Association for International Arbitration
In Touch

November 2010

arbitration-adr.org

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Inside this month's issue:

AIA Upcoming Events

The Association for International Arbitration is proud to invite you to its upcoming conference on

The Introduction of Class Actions in Belgium

The topics will include lectures regarding the political, legal and ethical context of class actions, reactions from the market and the interferences with alternative forms of dispute resolution.

Location: Brussels
Date: Friday, 25th March 2011

The number of participants is limited. Registration is not yet open.
To reserve a place or for further information please contact Philippe Billiet at events@arbitration-adr.org

Report on AIA's October Conference

Contemporary Topics in Investment Arbitration:

Most Favored Nation Treatment of Substantive Rights
&
Investment Arbitration in China

The international conference, Contemporary Topics in Investment Arbitration, organised by the Association for International Arbitration in cooperation with the Vrije Universiteit Brussel that was held on October 22, 2010 drew considerable interest of the legal community. The conference was attended by over 60 participants, whose professional comments and questions turned the event into a lively discussion. The conference brought together leading international arbitration practitioners, well-known arbitrators, scholars, among others, to discuss the issues of Most Favored Nation Treatment of Substantive Rights, Investment Arbitration in China and other Contemporary Issues in Investment Arbitration. The program of the Conference included three sessions. Christian Leathley, the head of AIA's Investment Arbitration Group, from Herbert Smith, LL.M. (NYU), Attorney-at-Law (New York), Solicitor (England and Wales), acted as a moderator throughout all the sessions.

After a warm welcoming speech of AIA's President Johan Billiet where he addressed the issues of MFN's role and function in the context of the investment treaties and why MFN clauses have become the subject of much debate, the speakers of the first session took the floor.

Session 1: MFN Treatment of Substantive Rights

The speakers of the first session on MFN Treatment of Substantive Rights were Dr. Stephan Schill, LL.M (NYU), Rechtsanwalt, Attorney-at-Law (New York), Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Heidelberg; Diego Brian Gosis, Of Counsel at the International Affairs Directorate, Procuración del Tesoro de la Nación, Government of the Republic of Argentina and Professor Tony Cole, Assistant Professor of Law, Warwick Law School, University of Warwick, England.

The presentations dealt with such important issues as application of MFN clauses to substantive rights granted in international investment treaties, MFN treatment as a standard of State conduct, the meaning of "treatment" under an MFN clause and what makes substantive treatment "more favorable".

Stephan Schill provided a comprehensive overview of MFN clauses. He started by noting that MFN clauses are the tool which allow investors to access rights and obligations through investment treaties. MFN clauses aim at preventing States from entering into preferential bilateral treaties and their purpose is to multilateralize benefits falling within their scope of application and create a level playing-field with equal conditions in order to allow for undistorted competition among foreign investors. With the help of drawing a diagram on the board Stephan Schill explained the operation of the MFN clauses which presupposes a relationship of at least three states: State A (the granting State) enters into an obligation to extend to State B (the beneficiary State) the rights and benefits granted to any third State C. The economic rationale for MFN treatment is non-discrimination of investors from different home States and this equal competition, in turn, is essential for the functioning of a market economy that helps to allocate resources efficiently. Beyond its economic function, MFN treatment also has a peace-building function. It prevents States from forming bilateral economic alliances that might cause political tension or foreshadow miltary alliances. The surging bilateralism in the period before World War II, for example, mirrored the military coalitions in the upcoming war. Thus, Germany's web of bilateral economic arrangements could easily be transformed into military alliances.

The presentation of Diego Brian Gosis was focused on the issue of MFN treatment as a standard of State conduct. Argentina has concluded 59 BITs so far, 54 of which are currently in force. As early as in 1758 M. De Vattel identified the principle that treaty provisions usually contain rules of conduct by which States agree to abide, he maintained in particular that "[o]wing to the binding character of express promises and agreements, a wise and prudent Nation will carefully examine and maturely consider a treaty of commerce before concluding it, and will take care not to bind itself to anything contrary to its duties to itself and to others." The interpretation of MFN treatment obligations by States in Diego Brian Gosis' view must be understood such that the host State involved is actually provided with the chance to foresee what conduct is expected of it, and only upon a finding that, having been provided that chance, such treatment was not in fact accorded, can the host State be deemed in breach of the relevant MFN provision. However, this interpretation seems not to have prevailed in the practice of investment arbitration. In most cases the host State was never aware of what the investor considered to be the treatment due under the MFN obligations, to the effect that the proper State conduct has become in fact a moving target, while the investor is being allowed to trigger a legal attack from moving angles, like a speeding shooter. While it is quite easy to distinguish MFN treatment in trade law, where the party can refer, for example, to better tariff rate, the situation becomes more complicated in the context of international investment law. In order to interpret the wide variety of MFN obligations of States under the BITs currently in force, States should only be required to adopt such policies towards investors as they can foresee to be required of them.

