Volume 19, No. 2 June 2006

WHITE & CASE

International Dispute Resolution

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LCIA Arbitration: Rejection of Expropriation Claim against Ecuador

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On February 3, 2006 the London Court of International Arbitration (LCIA) issued an award in the case of *EnCana Corporation* v. *Republic of Ecuador*[1] ("EnCana") that contains an important ruling regarding the degree of deference to be accorded by international arbitral tribunals to a State's good faith interpretation of its own laws in assessing an investor's expropriation claim under those laws.

The Claimant, EnCana, is a Canadian oil and gas company. In 1995, EnCana's Ecuadorian subsidiaries entered into contracts for the exploration and exploitation of oil and gas reserves with Petroecuador, an entity wholly owned by Ecuador, the Respondent.[2] Under these "participation contracts", EnCana bore all the risks associated with exploration and exploitation of the resource, including all costs and expenses. In exchange, the investor received a portion of the oil extracted, with the precise amount being determined by the daily oil production levels.

At issue in *EnCana* were VAT refunds to which the Claimant was allegedly entitled under Ecuadorian laws and regulations. At the time the participation contracts were signed, Ecuador-based exporters of goods who had paid VAT for the importation of "an input or raw material employed in the manufacture… of export products" were eligible to receive a VAT refund.[3] However, the Tribunal found that when the parties contracted, and for several years thereafter, the tax laws were unclear in several respects, including what kinds of

1 LCIA Case No. UN3481 (Feb. 3, 2006), available at <http://www.investmentclaims.com/decisions/Encana_Equador_Award.pdf>.
2 Ecuador conceded that for purposes of the BIT, Petroecuador acted as an "agency or instrumentality" of the Government of Ecuador, which was the proper Respondent in the arbitration. *EnCana* para. 154.
3 *Id.* para. 47.

Editor's Note

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The arbitral tribunal stated that as long as a tax claim was "sufficiently connected to a taxation law or regulation", a degree of deference should be given to the State's courts to interpret and apply those laws and regulations.

manufacturers and export products would be eligible for the VAT refund.[4] Exacerbating this lack of clarity were Ecuador's numerous attempts to amend and clarify the applicable tax regime, culminating in the so-called Interpretative Law of 2004, which explicitly denied petroleum companies VAT refunds.[5]

Taxation as Expropriation?

In essence, EnCana's expropriation claim rested on the argument that since it was an exporter of oil, for the extraction of which it imported "raw materials", it was entitled to a VAT refund on those imports. In addition, it claimed that it had a legitimate expectation to receive such refunds because they were integrated into the investor's cost structure as reflected in the participation contracts. In response, Ecuador claimed that EnCana was never legally entitled to VAT refunds, and that such refunds had not been included in the parties' contractual arrangements. Therefore, EnCana's property had not been expropriated, nor had its expectations under the contracts with Ecuador been frustrated.

Before turning to the merits of EnCana's expropriation claim, the Tribunal addressed Equador's jurisdictional objections. The Tribunal's ruling on one of these objections foreshadowed its subsequent holding on the merits. In particular, Ecuador argued that the Canada-Ecuador BIT (under which the claim was brought), Art. XII(1), specifically exempted "taxation measures" as a potential basis for liability.[6] The Tribunal refused to read this exemption too broadly: "Tax authorities," the Tribunal ruled, "are not robber barons writ large, and an arbitrary demand unsupported by any provision of the law of the host State would not qualify for exemption…."[7] Simultaneously, however, the Tribunal found that "arbitrariness" for purposes of the BIT should be determined in light of the applicable domestic law. Since "the Tribunal is not a court of appeal in Ecuadorian tax matters," if a claim is "sufficiently connected to a taxation law or regulation" or to the actions of taxation authorities, "*its legality is a matter for the courts of the host State.*"[8] Thus, while holding that it would not divest itself of jurisdiction on a matter of Treaty interpretation, the Tribunal hinted that it should give a degree of deference to the expertise of Ecuador's courts on an area of Ecuadorian law that is undoubtedly specialized and, in this case, somewhat arcane.

On the merits of the case, the Tribunal first rendered its opinion on the claim of indirect expropriation. EnCana argued that even if its subsidiaries were not entitled to a tax refund under Ecuadorian law, their deprivation of this refund had an impact so substantial as to be equivalent of expropriation of EnCana's investment. The Tribunal summarily rejected this argument on two grounds. First, unless there is mutual agreement to the contrary, a host State may change its taxation legislation, even in a manner that results in some additional economic burden to the investor. Such legislative changes are part of the risk the investor assumes when it conducts business into the host State's territory. Second, the effect of the legislative change on EnCana's subsidiaries was not "substantial," since they continued "to function profitably and to engage in the normal range of activities…."[9] Finally, the Tribunal ruled that Ecuador's tax regime did not constitute an "incidental interference" with EnCana's property rights to such an extent as to constitute indirect expropriation.[10] Instead, such expropriation occurs "[o]nly if a tax law is extraordinary, punitive in amount or arbitrary in its incidence…."[11]

In support of its direct expropriation claim, EnCana contended that it was entitled to VAT refunds under

4 *Id.* para. 57 (enumerating the five main (and arguably dispositive) questions arising under Ecuadorian law).
5 For an overview of the various relevant provisions and amendments thereto, *see Id.* paras. 42-58. As the Tribunal observed, the parties' "legal position was thus, under any view, complex and obscure." *EnCana* para. 56.
6 *Id.* para. 112 (3).
7 *Id.* para. 142(1).
8 *Id.* (emphasis added).
9 *Id.* para. 174.
10 *Id.* para 177.
11 *Id.* para. 177.

Ecuadorian law and was wrongfully deprived of its right to such refunds. The preliminary question that arose was whether these tax refunds were "claims to money," which the BIT recognizes as a protected "investment." The Tribunal answered in the affirmative and proceeded to draw a distinction between prospective and retrospective operation of laws that relieve the State from an obligation towards an investor. Prospective application of such legislation would be "prima facie at least" within the State's prerogative to set and amend its laws, including its taxation regime. Retrospective cancellation of an obligation accrued under the State's laws, by contrast, can give rise to a BIT violation. Since Ecuador properly issued a legislative pronouncement denying EnCana and other oil companies tax refunds in 2004, only pre-2004 events were relevant to the Tribunal's analysis.[12]

The Tribunal ruled that Ecuador's persistent refusal to issue VAT refunds to EnCana did not amount to expropriation of the latter's property, because the enduring vagueness of the legal regime left room for good faith disagreement.[13] The Tribunal further held that a State "does not expropriate the value represented by a statutory obligation to make a payment or refund by mere refusal to pay, provided at least that (a) the refusal is not merely willful, (b) the courts are open to the aggrieved private party, (c) the courts' decisions are not themselves overridden or repudiated by the State."[14] Reviewing Ecuador's conduct under this three-prong test, the Tribunal found that, during the relevant period, Claimant could always rely on Ecuador's courts, which remained open and ostensibly free from undue Government interference. In addition, in refusing EcCana VAT refunds, the State acted in the good faith belief, supported by at least some court decisions,[15] that it was not legally obligated to issue such refunds to EnCana.

Deference to National Courts and Dissenting Opinion

The dissenting arbitrator's opinion focused primarily on the Tribunal's refusal, under the doctrine of "renvoi" or some "localizing principle pointing to the application of the national law of the host State," to resolve the statutory ambiguities that gave rise to the dispute in the first place.[16] The dissent noted that by deferring the resolution of the pending Ecuadorian tax law questions to Ecuador's tax courts, the Tribunal imposed on Claimant a requirement to exhaust local remedies—an obligation not supported by the BIT. Instead, the dissent argued, "the local laws, administrative acts…and conduct attributable to the Host State…are *facts* to be freely evaluated by the arbitrators to determine if the foreign investor's entitlement to protection under international law has been infringed…."[17] Based on this premise, Ecuador's unclear tax laws and regulations, and the corresponding confusion in local courts should be seen as State conduct that could have frustrated Claimant's legitimate expectations and ultimately expropriated its investment.[18]

Echoing its ruling in the jurisdictional section of the opinion, the Tribunal provided a succinct response: "Consistent with well-established international principle and doctrine…[the BIT] does not convert this tribunal into an Ecuadorian tax court….

