

# International Disputes Quarterly

## *Focus on Construction Arbitration*

### In This Issue...

Introduction: Focus on Construction Arbitration .....	1
FIDIC to Issue New Design, Build and Operate Form of Contract .....	2
Physical Inspections, When Planned and Conducted Properly, Can Prove Beneficial in International Construction Arbitration .....	3
Radical Adverse Change in Circumstance: Can a Contractor Obtain Compensation When a Construction Contract Contains No Price Escalation Clause? .....	5
Defects in Construction and the Temporary Disconformity Principle .....	6
The Eurotunnel Decision: France and the UK Held Liable .....	10
PPP Law Brings Positive Change to Public, Private Sectors in Greece .....	11
<b>Client Alerts: Recent Developments in International Arbitration</b> .....	13
Practice Tips: Tips for Making “Sealed Offers” in International Arbitration to Cap Liability for Costs .....	23
What Our Practitioners Are Saying .....	27
Practitioner Appointments and Practitioner Recognition .....	28

## Introduction: Focus on Construction Arbitration

White & Case has long been recognized as a leader in the field of construction arbitration, the area of focus for this issue of *International Disputes Quarterly*.

Construction arbitration is a specialized area of arbitration, demanding knowledge and skill in areas such as engineering, design and building standards. The articles in this edition of *International Disputes Quarterly* canvass recent key developments in construction practice and arbitration. A model contract soon to be issued by the International Federation of Consulting Engineers is examined in the first article of this issue. In its current draft form, this new model contract will be suitable for projects combining design, construction and long-term operation and maintenance of a facility, specifically for projects which are awarded to a single contractor (typically, a joint-venture or consortium). Other construction-related developments reported on in this edition are the law of

Public-Private Partnerships in Greece as it applies to construction and the 2007 decision in the Eurotunnel arbitration.

This edition of *International Disputes Quarterly* also offers some practical considerations to bear in mind when conducting a physical inspection as part of a construction dispute. The authors lay out a procedure to follow during the inspection to maximize the benefit of such inspections and to ensure fairness and equality between the parties to a dispute.

Finally, our focus on construction arbitration considers two relevant legal principles: (i) the principle, under the law of a number of civil law countries, that even in the absence of a price escalation clause in the contract, contractors might obtain an adjustment of contract price where circumstances have changed in a manner that was unforeseeable and (ii) the emerging English law principle of “temporary disconformity” which may

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provide a balance between an owner's need for a remedy without waiting for completion of a project, with a contractor's right to complete and correct work without being liable for pre-completion remedies.

Together the pieces in this edition aim to give readers a taste of some of the issues that arise in construction arbitration. We hope you find it informative.

## FIDIC to Issue New Design, Build and Operate Form of Contract

**Christopher Seppälä,  
Nicolas Bouchardie**

The International Federation of Consulting Engineers (*Fédération Internationale des Ingénieurs-Conseils* or FIDIC) is planning to publish in 2008 new Conditions of Contract for Design, Build and Operate Projects (the DBO form). This new model contract will supplement FIDIC's existing forms of contract for major works, namely the Conditions of Contract for Construction (the Red Book), the Conditions of Contract for Plant and Design-Build (the Yellow Book) and the Conditions of Contract for EPC Turnkey Projects (the Silver Book) issued in 1999. A pre-press seminar edition of the DBO form has recently been circulated for comments.

In its current draft form, the new DBO form will be suitable for projects combining design, construction and long-term operation and maintenance of a facility, which are awarded to a single contractor (typically, a joint-venture or consortium). While being responsible for the project's design, construction and operation, the contractor will have no responsibility for its financing or for its ultimate commercial success. The facility's output (for example, electricity, in the case of a power plant) will be the project owner's property and not the contractor's, as is generally the case in concession arrangements.

The overall contract duration will be divided into two distinct periods:

- the Design-Build Period, at the end of which the facility will be handed over to the project owner (through issuance of a taking-over or commissioning certificate); and

- a 20-year Operation Period, during which the contractor will maintain and operate the facility for the project owner's benefit and will be required to respect pre-defined output criteria. Parties will be free to choose a shorter or longer Operation Period, but FIDIC has warned that the DBO form should not be used for projects where the Operation Period differs significantly from 20 years.

The contractor will be compensated for its work during the Design-Build Period as in regular design-build projects (presumably, a lump sum) and receive separate compensation for operating and maintaining the facility during the Operation Period. As FIDIC has pointed out, the contractor will have an incentive to design and build a facility that is both reliable and cost effective (i.e., with low operation and maintenance costs) as it will be responsible for maintaining the facility at its cost during the Operation Period. An asset replacement fund will provide the necessary funding for the replacement of important pieces of equipment. At the end of the Operation Period, the responsibility for operation and maintenance will be transferred to the project owner for the facility's residual life.

In its current draft form, the DBO form follows the traditional format and layout of previous FIDIC model contracts. It contains many traditional FIDIC clauses. For example, an Employer's Representative will be appointed prior to the signing of the contract. The Employer's Representative will have the authority to make decisions on behalf of the project owner but not to relieve either party from its contractual duties. Thus, the Employer's Representative will be able to grant extensions of time postponing the date

of issuance of the commissioning certificate (and the overall project completion date). The determinations of the Employer's Representative will be binding on the parties unless and until reversed by the Dispute Adjudication Board (DAB).

If one (or both) party(ies) elect(s) to contest the DAB's ruling and assuming that the parties are unable to settle the matter amicably, the dispute may then be referred to arbitration under the ICC Rules of Arbitration.

## Physical Inspections, When Planned and Conducted Properly, Can Prove Beneficial in International Construction Arbitration

**Frank Panopoulos,  
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### Introduction

In construction arbitration, the nature of the dispute often centers on the extent to which the structure at issue complies with contractual specifications. Although documents regarding the construction schedule or the materials and methods employed during construction may provide helpful relevant information, an ocular physical inspection of the structure itself can constitute persuasive evidence of the degree of contractual performance.<sup>1</sup>

To maximize the benefit of a physical inspection and to preserve the principles of fairness and equality of the parties, it is important that the Tribunal and the parties establish a procedure to be followed during the inspection. The key steps in such a procedure are described below, followed by a brief discussion on the potential

significance of statements and other evidence recorded or collected during an on-site survey of the structure at issue.

### Establishment of an Inspection Protocol

Typically, the Tribunal (or, sometimes, a Tribunal-appointed expert) will conduct an ocular inspection of a structure or a construction site accompanied by representatives of the parties. Several procedural issues arise from this situation. It is not clear, for instance, whether the Tribunal and the parties should interact and if so, how. Assume, for example, that during an inspection members of the Tribunal wish to ask questions. Because the answers to these questions may address directly the crux of the dispute, the parties need to devise a manner in which each can respond in an orderly fashion, with proper notice to the other party and without engaging in legal argument.<sup>2</sup> This constitutes merely one of several procedural matters the parties need to agree on or the Tribunal needs to rule on, prior to inspection:<sup>3</sup>

## *Intimate Knowledge of All Stages of a Construction Project*

We advise clients across the globe on all their construction-related needs, from the drafting of tender and project documentation, to the resolution of disputes. All our lawyers work on both project development and dispute resolution, providing a unique understanding of the full life cycle of a construction project and the issues that can arise.

1. Such a hands-on approach is contemplated in most mainstream arbitral rules and lies, therefore, squarely within the discretion of many arbitral tribunals. ICC Rule 20(1), for example, renders independent fact-finding by a Tribunal as a duty by providing that "the Tribunal shall proceed...to establish the facts of the case by all appropriate means"—a broadly phrased rule that apparently allows on-site inspections. See ICC Rules of Arbitration, Art. 20(1). Other rules do so explicitly. ICSID Rules 34(2)(b) and 37; IBA Rules, Art. 7 (allowing on-site inspections of relevant goods or sites).
2. The UNCITRAL Notes on the Organization of Arbitral Proceedings, for example, explicitly preclude ex parte communications between a party and the Tribunal during an inspection. Note 57.
3. Most Tribunals enjoy broad discretion in determining arbitral procedure and can do so when the parties fail to agree. UNCITRAL Model Law on International Arbitration Art. 19, for example, states: "Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings." If the parties fail, "the arbitral tribunal may, subject to the provisions of this Law, conduct the proceedings in any manner it deems appropriate." Prominent commentators have characterized Article 19 as the "most fundamental rule of due process and *ordre public*." Matti S. Kurkela and Hannes Snellman, *Due Process in International Commercial Arbitration* 182-84 (2005).

## *Involvement in the Industry*

Christopher Seppälä, a Paris-based partner, is the Legal Adviser to the FIDIC Contracts Committee, which produces the most widely used standard forms of international construction contracts. Among other things, he assisted the FIDIC in the drafting of the dispute adjudication board rules included in the current FIDIC contracts and our group has been involved in advising clients in relation to the establishment and successful operation of dispute adjudication and/or review boards in relation to projects around the world.

**Party Representatives:** Each party should designate which of its representatives will accompany the Tribunal in an inspection. Each party should appoint a reasonable number of representatives to avoid potential safety concerns. If no Tribunal-appointed expert is present and Tribunal members do not have sufficient technical expertise in construction matters to assess fully the importance of what they observe, the parties may opt to include their own experts in the inspection delegation. This can be particularly important if the inspection takes place close to or during a hearing on the merits, since expert commentary with the actual structure serving as an illustration of various technical points can be very helpful to the Tribunal. The manner in which these experts can assist the Tribunal should also be predetermined, as discussed below (under “Interactions with the Tribunal”).