Tony Cole provided deep insight into the meaning of "treatment" under a MFN clause and what exactly makes substantive treatment "more favorable". The term "treatment", according to Tony Cole, refers to the way States act, not to the effect of those actions on investors. A State that adopts a general rule that will affect investors but is not intended to do so, does not thereby "treat" investors in any way at all. The State's action affects investors, but an MFN clause guarantees equivalence of treatment, not equivalence of effects. Consequently, only if an action taken by a State, whether the adoption of a treaty or some other action, is intended to affect investors insofar as they are investors, will such an action constitute "treatment" under an MFN clause. However, not any form of benefit can suffice to make a treaty promise "more favorable". Treatment of investors will only be "more favorable" under an MFN clause in an investment treaty to the extent that it allows investors to more successfully pursue their investments. If it provides them with any other kind of benefit, or has no impact at all upon their investment-related activities, it may be "more favorable" in a colloquial sense, but not insofar as the term relates to the MFN clause in the applicable investment treaty.

Session 2: Investment Arbitration in China

The speakers of the second session, Prof. Zhao Hong, Ph.D, Minister Counsellor Permanent Mission of China to WTO and Domenico Di Pietro, Avvocato (Italy) and Solicitor (England & Wales), International Law and Arbitration Department at Chiomenti Studio Legale (Rome), Lecturer, International Arbitration, University of Rome, "Roma Tre", discussed the situation with the investment arbitration in China.

Zhao Hong gave an overview of Chinese BITs and distinguished their three generations. The Chinese-Swedish BIT concluded in 1982 can be regarded as an example of the first generation. That BIT provided only for the State-State dispute settlement and did not contain any investor-State dispute settlement provision. The Chinese BITs of the second generation in 1990s on the contrary included investor-State dispute settlement provision, but only limited number of issues could be referred to international arbitration (those regarding amount of compensation for nationalization and expropriation) and such referral was subject to prior consent. The third generation of BITs is the ones of the 21st century. Zhao Hong analyzed the investor-State dispute settlement mechanism under the Model Text 2003 of the Chinese BIT. In case the parties do not solve

the dispute through six months negotiations the investor can resort either to the competent court of the host State or to the ICSID. However, in the latter case the host country may require the investor to exhaust its domestic administrative review procedures before submitting the dispute to the ICSID.

Within her presentation Zhao Hong also spoke about arbitration in CIETAC. CIETAC was established in 1956 and since that time there have been more than 10,000 cases filed with it. Last year CIETAC received around 1,500 cases and 40% of them involved a foreign element. According to Zhao Hong the fees charged by CIETAC are fair and quite competitive.

Domenico Di Pietro shared his personal experience regarding the topic of the second session. For 2.5 years he has been advising European clients on how to invest in China as well as Chinese clients on how to invest in Europe, Africa and South America. While European and US investors have better knowledge in terms of international trade, Chinese investors benefit from the information and the support provided by their regional governments. It also happens that when Chinese companies act abroad, especially in the gas and oil sectors, they are strongly supported by their national government and if the dispute arises technically it is the dispute between two private entities, but the Chinese party can often benefit from a degree of support by its public authorities. In Domenico Di Pietro's view the described situation with Chinese investors represents the responsible way of doing business abroad as the involvement of the officials can play a crucial role for the settlement of a dispute before it deteriorates into either arbitration or litigation.

Domenico Di Pietro also pointed out an interesting tendency in international contracts. If 7-8 years ago the contracts involving Chinese parties contained provisions providing for arbitration in Europe in such recognized institutions as for example ICC, the Swiss Chambers or SCC, nowadays it is more and more common that Chinese parties would attempt to have CIETAC - or any other smaller but reliable Chinese institutions such as the Beijing Arbitration Commission or the Shanghai Arbitration Commissions - with seat in China. As a fall back position Chinese parties are prepared to accept either arbitration administered by a Chinese institution but with seat of arbitration outside of China or, alternatively, a reliable Asian arbitral institution such as HKIAC or SIAC with seat in Hong Kong and in Singapore respectively.
The speakers' presentations gave rise to numerous questions of the audience and some additional issues were touched upon. Thus, in the opinion of Zhao Hong, the main reason for China to switch to broader arbitration clauses in its BITs is because that is what the other party to the agreement would insist on. The characteristic of the Chinese culture that distinguishes it from pro-litigation European one is that you are perceived as a "bad guy" if you go to court but it does not mean that in case of a conflict with the Chinese party it will be efficient to threaten it with referring the case to the court. The mentioned feature in the opinion of Zhao Hong means that Chinese are not aggressive and they would take all the possible efforts to resolve the dispute on their own and only if they do not succeed in that they will resort to adjudication.