While the Tribunal ruled that there was no indirect expropriation, the dissenting arbitrator wrote that Ecuador's tax laws and regulations and interpretation thereof should have been subject to greater scrutiny by the Tribunal.

12 *Id.* paras. 187-88.

13 *Id.* para. 194.

14 *Id.* para. 194.

15 Adding to the muddled legal landscape, Ecuadorian courts had issued conflicting decisions on EnCana's eligibility for VAT refunds. *See EnCana* paras. 87-94.

16 Dissent para. 10 The dissenting arbitrator seems to have mischaracterized the majority's approach as "renvoi." Renvoi is not merely a "localizing principle pointing to the application of the national law of the host State," but a (much-maligned) doctrine according to which, in resorting to the substantive law of a foreign jurisdiction, a court should also resort to the foreign jurisdiction's choice of law rules. In this case, even if the dissent is right in arguing that the Tribunal has improperly resorted to the laws of Ecuador to resolve substantive questions, at no point do the choice of law rules of Ecuadorian law figure in the analysis. For an overview of the various approaches to renvoi, *see* Kermit Roosevelt III, "Resolving Renvoi: The Bewitchment of our Intelligence by Means of Language", 80 Notre Dame L. Rev. 1821, 1830-74 (2005).

17 Dissent para. 12.

18 *Id.* paras. 24-25.

The Tribunal cannot pick and choose between different and conflicting national court rulings in order to arrive to a correct view as to what the local law should be."[19] By declining EnCana's invitation to interpret Ecuador's unclear and conflicting tax laws, the Tribunal did not merely make a policy decision. More importantly, it refused to infer the existence of legitimate investor expectations under a tax regime that had been marked by lack of clarity from the outset, and to diagnose bad Government acts amounting to expropriation when the Government in good faith supported its position before independently functioning national courts.

In sum, the *EnCana* award suggests that arbitral tribunals are reluctant to characterize as expropriatory a State's refusal to confer benefits on an investor when the State has consistently and in good faith interpreted its laws to warrant that refusal while the investor can effectively seek redress in the State's national courts. This ruling does not signify a broader deference to the host State's conflict resolution mechanisms. Rather, it reflects the great weight international tribunals place on good faith, and their reluctance to resolve complex questions of the host State's laws when doing so will ultimately have no bearing on a finding of expropriation.

William Spiegelberger

Russian Courts Enforce an English Money Judgment in the Absence of a Directly Applicable Treaty

William Spiegelberger, Venera Kamalova, Irina Sergeeva
Moscow

Conventional wisdom has it that foreign judgments are enforced in Russia only if a treaty or federal law so provides. The statutory basis for this view is Article 241(1) of the Procedural Code of the Commercial Court, which states in relevant part that the "decisions of the courts of foreign states [in commercial disputes] shall be recognized and enforced in the Russian Federation by the Commercial Courts if recognition and enforcement of such decisions is provided by international agreement of the Russian Federation and federal law." A vocal minority, however, has contended that foreign judgments can also be enforced solely on the basis of reciprocity. This minority view is based on dicta from certain Russian courts,[20] but no foreign judgment, as far as we are aware, has been ultimately enforced in Russia solely on the basis of reciprocity. Nonetheless, the Russian courts continue to grapple with the concept of reciprocity, as a recent enforcement case against the Yukos Oil Company illustrates.

In the summer of 2005, a consortium of fourteen banks commenced an action in the Moscow Commercial Court to enforce a $475 million judgment of the High Court of England and Wales against Yukos for breach of a credit agreement.[21] In a decision dated September 28, 2005, the Moscow Commercial Court enforced the English judgment over Yukos' objection that no treaty or federal law permitted enforcement as required by Article 241(1).[22] The court concluded that a foreign judgment "can be enforced by a competent Russian court also in the absence of a relevant international treaty if, on the basis of reciprocity, the judgments of Russian courts will be enforced by the court of the foreign state."[23] The court found as a matter of fact that the English courts can enforce Russian judgments.

Yukos then petitioned the Federal Commercial Court of the Moscow Region to quash the lower court's decision. In a December 5, 2005 decision, the court did not question the legal basis of the lower court's holding—that reciprocity can support enforcement—but it did hold that the right *kind of reciprocity* had not been proved by the English-law declaration

19 *EnCana* para. 200 n. 138.
20 *See, e.g.*, Decision of the Supreme Court of the Russian Federation in Case No. 5-G02-64, dated June 7, 2002.
21 *BNP Paribas S.A. & others* v. *Yukos Oil Company*, Case No. HC 05C0 12 19, [2005] EWHC 1321 (Ch) (June 24, 2005).
22 Decision of the Commercial Court of the City of Moscow in Case No. A40-53839/05-8-388, dated September 28, 2005.
23 *Id.* at 4.

submitted to the court below.[24] That declaration apparently stated that English courts will enforce foreign judgments on the basis of international treaty, national legislation, and the "general law of Great Britain [sic]" but it did not say that English law permits the enforcement of Russian judgments specifically on the basis of reciprocity. The court therefore remanded the case for an appropriate factual finding about English law.[25]

On remand, the Moscow Commercial Court again enforced the English judgment in a decision of December 21, 2005.[26] This time, the Court enforced the judgment on the basis of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("1950 Convention"), the 1992 Agreement on Economic Cooperation between the UK and Russia ("1992 Agreement"), as well as reciprocity and international comity "as generally recognized principles of international law."[27] The court concluded that Russia is bound to enforce the English judgment under the two treaties on the ground that they require Russia to afford UK persons the same rights as Russian persons with regard to the enforcement of foreign judgments in the Russian courts. Neither treaty, however, specifically provides for the enforcement of foreign judgments.

Yukos then filed a cassation petition against the decision on remand on the grounds that the lower court had misapplied the 1950 Convention and 1992 Agreement, failed to apply Article 241(1) of the Code, and reached conclusions not in accord with the facts in the record. The Federal Commercial Court of the Moscow Region rejected Yukos' petition in its decision of February 22, 2006.[28] The court relied on a third treaty, one not previously cited in the three previous decisions: the 1994 Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States, of the one part, and the Russian Federation, of the other ("1994 Agreement"). As the 1994 Agreement nowhere addresses, much less specifically authorizes, the enforcement of foreign judgments, the court had to rely on certain general principles embodied in the 1994 Agreement to support its holding, such as non-discriminatory access to the courts.

Yukos has apparently filed for appellate review of this decision. It therefore remains an open question whether the decision of the fourth proceeding will withstand review. If it does, and the Russian courts follow the approach in that fourth proceeding, it will be necessary to revise, if not discard, the conventional wisdom about the enforcement of the foreign judgments in Russia.

Russian court shows a willingness to enforce a foreign judgment on the basis of reciprocity

Dutch Court Refuses to Enforce US Arbitral Awards on Public Policy Grounds for Violation of EU Competition Law

Assimakis Komninos
Brussels

Assimakis Komninos

The interface between EU competition law and international arbitration was recently before a Dutch court in a case that had a surprising result. In *Marketing Displays International Inc.* v. *VR Van Raalte Reclame BV*,[29] the Court of Appeal of The Hague upheld a lower court's refusal to grant *exequatur* to three US arbitral awards, because the awards were considered incompatible with Article 81 of the EC Treaty and thus violated public policy. This is the first time that a foreign arbitral award has been refused recognition/enforcement in Europe on grounds of EU competition law.

24 *See* Decision of the Federation Commercial Court of the Moscow Region in Case No. A40-53839/05-8-388, dated December 5, 2005.
25 *See id.*
26 *See* Decision of the Commercial Court of the City of Moscow in Case No. A40-53839/05-8-388, dated December 21, 2005.
27 *Id.*
28 *See* Decision of the Federation Commercial Court of the Moscow Region in Case No. KG-A40/698-06-P, dated February 22, 2006.
29 Judgment of 24 March 2005, Case No. 04/694 and 04/695.

The Dutch decision reveals disagreements amongst some European courts as to the extent public policy should be used to justify refusal to enforce arbitral awards based on anti-competitive agreements.