**Areas to Be Visited:** Each party has a stake in presenting its case in the best possible light and certain parts of the structure or site may accomplish this better than others. In the interest of fairness and expediency, the parties should reach agreement in advance as to which areas the Tribunal will visit, without prejudicing either party’s case or jeopardizing the safety of the Tribunal and the parties.

**Route of the Inspection:** To preserve equality, neither party should “lead” the inspection—i.e., single-handedly determine the path through the construction site that the Tribunal should follow. After taking safety and security considerations into account (discussed below) the parties should agree on or the Tribunal should set out, a route through each of the areas to be inspected.

**Interactions with the Tribunal:** Because of the concerns mentioned above, the parties should establish rules for addressing the Tribunal and responding to the Tribunal’s questions, including the timing, length and format of any response (on-site oral answers, subsequent separate

presentations or submissions). In any event, particular attention should be paid by the parties and the Tribunal so as not to transform the inspection into an ad hoc evidentiary hearing. Any rules established in this regard would apply to the parties’ experts, as well.

**Safety and Security:** Construction sites and unfinished structures may pose dangers that require safety measures to be taken prior to inspection. The parties should decide collectively on the appropriate safety measures, including cordoning off hazardous areas, ensuring adequate signage and signing liability waivers. If necessary, the parties should devise a protocol to be followed in case of emergency.

## **On-Site Statements and Other Evidence**

Important questions arise with respect to evidence collected during an inspection. Such evidence can include a recording of the inspection itself (typically by video or photo camera) and the statements made by either party or the Tribunal. Video or photographic images can be controversial, since their angle and order of presentation, among others, can convey a different impression than that of the naked eye. Moreover, given the fallibility of human memory, such images could ultimately affect the Tribunal’s conclusions from the actual inspection.

Two solutions, therefore, seem appropriate. The Tribunal can appoint its own independent videographer or photographer, accompanied by assistants who would keep a written record (in transcript or note form) of the Tribunal’s on-site findings. Alternatively, the Tribunal can allow each party to prepare its own set of images, with due regard to veracity and accuracy and determine their admissibility similarly to any other type of documentary evidence.<sup>4</sup>

With respect to statements made by the parties during the inspection, as a general matter they should be aimed to assist the Tribunal and should

4. It is worth noting that the Tribunal has discretion to rely solely on the video or photo surveys of the parties and forgo the inspection altogether.

not be used as evidence in the arbitration.<sup>5</sup> This approach allows the inspection to proceed without evidentiary concerns and debates that would obstruct the overarching purpose of the process, namely to assist the Tribunal's understanding of the condition of the structure and the issues surrounding it.

Finally, it seems obvious that neither party should attempt to collect evidence during an inspection in a manner that alters in any way the condition of the structure. Any sampling or testing of materials during the inspection that could physically alter the structure or the site should be conducted only with permission from the Tribunal and carefully recorded.

## Radical Adverse Change in Circumstance: Can a Contractor Obtain Compensation When a Construction Contract Contains No Price Escalation Clause?

**Christopher Seppälä,  
Elizabeth Lefebvre-Gross**

Faced with a drastic increase in the cost of commodities—for example, of steel or oil—that undermines the economic assumptions of a construction contract, lawyers trained in the common law may believe that, if the contract has no price-escalation clause, the only relief from the contract available is termination on the grounds of frustration, impossibility or impracticability. In fact, outside the common law countries, it may be possible to obtain other relief, including an increase in the contract price, to take into account the changed circumstances. Several examples are provided below.

Under the French law theory of *imprévision*, a contractor party to an administrative contract (i.e., a contract involving the state) may be

### Conclusion

An inspection of a structure or a construction site offers members of an arbitral tribunal a direct impression of the thing that usually lies at the heart of the construction dispute before them. To ensure that this impression is legally relevant and helpful towards the resolution of the dispute and to protect fundamental principles of fairness and due process, parties and tribunals in international construction arbitration must ensure that an appropriate inspection protocol is established in advance and followed during the inspection. In addition, parties should agree on the appropriate method of recording the inspection and ensure that the inspection does not alter the state of the structure or site inspected.

compensated through an increase in the contract price where the circumstances have changed so much that a reasonable person could not have foreseen the new situation. This theory results from the well known *Compagnie générale d'éclairage de Bordeaux v. Ville de Bordeaux* decision. The theory also exists in Algerian law, where Articles 107 and 561 of the Algerian Civil Code extend the concept to private contracts. Any agreement to the contrary is void.

Under the concept of *Wegfall der Geschäftsgrundlage* (failure of the basis of the contract), in German law, in the case of a subsequent change in circumstances that results in a "profound alteration of the economic equilibrium of a contract" (as described by one author), which makes an obligation substantially onerous to perform, courts are able to adjust the contract's price terms to the changed situation,

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5. UNCITRAL Notes on the Organization of Arbitral Proceedings, Note 58.

**Complex Cases**  
White & Case is involved in some of the most complex construction arbitrations currently underway. For example, we are counsel in a US\$1.4 billion arbitration arising out of disputes concerning the expansion and upgrading of an oil refinery and pipelines owned by a Latin American government; and we are representing three major oil companies in a highly technical and complex arbitration arising out of a dispute with the contractor for the construction and relocation of a gas plant in a desert location.

without releasing the parties from the contract. Similarly, under the Swiss law concept of *Clausula Rebus Sic Stantibus* (adjustment of the contract to changed circumstances), courts or arbitrators have a choice either to terminate the contract or adjust the contract's terms where "particularly disruptive extraneous events" (as described by one author) have occurred that radically alter the foundation of the contract.

Similarly, under the laws of certain Arab countries, influenced by Islamic law with its emphasis on equity, adjustment of the contract price is possible where the contractor has encountered severe, unforeseeable adverse conditions. Under Egyptian law, as stated in Article 147 of the Egyptian Civil Code, a judge or arbitrator may revise or amend a contract to "reduce to reasonable limits, the obligation that has become excessive" where the occurrence of the changed circumstance is of a "general character," the events were unpredictable and the events result in heavy losses to the contractor. Any agreement to the contrary is void. The codes of several

other Arab countries contain similar provisions. For example, Article 48 of the Qatari Civil Code includes essentially the same principle. Under the civil codes of the United Arab Emirates (Article 249) and Kuwait (Article 198), where exceptional and unforeseeable circumstances of a general nature make performance of a contract onerous, the contractual obligation may be reduced in the interests of justice. Again, any agreement to the contrary is void.

Finally, prior to 1999, Chinese contract law allowed for either termination of the contract or an adjustment of the contract price where there had been an extreme change in circumstance. While this provision was removed from the written law in 1999, it is still applied in extraordinary circumstances.

Accordingly, under the laws of a number of civil law countries, even though a contract may not contain a price escalation clause, contractors can, in certain circumstances, obtain an adjustment of the contract price.

## Defects in Construction and the Temporary Disconformity Principle

**Anthony Lavers**

### **Background: The Problem of Defective Work**

If, during the running of a construction project, the works do not comply with the contract requirements, the owner will wish to know what remedies, if any, are available against the contractor.

At a practical level, this is often dealt with by the supervising officer exercising powers given by the contract. Thus under Clause 7.5 of the FIDIC Red Book, the Engineer may reject by giving notice to the Contractor of any Plant, Materials or Workmanship which "is found to be defective or otherwise not in accordance with the contract." There are similar provisions in many other modern

construction and engineering contracts, including the other FIDIC forms. The Contractor's obligation must then "promptly make good the defect and ensure that the rejected item complies with the Contract." This provides the solution in the many cases in which the contractor is willing and able to respond positively by complying with its obligation to make good and ensure compliance. When that willingness and/or ability is lacking, the owner (Employer in the FIDIC forms) needs to consider its position further; specifically, the remedies available to it.

At the completion date, the contract will usually provide for the payment of liquidated damages (Delay damages in Clause 8.7 of the Red Book) if the work has not been completed on time according

to the contract. Outstanding work and defects have to be remedied by the Contractor at its expense (Red Book Clauses 11.1 and 11.2), failing which, the Employer has a range of remedies available: termination; reduction in contract price; and having the work carried out by others at the Contractor's expense. (Red Book Clause 11.4.)

However, the most difficult situation for the owner/ employer arises when the contractor's work is clearly noncompliant but the employer has no belief that the contractor can or will remedy it. Faced with the unattractive prospect of waiting until the completion date is reached before the remedies referred to above are triggered, the employer will wish to know whether the option exists of terminating the contract immediately for breach by the contractor.

### Temporary Disconformity

In English law, it is difficult to answer that question with certainty. Over the last 30 years, the concept of "temporary disconformity" has been developed, supporting the view for which many contractors would wish to argue. The concept has developed from an oft-cited passage of Lord Diplock's in the 1972 House of Lords decision *P and M Kaye Ltd. v. Hosier & Dickinson Ltd.* [1972] 1 WLR 146. Here Lord Diplock suggested that: "Provided that the Contractor puts it right timeously I do not think that the parties intended that any temporary disconformity should of itself amount to a breach of contract by the Contractor." This passage formed part of a minority judgment in the case and other English judges have not been very receptive to arguments that Lord Diplock's statement creates any sort of binding legal principle. In *Lintest Builders Ltd. v. Roberts* [1980] 13 BLR 38, Lord Justice Roskill emphasized that Lord Diplock's statement came from a dissenting speech and doubted "whether his Lordship on any view intended it to be of universal application."