Session 3: Contemporary Issues in Investment Arbitration

The final session included discussions of some other, equally important, areas of investment law, such as provisional measures, Dutch BITs and investment protection in the EU, disqualification of arbitrators under the ICSID Arbitration Rules and multiple methods for resolving disputes between States and foreign investors. The speakers of the session were Lluís Paradell, Counsel, International Arbitration and Public International Law groups, Freshfields Bruckhaus Deringer; Karel Daele, Partner at MKONO & CO Advocates in Association with Denton Wilde Sapte, Dar Es Salam, Tanzania (Counsel to the Government of Tanzania); Thomas Henquet, Senior Jurist/ Legal Counsel, International Law Division, Legal Affairs Department, Ministry of Foreign Affairs, The Netherlands and Professor Dr. Alexandra Koutoglidou, Vrije Universiteit Brussel.

The question examined by Lluís Paradell was whether provisional measures having a conservatory effect on the subject matter of the dispute or those freezing the underlying legal and factual situation might be obtained against sovereign States in investment treaty cases. As a matter of fact, some investment treaties (for example Article 1134 of NAFTA Chapter 11) expressly exclude enjoining the disputed State action by provisional measures. Further, claimants in investment treaty arbitration do not usually seek a final award of specific performance or injunctive relief. Compelling a State to perform a contract or derogate legislation adverse to the claimant investor may be regarded as impractical, materially unviable or legally impossible. Sometimes the issue may be framed in terms of the non-irreparability of damage, though the most common concepts associated with provisional measures are non-aggravation of the dispute and preservation of the status quo.

Lluís Paradell gave an overview of the practice of tribunals in investment cases. He analyzed, among others, two decisions on provisional measures: Plama v. Bulgaria (6 September 2005) and Occidental v. Ecuador (17 August 2007).

In Plama v. Bulgaria the tribunal refused to grant the requested provisional measures whereby the claimant sought to halt bankruptcy and liquidation proceedings before Bulgarian courts. The tribunal stated that since the claims and relief pursued by the Claimant in the arbitration were limited to damages, the scope of the rights which could deserve protection by provisional measures were necessarily limited to the damage claims. Hence the provisional measures requested were not necessary because any prejudice could be compensated with increased damages.

In Occidental v. Ecuador the claimant asked the tribunal to

grant the right to specific performance of an oil contract and applied for a provisional measure to enjoin Ecuador from entering into new contracts with another company regarding the same oil fields. The tribunal rejected the claimant's request and stated that to impose on a sovereign State the remedy sought by the claimant would constitute reparation disproportional to its interference with the State's sovereignty when compared to monetary compensation. For the tribunal, the usual remedy in investment treaty cases is monetary compensation; restitution in kind or specific performance are to be regarded as unviable or legally impossible. Thus, it refused to grant the provisional measure on the basis that any prejudice, if subsequently found illegal by the tribunal, could be compensated by a monetary award.

In his conclusions Lluís Paradell spoke about recent tendencies in investment arbitration regarding provisional measures. He mentioned, in particular, that there remains some considerable uncertainty as to the circumstances in which interim relief for the preservation of the status quo may be available, although recent tribunals seek to distinguish Plama v. Bulgaria and Occidental v. Ecuador case law.

Thomas Henquet examined Dutch BITs and investment protection in the EU providing some observations on non-discrimination and investment restructuring. Dutch BITs contain some investor-friendly provisions, for example broad definitions of "investment" and "national", that investors of third States may also wish to rely on. However, it is unlikely that the investor-friendly provisions in the Dutch BIT can be incorporated through the MFN clause in the other BIT. In order to qualify for protection under the Dutch BIT investors may restructure their investments through the Netherlands prior to a dispute with the investment host State. Insofar as the BIT is between the Netherlands and a non-EU member State, this reconstruction will be affected by the new EU investment policy, further to the recent entry into force of the Lisbon Treaty. If future EU investment agreements with third States contain similar broad definitions of "investment" and "national", investors will have an option to restructure their investment through any EU member State.

In the light of the new EU investment policy, the European Commission has proposed transitional arrangements that encompass the authorization for member States' BITs with third States to remain in force. During a period of five years, the Commission will review these BITs for their compatibility with EU law, and authorization might be withdrawn. In such a case the member State can attempt to re-negotiate the BIT with the third State to make the BIT acceptable to the Commission, or it must terminate the agreement. Likewise, EU member States must obtain authorization from the Commission to conclude a new BIT with a third country. As to the advisability of restructuring an investment in order to rely on an intra-EU BIT, the relationship between such BITs and EU law, according to Thomas Henquet, requires further study.

Karel Daele spoke about disqualification of arbitrators under the ISCID Arbitration Rules and emphasized that the disqualification mechanism in ICSID system is even more important than in other arbitration systems for the two main reasons. First, parties to an ICSID arbitration have near-full autonomy when constituting the tribunal as the appointment of an arbitrator is a unilateral decision which is not subject to the approval of the other party or the ICSID Centre. Second, there is no solid safety net for awards issued by biased ICSID tribunals as the scope for review of ICSID awards at the annulment or enforcement stage is very limited to non existent.