The decision is also a setback in Europe, following the very liberal judgment of the Paris Court of Appeal in *SA Thalès Air Defence* v. *GIE Euromissile and others*. [30] In that case, while the French court agreed that EU competition law is a matter of public policy, the violation of public policy in an international arbitration case must be "*flagrant, effective and concrete*" to justify annulling an arbitral award. The mere excessive duration of an exclusivity arrangement and the market-sharing elements of a licensing agreement were not considered so serious as to justify the setting aside of the arbitral award, especially in a case where the plaintiff had never brought the antitrust issue to the attention of the arbitrators.

Stringent Application of Public Policy Principle

The facts in the Dutch case are similar to *Thalès*. An exclusive licensing agreement ("Agreement") was entered into by Marketing Displays International ("MDI") and Van Raalte Reclame ("VR") in relation to interchangeable aluminium frames for billboards. In particular, the Agreement granted an exclusive licence to VR for the territory consisting of Belgium, The Netherlands, and Luxembourg ("Benelux"). The Agreement also provided for a grant-back clause with respect to improvements made by VR on technologies licensed to VR by MDI.

Further to a dispute as to VR's obligations to pay royalties to MDI, arbitration proceedings were initiated.[31] The arbitration led to three awards: In 2001, a "Partial and Interim Arbitral Award" found VR in breach of contract. In 2002, a "First Amended Partial Final Arbitral Award" confirmed the previous ruling and ordered VR to pay EUR 5,000 per day of non-compliance. In 2003, a "Second Amended Partial Final Arbitral Award" confirmed the previous rulings and ordered VR to pay $160,216 to MDI in damages. The award also included an injunction.

MDI petitioned a Dutch lower court to enforce the three US arbitral awards pursuant to Article 1075 of the Netherlands Code of Civil Procedure and to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards ("New York Convention"). VR resisted enforcement of the arbitral awards *inter alia* on public policy grounds. According to VR, the Agreement upheld by the awards was contrary to Article 81(1) of the EC Treaty, which prohibits anti-competitive agreements. The first instance court refused to grant *exequatur* because the Agreement was in breach of Article 81(1) EC due to its market-sharing elements. Further, the Agreement was found ineligible for an "exemption" under Article 81(3) EC, which provides that *prima facie* anti-competitive agreements can nevertheless be saved if they result in pro-competitive benefits.[32]

The Dutch Court of Appeal referred to the *Eco Swiss* judgment of the European Court of Justice which had held that Article 81 of the EC Treaty pertains to public policy (*ordre public*) and that EU Member States courts are under a duty to refuse to recognise/enforce arbitral awards that violate that provision.[33] The Court considered the Agreement to be *prima facie* anti-competitive, because it awarded VR an exclusive licence to manufacture and sell products in the Benelux countries. It also noted that the 2001 arbitral award found VR in breach of contract because the latter was offering products protected by MDI patents outside its exclusivity territory. The Court then referred to the Block Exemption Regulations applicable at the relevant time and noted that they all disapproved of grant-back clauses. These were, in the Court's words, "intolerable restrictions". Since the agreement could not be saved by a

30 *See* Assimakis Komninos "Paris Court of Appeal Refuses to Set Aside Arbitral Award for Public Policy Violation", in the December 2004 (vol. 17, no. 4) issue of this newsletter.

31 The contract contained an American Arbitration Agreement ("AAA") arbitration clause and a choice of the law of the State of Michigan. VR at the outset appeared in the arbitration procedure but withdrew shortly before the rendering of the arbitral awards.

32 This was because the agreement was not eligible to fall under the then-applicable "Block Exemption Regulation" (Regulation 240/1996 on technology transfers) because of the grant-back clause, which the Regulation did not allow. There was also no possibility of an "individual exemption" given by the European Commission because it was never notified during the requisite time period to the Commission.

33 Case C-126/97, *Eco Swiss China Time Ltd.* v. *Benetton International NV*, [1999] ECR I-3055.

Block Exemption Regulation and because it had not been granted an individual exemption by the Commission, the anticompetitive parts of the licence agreement were, null and void under EC law, thereby nullifying the Agreement.

In these circumstances, the Dutch Court decided that recognition and enforcement of the three US arbitral awards should be denied pursuant to Article V(2)(b) of the New York Convention.

Inconsistent Court Rulings

The judgment of the Court of Appeal of The Hague is a disappointing development for international arbitration in Europe. This is the first case we are aware of where a foreign arbitral award has been refused recognition/enforcement pursuant to the public policy exception of Article V(2)(b) of the New York Convention on EC competition/antitrust law grounds. Apart from its symbolism, it constitutes a worrisome precedent in Europe because it creates a potentially wide exception to the cardinal rule of finality of arbitral awards and undermines the effectiveness of the New York Convention.

Following the European Court of Justice's *Eco Swiss* ruling, there are now two schools of thought in Europe as to the extent of control exercised by state courts over arbitration proceedings and awards. While *Eco Swiss* concluded that EU Competition law pertains to public policy, most commentators note that this ruling left unanswered exactly what type of violation of EU competition law would qualify as contrary to public policy as understood in the context of the New York Convention. Thus, according to a "minimalist" school, a foreign arbitral award should be denied recognition/enforcement only in the most extreme of circumstances, where there is a clear and very serious violation of competition law and this is upheld by the arbitral tribunal. An award upholding a cartel agreement or a serious abuse of dominant position (monopolisation) would thus certainly violate public policy. This approach was followed by the Paris Court of Appeal in *Thalès*, which stressed that the violation of the competition rules must be "*manifest*". On the other hand, according to a "maximalist" school, arbitral awards that concern EU competition law must be subjected to a full-fledged control on public policy grounds. The Dutch court's judgment in *Marketing Displays* leans in this direction.

The maximalist approach is problematic because of its ramifications for the New York Convention. It must be rejected particularly in cases such as the *Marketing Displays* where the agreement merely contained a clause disapproved by a Block Exemption Regulation. It should take much more than a mere failure to fall into the ambit of a block exemption to lead a court to the dramatic option to refuse recognition of a foreign arbitral award on the basis of public policy. In addition, state courts must draw the appropriate conclusions from situations where parties elect not to raise the reward competition law point during the arbitration proceedings but only at the belated stage of judicial review. This was something that was specifically disapproved of by the Paris Court of Appeal in *Thalès*. In any event, the Dutch case *Marketing Displays* signifies that there may be a brewing debate in Europe as to the extent of control over arbitral awards in cases concerning EU competition law. This development certainly deserves close attention.

Developments in the United States

Erika Serran

Enforcement of $495 Million Award Against Non-Signatory Sovereign

Erika Serran
Washington, DC

In a case the court itself described as "rare", the United States Court of Appeals for the Fifth Circuit ("Court") recently overturned a lower district court's vacatur of a $495 million arbitral award against the Government of Turkmenistan ("Government") in a dispute arising out of a joint venture between Bridas, an Argentine corporation, and a Turkmenian state-owned oil and gas company.[34] In *Bridas S.A.P.I.C.* v. *Government of Turkmenistan* ("*Bridas II*"), the Court held that the Government was a proper party in the underlying arbitration, despite the fact that it never signed the arbitration agreement nor was defined as a "party" in the Agreement.[35] Drawing upon concepts of US corporate law, the Court reasoned that the Government had acted as the "alter ego" of its instrumentality in relation to the joint venture agreement, and was therefore appropriate to "pierce the corporate veil" in the name of equity to allow enforcement of the award against the sovereign.

Dispute Involving Government—Owned Oil and Gas Company

In February 1993, on the heels of Turkmenistan's independence from the Soviet Union, Bridas entered into a 25-year joint venture agreement ("Agreement") to exploit oil and gas resources with an entity designated and wholly-owned by the Government (the so-called "Turkmenian Party").[36] The Agreement provided that the parties would split certain revenues from hydrocarbon production and secured an unlimited export license to Bridas for hydrocarbons. Less than three years after entering into the Agreement, however, the Government insisted on raising its share of future proceeds and ordered Bridas to halt operations and its imports to and exports from Turkmenistan. Bridas subsequently commenced an ICC arbitration, against the Turkmenian Party and the Government in accordance with an arbitration clause in the Agreement. The Government then dissolved the Turkmenian Party referred to in the Agreement, replaced it with Turkmenneft, abolished its Ministry of Oil and Gas, and decreed that all proceeds from oil and gas exports in the country were to be directed to a special fund, the assets of which were immune from seizure.