The English courts have tended to avoid application of the Diplock approach to temporary disconformity if, unlike the *Kaye* case, the defects had not been subsequently corrected and/or the approach would be inconsistent with express contractual provision. In *Nene Housing Society v. National Westminster Bank* [1980] 16 BLR 22, for example, the Court held

that not only did the defects in question remain uncorrected, undermining the argument that the disconformity was "temporary," but the express terms of the contract referred not merely to a duty of the contractor to complete the work but to an obligation to "carry out and complete the work."

The *Nene* decision notes two separate obligations: "to carry out" and "to complete" the work, sometimes referred to as the 'dual obligation'. In the FIDIC Red Book, Clause 4.1 describes the Contractor's general obligation to "design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer's instructions." Logically, it should not be necessary, or not always, to wait for completion to ascertain if the work is being "carried out" or "executed". As the editors of the Building Law Reports put it in their commentary on *Guinness v. CMD Property Developments* [1995] 76 BLR 44, "[t]he dual nature of the obligation is a further reason to treat Lord Diplock's analysis with caution." The court rejected the application of Lord Diplock's temporary disconformity principle in that case too.

The "temporary disconformity" theory has faced judicial opposition on a further ground, namely that it would permit serious and extensive defective work to be unchallengeable so long as the contractor could argue that there was still time to do it all again. Professor John Uff QC had attempted to test the boundaries of this concept when he appeared as counsel in the *Lintest* case arguing that: "There was no accrued right merely because defective work had been done...a builder in those circumstances can do defective work as often and as long and as frequently as he liked provided that by the time the contract comes to an end and the defects period comes to an end he has remedied those defects." Lord Justice Roskill's reaction to this challenging argument placed significant limits on the prospects of expansion of the temporary disconformity principle: "I confess I find that submission rather surprising...with respect, I do not think that is correct."

The courts have on several occasions demonstrated that they regard the nature of some breaches as inconsistent with the temporary disconformity

### Award-Winning Work

*Chambers UK 2008* describes White & Case as "a US giant with a globally recognised expertise in many of the sectors most active in construction" whose "presence in the rankings should come as no surprise." *EMEA Legal 500 2007* states that White & Case has "terrific international arbitration experience and handle a number of ongoing construction projects in the Middle East and Latin America."

Christopher Seppälä is recognized in *Chambers Global 2008* as having “been involved in high-level construction disputes for more than 30 years.” He is described as “highly respected by his peers” and someone who impresses clients with his “encyclopedic knowledge.”

theory. In *Sutcliffe v. Chippendale & Edmondson* [1971] 18 BLR 157, for example, His Honor Judge William Stabb considered whether an owner was justified in terminating a contractor’s employment, when:

“The quality of work was deteriorating and the number of defects was multiplying, many of which [the architect] had tried unsuccessfully to have put right...the contractors had neither the ability, competence or the will by this time to complete the work in the manner required by the contract.”

The defect may also be too serious to be treated as a temporary disconformity, even though it is neither numerous nor frequent. The Diplock temporary disconformity argument was again deployed in *Surrey Health Borough Council v. Lovell Construction Ltd.* [1988] 42 BLR 25, when a building in construction had been largely destroyed by fire. The contractor in that case argued that as long as its principal obligations (completing work in accordance with design and on time) had been satisfied, any alleged “temporary” breaches prior to completion date did not amount to breaches of contract. His Honor Judge Fox-Andrews rejected the idea and commented that “the expression ‘temporary disconformity’ does not immediately appear apt to describe a destruction of a building by fire when nearing completion.”

Despite the criticism it has endured, the temporary disconformity concept in English law cannot be discounted entirely. A recent decision of the Court of Appeal, while not relying on it, revealed some sympathy with the rationale on which it is based. In *Shawton Engineering Ltd. v. DGP International Ltd.* [2006] BLR 1, the court noted that: “Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach.”

If there is to be no concept of temporary disconformity, one must consider the other extreme observed

by the late Ian Duncan Wallace QC (*Hudson’s Building and Engineering Contracts*, 11th ed., 1995): “[A] contractor will be in immediate breach of contract whenever his work fails to comply with the contract descriptions or requirements.” This position would appear to place virtually every contractor in breach of contract on every project since incomplete work will inevitably fail contract descriptions and requirements.

There is, it is submitted, a balance to be struck between: (i) the owner’s need, in appropriate cases, for a remedy without waiting for completion of a project and (ii) a contractor’s right to complete and correct work without being liable for pre-completion remedies.

Although English law has not managed to achieve a consistent view as to how the temporary disconformity theory might achieve this balance, it has been attempted in other common law jurisdictions and it appears that case law from Hong Kong and New Zealand may be of assistance in seeing how the principle can operate.

#### Other Jurisdictions: Remediability

The New Zealand case of *Adkin v. Brown* [2002] NZCA 59 arose from what the court described as “an almost unbelievably protracted saga involving a residential building contract.” The employer had terminated the contract on account of defective work; the issue was whether the contractor had been in breach, so as to entitle the employer to do so. The Court held that although there will be situations when the defects in question cannot be categorized as a temporary disconformity; in this case they could be. The Court noted:

“The fact that the building’s defects...could be remedied and that it could be completed for such a relatively small sum...rather speaks for itself. It may be that in another case it could be shown that a failure to meet such a structural safety requirement during construction could give rise to a right of cancellation on the part of the owner. It was held not to be so in this case and, we think, understandably so.”

The New Zealand Court of Appeal's significant conclusion was that this decision was not "in disharmony with the so-called temporary disconformity theory."

The second instructive overseas application is provided by the decision of the Hong Kong High Court in *Eu Asia Engineering v. Wing Hong Construction* (a 1990 case, upheld on appeal by the Hong Kong Court of Appeal CA No 29 of 1992 and discussed by JA McInnis in *Hong Kong Construction Law*, Butterworths Hong Kong looseleaf). This was a dispute between a main contractor and a subcontractor concerning defects in concrete work, principally honeycombing in the flooring and bulging at the joints. Judge Kaplan, faced with a citation of the Diplock approach from *Kaye v. Hosier & Dickinson*, found the case to be a straightforward application of temporary disconformity, stating:

"Honeycombing is a frequent occurrence. I accept that it has to be put right before finishes are applied to the walls. I am quite satisfied that if there was any honeycombing, *Eu Asia* would have made it good in the normal course of the work. To suggest that it could give rise either to termination or to an allegation that it prevented a floor from being completed is quite unreal."

Judge Kaplan applied the Diplock approach expressly to the matter of bulging at the concrete joints, stating that: "Such defects are commonplace and will in the normal course of events be remedied before finishes are applied...these defects come within Lord Diplock's above observations."

### Conclusions on Temporary Disconformity in Construction

The starting point for producing a workable position on temporary disconformity is that it cannot be viewed in isolation from the provisions of the contract and particularly from the remedy sought. This latter is crucial. The significance of the subject derives from the pressing need, in certain circumstances, of a remedy prior to completion of the construction project.

The owner will, under any normal contractual arrangement, have two main remedies for breach by the contractor of an express obligation to rectify the work during the construction period, namely: (i) to terminate the contract for contractor breach and (ii) to recover rectification costs. The questions then arise as to what defects give rise to a right of termination during construction or entitle the employer to require rectification or the cost of it in default.

In trying to answer these questions, it is submitted that a crucial concept underlying the case-law is remediability.

The starting point is the words of Lord Diplock himself: "*Provided that the contractor puts it right timeously*, I do not think that the parties intended that any temporary disconformity should of itself amount to a breach of contract by the contractor" (emphasis added).

The clear implication was that, if the defect could not be put right timeously by the contractor, it could, of itself, amount to a breach of contract. This principle was helpfully developed in *Eu Asia* in Hong Kong and in *Adkin v. Brown* in New Zealand. In *Eu Asia*, the court thought that defects which "*in the normal course of events*" (emphasis added) would be remedied by the contractor before completion, would fall within the scope of "temporary disconformity." It would follow that in such a case the employer would not be entitled to terminate. Similarly, in *Adkin v. Brown*, the court expressly referred to the issue of whether the defects could be remedied (and, if so, at what cost) in the context of a purported termination.

In both *Eu Asia* and *Adkin v. Brown*, it was held that the defects were remediable and so should be classed as temporary disconformities. There is nothing in either case to suggest that *irremediable* defects should be treated as temporary disconformities. Indeed, the New Zealand Court of Appeal expressly referred to defects which would *not* be treated in this way.

Irremediability could derive from two basic sources. Either the nature of the defect itself is such that the contractor cannot rectify it in time (or at all), or the

defects, while not necessarily individually of great significance, are too numerous to be remedied in time. In either case, an irremediable defect cannot be covered by the temporary disconformity theory. The disconformity is not temporary; it will remain at the completion of the project. The breach then takes place at the point in the project when this state of affairs occurs and not at completion, as would otherwise be the case.

Taking this approach, the idea of temporary disconformity does have a useful role to play in ascertaining when an owner's rights to remedies accrue. The importance of the remediability concept can be seen from the Hong Kong and New Zealand authorities, where it was used in a practical and realistic way.

Appropriate contract drafting will always be crucial in the protection of the parties' rights and remedies. However, the owner's protection cannot always wait until completion. In certain circumstances, the owner can have a remedy without waiting. In others, the contractor will be entitled to correct routine defects or incompleteness without being held liable for these anomalies prior to completion of the project.

Temporary disconformity, interpreted by reference to remediability, is capable of balancing these protections between the respective parties. English law, however, requires further decisions of the appellate courts to resolve current uncertainty.

