

We must also remember that the Energy Charter provides that awards on the merits will be decided according to the articles of the Treaty itself and the applicable rules of international law. These rulings, which may include an award of interest, shall be final and binding on the parties. In the case of awards concerning government measures (or measures of lower level political bodies), the state shall have the option to pay monetary damages in lieu of any other remedy, and member states should implement the awards without delay, taking all measures necessary for their effective implementation in their territory.

But on top of all this we must point out a new phenomenon. Very recently various news and media outlets have published news of foreign associations of minority shareholders in Spanish companies that are preparing to sue Spain for the cuts to wind energy. It appears they intend to start *ad hoc* arbitration proceedings under the UNCITRAL Rules. In this sense, they would act as foreign investors who have had the value of their investment seriously compromised by the actions of the Spanish authorities. It will be interesting to observe how these cases develop, especially with regard to whether or not foreign associations of minority shareholders in big Spanish energy companies are entitled to bring such investment arbitration proceedings.

The answer to this question is certainly not obvious. Some recent Agreements for the Promotion and Reciprocal Protection of Investments signed by Spain contain provisions like the following: "Where a Contracting Party expropriates the assets of a company duly incorporated under the laws in force in any part of its own territory, and where the company is participated in by investors from another Contracting Party, the provisions of this Article shall apply in order to assure the prompt, adequate and effective compensation for the other Contracting Party's investors who are owners of those shares." A provision of this type may protect the aforementioned claims of foreign minority shareholder associations. Moreover in this area, Article 13.3 of the Energy Charter Treaty establishes that "for the avoidance of doubt, expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its area in which an investor of any other Contracting Party has an investment, including through the ownership of shares." In any case, regardless of the application of this provision, we have a very interesting problem whose resolution must be keenly observed.

This recent phenomenon aside, the fact is that a very considerable number of arbitration claims have been brought against Spain for its renewable energy laws. By way of illustration, Spain has been an ICSID defendant as frequently as some Central Asian republics. Furthermore, it is reasonably foreseeable that the number of claims will increase in the coming years, and this will certainly adversely affect the image of "Brand Spain."

1 An interesting follow-up on the case-law and regulatory changes can be found in various newsletters on the Lupicinio Abogados International Attorneys website at www.lupicinio.com.

Recent Weil Events

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February 14-15, 2014

Future of International Arbitration in India

Jamie Maples spoke at the ABA conference in Delhi, on a panel titled "Future of International Arbitration in India."

February 28, 2014

Beware of What You Don't Know About International Arbitration Advocacy: Cross-Cultural Issues for Common Law and Civil Law Practitioners

Samaa Haridi spoke at the Florida Bar International Law Section's Annual International Litigation and Arbitration Conference (ILAC), on a panel titled "Beware of What You Don't Know About International Arbitration Advocacy: Cross-Cultural Issues for Common Law and Civil Law Practitioners."

March 11, 2014

Unique Issues in International Commercial Arbitration of Energy Disputes

Arif Ali spoke at the ICC's 2nd Annual International Arbitration in the Middle East and North Africa (MENA) conference, on a panel titled "Unique Issues in International Commercial Arbitration of Energy Disputes."

April 7–12, 2014

ITA-ASIL Conference Mass and Class Claims in International Arbitration

Annual conference will examine competing trends and the future prospects for class claims and mass claims in arbitration. Weil sponsored the Networking Luncheon on April 9 at the event.

April 11, 2014

The Revised International Centre for Dispute Resolution (ICDR) Rules – An Overview of Key Innovations

ICDR Y&I organized a breakfast event in connection with the American Society of International Law (ASIL)-International Law Association (ILA) 2014 Joint Meeting in Washington, DC. The seminar unveiled some of the most significant changes and enhancements in the soon-to-be-released Arbitration Rules of the International Centre for Dispute Resolution (ICDR). Marguerite Walter moderated, Arif Ali presented, and Samaa Haridi made welcoming remarks.

April 28-30, 2014

Enforcement of Arbitral Awards

Arif Ali spoke at the VIII Latin American Arbitration Congress-Peruvian Institute of Arbitration in Lima Peru, on a panel discussing the enforcement of arbitral awards.