The Houston-seated arbitral tribunal found the Government and Turkmenneft liable for repudiating the Agreement and issued an award for $495 million in damages to Bridas. Among its holdings, the panel determined that the Government was a proper party to the arbitration and that the tribunal had the authority to adjudicate Bridas' dispute with the Government.[37] The parties then cross-moved to confirm, modify or reject the award in Houston district court. The district court initially upheld the award, concluding that the Government was bound to arbitrate under principles of agency and estoppel. In the first Fifth Circuit opinion in this case, *Bridas S.A.P.I.C.* v. *Government of Turkmenistan*

34 *Bridas S.A.P.I.C.* v. *Gov't of Turkmenistan* ("*Bridas II*"),_F.3d_(5th Cir. April 21, 2006), 2006 WL 1046963 at *7.

35 For an authoritative discussion of the various situations in which US courts will obligate non-signatories to a contract to arbitrate, See Carolyn Lamm and Jocelyn A. Aqua, "Defining the Party—Who is A Proper Party in an International Arbitration before the American Arbitration Association and Other International Institutions," 34 Geo. Wash. Int'l. L. Rev. 711 (2003).

36 The Government changed the identity of the "Turkmenian Party" several times over the life of the joint venture.

37 It is the author's understanding that the arbitral tribunal included the Government on the basis of construing the contract, which was governed by English law, not on the basis of an "alter ego" theory under US contract principles. *See also Bridas II*, 2006 WL 1046963 at n.5 ("There is an air of unreality to the analysis in this opinion, first because the [Agreement] specified both that English law would govern the parties' relationship, and the arbitral tribunal was to convene in Stockholm, Sweden. The parties, however, agreed to arbitrate in Houston, Texas, and both parties have relied exclusively on US law.").

("*Bridas I*"),[38] the appellate court rejected the agency and estoppel theories, and remanded to the district court for a more complete consideration of the alter ego argument. On remand, the district court held that there was insufficient evidence to support an alter ego theory and thus vacated the award, from which ensued this appeal.

Alter ego of Turkmenistan?

In *Bridas II*, the Fifth Circuit again considered the jurisdictional question of whether the Government was liable to Bridas, focusing exclusively on the theory that the Government was the alter ego of Bridas. The Court explained the general US rule that "'the concepts of corporate separateness have been applied to business entities owned by foreign governments'" and the exception in cases "in the name of equity when the corporate form is used as a 'sham to perpetrate a fraud.'"[39] The Court restated the two-prong test for applying the alter ego doctrine, to wit: "(1) that the owner exercised complete control over the corporation with respect to the transaction at issue, and (2) such control was used to commit a fraud or wrong that injured the party seeking to pierce the veil."[40]

Addressing the "fraud or injustice" prong first, the Court held that the Government's manipulations of Turkmenneft in 1996 constituted a misuse of the corporate form that caused injustice to Bridas. According to the Court, the Government destroyed the value of the parties' Agreement by replacing the Turkmenian Party with Turkmenneft—a company with an initial capital of only $17,000, which was funded by assets rendered immune from seizure under newly enacted laws. These measures, combined with the Government's attempts to limit its own potential exposure to liability, caused an injustice to Bridas as they were designed to prevent Bridas from recovering any substantial damage award under the Agreement.[41]

The Court then analyzed the "more difficult" control element.[42] By way of background, in *Bridas I*, the Court had instructed the district court on remand to consider a non-exhaustive list of 21 factors in the application of the alter ego doctrine, with the goal of determining "the reality" in which the corporation functions.[43] Among these include factors related to the entity's corporate formalities, its operations, and its finances.

Despite a "conscientious attempt" by the district court to follow the higher court's prior mandate, the Fifth Circuit in *Bridas II* determined that the lower court "clearly erred" in finding that the Government had not exercised sufficient control over its instrumentality as to be its alter ego. The district "court's error lay in elevating the form over the substance of the relationship as it pertained to the transaction with Bridas."[44] More specifically, the district court had pointed out that Turkmenneft exhibited some "corporate formalities" of an independent and self-supporting entity—including that its legal status was recognized on the face of the Agreement, it was solely responsible for its own obligations, that it and its predecessors had the right and actually did hold and use property and that it could sue and be sued in its own name. Coupled with these, the district court relied on certain "operations factors" supporting the

The Government's manipulations of the Turkmenian oil company justified holding that the sovereign was the alter ego of its instrumentality.

38 345 F.3d 347 (5th Cir. 2003), *reh'g and reh'g en banc denied*, 84 Fed.Appx. 472 (5th Cir. 2003), *cert. denied*, 541 US 937 (2004). For an in-depth analysis of this decision, see Carolyn Lamm, Eckhard Hellbeck and Anna Kovina, "*Bridas SAPIC* v. *Government of Turkmenistan*," 7 International Arbitration Law Review at N-55, 2004.

39 *Bridas II*, 2006 WL 1046963 at *2 (quoting, first, *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 US 611, 623-27 (1983), then *Pan Eastern Exploration Co.* v. *Hufo Oils*, 855 F.2d 1106, 1132 (5th Cir. 1988).

40 *Id.* at *3.

41 The Court reiterated that the fraud or injustice must be caused by the Government's misuse of the corporate organizational form, not merely by any exercise of the Government's sovereign powers. *See id.* (explaining that although the 1996 export ban may have constituted a wrong to Bridas, it was not a wrong based on misuse of the corporate organizational form and thus was insufficient to satisfy the alter ego test).

42 *Id.* at *4.

43 *Id.* The Court repeated these factors again in *Bridas II*. *See id.*

44 *Id.*

same conclusion, such as the fact that Turkmenneft traced its origins back many decades, had engaged in joint ventures with other foreign concerns, and in two instances its officials had sided with Bridas against the Government.

According to the Fifth Circuit, although these factors "may be consistent" with Turkmenneft's independent status, they are outweighed by two aspects more revealing of the reality of the Government's relationship with Turkmenneft.[45] First, the Court found it "critical" that the Government "did not really deal with Turkmenneft at arm's length," as demonstrated by how the Government manipulated Turkmenneft legally and economically to repudiate the contract with Bridas and rendered it impossible for Bridas to collect damages.[46] Second, the Court stressed the importance of the "finances" factors—most importantly, Turkmenneft's gross undercapitalization at its creation, but also the absence of any financial statement or balance sheet for the entity, and that its revenues were diverted to a common fund that also collected revenues from other state-owned entities. On this point, the Court explained, "[t]he fact that a subsidiary maintains what amounts to a 'zero balance,' and relies exclusively upon another entity to service its debts, is strong evidence that the subsidiary lacks an independent identity."[47] Based on the lack of real operational and financial independence, the Court concluded that the Government was Turkmenneft's alter ego, because "[i]ntentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil."[48]

Bridas II is instructive as an example of the "exceptional" case in which US courts will find a sovereign to be the alter ego of its instrumentality.[49] The Court's decision reminds us that the standard for this equitable remedy is stringent, particularly in breach of contract cases where the creditor willingly transacted business with the subsidiary and forewent the opportunity to obtain a guarantee of the subsidiary's debts by the parent. However, the standard is not impenetrable and may be satisfied where the sovereign (1) exercised substantial operational and financial control over its instrumentality, despite some indicia of corporate separateness, and (2) misused that control over the corporate form in order to unjustly deprive the other party a contractual remedy.

Federal District Court Upholds Class Arbitration Despite Class Action Waiver

Rima Al-Mokarrab
New York

In his April 6, 2006 ruling in *Genus Credit Mgmt. Corp.* v. *Jones*,[50] Judge J. Motz of the US District Court for the District of Maryland upheld an arbitrator's decision to permit class arbitration notwithstanding a class action waiver in the arbitration agreement. The ruling affirms an arbitrator's broad power to determine the availability of class arbitration, but the question of the validity of class action waivers remains unsettled under US law.