## The Eurotunnel Decision: France and the UK Held Liable

### Gaëlle Goudet

In a partial award rendered January 30, 2007, the operators of the Channel Tunnel—The Channel Tunnel Group Ltd. and France Manche S.A., known as “Eurotunnel”—were found entitled to damages in arbitration against the governments of France and the United Kingdom.<sup>6</sup>

Eurotunnel commenced arbitration in November 2003, pursuant to Article 40 of a Concession Agreement it signed March 14, 1986 with both governments (the “Concession Agreement”). Eurotunnel claimed that France and the UK had breached their obligations under the Concession Agreement and the Treaty of Canterbury (a treaty signed February 12, 1986 by France and England to provide a legal framework for the construction of the Channel Tunnel).

Eurotunnel presented two main arguments. First, Eurotunnel alleged that the governments had failed to take the necessary measures to protect

the Channel Tunnel from multiple incursions by migrants living at the nearby Sangatte Hostel (a Red Cross refugee camp opened in 1999 near the entry of the tunnel in France), who tried to reach the UK through the tunnel, thus causing significant delays and disruptions to services and consequential financial losses to Eurotunnel. Second, Eurotunnel argued that the governments granted subsidies to the SeaFrance ferry operator, which allowed SeaFrance to compete with Eurotunnel on an unfair basis.

The Tribunal was composed of five eminent arbitration practitioners: Professor James Crawford (Chairman), Yves Fortier, Jan Paulsson, Lord Millet and Judge Gilbert Guillaume. It noted at the outset of the award that its jurisdiction is limited to the rights and obligations laid out in the Concession Agreement and the Treaty of Canterbury. Eurotunnel had sought to extend the scope of the arbitration to legal obligations found outside the Concession Agreement and Treaty, such as rights arising under the European Convention on Human Rights or the

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6. The Tribunal's Award can be viewed at: [http://www.pca-cpa.org/upload/files/ET\\_PAen.pdf](http://www.pca-cpa.org/upload/files/ET_PAen.pdf)

rules protecting foreign investment. However, the Tribunal decided that these rules only provided a legal background for the interpretation and implementation of the Concession Agreement and the Treaty. All considerations pertaining to national, European or international law were thus to be referred to the competent court. Nonetheless, the Tribunal noted that it doubted whether the tunnel was a foreign investment in either country and that the problems encountered by Eurotunnel were unlikely to amount to expropriation, as Eurotunnel had alleged.

With regard to the merits of the Sangatte claim, the Tribunal held that the French and UK governments were liable for the loss suffered by Eurotunnel because they had failed to maintain conditions of normal security and public order around the Eurotunnel entrance.

The SeaFrance claim, to the contrary, was ultimately dismissed. Eurotunnel claimed that the governments had favored the ferry operator

by granting it large subsidies, to Eurotunnel's detriment. With regard to France, however, the Tribunal considered that the assistance given to SeaFrance was not in breach of any of the stipulations of the Concession Agreement and that, should Eurotunnel consider that such subsidies amounted to unlawful competition, this is a matter for Eurotunnel to pursue before the relevant French or European courts. As far as the UK was concerned, the Tribunal ruled that it could not examine the merits of the claim because no dispute had arisen on this point between the parties before the commencement of the arbitration.

The total amount of the damages to be paid to Eurotunnel will be determined at a later stage of the proceedings, but according to Eurotunnel's estimations, the sum could be close to £50 million. Interestingly, this award would represent the first public funds ever paid with respect to the tunnel, as its construction was financed entirely through private investment.

## PPP Law Brings Positive Change to Public, Private Sectors in Greece

### **Marilyn Paralika**

Public-private partnerships (PPPs) are recognized as a valuable means of procuring and delivering infrastructure and public services through the implementation of contractual, long-term agreements between a public entity and a private counterpart. They bring significant benefits not only to the public sector, through focusing on the provision of public services in an efficient manner, but also to the private sector, by allowing it to expand into new markets.

There is a legal framework in Greece for the establishment of PPPs, which was ratified by the Greek Parliament in September 2005 (Law 3389/2005, the "PPP Law"). Before this law was introduced, construction projects

in Greece were realized through concession agreements, which had to be ratified by the Greek Parliament. This process caused considerable delays in implementing these agreements. The PPP Law abolishes the requirement of parliamentary ratification and instead provides for two specialized bodies to implement PPP contracts—the Inter-Ministerial PPP Committee, which controls and coordinates PPP projects and awards the concessions and the PPP Secretariat, which provides assistance in the administration of PPP projects.

The PPP Law also codifies certain concepts related to PPPs, regulates the implementation of PPP projects, describes the contract award procedures and determines the public entities that can implement these contracts. The law addresses

a number of risk allocation issues that had previously caused difficulties in financing projects in Greece. To protect the private sector's interests, the PPP Law also provides incentives that offer substantial security to entrepreneurs engaged in long-term contracts with public authorities. It also sets out the minimum content of a PPP contract and deals with other issues such as taxation, the granting of permits and licenses, protection of the environment, treatment of archaeological finds and expropriation. Legal issues related to these partnerships, such as the transfer of claims, validity of security granted to banks, bankruptcy and resolution of disputes, are clearly defined.

The PPP Law specifies that Greek law will apply in the resolution of disputes arising out of the interpretation, application or validity of partnership contracts. Regarding the resolution of disputes, Article 31(1) provides that *"Any dispute arising with regard to the application, interpretation or execution of the Partnership Agreements...shall be settled by arbitration."* This is in deviation from the provisions in force relating to arbitration involving the Greek State, which provide that it can enter into an arbitration agreement only following the favorable opinion of the plenary session of the Legal Council of the State and decrees issued by the Minister of Finance and the competency minister. The PPP Law provides that the partnership contracts

must set out the rules for the appointment of arbitrators, the applicable arbitral rules, the place of arbitration (which does not have to be in Greece), the fees of the arbitral tribunal and the language of the arbitration. Article 31(2) goes on to note that *"The arbitral decision shall be final and irrevocable with no right of appeal and will be enforceable directly and the parties must comply immediately with its terms."*

Since its ratification in September 2005, the public sector's response to the PPP Law has been very positive. More than 28 projects, worth a total of €2.4 billion, have been submitted for evaluation to the PPP Secretariat by public entities. Since March 2007, the Inter-Ministerial PPP Committee has approved 16 projects that fall under the sectors of education, public administration buildings, justice and culture. Two of these projects have already gone to tender and a number of further tenders will be launched in the first half of 2008.

### Conclusion

The ratification of the PPP Law constitutes a significant system reform for construction of public infrastructure in Greece. It has introduced a stable legal framework that will hopefully continue to promote and facilitate the wider implementation and development of PPPs.

# Client Alerts: Recent Developments in International Arbitration

## UNCITRAL Arbitration Rules: Progress of the Working Group

### Alexander Lütgendorf

The revision of the UNCITRAL Arbitration Rules (the “Rules”) is currently on the agenda of the United Nations Commission on International Trade Law (“UNCITRAL”) Working Group on International Arbitration and Conciliation. The Rules, dating back to 1976, are more than 30 years old.<sup>7</sup> A revision of the Rules was long overdue to ensure that they continue to meet the needs of their users, reflecting best practices in the field of international arbitration.<sup>8</sup>

The Working Group, which meets biannually (alternately in New York and Vienna), reconvened in Vienna from September 10 – , 2007 to continue its work on the Rules.<sup>9</sup> UN member state delegates, observers from non-UN member states and international and non-governmental organizations (including arbitral institutions and associations) reviewed and discussed proposed amendments to articles 21 – 37 of the Rules, essentially on the basis of a note prepared by the UNCITRAL Secretariat.<sup>10</sup>

### Main Points of Discussion

The main discussion points during the last session in September included: whether employees and officers of a party may appear as witnesses and

experts (articles 25 and 27); whether the proposed rule for interim measures should allow for *ex parte* preliminary orders (article 26); whether in circumstances where a majority decision may not be achieved, the presiding arbitrator may make an award alone (article 31); the form and effect of an award (article 32); and the applicable law rule (article 33). The thrust of these discussions is briefly summarized in the following paragraphs.

### Witness and Expert Evidence

In relation to witness and expert evidence, the Working Group’s discussions centered around the proposed rule providing that parties to the arbitration or officers, employees or shareholders thereof who testified to the arbitral tribunal should be treated as witnesses.<sup>11</sup> The main concern expressed was that in most civil law countries, parties, including officers and employees, cannot be witnesses. The delegates were concerned that this inconsistency with the position under some existing national laws might impact negatively on the enforcement of an award in jurisdictions where a party was prohibited from being heard as a witness. In response, it was observed that, where the Rules conflicted with a provision of mandatory applicable law, the provision of that mandatory law prevailed.<sup>12</sup>

7. The 1976 UNCITRAL Arbitration Rules are available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html)>.

8. A summary of the main areas of the Working Group’s proposed revisions is available in a previous issue of this publication, see Judith Levine, “UNCITRAL Working Group on Arbitration Proposes Revisions to Arbitration Rules,” *International Dispute Resolution*, Vol. 19, No. 4 (December 2006) at p. 4.

9. Two White & Case lawyers are members of the UNCITRAL Working Group on International Arbitration and Conciliation. The author serves as observer delegate on behalf of a non-governmental organization; Judith Levine (New York) is part of the Australian delegation.

10. References to proposed amendments of articles of the UNCITRAL Arbitration Rules relate to the Secretariat’s note. The Secretariat’s note A/CN.9/WG.II/WP.145/Add.1 is available at <[http://www.uncitral.org/uncitral/en/commission/working\\_groups/2Arbitration.html](http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html)>.