The number of challenges has increased dramatically in the last 5 years, which is severely criticized by eminent arbitrators and commentators. However, thanks to that rise in challenges the problematic issues in the ICSID disqualification mechanism can be identified. Karel Daele chose to discuss three procedural aspects of disqualification.

First, the arbitrators have the duty to disclose. This serves a number of purposes: it helps to avoid selection of an arbitrator who could have been successfully challenged on the ground of a conflict of interest had he or she been selected; it allows parties to challenge an arbitrator if they disagree with his or her appointment to the tribunal on the ground of a conflict of interest and finally if after arbitrator's disclosure no objection is timely made the right to challenge the arbitrator on the grounds mentioned in the disclosure is then deemed to have been waived. The scope of the disclosure obligation is however unsettled. This is illustrated by the disqualification decisions issued in Suez v. Argentina and in EDF v. Argentina and by the second annulment decision in Vivendi v. Argentina. Each one of these Tribunals set a different standard.

The second procedural aspect addressed by Karel Daele was the prompt filing of the disqualification proposal. Usually arbitration rules set a definite deadline for challenging an arbitrator. The ICSID Convention takes a different approach. It requires a party to file its disqualification proposal "promptly" without any further definition of the term "promptly". The existing case law shows that the filing of a disqualification proposal within one month will be considered prompt, whereas a period of five months or longer will be considered untimely. For anything in between one and five months, tribunals' decisions have not been consistent. In any event, the disqualification decisions in Suez v. Argentina and in CEMEX v. Venezuela illustrate that in deciding whether a party has complied with the timing requirement, all the factors of the case must be taken into account.

Third, as distinct from other arbitration systems where decisions on a disqualification proposal are taken by the arbitral institution or the appointing authority, it is the other members of the tribunal who take the decision on a challenge in the ICSID system. This peer review system has a number of drawbacks, the most important one being the impartiality and independence of the deciding co-arbitrators. They may not be entirely impartial because they may have developed professional and/or social relationships with the challenged arbitrator. They may also not be entirely independent as, by setting a standard for their fellow-arbitrator, they also set a standard for themselves in future arbitrations.

As the rise in challenges is unlikely to come to a halt, there will be new opportunities, in the opinion of Karel Daele, to clarify a number of problematic procedural and substantial issues.

Alexandra Koutoglidou's presentation was focused on multiple methods of resolving disputes between States and foreign investors that currently are either allowed or even imposed by the regime of international investment law. Looking back into the history one might see that until as recently as 1980 international legal instruments dealing exclusively with the foreign investments were rare and they proliferated during the 1990s. Within a decade, the number of BITs providing for arbitration of investor-to-host State disputes exceeded 2000, and the conclusion of NAFTA and the Energy Charter Treaty established more sophisticated rules in the field of international investment law. All these international treaties developed in addition to existing national law protective instruments. According to Alexandra Koutoglidou it is quite possible that the plethora of international treaties, investment laws and contracts, was not developed in ignorance of the consequences, but with the purpose of offering to foreign investors a *forum shopping in favorem*.

However, the lack of rules establishing a clear hierarchy of applicable international and national laws offered the opportunity to the foreign investor to have recourse to all the multiplicity of dispute resolution mechanisms either simultaneously or successively. The possible scenarios of multiplicity include a number of different scenarios that all arise by the simultaneous application of multiple sources of law. Such multiple proceedings are undesirable for two reasons. First, they waste national resources of the States parties to a dispute and second, they can possibly lead to inconsistent or conflicting awards for related disputes and consequently pose a threat to the predictability, legal certainty and consistency, which are key elements of any legal regime; it was nevertheless outlined that *different* decisions are not necessarily *contradictory* decisions. The most effective solution for the current situation with the multiple proceedings, in Alexandra Koutoglidou's view, is to adopt a multilateral treaty which would comprehensively regulate the promotion and protection of foreign investment. However, this option does not seem achievable at the time being.

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AIA would like to thank all the speakers who found time in their busy schedule to provide the audience with discussion provoking presentations as well as all international attendees who actively participated in the debates raised during the conference!

2010 INTERNATIONAL ARBITRATION SURVEY: KEY FINDINGS

The School of International Arbitration at Queen Mary, University of London, conducted a major new survey entitled 'Choices in International Arbitration'. This survey considers the key factors that influence corporate choices about international arbitration and it was sponsored by White & Case. Next, some of the most relevant data of the survey will be considered.

The Sample

The research for this study was conducted from January to August 2010 and comprised two phases: an online questionnaire completed by 136 respondents (general counsel, heads of legal departments, specialist legal counsel and regional legal counsel) and 67 in-depth interviews based on a set of guideline questions and ranged from 15 minutes for phone interviews to 90 minutes for interviews in person. Interviews were conducted in London, Paris, Mumbai, Florence, Milan, Istanbul, Tokyo, Beijing, Houston, New York, Washington, DC, Rio de Janeiro, Sao Paulo, Dubai, Frankfurt, Moscow, Warsaw and other locations.