History of the Genus Ruling

In an earlier action before Judge Motz, consumers brought individual and class claims against Genus Credit Management Corporation, alleging conspiracy to commit violations of various state and federal laws.[51] On January 31, 2005, the court dismissed the case and ordered the parties to arbitration, as required by a valid arbitration agreement in

45 *Id.* at *6.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.* at *2.
50 2006 WL 905936, slip op. (D. Md. Apr. 6, 2006) [hereafter *Genus*].
51 *Jones* v. *Genus Credit Mgmt.*, 353 F. Supp. 2d 598 (D. Md. Jan. 31, 2005) [hereafter *Jones*].

the consumer contracts. The arbitration agreement provided for arbitration of "any dispute" arising out of the contract pursuant to the Commercial Arbitration Rules of the American Arbitration Association ("AAA"). It contained a class action waiver, prohibiting consumers from participating in "'any class action *lawsuit*…either as a *representative plaintiff* or as a member of the putative class.'"[52]

Judge Motz added in *obiter dicta* that under the facts of the case, such a class litigation waiver is valid in the Fourth Circuit, and that he would strike the class claims if ultimately the parties were not required to arbitrate.[53] He intended that as a matter of contract interpretation, the arbitrator, not the court, should decide whether class-wide or merely individual arbitration could proceed.[54]

Sole arbitrator Donald H. Green issued his Partial Final Clause Construction Award on October 13, 2005, finding that the terms of the arbitration agreement were ambiguous. Construing ambiguity against the drafters, the arbitrator determined that waiver of a class action "lawsuit" applied to courtroom remedies alone, and therefore, class arbitration could proceed.[55]

In *Genus*, the debt management company sought to vacate the Award. Judge Motz upheld the Award and affirmed that judicial review of arbitral decisions is "severely circumscribed," is due "great deference."[56] An award may be overturned only if it does not "'[draw] its essence from the agreement'" and if it is in "'manifest disregard of the law.'"[57] It was clear to the court that Arbitrator Green's interpretation drew its essence from agreement. In addition, the Award did not manifestly disregarded the law. Judge Motz found it plausible that given the plain meaning of the terms "lawsuit" and "representative plaintiff," an arbitrator could interpret these words as ambiguous with respect to the availability of class arbitration.[58]

US Law Remains Unclear as to Validity of Class Action Waivers

Genus reveals that under certain circumstances, the Fourth Circuit will uphold class litigation waivers. The implication is that if an arbitrator were to find that a party had waived class arbitration as well, this finding would be afforded great deference, and might preclude all avenues of class relief. A party seeking to avoid class liability in the Fourth Circuit might be able to do so with a clearly drafted arbitration agreement.

Outside the Fourth Circuit, careful drafting will only take a party so far. US case law remains unsettled as to the validity of class action waivers, especially in cases where an arbitration agreement waives both judicial and arbitral relief.[59] As corporations increasingly include class action waivers in arbitration agreements with consumers,[60] the Supreme Court may one day settle the question of whether and under what circumstances a class action waiver is valid. In the meantime, AAA and the mediation institution JAMS have published institutional rules governing class actions in order to make arbitration better

Rima Al-Mokarrab

It may take a United States Supreme Court ruling to clarify whether class action waivers in arbitration clauses are valid.

52 *Genus* at *1 (quoting the arbitration clause)(emphasis added).

53 *Jones* at 603.

54 *Jones* v. *Genus Credit Mgmt. Corp.*, Partial Final Clause Construction Award dated October 13, 2005, at 3 (citing Judge Motz's letter to the parties dated February 24, 2005) [hereafter the *Award*]. This approach is consistent with the leading case on class actions in arbitration, *Green Tree Fin. Corp.* v. *Bazzle*, 539 US 444 (2003).

55 *Award* at 6-8.

56 *Id.* at *2 (quoting *Upshur Coals Corp. v. United Mine Workers of America Dist. 31*, 933 F.2d 225, 228-29 (4th Cir. 1991)).

57 *Id.*

58 *Id.* at *3.

59 With few exceptions (the First and Ninth Circuits and California), courts applying the Federal Arbitration Act tend to uphold class action waivers. State courts are split over the validity of class action waivers, with a small minority finding certain class waivers to be unconscionable under state law. *See also* News Release, Trial Lawyers for Public Justice, "TLPJ Launches Special Project to Preserve Class Actions", (May 16, 2006) (including a list of state and federal courts that have ruled on waivers of class litigation and arbitration); Bernard Hanotiau, *Complex Arbitrations: Multiparty, Multicontract, Multi-issue and Class Actions* 267-270 (Julian Lew ed., Kluwer Law International 2005).

60 *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373 (2005).

suited to providing class relief.[61] The International Institute for Conflict Prevention & Resolution recently created a commission to develop guidelines for managing mass litigation claims.[62] A national public interest law firm has launched "The Class Action Preservation Project," an effort to raise awareness that corporations may be using waivers barring all class relief as an exculpatory mechanism, given that consumer claims tend to be prohibitively expensive for individual action. Ultimately, although consumer class actions may be under attack, it appears that the US legal landscape is prepared to preserve mass claims as valuable tools for overcoming collective action barriers to relief.

Jonathan C. Ulrich

Frustrated US Courts Impose Sanctions For Frivolous Arbitration Award Challenges

Jonathan C. Ulrich
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In three recent decisions by the US Courts of Appeal, the Seventh, Tenth and Eleventh Circuits threatened or ordered sanctions against parties for filing groundless motions to vacate an arbitration award. While the holdings themselves are sufficient to caution arbitrating parties against unwarranted appeals from a final arbitral decision, the strongly worded opinions further convey a mounting judicial frustration with such frivolous challenges.

In a December 7, 2005 opinion, the Tenth Circuit ruled in *Dominion Video* v. *EchoStar Satellite LLC* that sanctions were properly imposed on a party bringing a baseless challenge to confirmation of an arbitration award.[63] Arising out of a dispute over the exclusivity provisions of a satellite television transponder lease and programming agreement, the case had been described by the district court as "the most glaring example of the wisdom of having [sanctions]."[64]

The parties' agreement provided for arbitration before the American Arbitration Association ("AAA"), and the AAA panel had ruled in favor of Dominion. On appeal from the district court's confirmation of the award, EchoStar claimed that federal preemption, legal impossibility, and the First Amendment prohibited enforcement. EchoStar had raised and lost the same arguments in the arbitration proceeding, confirmation proceeding, and an earlier preliminary injunction hearing, where the district court characterized them as "disingenuous," "exceedingly fanciful" and based on a "gross contortion" of governing law.[65]

Noting that judicial review of an arbitration award is "among the narrowest known to the law,"[66] the Tenth Circuit held that none of EchoStar's arguments fell under the limited grounds for vacating an award in section 10 of the Federal Arbitration Act (FAA), nor under the judicially-created ground of manifest disregard of the law.[67] "[M]indful that nearly all of [EchoStar's] arguments ha[d] been raised and rejected three times,"[68] the court found that appeal of the award was "frivolous," and that EchoStar should be sanctioned for "depriv[ing] Dominion of the primary benefit gained by submitting to arbitration: to avoid the expense and delay of court proceedings."[69]

The Eleventh Circuit reached a similar conclusion in its February 28, 2006 decision in *B.L. Harbert International, LLC* v. *Hercules Steel Co.*[70] As in

61 *See* AAA Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003); JAMS Class Action Procedures (dated Feb. 2005).
62 News Release, International Institute for Conflict Prevention & Resolution, "CPR Institute Appoints Kenneth R. Feinberg and Deborah E. Greenspan to Head Up New Commission on Facilities for the Resolution of Mass Claims" (Jan. 24, 2006).
63 430 F.3d 1269 (10th Cir. 2005).
64 *Id.* at 1274.
65 *Id.* at 1273.
66 *Id.* at 1275 (internal quotation and citation omitted).
67 *Id.* at 1278.
68 *Id.* at 1275.
69 *Id.* at 1278 (internal quotation and citation omitted).
70 441 F.3d 905 (11th Cir. 2006).

Dominion Video, the parties had arbitrated a contractual dispute under the auspices of the AAA, and the losing party-there, Harbert-refused to recognize the finality of the award. Harbert moved to vacate the award and then appealed the district court's confirmation of it, arguing that the arbitrator's alleged misapplication of the parties' contract constituted a manifest disregard of applicable law.