11. See proposed article 25(2bis).

12. Article 1(2).

The Working Group endorsed the principle that any person could be heard on any issue of fact or expertise and that the parties may present their own expert evidence irrespective of whether the arbitral tribunal appointed an expert.<sup>13</sup>

### Interim Measures and Preliminary Orders

The discussions focused on whether the proposed rule on interim measures<sup>14</sup> should allow for preliminary orders by an arbitral tribunal upon request by a party without notice of the request to the other party. The circumstances allowing for such orders would be where it is considered that prior disclosure of the request for the interim measure to the party against whom it is made risks frustrating the purpose of the measure in question.<sup>15</sup> Diverging views were expressed at the Working Group. Numerous delegations were of the view that, unless prohibited by the law governing the arbitral process, the arbitral tribunal was not prevented from issuing preliminary orders.<sup>16</sup> The Secretariat was asked to prepare an alternative short draft sentence omitting the terminology “preliminary order,” which stated that the arbitral tribunal was entitled to take appropriate measures to prevent the frustration of an interim measure.

### Majority Decisions

The Working Group discussed whether the so-called “majority requirement” for awards made by a three-member arbitral tribunal should be revised so as to enable the presiding arbitrator to make the decision alone in cases where no

majority decision can be reached among the three arbitrators (as if the presiding arbitrator were a sole arbitrator).<sup>17</sup> While it was argued that the “presiding arbitrator solution” would undermine the consensual process of arbitration and give excessive powers to the presiding arbitrator that could be open to abuse, it was suggested that the “majority requirement” allowed the co-arbitrators to defend unreasonable positions which would leave the presiding arbitrator with no alternative but to join one or the other of the co-arbitrators to form a majority, offering no effective solution in case of a deadlock. The “presiding arbitrator solution” received considerable support from delegates and it was observed that modern arbitral practice and numerous institutional arbitration rules require the presiding arbitrator to take a decision in the case of a deadlock situation.<sup>18</sup> No consensus on this issue has been reached yet and it will be considered upon the second reading of the proposed amendments at a future session.

### Form and Effect of Awards

In relation to the form and effect of awards,<sup>19</sup> the Working Group considered: (1) whether the Rules should clarify that the arbitral tribunal may render separate awards on different issues at different times during the course of the proceedings;<sup>20</sup> and (2) whether qualifications such as “final,” “interim” or “interlocutory” regarding the nature of awards, created confusion and should be avoided, given that not all types of awards are known in all legal systems. Discussions followed

13. Discussions relating to articles 15(2), 25 and 27 and proposed amendments.

14. The proposed article 26 is closely modelled on the provisions on interim measures contained in Chapter IV A, article 17 of the UNCITRAL Model Law on International Commercial Arbitration, which was adopted by the Commission in 2006. A report on the recent amendments to the UNCITRAL Model Law is available in a previous issue of this publication, see Judith Levine, “UNCITRAL Working Group Proposes Reforms to Model Law,” *International Dispute Resolution*, Vol. 19, No. 1 (March 2006) at p. 12. The text of the UNCITRAL Model Law is available at <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html)>.

15. See Section 2 of Chapter IV A of the UNCITRAL Model Law on International Commercial Arbitration.

16. Article 15(1) gives a broad discretion to the arbitral tribunal, provided that the parties are treated with equality and full opportunity to present their cases.

17. See article 31, as proposed in the Secretariat’s note.

18. For example, article 25(1) ICC Rules, article 61 WIPO Rules, article 26.3 LCIA Rules, article 26(2) Vienna Rules, article 31 Swiss Rules, article 30 SCC Rules and article 43 CIETAC Rules; *cf.* article 26 ICDR Rules (AAA).

19. See article 32, as proposed in the Secretariat’s note.

20. As is provided by article 26.7 of the LCIA Rules.

in relation to the meaning of the terms “final and binding.” Once rendered, an award shall not be susceptible to revision by the arbitral tribunal and shall be binding on the parties. A waiver of any form of appeal, as expressed in the proposed language of the Rules, shall not be understood as also waiving the parties’ rights to apply for setting aside of the award.<sup>21</sup> While the parties’ consent is required to make an award public, wide support was expressed for a proposed provision to also make an award public in situations where a party is under a legal duty of disclosure, where a party sought to protect or pursue a legal right and where a party sought to produce an award in relation to legal proceedings.

### Applicable Law

In relation to the applicable law provisions,<sup>22</sup> the Working Group agreed that the wording of the parties’ choice of law shall refer to “rules of law” rather than merely “law,” so as to enable the inclusion of other legal sources, such as the UNIDROIT Principles of International Commercial Contracts. Further, it was proposed to replace the existing conflict of laws rule which guides the arbitral tribunal to determine the applicable law of the dispute where the parties have failed to do so. The existing conflict of laws rule provides for an indirect choice by referring to the

application of the law determined by the conflict of laws rules which the arbitral tribunal considers applicable.<sup>23</sup> The proposed new conflict of laws rule replaces that indirect choice with a direct choice of the rules of law most closely connected to the dispute.<sup>24</sup>

### Investor-state Arbitrations

Lastly, issues arising out of arbitrations involving a state as one or more of the parties to a dispute, in particular investor-state arbitrations, are yet to be addressed. Two of the observer organizations, the International Institute for Sustainable Development and the Center for International Environmental Law, suggest revisions to the Rules to take into account public interest aspects of investor-state arbitrations.<sup>25</sup> In essence, the proposal aims to enhance the transparency of these proceedings, including the disclosure of pleadings, public hearings, the submission of *amicus curiae* briefs and the publication of awards.

### Next Working Group Meeting

The next Working Group session is scheduled to take place from February 4 – 8, 2008 in New York. The process for revision will continue past this and the new revisions to the Rules are not likely to take effect for several years.

## ICSID: Prospects for Canadian Investors and Foreign Investors in Canada

### Pierre-Olivier Savoie

Canada continues its progress towards ratifying the 1965 Convention on the Settlement of Disputes between States and Nationals of Other States (the “ICSID Convention”). Although Canada signed

the ICSID Convention on December 15, 2006, Canadian provinces and territories are required to adopt implementing legislation and the federal legislation ratifying the Convention must be passed by the Canadian parliament. When it finally ratifies the Convention, Canada will join the 143 other

21. For example, on the grounds for challenging an award as set out in article 34 of the UNCITRAL Model Law on International Commercial Arbitration.

22. See proposed amendment to article 33.

23. See existing article 33(1).

24. Article 17(1) of the ICC Rules was considered as a model.

25. A revised joint paper on “Revising the UNCITRAL Arbitration Rules To Address Investor-State Arbitrations” was circulated in September 2007.

It is available at <<http://www.iisd.org/investment/>>.

members of the World Bank's investment dispute mechanism, including most of Canada's trading partners. Canada's ratification of the ICSID Convention will improve the rights of investors under the North American Free Trade Agreement ("NAFTA") and under most of Canada's 22 Foreign Investment Protection Agreements ("FIPAs")<sup>26</sup> currently in force.

Currently, under NAFTA or a FIPA, claims by Canadian investors against foreign states or claims by foreign investors against Canada can only be pursued through the ICSID Additional Facility Rules, the UNCITRAL rules or ad hoc arbitrations. In all cases, the award is subject to national laws on the recognition of foreign arbitral awards. Moreover, nothing prevents national courts from interfering with arbitral proceedings. For investors, the major advantage of the ICSID system is that it is self-contained. ICSID tribunals have the power to make interim measures and are exempt from the scrutiny or control of domestic courts in contracting states.<sup>27</sup> This may well ensure more efficient proceedings. Predictability is also increased because of ICSID's quickly growing body of arbitral case law, both procedural and substantive.

Another major advantage of the ICSID system is that it does not allow parties to seek annulment of an award before a national court.<sup>28</sup> Under the Convention, an ICSID award is to be recognized by contracting states as if it were a final judgment of a court of that state.<sup>29</sup> The only remedies

available are those provided under the Convention and are restricted to a request for interpretation, a request for revision based on a newly discovered decisive fact and a request for annulment.<sup>30</sup> The five grounds for annulment are narrower than the grounds for refusing recognition or enforcement of an award under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").<sup>31</sup> On the basis of their rights under the New York Convention, states have usually adopted legislation under which recognition or enforcement of a foreign arbitral award can be prevented on the grounds the award is contrary to the state's own public policy.<sup>32</sup> This is not a ground for nonenforcement under the ICSID Convention.

Once Canada has ratified the ICSID Convention, investors will be able to choose the ICSID Convention and Rules under all Canadian treaties containing an ICSID option (with the exception of the Canada-Thailand FIPA and claims against Mexico under NAFTA, as neither Thailand nor Mexico<sup>33</sup> are parties to the ICSID Convention; though the ICSID Additional Facility Rules will be available). Among the five first-generation FIPAs (1990 – 1995),<sup>34</sup> only the Hungary-Canada and Argentina-Canada treaties have ICSID clauses. However, the 17 FIPAs that entered into force since 1995 are based on NAFTA Chapter 11 and all contain almost identical provisions on applicable arbitration rules. The investor can choose among: 1) the ICSID Convention, if the state and investor's state are both parties to

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26. FIPAs are the Canadian appellation for bilateral investment treaties ("BITs").

27. ICSID Arbitration Rules, Article 19.

28. ICSID Convention, Article 53.

29. ICSID Convention, Article 54.

30. *Id.*, Articles 50-52.