The Objective

The objective of this study was to determine the key factors that drive corporate choices about arbitration: how are decisions made about arbitration, who influences these decisions and what considerations are uppermost in the minds of corporate counsel when they negotiate arbitration clauses.

Key Findings

The key findings from the study are:

<u>Choices about international arbitration</u>

⇒ 68% of corporations have a dispute resolution policy. Whether or not they have a policy, corporations generally take a reasonably flexible approach to negotiating arbitration clauses. They have strong preferences regarding confidentiality and language and reasonably strong preferences regarding governing law and seat. In all cases, the result depends on the nature of the contract and the relative bargaining positions of the parties.

⇒ The law governing the substance of the dispute is usually selected first, followed by the seat and then the institution/rules. 68% of respondents believe that the choices made about these factors influence one another, particularly in relation to the governing law and seat.

⇒ The general counsel is usually the lead decision-maker on arbitration clauses, although the legal department may only be brought into negotiations at a late stage.

<u>Choice of the law governing the substance of the dispute</u>

⇒ Choice of governing law is mostly influenced by the perceived neutrality and impartiality of the legal system with regard to the parties and their contract, the appropriateness of the law for the type of contract and the party's familiarity with the law.

⇒ The decision about governing law is a complex issue to which most respondents and interviewees appear to take a considered and well thought out approach.

⇒ 40% of respondents use English law most frequently, followed by 17% who use New York law.

⇒ The use of transnational laws and rules to govern disputes, at least partially, is reasonably common (approximately 50% have used them at least 'sometimes'), but use varies depending on the particular law or rules.

⇒ 53% of respondents believe that the impact of the governing law can be limited to some extent by an extensively drafted contract, 29% believe it can be limited to a great extent.

Choice of the seat of arbitration

⇒ Choice of seat is mostly influenced by 'formal legal infrastructure' (the national arbitration law, track record in enforcing agreements to arbitrate and arbitral awards, neutrality and impartiality of legal system), the law governing the contract and convenience.

⇒ London is the most preferred and widely used seat of arbitration.

⇒ London, Paris, New York and Geneva are the seats that were used most frequently by respondents over the past five years. The level of user satisfaction for these seats is high. For all four seats a majority of users described them as either 'excellent' or 'very good'.

⇒ Singapore has emerged as a regional leader in Asia.

⇒ Respondents have the most negative perception of Moscow and mainland China as seats of arbitration.

Choice of arbitration institution

⇒ Corporations look for neutrality and 'internationalism' in their arbitration institutions and expect institutions to have a strong reputation and widespread recognition.

⇒ The ICC is the most preferred and widely used arbitration institution.

⇒ The ICC, LCIA and AAA/ICDR are the institutions used most frequently by respondents over the past five years. For all three institutions, a majority of users rated them as either 'good' or higher.

⇒ Respondents have the most negative perception of CRCICA (Cairo Regional Centre for International Commercial Arbitration), DIAC (Dubai International Arbitration Centre) and CIETAC (China International Economic and Trade Arbitration Commission).

Appointment of arbitrators

⇒ Open-mindedness and fairness, prior experience of arbitration, quality of awards, availability, knowledge of the applicable law and reputation are the key factors that influence corporations' choices about arbitrators.

⇒ 50% of respondents have been disappointed with arbitrator performance.

⇒ Corporations want greater transparency about arbitrator availability, skills and experience and, to some extent, greater autonomy in the selection of arbitrators.

⇒ 75% of respondents want to be able to assess arbitrators at the end of a dispute. Of these, 76% would like to report to the arbitration institution (if any). 30% would like to be able to submit publicly available reviews.

Confidentiality

⇒ The responses indicate that confidentiality is important to users of arbitration, but it is not the essential reason for recourse to arbitration.

⇒ 50% of respondents erroneously believe that arbitration is confidential even where there is no specific clause to that effect in the arbitration rules adopted or the arbitration agreement and 12% did not know whether arbitration is confidential in these circumstances.

Time and delay

⇒ Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay.

⇒ According to respondents, parties contribute most to the length of proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly.

Comment

The survey provides significant insights into international arbitration and how and why its use has developed over recent years. The arbitration community should find a way to learn from these key finding in a manner consistent with the long-term interest and purpose of the arbitration system. Additionally, this survey raises new questions and many more will turn up. For instance:

⇒ There appears to be general support for newer arbitration institutions, with regional knowledge and presence. When will they have the opportunity to prove themselves?

⇒ The disappointment about arbitrators performance is high (50%), how could this perception be changed for the benefit of arbitration?

⇒ Is it convenient to give a more influential role to the parties in the selection of the Tribunal? Is it the review or assessment of arbitrators at the end of the dispute a good mechanism for transparency and independence?