The Eleventh Circuit ruled that none of the statutory grounds for vacating an award were "even remotely applicable in this case,"[71] and that "[t]he only manifest disregard of the law evident in this case is Harbert's refusal to accept the law of this circuit which narrowly circumscribes judicial review of arbitration awards."[72] Under the well-established standard, the court noted, vacating an award for manifest disregard of the law requires that the arbitrator was conscious of the law and deliberately ignored it; misinterpretation, or even "clear error," is not enough.[73]

The court further expressed its "exasperat[ion] [with] those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards."[74] In a stern warning to parties that "assume[] a never-say-die attitude,"[75] the court stated that it was "ready, willing, and able" to impose sanctions—but would not do so in the present case primarily because Harbert did not have notice or warning of such a penalty.[76]

Only days after the Eleventh Circuit threatened sanctions in *B.L. Harbert*, the Seventh Circuit did order sanctions in a March 16, 2006 decision in *CUNA Mutual Insurance Society* v. *Office & Professional Employees International Union*.[77] Although ruling in the limited context of labor arbitration, the court noted that the "precedent is clear and emphatic and directs us to uphold sanctions in a broad spectrum of arbitration cases."[78] The court added that it would not permit parties to nullify the advantages of arbitration by "spinning out the arbitral process unconscionably through the filing of meritless suits and appeals."[79] Holding that the district court's imposition of sanctions was warranted, and that it would not hesitate to impose future sanctions when necessary, the court punctuated its opinion with a warning of its own: "Lawyers practicing in the Seventh Circuit, take heed!"[80]

The Seventh, Tenth and Eleventh Circuits are hardly the first to consider or to impose sanctions for frivolous challenges to an arbitration award.[81] The exasperated tone and stern admonitions which permeate these recent opinions, however, suggest that the courts may be increasingly willing to do so. Parties seeking to vacate or modify an arbitration award in a US court are well-advised to evaluate fully the merits of their claim before testing the patience of an evidently frustrated judiciary.

Arbitral awards should not face endless and meritless appeals, and court sanctions are appropriate to punish parties pursuing frivolous challenges in US courts.

71 *Id.* at 909-10.
72 *Id.* at 913.
73 *Id.* at 910, 911-912.
74 *Id.* at 914.
75 *Id.* at 913.
76 *Id.* at 914.
77 443 F.3d 556 (7th Cir. 2006).
78 *Id.* at 561.
79 *Id.* (quotation and citation omitted).
80 *Id.* (quotation and citation omitted).
81 *See, e.g.*, *Rostad & Rostad Corp.* v. *Inv. Mgmt. & Research, Inc.*, 923 F.2d 694, 697 (9th Cir. 1991) (affirming an order to pay attorneys' fees and costs for a party's "meritless opposition" to award confirmation and "fail[ure] to understand the very limited review now available in federal court").

Developments in Arbitral Institutions

Judith Levine

Amendments to ICSID Arbitration Rules and Regulations

Judith Levine
New York

On April 10, 2006 amendments to the Rules and Regulations of the International Centre for the Settlement of Investment Disputes ("ICSID") came into effect. ICSID was established under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention").[82] The ICSID Convention, a multilateral treaty ratified by over 140 countries, establishes a system for the conciliation and arbitration of investment disputes between Contracting States and foreign investors who are nationals of other Contracting States. The provisions of the ICSID Convention are supplemented by various rules and regulations, including the ICSID Arbitration Rules which set out procedures for the conduct of an arbitration proceeding.

As the ICSID caseload has continued to grow in recent years (in part due to the mounting number of bilateral and investment treaties providing for ICSID arbitration), certain procedural issues became ripe for reform. The ICSID Secretariat conducted extensive consultations with governments, arbitration experts and business and civil society groups and came up with a set of proposals to update the ICSID Rules and Regulations.[83] The final reforms were approved earlier this year by ICSID's governing body, the Administrative Council, which is composed of one representative of each Contracting State, and is chaired by the President of the World Bank.[84]

Where applicable, the amendments have also been made in corresponding provisions of the ICSID Arbitration (Additional Facility) Rules.[85] Not all of the changes originally canvassed by the ICSID Secretariat have been implemented. Notably, a proposal to establish an ICSID appeals facility was considered to pose difficult technical and policy issues, and it was decided not to pursue such a mechanism at this time.[86] The most significant new amendments are below.

Preliminary Procedures: Provisional Measures and Dismissal of Unmeritorious Claims

Two reforms are aimed at speeding up proceedings at the preliminary phase. Rule 39 has been amended to allow a party to request and file observations for provisional measures even *before* the arbitral tribunal has been constituted. This means that by the time a Tribunal is formed, all the papers will have been filed and ready for immediate consideration by the Tribunal.

Also affecting the early stages of a case is the new Rule 41(5) on Preliminary Objections. The Secretary-General of ICSID has always had a power to screen requests for arbitration and refuse

82 The text of the Convention is available at: http://www.worldbank.org/icsid/basicdoc/basicdoc.htm

83 *See* ICSID Secretariat, Discussion Paper "Possible Improvements of the Framework for ICSID Arbitration", October 22, 2004, available at: http://www.worldbank.org/icsid/highlights/DiscussionPaper.pdf ("2004 Discussion Paper"), which stimulated discussion amongst interested parties; and ICSID Secretariat, Working Paper "Suggested Changes to the ICSID Rules and Regulations", May 12, 2005, available at: http://www.worldbank.org/icsid/highlights/052405-sgmanual.pdf, ("2005 Working Paper") which reported on the reactions of interested parties to the proposed reforms.

84 ICSID News Release, "Amendments to the ICSID Rules and Regulations", April 5, 2006, available at: http://www.worldbank.org/icsid/highlights/04-10-06.htm.

85 The Additional Facility Rules authorize the Secretariat of ICSID to administer proceedings that fall outside the scope of the ICSID Convention, such as arbitrations for the settlement of investment disputes where either the State party to the dispute or the home State of the foreign national is not a Contracting State of the Convention.

86 *See* 2004 Discussion Paper, ¶¶ 20-23 and Annex; and 2005 Working Paper, ¶ 4.

to register them for manifest lack of jurisdiction. However this power did not extend to the *merits* of a dispute. Now, under the new Rule 41(5), a party has the option within 30 days of the Tribunal being constituted, to file an objection to a claim that is "manifestly without legal merit." The party must specify "as precisely as possible" the basis for such an objection, and each party has the opportunity to present observations on the objection. This new procedure may lead the Tribunal to issue an award akin to a summary dismissal of all or part of the claims.[87]

Greater Transparency: Publication of Awards and Access by Non-Parties

While the consent of both parties is still required before ICSID publishes an entire award, the new Rule 48 on the "Rendering of the Award" obliges ICSID to "promptly include in its publications excerpts of the *legal reasoning* of the Tribunal." This move was considered important at a time when many cases involving similar issues are pending.[88]

Amongst the more controversial of the changes to the Rules were those involving greater access to ICSID by non-parties. Rule 32(2) now provides for a Tribunal to allow non-parties to attend or observe all or part of the hearings. Importantly (and no doubt disappointingly to interest groups seeking greater access) a Tribunal can only open proceedings to outsiders if neither party objects. Essentially this means that parties can veto outsider observers—a veto which was not contained in earlier versions of the proposed amendments.[89] If neither party objects, and third parties are allowed in, the amended rule requires the Tribunal to prescribe procedures to "protect proprietary information" and to make "appropriate logistical arrangements."

On a related theme, the new Rule 37(2), deals with written submissions of "non-disputing parties" (sometimes known as "amicus briefs"). Such non-disputing parties might be NGOs, business groups, or even the non-participating State Party to the treaty at issue. While there is no party veto for Rule 37(2), the Tribunal must consult with both parties before allowing a non-disputing party to file a written submission. In determining whether to allow such a filing, the Tribunal must consider "among other things" the extent to which: (a) the filing would assist by "bringing a perspective, particular knowledge or insight that is different from that of the disputing parties," (b) the filing would "address a matter within the scope of the dispute;" and (c) the non-disputing party has a "significant interest" in the proceeding. The Tribunal must ensure that such submissions are not disruptive, unduly burdensome or prejudicial, and that both parties have the opportunity to present observations on the non-disputing party submission.