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May 8, 2014

22nd Investment Treaty Forum

Ted Posner spoke at the 22nd Investment Treaty Forum sponsored by the British Institute of International and Comparative Law, on a panel addressing alternatives to ad hoc arbitral resolution.

May 20, 2014

The Investor-State Dispute Settlement Mechanism: An Examination of Costs and Benefits

Ted Posner will speak at a conference sponsored by the Cato Institute, entitled The Investor-State Dispute Settlement Mechanism: An Examination of Costs and Benefits, on a panel examining the question of whether investor-State arbitration strengthens or weakens the rule of law.

May 29-30, 2014

International Bar Association's International Arbitration Today: First Principles, Current Practice, Latest Trends

Samaa Haridi is speaking in Toronto, Canada at the International Bar Association's conference, International Arbitration Today: First Principles, Current Practice, Latest Trends, on a panel titled "Party Autonomy and its Limits."

Editors

Theodore R. Posner
Partner
Washington, DC
ted.posner@weil.com
+1 202 682 7064

Marguerite Walter
Associate
Washington, DC
marguerite.walter@weil.com
+1 202 682 7102

Jamie Maples
Partner
London
jamie.maples@weil.com
+44 20 7903 1179

Contributing Authors

Arif Ali
Partner
Washington, DC
arif.ali@weil.com
+1 202 682 7004

Juliet Blanch
Partner
London
juliet.blanch@weil.com
+44 20 7903 1233

Meredith Craven
Associate
New York
meredith.craven@weil.com
+1 212 310 8067

Samaa Haridi
Partner
New York
samaa.haridi@weil.com
+1 212 310 8998

Haley Lund
Associate
London
hayley.lund@weil.com
+44 20 7903 1361

Christopher Marks
Associate
London
christopher.marks@weil.com
+44 20 7903 1363

Theodore R. Posner
Partner
Washington, DC
ted.posner@weil.com
+1 202 682 7064

Roman Rewald
Partner
Warsaw
roman.rewald@weil.com
+48 22 520 4215

Marguerite Walter
Associate
Washington, DC
marguerite.walter@weil.com
+1 202 682 7102