⇒ Confidentiality is considered a deal-breaker in some cases. However, it seems that in many cases there is not a proper understanding of its regulation (arbitration rules or arbitration clauses), how to improve the understanding of confidentiality in arbitration? Is it possible to harmonize confidentiality rules when one party is a state?

The survey is available at http://www.whitecase.com/files/upload/fileRepository/2010-International-Arbitration-Survey-Choices-International-Arbitration.PDF

Rent-A-Center, West, Inc. v. Jackson

by Eugene S. Becker and Stephen H. Marcus

In a recent 5 to 4 United States Supreme Court decision, Rent-A-Center, West, Inc. v. Jackson, U.S., No. 09-497 (2010), the majority held that where an agreement to arbitrate includes an agreement that the arbitrator will determine the enforceability of the agreement, the district court has jurisdiction to consider challenges to that provision. Where a party, by contrast, challenges the enforceability of the agreement as a whole, that challenge is only for the arbitrator to decide.

Rent-A-Center involved an employment agreement that contained an arbitration provision. The agreement in Rent-A-Center included a provision for arbitration of all disputes arising out of Jackson's employment, including discrimination claims, and it gave the "arbitrator … exclusive authority to resolve any dispute relating to the [Agreement's] enforceability…including… any claim that all or any part of this Agreement is void or voidable."

The majority concluded that since Jackson challenged only the validity of the contract as a whole and not the validity of the agreement to arbitrate, the question was for the arbitrator and not the court to decide. In so holding the Supreme Court reversed the decision of the Ninth Circuit, reported at 581 F3d 912 (2009). The Supreme Court split along politically conservative and liberal lines.

The conservative majority noted that there were two types of validity challenges under the Federal Arbitration Act § 2. One type challenges specifically the validity of the agreement to arbitrate. The other challenges the contract as a whole either on a ground that directly effects the entire agreement (e.g. fraudulent inducement) or on the ground that illegality of one of the contract's provisions renders the whole agreement invalid. Under existing precedent (Prime Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 [1967]), only the first challenge is relevant to the court's determination. This is so because FAA § 2 states that a written provision to arbitrate is valid and enforceable without mention of the validity of the contract in which it is contained.

The dissent observed:

> Neither petitioner nor respondent has urged us to adopt the rule the Court does today: Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator – that so-called "delegation clause."

The dissent further stated that questions of arbitrability may go to the arbitrator when the parties have demonstrated it is their intent to do so. The agreement at bar, however, did not evince the parties' intent to submit questions of arbitrability to the arbitrator. "Respondent's claim that the arbitration agreement is unconscionable undermines any suggestion that he 'clearly' and 'unmistakably' consented to submit questions of arbitrability to the arbitrator… [W]hen a party raises a good-faith validity challenge to the arbitration agreement itself, that -issue- must be resolved before a court can say that he clearly and unmistakably intended to *arbitrate* the very validity question."

The Rent-A-Center decision upholds a contractual provision delegating questions of enforceability to the arbitrator. Furthermore, in light of this decision, a party challenging the agreement must do more than claim the arbitration agreement is unenforceable. He would have to attack the precise agreement to arbitrate sought to be enforced. Our submission is that Rent-A-Center expands the discussion on arbitral provisions and their plenary agreements towards a new realm as discussed above. The distinction that the majority set out for such an analysis is highly nuanced. It will remain to be seen how arbitral practice deals with the effect of this decision.

Report on the C5 Investment Treaty Arbitration conference in London, 22-23 September 2010

by Ewa Kurlanda

Introduction

The latest C5 Investment Treaty Arbitration conference which took place in London on 22 and 23 September 2010 aimed its discussions at the measures affected to FDI and afforded a thorough and panoramic view of the issue.

The speakers were eminent members of the legal profession who specialise in international public law, cross-border commercial arbitration and dispute settlement, international investment law and international as well as domestic litigation, often acting as counsel to investor-state disputes.

This article purports to give an overview of the findings under the C5 Investment Treaty Arbitration conference.

Foreign Direct Investment

Foreign Direct Investment (FDI) often affords the host state great benefits, such as improvement of health facilities and infrastructure, in addition to creating jobs for the third country nationals. But above all, an investor seeks a return from his business by maximising profits and repatriating capital.

What happens when the political situation of the third country goes askew and a new government deploys mechanisms designed to discourage foreign investment for this or other reason? Surely there are legal structures set up to pro-

tect the investor from dire consequences of new legislation or a general lack of fair play on the part of the state, but how far does the enforcement of these structures go?