Changes for Arbitrators: Independence Declarations and Fee Increases

Two amendments concern arbitrators. First, the scope of written disclosures by arbitrators has expanded. Under the new Rule 6, arbitrators now have to disclose, in addition to relationships with the parties, "any other circumstance that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party." This change was considered important with the large number of new cases and increased scope for possible conflicts of interests.[90]

Second, there is a new provision on fee increases. Under the ICSID Convention, the Secretary-General sets standard daily fees for arbitrators.[91] However it

New ICSID Arbitration Rules include a mechanism for expedited preliminary challenge to a claim that is "manifestly without legal merit".

87 Note that the Rule allows for the parties to have agreed to expedited procedures different from the procedures set out in the rule. Rule 41(5) also makes clear that the Tribunal's decision shall be without prejudice to the right of a party to file a jurisdictional objection in the ordinary way (Rule 41(1)) or argue at any stage that a claim lacks legal merit.

88 2004 Discussion Paper, ¶ 12; 2005 Working Paper, p. 9.

89 2005 Working Paper, p. 10.

90 The ICSID Secretariat had noted that this change "might in particular be helpful in addressing perceptions of issue conflicts among arbitrators." (2004 Discussion Paper, ¶ 18).

91 ICSID Convention, Article 60(2).

has become common for arbitrators to request fees in excess of the standard rate. An amendment to Financial Regulation 14 requires that all such requests now be made through the Secretary-General.[92]

When Do the New Rules Apply?

Pursuant to Article 44 of the ICSID Convention, unless otherwise agreed by the parties, an ICSID arbitration proceeding is conducted "in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration."[93] Thus, unless parties to an existing arbitration choose to apply them, the amendments discussed above apply *only* to disputes where parties consented to ICSID arbitration after April 10, 2006.

Conclusion

The new amendments to the Rules and Regulations show that ICSID has been willing and able to engage with its users and consult with interested parties to update and improve this increasingly active forum for dispute resolution.

The new Rules and Regulations are available from the ICSID website in the official English, French and Spanish versions at: http://www.worldbank.org/icsid/basicdoc/basicdoc.htm. The ICSID Secretariat has also published hardcopy reprints of the Convention, Regulations and Rules.

92 The draft proposal had originally limited such requests to "exceptional circumstances" and prohibited the requests from being made directly to the parties. Neither of these limits were adopted in the final version of the amendments.

93 Rule (2) of the ICSID Institution Rules provides that "Date of consent" means "the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted." In investment treaty arbitrations, the date of consent will normally be the date when the investor files a Request for Arbitration. For discussion of the timing of consent, *see* Christoph H. Schreuer, The ICSID Convention: A Commentary (Cambridge University Press, 2001), pp. 225-34.

Recent Developments in Cases Handled by White & Case

White & Case Achieves Major Victory for RWE Nukem, Inc. In Long-Standing Arbitration Dispute

White & Case achieved a significant victory in a decade-long dispute between its client, RWE Nukem, Inc., and US Energy Corporation regarding the enforcement of an arbitration award that was remanded by the Tenth Circuit Court of Appeals to the Arbitral Panel for clarification of an ambiguous award. In its Clarification Award issued May 15, 2006, the three-member arbitration panel found in favor of Nukem and denied all of US Energy's claims to Nukem's CIS contracts with certain uranium producers, involving more than an alleged $174 million in damages.

The dispute related to the enforcement of a 1996 arbitration award concerning the Sheep Mountain Partnership ("SMP") established in 1989 by Nukem (together with its affiliate Cycle Resource Investment Corporation) and US Energy (together with its affiliate Crested Corp.) to mine and market certain specified uranium. Multiple disputes erupted between the parties shortly after they formed the partnership, and in 1994 they stipulated to binding arbitration of more than 33 claims under the auspices of the American Arbitration Association ("AAA").

In the arbitration, US Energy made two claims relating to uranium from the Commonwealth of Independent States ("CIS"). The first related to Nukem's four contracts for the purchase of uranium from certain uranium producers. The second related to the benefits of import rights obtained under a bilateral Suspension Agreement between the United States and Uzbekistan that permitted Nukem to fill five uranium contracts between SMP and certain US utilities ("SMP Contracts") with Uzbek origin uranium but where Nukem allegedly failed to do so.

In its 1996 Award, the Arbitral Panel denied US Energy's claim relating to Nukem's four uranium purchase contracts, but granted US Energy's claim relating to the five SMP contracts. The Panel awarded damages for those five contracts and a constructive trust to secure payment of the damages. Although Nukem paid the damage award in full in 1997, US Energy spent the next ten years litigating an ambiguity in the Award as to the nature and value of the constructive trust, asserting that the constructive trust was imposed on all profits from the four CIS purchase contracts.

Nukem retained White & Case in 2003 following the entry of judgment by the US District Court for the District of Colorado in favor of US Energy for an additional $20 million for the value of the constructive trust. The Firm appealed the judgment, which was vacated by the Tenth Circuit and remanded to the Panel for clarification of the contents and value of the constructive trust in *US Energy Corp.* v. *Nukem, Inc.*[94] In its decision, the Tenth Circuit held that the district court's valuation of the constructive trust was "based upon extensive guesswork" and, therefore, a remand to the arbitration panel for clarification was necessary.[95] "[I]t is not the role of the courts to interpret vague arbitration awards,"[96] the court ruled, further noting that "neither the passage of time nor the fact that one of the three arbitration panel members has died precludes remand."[97]

On remand, the parties reconstituted the Panel, which required the appointment of one new

94 400 F.3d 822 (10th Cir. 2005).
95 *Id.* at 836.
96 *Id.*
97 *Id.* at 831.

arbitrator given that Nukem's appointee to the Panel had passed away since issuance of the Award. The parties made further written submissions to the Panel in November and December 2005, and a one-day hearing was held on December 20, 2005. Throughout the remand proceedings, US Energy continued to pursue its failed claim relating to Nukem's four CIS purchase contracts.

In its Clarification Award, issued May 15, 2006, the Panel rejected US Energy's arguments *in toto*, ruling that US Energy was never entitled to a constructive trust or damages of any kind relating to Nukem's CIS purchase contracts.[98] Instead, the Panel held that the "Original Panel's intention was to grant damages as a remedy at law" for the SMP contracts claim only, and "to impress a constructive trust solely for the purpose of securing the collection of the damage award."[99] In that regard, "the Original Panel concluded that there was no credible evidence to support any additional damages or any additional relief of any kind with respect to the [purchase contracts]."[100]

Thus, the Panel declared moot and denied all of US Energy's claims to Nukem's four purchase contracts. The Panel further found that Nukem had satisfied in full the damage award relating to the five SMP contracts that benefited from import rights under the Suspension Agreement, and that the constructive trust to secure this payment thereby had been extinguished.

White & Case's arbitration victory in this decade-long dispute is a tremendous validation for client Nukem, as well as for the fundamental principle that parties cannot use the courts to second-guess or rewrite adverse arbitration awards to suit their purposes. Members of the White & Case team, all from the Firm's Washington, DC office, were Carolyn B. Lamm, Francis A. Vasquez, Jr., Adams C. Lee, Jonathan C. Hamilton, M. Megan Smith, Matthew Leddicotte, and Jonathan C. Ulrich.

Chambers USA 2006 Ranks White & Case International Arbitration in First Tier

The recent publication Chambers USA 2006 wrote the following about White & Case's International Arbitration Practice:

"Few other US firms are as internationally entrenched as White & Case. It comes as little surprise, therefore, that it possesses a "*terrific*" international arbitration practice that stands as a "*leader in the field.*" Its quality is enhanced by the profile of its "*impressive core of well-known experts*" in Washington DC, New York and Paris. These are experienced in all manner of arbitrations. However, the legacy of Charles Brower's public international law focus continues to prevail such that the firm's reputation shines particularly brightly when it comes to investor-state disputes. Clients confirmed the team's strong standing and waxed lyrical about the "*depth of talent*" on offer and the firm's "*plugged-in and extremely well-prepared*" lawyers."