31. *Id.*, Article 52. An ICSID *ad hoc* Committee can only annul an award based on the following grounds: the tribunal was not properly constituted; the tribunal manifestly exceeded its powers; there was corruption on the part of one of the tribunal's members; the tribunal made a serious departure from a fundamental rule of procedure or the award failed to state reasons on which it is based.

32. New York Convention, Article V(2)(b).

33. There is currently some movement in Mexico to become an ICSID member, including a push for membership by a former foreign affairs minister: Bernardo Sepúlveda, "Mexico and the Settlement of Investment Disputes: ICSID as the Recommended Options," 5 *Pepperdine Dispute Resolution Law Journal* 407 (2005).

34. With Poland, the USSR, Argentina, Hungary and the Czech and Slovak Federal Republic.

ICSID; 2) the ICSID Additional Facility Rules, if the state of only one of the parties is a party to ICSID; or 3) the UNCITRAL arbitration rules.

As stated, Canada's ratification may still take time because legislation implementing the ICSID Convention is required at both the provincial and federal levels. The practice of the Canadian Ministry of Foreign Affairs and International Trade is that "Canada will not normally become a party to an international agreement which requires implementing legislation until the necessary legislation has been enacted."<sup>35</sup> To date, four of the ten Canadian provinces (Ontario, Saskatchewan, British Columbia

and Newfoundland and Labrador) and one of the three territories (Nunavut) have adopted implementing legislation. At the federal level, the implementing legislation (Bill C-9) passed first and second readings in the House of Commons on October 29, 2007. Under its previous name (Bill C-53), the bill gained support from the three largest parties in Parliament, which should ensure a large majority when time comes for adoption.<sup>36</sup> Bill C-9 has now been referred for consideration to the Foreign Affairs and International Development Committee before it is to be sent back to the House of Commons for its third and final reading.

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35. Canadian Practice in International Law during 1981 at the Department of External affairs, compiled by L.H. Legault, 20 Canadian Yearbook of International Law 282, 291-292 (1982).

36. Debates, House of Commons, 15 May 2007. <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Mode=1&Parl=39&Ses=1&Language=E&DocId=2945948&File=0#Int-2081960>>.

## Dispute Resolution Fora Under 22 Foreign Investment Protection Agreements Ratified by Canada and Under the North American Free Trade Agreement

	Whether State is Party to ICSID Convention	ICSID or the Additional Facility Rules	UNCITRAL	Ad Hoc/Other
Argentina	■	■	■	■
Armenia	■	■	■	
Barbados	■	■	■	
Costa Rica	■	■	■	
Croatia	■	■	■	
Czech and Slovak Federal Republic (now the Czech Republic and the Slovak Republic)	■			■
Ecuador	■	■	■	
Egypt	■	■	■	
Hungary	■	■ (Additional Facility Rules not an option)	■	
Latvia	■	■	■	
Lebanon	■	■	■	
Mexico (NAFTA)	■	■	■	
Panama	■	■	■	
Peru	■	■	■	■
Philippines	■	■	■	
Poland	■			■
Romania	■	■	■	
Thailand	■	■	■	
Trinidad and Tobago	■	■	■	
Ukraine	■	■	■	
United States (NAFTA)	■	■	■	
Uruguay	■	■	■	
USSR (now Russia)	■		■	
Venezuela	■	■	■	

## The Role of Arbitration in EC Merger Control

**Luisa H. Cetina**

On April 24, 2007, the European Commission's Directorate General for Competition ("Commission") began its public consultation on a new Notice on Remedies acceptable under the Merger Regulation ("Draft Notice").<sup>37</sup> The Draft Notice is intended to provide non-binding guidance to companies to eliminate competition concerns identified by the Commission. The Draft Notice results from an extensive study undertaken by the Commission on the implementation and effectiveness of competition remedies, recent judgments of the European Courts and the Merger Regulation currently in force.<sup>38</sup> Significantly, the Draft Notice expressly mentions the use of arbitration commitments in merger control.

The text of the Draft Notice was accompanied by draft amendments to the Merger Implementing Regulation. At present, the Merger Regulation provides that concentrations that meet certain turnover thresholds must be notified to and approved by the Commission prior to implementation. Where the Commission finds that the acquisition is likely to produce anti-competitive effects, the party can obtain clearance by making certain "commitments." Traditionally, the Commission and the European courts favored structural commitments because they are considered to guarantee compliance through a carefully administered monitoring process.<sup>39</sup>

These commitments generally involve divestitures of parts of the business to a third-party competitor. Usually, Commission clearance requires compliance with structural remedies. More recently, however,

European courts have recognized that when divestments are undesirable or impossible, competition concerns can be addressed by behavioral commitments as long as they have a quasi-structural effect on the market and they can assuage the Commission's competition concerns.<sup>40</sup> Behavioral commitments are promises to behave in a particular manner vis-à-vis third-party competitors.

Examples of these commitments are promises by the acquiring party: to give access to technology or infrastructure; to secure the establishment of supply or purchasing relationships; to terminate exclusive or long-term contractual arrangements with its customers or to terminate anti-competitive distribution agreements with its customers. The latest draft Notice expressly sanctions these so-called "access commitments" and they generally qualify as obligations rather than conditions for clearance by the Commission. They are arguably more problematic for the Commission than structural commitments because they require policing over the long term, thus putting a strain on the Commission's resources. It is in this context that arbitration can play a role.

In recent years, the European courts and now the Draft Notice, have recognized that arbitration commitments may be a mechanism to monitor the proper implementation of access commitments.<sup>41</sup> If an acquiring party fails to comply with a commitment, the third-party competitor can commence arbitration proceedings to enforce the promise by reference to the arbitration clause in either the original Commission decision or in the Commitment Letter by the acquiring party.

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37. Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2007), electronically accessible at [http://ec.europa.eu/comm/competition/mergers/legislation/draft\\_remedies\\_notice.pdf](http://ec.europa.eu/comm/competition/mergers/legislation/draft_remedies_notice.pdf). The draft Notice is currently under review. Its adoption is expected late 2007 or early 2008.

38. Council Regulation (EC) No 139/2004 of 20 January 2004.

39. See Case T-102/96 *Gencor v. Commission* [1999] ECR II-753.

40. See Case T-177/04 *easyJet v. Commission* [2006] OJ C212/29.

41. See, e.g., *T-Mobile Austria/Tele.ring* (Comp/M3919) [2006] OJ L008/44; *Johnson & Johnson/Pfizer Consumer Healthcare* (Comp/M4314)

Commission decision of December 11, 2006; *Axalto/Gemplus* (Comp/M3998) [2006] OJ C196/34; *Piaggio/Aprilia* (Comp/M3570) [2005] OJ C7.

Where the third party has already concluded an agreement with the merged entity, it can trigger arbitration through the clause in the agreement itself. The merged party has an obligation to submit to arbitration. Because arbitration commitments are “obligations”<sup>42</sup> within the meaning of the Notice on Remedies,<sup>43</sup> breach allows the Commission to impose fines or order the dismantlement of the concentration. The Commission is also likely to commence its own investigation into the correct implementation of the access commitments concerned.

In the context of merger control, arbitration provides a number of advantages to the European Commission. By providing for independent arbitral tribunals, the Commission allows for the policing of the behavioral commitments in the medium and long-term without placing an undue burden on its own resources. Furthermore, arbitration likely brings certain advantages such as speed, flexibility of proceedings, the ability to select an arbitral tribunal with experience in the relevant

industry and ease of enforceability of the award under the New York Convention.

Note that although the arbitral tribunals have the power to adjudicate the civil law consequences of the acquiring party’s breach of the behavioral commitments,<sup>44</sup> under the Merger regulation the Commission has the ultimate power to sanction the acquiring party (e.g., by imposing fines or dismantling the acquisition).<sup>45</sup> In the past few years, the Commission also introduced tiered dispute resolution clauses that allow for amicable settlement and mediation of disputes before arbitration is undertaken.<sup>46</sup>

By explicitly mentioning arbitration in the Draft Notice, the Commission has acknowledged that arbitration can help to enforce compliance with behavioral commitments. This may be a sign that arbitration will play an increasingly important role in ensuring competition in the European marketplace.

## English Courts Strongly Back Arbitration: The Fiona Trust Case

### Alexander Lütgendorf

On October 17, 2007, the House of Lords in *Fiona Trust*<sup>47</sup> handed down an important judgment that is strongly supportive of international arbitration. The Lords upheld, unanimously, the Court of Appeal’s ruling in a case concerning the scope and effect of arbitration clauses. The decision is significant in two respects:

- First, the Lords drew a line under previous authorities concerning the construction of arbitration clauses and supported the view that arbitration clauses should be construed liberally, without making fine semantic distinctions between disputes “arising out of,” “arising under” or “in connection with” the contract. When construing arbitration clauses, the courts will now start from the assumption that in the absence of a clear

42. See, e.g., the Commission’s statement in *SEB/Moulinex* (Comp/M.2621) [2002] OJ C49, at para. 148.

43. Note that pursuant to Art. 12 of the notice on Remedies, “[t]he implementing steps which are necessary to achieve [a structural change of the market] are generally obligations on the parties...”

44. As to the effects of arbitration clauses, the Draft Notice at para. 67 cites judgment of the Court of First Instance (CFI) in Case T-158/00 *ARD v. Commission* [2003] ECR II-3825, paras. 212, 295, 352; CFI judgment in Case T-177/04 *easyJet v. Commission* [2006] ECR-II 0000, para. 186.

45. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L24/1), Arts. 14 and 15.

46. See, e.g., *Lufthansa/Swiss* (Comp/M.3770) [2005] OJ C204, at p. 3.

47. *Fiona Trust & Holding & Holding Corporation & 20 Ors v. Yuri Privalov & 17 Ors sub nom Premium Nafta Products Ltd. (20th defendant) & Ors v. Fili Shipping Co. Ltd. (14th claimant) & Ors* [2007] UKHL 40.

wording to the contrary, commercial parties are likely to have intended to use arbitration as the only forum to resolve all their disputes.

- Secondly, the Lords elaborated on the scope of the doctrine of “severability” (enshrined in Section 7 of the Arbitration Act 1996), endorsing the Court of Appeal’s view that arbitration clauses are to be treated as “distinct agreements” from the main agreements and can only be invalidated on grounds that relate to the arbitration clause itself. The Lords confirmed that arbitration tribunals, not courts, have jurisdiction to determine the validity of a contract that is subject to an arbitration agreement, even in cases where that contract has been induced by fraud, misrepresentation or bribery.

## Background

The dispute arose out of eight charter-party contracts entered into between a Russian group of ship owners and eight charter companies. The ship owners wished to rescind the charter-party contracts on the grounds that their entry into the agreements had been procured by bribery. Each of the charters contained a “Law and Litigation” clause that provided for disputes arising “under” or “out of” the charter to be decided by the English courts but which also gave both parties the right to elect to have the matter decided by arbitration in London. The charter-parties elected for arbitration in London and sought to proceed to arbitration. The ship owners sought an injunction preventing the arbitration from proceeding on the basis that the charter-party contracts and the arbitration clauses contained therein, had been validly rescinded for bribery. They argued that, but for the bribery, they would not have entered into the charters at all and, therefore, would not have entered into an arbitration agreement.

At first instance, the Court granted the injunction sought by the owners. On appeal, the Court of Appeal reversed this decision on the ground that the question of the validity of the contracts (allegedly procured by bribery), was to be determined by

arbitration and not by the English Courts. That decision was fully confirmed by the House of Lords.

## Construction of Arbitration Agreements

The first issue before the House of Lords was the construction of the arbitration clause. The ship owners claimed that the charters had been rescinded for bribery and that this was not a claim covered by the arbitration agreement contained in the charters. They argued that the question of whether the charter was procured by bribery was not a matter arising “under” or “out of” the charter and should, therefore, not be submitted to arbitration.

Lord Hoffmann, delivering the leading judgment, agreed with the Court of Appeal’s observations that it was time to make a “fresh start” and move away from semantic distinctions such as whether arbitration clauses covered disputes arising “under,” “out of,” “in relation to” or “in connection with” the relevant agreement. Lord Hoffmann stressed the consensual character of arbitration agreements and the need to give effect, so far as the parties’ language permits, to the commercial purpose of the arbitration clause. In most cases, that purpose is to refer all disputes to one tribunal that the parties have chosen rather than to submit certain disputes to one tribunal and other disputes elsewhere. Unless there is clear wording to the contrary, it is assumed that rational businessmen intended to submit all of their disputes to the same tribunal.

## Severability of Arbitration Agreements

The second issue before the House of Lords was whether the invalidity or rescission of the main agreement would also rescind the arbitration clause. Lord Hoffmann emphasized the doctrine of severability of arbitration agreements, enacted in Section 7 of the Arbitration Act 1996 and held that an arbitration agreement could only be invalidated on grounds that related directly to the arbitration agreement and not as a consequence of the invalidity of the main agreement.<sup>48</sup>

48. It is noteworthy that the doctrine of severability applied in *Fiona Trust* was confirmed only one month later, on November 13, 2007, by the Commercial Court in *El Nasharty v. J Sainsbury plc* [2007] EWHC 2618 (Comm).

Lord Hoffmann noted that there may be situations when an attack on the main agreement includes a challenge to the validity of the arbitration agreement on identical grounds. For example, in situations in which there was never any agreement at all, because the signature of the document containing the main agreement and the arbitration clause was forged, or, where the agent concluding the agreement had no authority to do so.

On the present facts, the Lords held that the alleged bribery was not sufficient to show that the agent had been bribed into concluding the arbitration clause. Lord Hoffmann noted that “It would have been remarkable for him to enter into any charter without an arbitration agreement, whatever its other terms had been.”

### Practical Implications

The House of Lords’ approach in looking at the true intentions of commercial parties will be welcomed by parties to an arbitration agreement. The decision sent a clear message that English courts remain highly supportive of the arbitral process.

While English courts have adopted a relatively broad approach to construing arbitration clauses in the past, the abandonment of drawing subtle distinctions in the wording of arbitration clauses has

further broadened this approach, avoiding costly and time-consuming disputes as to whether a particular issue arises “out of,” “under,” “in relation to” or in “connection with” a contract. This broad approach will no doubt make the drafting of an arbitration clause under English law more straightforward. However, if parties wish to carve out certain types of disputes from their arbitration agreement (and, for example, submit those disputes to the jurisdiction of the courts or some other alternative dispute resolution mechanism, such as mediation), they will need to take particular care in clearly identifying those disputes when drafting their arbitration clause.

The decision confirms that arbitral tribunals, not the courts, have jurisdiction to resolve disputes as to the validity of an agreement that includes an agreement to arbitrate. It also confirms the limited scope for challenging the validity of an arbitration agreement in court. If parties wish to impeach an arbitration agreement, a direct challenge of the arbitration agreement is required. It will not be sufficient to attack the main agreement, unless the ground for attack is also a direct challenge against the validity of the agreement to arbitrate. This decision may help to discourage parties from challenging the jurisdiction of arbitral tribunals on unmeritorious and technical grounds.

## Practice Tips

### Tips for Making “Sealed Offers” in International Arbitration to Cap Liability for Costs

#### Poupak Anjomshoaa

The costs of international arbitration can be considerable.<sup>49</sup> The “sealed offer” provides a potential mechanism for capping those costs. This article briefly outlines some tips to consider in making a “sealed offer.”

#### The Award of Costs in International Arbitration

An award of costs in international arbitration will be at the discretion of the arbitral tribunal, regulated only by the specific language of the arbitration clause and any applicable institutional arbitration rules. However, the most commonly used institutional arbitration rules impose a positive obligation on the tribunal to make an award on costs.<sup>50</sup> Further, there is a general expectation that the legal and other costs<sup>51</sup> of the successful party will form part of the award on costs, with the unsuccessful party being ordered to compensate the successful party for its reasonable legal and other costs.<sup>52</sup>

Three approaches to awarding costs have been observed in ICC arbitration: first, to order the losing party to bear all of the costs; second, to allocate costs in proportion to the outcome of the case, taking into account the relative success of each claim; and third, to require that the costs be shared equally by the parties or that each party bears its own costs.<sup>53</sup> Nevertheless, several international arbitration practitioners have observed an emerging trend in favor of the first approach.<sup>54</sup>

In light of this, parties to international arbitration who are at risk of receiving an unfavorable award must look for a means by which they can cap their potential costs liability. One potential solution is the “sealed offer.”

#### The “Sealed Offer”

A “sealed offer” (often referred to as a “Calderbank letter” or “Calderbank offer”)<sup>55</sup> is a written offer to settle a dispute which has been referred to arbitration, made “without prejudice save as to

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49. The costs involved in an international arbitration will generally consist of the fees and expenses of the arbitral tribunal, the administrative charge of any arbitral institution involved, the fees and expenses of the lawyers, any experts and any other professionals whose services may be required (e.g., transcribers and interpreters), the cost of the hearing room and facilities, witness expenses and any internal costs. Internal costs are not commonly awarded, save perhaps in respect of in-house counsel.

50. See Article 31 of the International Chamber of Commerce (ICC) Rules of Arbitration (1998), Articles 38 and 40 of the UNCITRAL Arbitration Rules (1976), Article 28 of the London Court of International Arbitration (LCIA) Arbitration Rules (1998), Articles 39 to 41 of the Rules of the Arbitration Institute of the Stockholm Chambers of Commerce (SCC) (1999), Article 31 of the American Arbitration Association (AAA) International Arbitration Rules (2006) and Rule 28 of the International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules, as well as Article 61(2) of the ICSID Convention.

51. These will include experts’ and lawyers’ fees and expenses.

52. See Articles 38 and 40 of the UNCITRAL Arbitration Rules, Article 41 of the Rules of the Arbitration Institute of the SCC and Article 28 of the LCIA Arbitration Rules which goes so far as to suggest that there is a “*general principle*” that costs should reflect the parties’ relative success and failure in the award or arbitration, except where it appears to the arbitral tribunal that in the particular circumstances this general approach is inappropriate” [emphasis added].

53. Derains & Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd edition (2005), at p. 371 et seq.

54. See Micha Bühler, “Awarding Costs in International Commercial Arbitration: An Overview” *ASA Bulletin*, Vol. 22 No. 2 (2004), pp. 249-279; Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration (2003)*, at pp. 654–655; Fouchard, Gaillard, Goldman, *International Commercial Arbitration* (1999), at p. 686.

55. The name derives from the English case of *Calderbank v. Calderbank* [1975] 3 All ER 333; [1976] Fam 93.

costs.” What distinguishes the sealed offer from an ordinary offer to settle a dispute, is the cost penalty (in respect of which see below) which the arbitral tribunal is expected to attach to it, against the offeree who does not accept the offer and fails subsequently to achieve a more favorable award by continuing the proceedings (i.e., “to beat the offer”).