Reliance of a foreign investor on the means offered to it by the host state in the circumstances of an investment in that country more often than not result in the investor's expropriation. Various treaties and tribunals have been established throughout the past decades to ensure that foreign investors are protected against arbitrary unfair dealings with the investor, denial of rights or benefits previously afforded, such as outright changes in royalties or favourable tax schemes or any other action which discourages business conducted outside the investor's borders. In the absence of an effective contract which would monitor any breach on the part of the host state, the investor is left with bringing a claim in a domestic court of the host state which more often than not is uncertain, unstable, ineffective and sometimes hazardous. There remains, of course, redress for the investor's government for its nationals by diplomatic means or those of international Tribunals which deal with civil or criminal breaches, but these should be a last resort.

Arbitration and Investment Treaties

In view of this, business conducted domestically but perhaps even more so internationally turns to various forms of alternative dispute resolution (ADR) in order to resolve claims of breach. Arbitration is a leading form of ADR in this respect as throughout the years it has developed into a cost and time effective procedure, and various forms and institutions of international public law, such as the International Centre for the Settlement of Investment Disputes (ICSID) through the World Bank, have ensured that the injured party has access to a stable remedy in the event of a breach committed by the other side.

Treaties of Commerce, Friendship and Navigation (CFN), Bilateral Investment Treaties (BITs), Energy Charter Treaty (ECT), North American Free Trade Association (NAFTA) have further expounded on the protection of FDI.

A prominent topic at the C5 conference concerned BITs and the benefits afforded to parties who choose to cover their investment by means of the agreement. Most BITs contain clauses which refer any dispute between the parties to international arbitration. The remedy for a breach of a BIT seeks to place the injured party into the *status quo* position, therefore as if the breach never occurred.

The most common protections under BITs include non-discriminatory fair and equitable treatment, full security and protection, treatment at least as good as that provided by the host state to its own nationals (national treatment), treatment at least as good as that provided by the host state to nationals of third states (most favoured nation treatment), free transfer of payments, repatriation of investments and returns, and no expropriation unless against prompt, adequate and effective compensation. These were discussed in detail by Matthew Coleman, partner at Steptoe and Johnson, and were referred to throughout the various speeches as a dominant form of investor insurance.

An interesting viewpoint was afforded by Alejandro Escobar, Special Counsel at Baker Botts, who discussed Investment Treaty Arbitration in South America. South American countries comprise 30 per cent of state parties to ICSID and are often mistakenly seen as a Latin-American "bloc". Issues considered the withdrawal of countries from ICSID, termination of treaties, unsuccessful challenges made under the ICSID Convention, and alternative arrangements based on the United Nations Commission on International Trade Law (UNCITRAL) standard. The topic was further expounded in talks on Treaty Shopping and the international community's say in the matter as to its legality or rationale. For example, Article 1(5) of the BIT between the UK and Mexico defines 'investor' to mean *an enterprise which is either constituted or otherwise organised under the law of a Contracting Party, and is engaged in business operations in the territory of that Contracting Party,* whereas Article 1 of the Swiss – India BIT sees the word to mean *companies, including corporations, partnership firms and associations, constituted in accordance with the law of that Contracting Party, and engaged in substantive business operations in the territory of the same Contracting Party.*

These have been looked into with regard to the ICSID definition of a national of a contracting state provided in its Article 25 and a most interesting presentation was propounded in relation to up to the latest ISCID arbitration tribunal decisions, for example *Phoenix v Czech Republic, Mobil v Venezuela, TSA v Argentina*, which illustrate the problem of creating off-shore company subsidiaries to benefit from the BIT, in the event that one party is not privy to the agreement, in order to gain access to international arbitration. Another issue is the subsequent need to pierce the corporate veil to discover the ultimate owner of the company, and therefore the foreign investor, to the claim.

The question of bribery and corruption, including judicial corruption, was also evaluated in the subject matter of the seminars in addition to the problem of impartiality and independence of arbitrators.

The NAFTA, UNCITRAL, ECT, ICSID Convention, ICSID Additional Facility and New York Convention as well as model BITs provide for enforcement of arbitration awards without delay, as expanded by Ray Werbicki of Steptoe & Johnson in his presentation on the topic, which included insights into national defences to enforcement of awards under various domestic and international legislation, such as the State Immunity Act 1978, Vienna Convention Article 31(3)(c). Various further issues, such as those of public policy, stays of execution as well as practical questions regarding enforcement of awards, for example locating assets or non-cooperation of any party, were evaluated on in view of the most recent cases.

Finally, conference discussions arose as regards third-party intervention in investment treaty arbitrations, such as third party funding of arbitration, a phenomenon which has observed significant increase within the past few years.

Insight was also provided to the other side of the coin, i.e. social provisions of foreign investment and the need to protect nationals of the third state from their own governments by means of, for example, reinvesting revenue instead of allocating them as dividends. A look into the Indigenisation and Economic Empowerment Regulations 2010 helped to appreciate the international community's interest in the just distribution of proceeds from FDI. Expropriation of a foreign investor is sometimes necessary in view of public policy, health or environmental protection reasons and this would not result in adequate and immediate compensation if it is aimed at the general welfare and is adopted *bona fide* in a non-discriminatory way, as developed in *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award of 17 March 2006.