"**Carolyn Lamm** is "*a recognized expert in the area of investment disputes.*" She is "*thoroughly immersed in her work*" and impresses commentators with her display of "*tenacity and quiet determination.*" She has recently been representing Tenex in an interesting case arising from the Swords to Plowshares agreement between the USA and Russia, whereby Russia has agreed to break down its nuclear warheads into uranium that can be used for energy. The case was brought by Globe Nuclear Services and Supply who claimed that Tenex breached the contract to supply it with chemicals to break down the uranium. Lamm succeeded in getting the case against her client dismissed. Interviewees frequently claimed that **Paul Friedland** "*has a more extensive technical knowledge of arbitration than any other lawyer out there—you can go to him with any conceivable question.*" Clients also praised his "*quickness of mind*" and "*the seriously impressive speed at which he outpaces opponents*

98 *Cycle Resource Investment Corp. and Nukem Inc. v. US Energy Corp., AAA Case No. 77 198 00119 045 MAVI (Clarification Award dated May 15, 2006).*
99 *Id. para. 6.*
100 *Id. para. 21.*

or witnesses." He is currently handling investor-state arbitrations for both Bulgaria and Indonesia. **Abby Cohen Smutny** is renowned for her "*thorough and technical*" preparation, as well as her "*vigorous and energetic*" advocacy. Admirers confidently stated that "*you can't go to a better practitioner, especially on cutting-edge cases.*" She has had a very notable past year due to her secural of an $877 million award for CSOB in its ICSID case brought against the Slovak Republic."

Appointments, Speeches, Conferences and Publications

1. The current edition of *The Best Lawyers in America*, published biennially since 1983 and considered a preeminent referral guide to the US legal profession, cited White & Case lawyers **Charles Brower, Paul Friedland, Carolyn Lamm, Abby Cohen Smutny** as leading lawyers in International Arbitration.

2. **Abby Cohen Smutny and Michael Polkinghorne** were included on the list of 45 leaders in international arbitration under the age of 45 in *Global Arbitration Review*.

3. **Pieter Bekker** (New York) was recently elected to serve for a three-year term on the Executive Council of the American Society of International Law at the Society's Centennial Meeting in Washington, DC. Pieter was also appointed by the President of the American Society of International Law to serve on the Society's Task Force on the Professional Responsibility of International Lawyers. The six-member Task Force is chaired by Professor Detlev Vagts of Harvard Law School.

4. **Jeremy Sharpe** and **Carolyn Lamm** (Washington, DC) wrote the chapter on "Substantial Validity of Arbitration Clauses, The Agreement Is 'Inoperative'" for *Enforcement of Arbitration Agreements and International Arbitral Awards*, edited by Emmanuel Gaillard and Domenico DePietro.

5. March 27, Hong Kong: **Kim Rooney** participated in a panel on "Enforcement of Arbitration Awards" at a conference on Institutional Arbitration—An Effective Method of Resolving International Commercial Disputes, organized by the Hong Kong International Arbitration Centre and the International Chamber of Commerce, and co-sponsored by White & Case.

6. March 27, Charleston, US: **Paul Friedland** (New York) spoke about "Effective Use of the Discovery Process in International Arbitration" at an International Chamber of Commerce conference, ICC International Commercial Arbitration.

7. **Andrew McDougall** and **Leon Ioannou** (Paris) wrote "Separability saved: US Supreme Court eliminates threat to international arbitration" which appeared in the 24 March issue of *Mealey's International Arbitration Report*.

8. **Chris Seppälä** (Paris) wrote "The Arbitration Clause in the FIDIC Contracts for Major Works" which was published in the April 2006 issue of the *Asian Dispute Review,* published by the Hong Kong International Arbitration Centre.

9. April 10, Vienna: **Michael Polkinghorne** (Paris) will speak about "Discovery in International Arbitration" at the Juris' Second Annual Leading Arbitrators' Symposium.

10. April 24, Vienna: **Arthur E. Appleton** (Geneva) delivered a paper on "Ten Years of SPS and TBT Dispute Settlement" at a Europainstitut conference.

11. May 5, London: **Abby Cohen Smutny** (Washington, DC) participated in a panel discussion on "The Standard of Compensation for Expropriated Property" at the British Institute of International and Comparative Law's Sixth Investment Treaty Forum Public Conference.

12. **Chris Seppälä** will be a speaker on a panel regarding "Practical Guidelines for Successful ICC Arbitration" at a conference on "ICC Arbitration in Practice 2006" being organized by the ICC in Helsinki on May 9, 2006.

13. **Chris Seppälä** will give an oral report on the latest developments regarding FIDIC contracts to the Commission on Arbitration of the ICC's International Court of Arbitration in Paris on May 23, 2006.

14. May 23, Washington, DC: **Abby Cohen Smutny** will participate in a panel discussion on "The Energy Charter Treaty: The Most Important Energy Treaty Most Americans Know Nothing About," organized by the Georgetown University Law Center.

15. May 30, Washington, DC: **Carolyn Lamm** chaired "The Geological Strata of International Law" program at the Annual Meeting of the American Society of International Law.

16. June 1 – 2, Montreal: **Steve Bond** (Paris) spoke about cross-examining legal experts, and **Paul Friedland** (New York) discussed claims for damages for breach of arbitration agreements at the International Council of Commercial Arbitration Congress, the leading biennial international arbitration conference. More than 500 arbitration specialists attended the Congress, which was co-sponsored by White & Case.

17. June 1, Montreal: **Andrew McDougall** (Paris) taught a class on appointing arbitrators at the McGill University Summer Arbitration Program.

18. June 19 – 20, London: **Pieter Bekker** (New York) will lead a workshop on "Effectively Managing Potential Disputes Concerning Cross-Border Pipelines," and will also speak about "Principles and Trends in Continental Shelf Delimitation," at the Advanced International Boundary Disputes in Oil and Gas conference organized by IQPC.

19. June 27, New York: **Paul Friedland** (New York) will speak at a PricewaterhouseCoopers conference on How Major Companies Resolve Cross Border Disputes—The Myths, Data and Analysis, which features the roll-out of a new study on "International Arbitration: Corporate Attitudes and Practices 2006," sponsored by PricewaterhouseCoopers LLP and conducted by the School of International Arbitration, Queen Mary, University of London.

20. **Chris Seppälä** will be chairing the first day of a 2-day conference entitled "International Construction Contracts and the Resolution of Disputes" being organized by the ICC and FIDIC in Hong Kong on July 3 and 4, 2006 and will be a speaker on certain international arbitration topics on the second day.

21. March 25, São Paulo: **Jonathan Hamilton** (Washington, DC) participated in a panel on "Investment Protection and Litigation" at the International Bar Association Latin America Conference.

22. April 1, San José, Costa Rica: **Jonathan C. Hamilton** (Washington, DC) was a featured speaker, discussing "The Destiny of Arbitration in Latin America" at the annual executive meeting of the Bomchil Group, a network of leading Latin American law firms.

23. May 11, Miami: **Jonathan C. Hamilton** (Washington, DC) spoke about "The Arbitration Challenge for Latin American Sovereigns" at a panel discussion on "Challenges in Representing the Foreign Sovereign," hosted by the Florida Bar International Law Section.

24. **Anthony Lavers** (London) co-authored "Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom" for the December 2005 issue of *Pepperdine Dispute Resolution Law Journal*.

25. **Judith Levine** (New York) wrote "Dealing with Arbitrator 'Issue Conflicts' in International Arbitration" for the February–April 2006 edition of *Dispute Resolution Journal*.

26. **Judith Levine** (New York) wrote "UNCITRAL Working Group Proposes Reforms to Model Arbitration Law" for the January/February/March 2006 quarterly newsletter of the Law Council of Australia's International Law Section.

27. 28 April 2006, Florence: **Assimakis Komninos** (Brussels) spoke about the co-operation mechanisms between the European Commission and commercial arbitration tribunals when the latter apply EU competition law, at a conference organized by the University of Florence (*Università degli studi di Firenze*) and funded by the European Union. The conference was attended by academics, practitioners and antitrust agency officials.

White & Case—Worldwide

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