The offer is “sealed” and “without prejudice” because it is not to be brought to the attention of the arbitral tribunal before the determination of the substantive dispute, in case it influences the decision of the tribunal with regard to the merits of the substantive case. However, in order that the offer can be taken into account in assessing liability for costs, it must be brought to the attention of the arbitral tribunal before the tribunal makes a determination on costs,<sup>56</sup> hence the words “save as to costs.”

### The Use of a Sealed Offer in International Arbitration

The sealed offer derives from English law and the practice of the English courts and arbitral tribunals in allocating costs whereby, as a general rule, the party considered to be the overall loser is ordered to pay the costs of the proceedings and the reasonable legal and other costs of the overall winner, as well as any sum awarded on the merits. This has been described as the “loser pays all” or “costs follow the event” principle and is generally followed even where the loser has defeated the winner on a number of points and the recovery of the latter is significantly less than the amount

originally claimed, so long as the recovery is for more than a nominal amount.

The sealed offer alleviates the general rule on costs in England by displacing the “loser pays all” principle when the winner has failed to beat the offer (in other words, where it would have recovered the same or more by accepting the offer). In such an eventuality, the winner will generally be held liable for the loser’s costs incurred after the time when the offer could have been accepted. Accordingly, the offeror can seek to place a ceiling on its potential costs liability in respect of the period following the offer, by offering to settle the offeree’s claims (or certain of them) for such amounts as it sensibly believes the tribunal would award in respect of those claims, if the proceedings were not settled.

Common law jurisdictions which follow the English approach towards allocating costs, most notably Hong Kong, Australia and Canada, also give cognizance to the use of sealed offers to counterbalance the potentially unfair effect of their approach towards awarding costs.<sup>57</sup> It is submitted that such a mechanism is crucial in any forum where costs are awarded in accordance with the English principle that “costs follow the event”; international arbitration, where this principle is increasingly followed, is one such forum. Anyone conducting international arbitration that has some connection with England, Hong Kong, Australia or Canada, should certainly use the sealed offer procedure where appropriate to contend with the potential application of the general rule on costs normally followed in those jurisdictions.

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56. This will normally be achieved by obtaining a “bifurcated” award, so that the sealed offer can be revealed to the tribunal during the course of the submissions on costs, following receipt of the interim award which will have dealt with liability and damages. The offer can thus be taken into account in the award on costs which will form part of the final award.

If the award is not bifurcated, the parties will have to inform the tribunal at the end of the hearing that there has been an offer of compromise from one party to the other which they would like the tribunal to take into account in exercising its discretion on costs; the tribunal should be provided with a sealed envelope containing a copy of that offer on the understanding that the envelope will not be opened before the tribunal has reached a final decision on the merits of the parties’ substantive claims.

57. With respect to Hong Kong, see Order 22, Order 73 (Rule 11 et seq.) and Order 62 (Rules 2 and 5) of the Rules of the High Court which apply in Hong Kong. With respect to Australia, see e.g., Part 42 (Divisions 1 and 3) and Part 20 (Division 4) of the New South Wales Uniform Civil Procedure Rules 2005. With respect to Canada, see e.g., Rule 49 of the Rules of Civil Procedure of Ontario and Prince Edward Island and Rule 41A and 63 of the Civil Procedure Rules of Nova Scotia.

## Tips for Making the Sealed Offer

### Tip 1: Make the sealed offer as early in the proceedings as possible

The winner will generally be entitled to its costs up to the date when the offer can be accepted; any costs protection that the loser derives from the offer will apply only to those costs that are incurred after that date. Accordingly, the sealed offer should be made as early in the proceedings as possible to derive maximum protection on costs.

### Tip 2: Set out the sealed offer in writing

The sealed offer should be set out in writing in a letter which should be clearly marked “Confidential and Without Prejudice Save as to Costs.” The effect of these words (which should be explained in the letter) is that the letter should not be revealed to the tribunal, save with respect to the question of the costs of arbitration after the merits of the substantive claims have been decided.

### Tip 3: State the intended cost consequences of the offer

Any ambiguity in the offer may prevent the tribunal from determining the terms of the offer and thus, whether or not the loser has “beaten the offer”; this could render the sealed offer ineffective. The sealed offer letter should therefore contain an express statement as to the intended costs consequences of the offer, so that there can be no argument subsequently as to whether the sum offered was inclusive or exclusive of costs.

### Tip 4: State whether interest and counterclaims are taken into account

For the same reason, to avoid any ambiguity in the terms of the offer, which would risk the tribunal disregarding the offer, the sealed offer should state whether or not it takes interest and any counterclaims into account.

### Tip 5: State the period during which the offer remains open for acceptance

The offeree must be given a reasonable period to consider the offer before it is hit by the costs penalty generally attached to a sealed offer. On the other hand, in order to place pressure on the offeree to accept the offer and cease incurring further costs, the offer should not be left open for acceptance indefinitely. Accordingly, the sealed offer should state a reasonable period during which it remains open for acceptance. This will also permit the tribunal to determine the date from which to impose the said costs penalty.

### Additional Tips

In addition, the sealed offer should include the date of the offer, the method of acceptance and the deemed date of acceptance, to avoid subsequent argument as to whether it was accepted within the permitted period for acceptance.

### Conclusion

In international arbitration, the award of costs is left largely to the discretion of the tribunal and it is difficult to state with confidence exactly how the tribunal will allocate costs between the parties. However, the costs of international arbitration can be significant, with losing parties often having to bear not only their own costs, but also a considerable proportion of the other side’s costs. In this context, the sealed offer can provide powerful ammunition for parties to international arbitration who are forced to defend inflated or exaggerated claims.

The cost consequences of sealed offers in England are largely a matter of logic and common sense; they go to the reasonableness of the conduct of the offeree in declining to accept the offer. The reasonableness of the conduct of the parties is also an important consideration for an international arbitral tribunal when exercising its discretion on costs, therefore it is to be hoped that a tribunal in an international arbitration will similarly give effect to a sealed offer made.

Parties who are at the contract negotiation stage may wish to consider drafting their arbitration clauses in such a way as to anticipate the use of the sealed offer mechanism. For those who are already at the dispute stage, there is no harm in making any “without prejudice” offer of compromise in the form of a sealed offer, so that it can be brought to the attention of the tribunal at the appropriate time and used in argument as to whom should be responsible for the costs of the arbitration, where it was reasonable for the offeree to accept the offer.

## What Our Practitioners Are Saying

### Kim Rooney, Hong Kong, on Arbitration Involving States

On December 7, 2007, Kim Rooney, Partner, Hong Kong, spoke at the Conference on “Investor-State Arbitration: Lessons for Asia,” organized by the Hong Kong International Arbitration Centre in Hong Kong. In a session on “Arbitration Involving States—Key Issues in Practice,” Rooney discussed the nature of umbrella clauses, their significance in context of investor-state arbitrations and issues that have arisen in relation to these kinds of clauses, found commonly in bilateral investment treaties (BITs). Rooney explained that some argue that the effect of umbrella clauses is to “elevate” what otherwise might be a breach of private legal obligations owed by the investment-receiving State into a breach of the bilateral investment treaty between that State and the State of the investor. She explained some of the ramifications of such an “elevation,” including, in particular, empowering the national investor to bypass the contractually agreed upon dispute-resolution mechanism and resort to international arbitration under a treaty. In the course of discussing some of the major decisions by international arbitral tribunals in this area, Rooney outlined various issues that have arisen in relation to umbrella clauses, including: (1) whether in order to be able

to invoke an umbrella provision, there must be a contract or relationship of obligor and obligee between an investor and the host State; (2) whether an arbitral tribunal appointed under a BIT may exercise jurisdiction over breach of contract claims on the ground that the umbrella clause applies to investor/State contracts; and (3) whether an arbitral tribunal appointed under a BIT may exercise such jurisdiction when the underlying investment contract contains an exclusive jurisdiction clause that provides for a different forum for the resolution of contractual disputes. Rooney concluded by saying that some argue the “elevator” effect of umbrella clauses causes investment protection treaties to intrude into an area for which they were not designed (namely, commercial and private dealings of sovereign States), while others argue that a State’s behavior in private commercial transactions may affect its attractiveness to foreign investors. In any event, investment protection treaties, apart from umbrella clauses, provide protections for those situations where internal systems of control are inadequate for protection of foreign investors when they fall short of minimum international standards.

## Practitioner Appointments and Practitioner Recognition

### Practitioner Appointments

The latest edition of the annual *International Who's Who of Commercial Arbitration*, features eight White & Case partners and names the Firm as one of the top three “global players” in arbitration.

White & Case’s international arbitration practice was ranked Tier One nationally in the United States in the 2008 edition of *Benchmark*.

**Carolyn Lamm**, **Abby Cohen Smutny** (Washington, DC) and **Kim Rooney** (Hong Kong) were named to *Global Arbitration Review*’s list of Top 30 Women of Arbitration.

London international arbitration partners **John Bellhouse**, **Ellis Baker**, **John Reynolds**, and **Kathleen Paisley**, all received mentions in the 2008 edition of *Chambers UK*.

### Practitioner Recognition

**Ank Santens** (New York), **Charles Nairac** (Paris) and **Paul Cowan** (London) have been elected partners in the White & Case International Arbitration Group.

**Judith Levine** (New York) has been appointed a director of the Australian Centre for International Commercial Arbitration.

**Thomas Heather** (Mexico City) has been elected Vice-Chair of the North American Forum of the International Bar Association.

## White & Case—Worldwide

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## White & Case

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