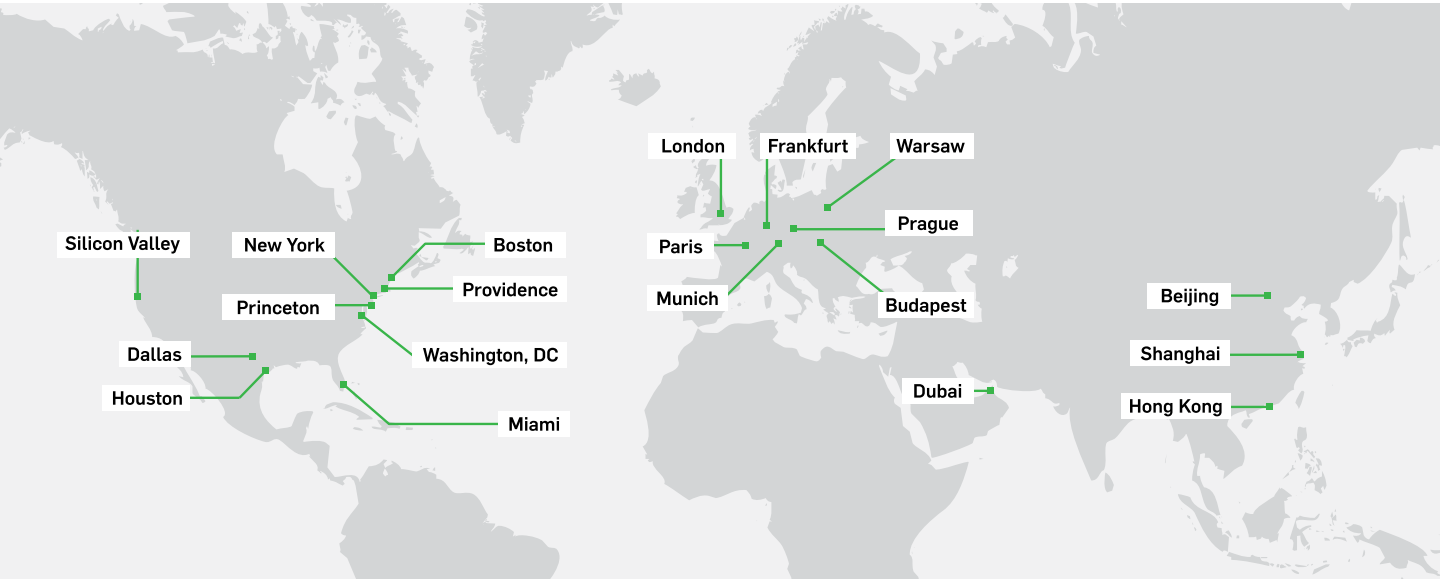
Our Global Organization

Beijing
2001 China World Office 2
1 Jianguomenwai Avenue
Beijing, PR China, 100004
Tel: +86 10 6535 5200
Fax: +86 10 6505 8366

Boston
100 Federal Street, Floor 34
Boston, MA 02110
Tel: +1 617 772 8300
Fax: +1 617 772 8333

Dubai
Dubai International Financial Centre
Level 7, Al-Fattan Currency House
PO Box 506781, Dubai, United Arab Emirates
Tel: +971 4 384 1700
Fax: +971 4 384 1701

Frankfurt
Taunusanlage 1 (Skyper)
60329 Frankfurt
Tel: +49 69 21659 600
Fax: +49 69 21659 699



Budapest
Bank Center, Granite Tower
Szabadsag ter 7
Budapest, H-1054
Tel: +36 1 301 8900
Fax: +36 1 301 8901

Dallas
200 Crescent Court, Suite 300
Dallas, TX 75201
Tel: +1 214 746 7700
Fax: +1 214 746 7777

Hong Kong
29/F Alexandra House
18 Chater Road
Central, Hong Kong
Tel: +852 3476 9000
Fax: +852 3015 9354

Houston
700 Louisiana, Suite 1700
Houston, TX 77002
Tel: +1 713 546 5000
Fax: +1 713 224 9511

London
110 Fetter Lane
London, EC4A 1AY
Tel: +44 20 7903 1000
Fax: +44 20 7903 0990

Miami
1395 Brickell Avenue, Suite 1200
Miami, FL 33131
Tel: +1 305 577 3100
Fax: +1 305 374 7159

Munich
Maximilianhoefe
Maximilianstrasse 13
80539 Munich
Tel: +49 89 24243 0
Fax: +49 89 24243 399

New York
767 Fifth Avenue
New York, NY 10153
Tel: +1 212 310 8000
Fax: +1 212 310 8007

Paris
2, rue de la Baume
Paris, 75008
Tel: +33 1 4421 9797
Fax: +33 1 4289 5790

Prague
Charles Bridge Center
Krizovnicke nam. 193/2
Prague
Tel: +420 22140 7300
Fax: +420 22140 7310

Princeton
301 Carnegie Center, Suite 303
Princeton, NJ 08540-6589
Tel: +1 609 986 1100
Fax: +1 609 986 1199

Providence
50 Kennedy Plaza, 11th Floor
Providence, RI 02903
Tel: +1 401 278 4700
Fax: +1 401 278 4701

Shanghai
30/F Tower 2, Jing An Kerry Centre
1539 Nanjing Road (W)
Shanghai, The People's Republic of China, 200040
Tel: +86 21 6016 6300
Fax: +86 21 6016 6399

Silicon Valley
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Tel: +1 650 802 3000
Fax: +1 650 802 3100

Warsaw
Warsaw Financial Center, 20th floor
ul. Emilii Plater 53
Warsaw, 00-113
Tel: +48 22 520 4000
Fax: +48 22 520 4001

Washington, DC
1300 Eye Street, NW, Suite 900
Washington, DC 20005
Tel: +1 202 682 7000
Fax: +1 202 857 0940

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World Arbitration Report is published by the Arbitration Practice Groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com

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