Conclusion

The Investment Treaty Arbitration seminar promised, and delivered, the latest legal developments, tactics and strategies to provide a competitive edge. It elaborated on the most recent cross-border arbitration awards and divulged hot topics for investment treaty arbitration in a global context.

SPORTS MEDIATIONS
Preserving Sporting and Business Relationships
by Ian Blackshaw

One of the advantages mediation has over litigation is that it tends to maintain and preserve business relationships among the parties.

This is particularly so in the case of sports disputes because, generally speaking, the sporting world is small – and, at times, incestuous. Everyone knows and is in the pockets of everyone else and, oftentimes, they are fighting for the same bit of turf!

In a good Mediation, everybody wins something--it is a win-win process, unlike litigation, which is a win-lose process. And the parties are usually able, as a result of reaching a settlement of their dispute through Mediation, to carry on where they left off when the dispute arose. Mediation enables their personal and business relationships to be ongoing ones. This, of course, is worth fighting for!

This phenomenon is illustrated by a dispute between the boxer Richie Woodhall and the boxing promoter Frank Warren. Because of the confidential nature of Mediation, the facts of the case are somewhat vague, but a number of the details of the dispute and how - perhaps more importantly why - it was settled emerged from a Press Release that was issued by the parties following the successful conclusion of the Mediation.

The facts and circumstances of the dispute are as follows:

Richie Woodhall sought to terminate his management and promotion agreements with Frank Warren, claiming that Warren was in breach of them and that the agreements were unenforceable. Woodhall refused to fight for Warren and began approaching other boxing promoters.

On the other hand, Warren refused to let Woodhall go, claiming that the contracts were valid, there was still considerable time left to run on them, and he was not in breach of them. The parties were adamant in their respective positions.

Woodhall, therefore, started proceedings in the English High Court. He requested an early hearing of the case to enable him to fight the defence of his world title within the deadline of a few months, as required by the rules of the World Boxing Organisation. As the agreements required that any disputes be referred to the British Boxing Board of Control, Warren, for his part, sought an order from the Court to that effect.

This dispute had all the makings of a full-blown legal fight in the Courts--with lots of blood on the walls and in the full glare of the media. As such, it would not only be time consuming and expensive to both parties, but also potentially damaging to their reputations. In addition, Woodhall was anxious to get back in the ring and, if he were to continue to be of any value to Warren, he needed to fight his mandatory defence to his world title within a relatively short period of time.

So, in all these particular circumstances, the question arose as to whether the Court was the best forum in which to resolve this dispute. It was decided to refer the dispute to Mediation. And the Court was prepared to adjourn the proceedings, for a short time, to enable the parties to see if they could, in fact, settle their differences by this process.

A hastily arranged Mediation was set up and conducted by CEDR (Centre for Effective Dispute Resolution), a body, based in London, which provides a wide range of ADR services, including Mediation. Within 72 hours of the matter being referred to Mediation, the dispute was, in fact, satisfactorily resolved, and Woodhall signed a new deal with Warren and continued to box for him for some time afterwards.

Since mediation is confidential and there is no official record or transcript of the process, it is not possible to have a 'blow by blow' account of the proceedings--which arguments were made, exactly why a settlement was reached (e.g. what leverage the mediator was able to apply to reach a compromise), and what the actual terms were. One thing, however, that can be deduced from the brief facts and circumstances of this dispute is that there were some sporting and commercial deadlines that focused the minds of the parties and motivated them to reach a compromise. There was also a pressing need for the parties to restore and maintain their sporting and business relation-

ships.

Thus, Mediation continues to be a very valuable tool for settling sports disputes quickly – sporting deadlines are often a pressing consideration as in the Woodhall-Warren case – and inexpensively. They also help get relations back on track for the mutual benefit of the parties!

AIA recommends to attend

AIA – VUB Moot Arbitration at the Vrije Universiteit Brussel

AIA is happy to announce its upcoming moot arbitration in cooperation with VUB. The 30 students of the Postgraduate Course in International Business Arbitration will plead an international commercial case that emphasizes the principles of UNIDROIT.

The event will take place at the Vrije Universiteit Brussel, Campus Etterbeek on the 3rd of December, between 2 PM – 5.30 PM. Upon prior contact with AIA, everyone is welcome to attend the event.

Please e-mail us:
administration@arbitration-adr.org

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IInd International Arbitration Conference in Tbilisi, Georgia On The Role of Investments in Economic and Social Development of Caucasian Countries. National and International Legislative Guarantees.

The Representatives of the European Arbitration Chamber in Georgia are proud to present the IInd International Arbitration Conference to be held on November 26th, 2010 in the Georgian capital.

The conference is an excellent place to have an overview on the current state of investment climate in the Caucasian countries. The forum provides an opportunity to examine the features of national law on arbitration in the aforesaid region.

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