

International Disputes Quarterly

Focus: An Arbitrator's Perspective

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An Interview with George A. Bermann

George A. Bermann is the Walter Gellhorn Professor of Law and the Jean Monnet Professor of European Union Law at Columbia Law School. He has been a member of the Columbia Law School faculty since 1975 and his principal courses at present are European Union Law, Comparative Law, Transnational Litigation and WTO Dispute Resolution. Professor Bermann has participated as arbitrator in numerous arbitrations.

Q: Are there any techniques/strategies that you have seen counsel use in an arbitration where you have been arbitrator, which you think are particularly effective to making counsel's case?

A: Graphics which succinctly depict a party's argument, followed by graphics that depict the defects in the adversary's argument.

Q: Are there any techniques/strategies that you have seen counsel use in an arbitration where you have been arbitrator, which you think are particularly ineffective to making counsel's case?

A: The use of expert witnesses who are less than cogent and convincing.

Q: Based upon your experience as arbitrator, are there any special tips for counsel from common law backgrounds? Any common law tendencies that counsel should try to limit?

A: Being of common law training, I generally find common law advocacy appealing. However, I often sit with civil-law-trained arbitrators, and in addressing them, common law counsel would do well to indicate as clearly as possible at the outset of examination (and especially cross-examination) the "path" of questioning. This will suggest a coherence in questioning that some arbitrators find lacking in common law advocacy. There is a risk with such arbitrators that counsel's direct and cross-examination can look disjointed and aimless.

Q: Based upon your experience as arbitrator, are there any special tips for counsel from civil law backgrounds? Any civil law tendencies that counsel should try to limit?

A: Civil law counsel, especially when appearing before common law arbitrators, need to pay special attention to the "crispness" of their advocacy, which is too often lacking.

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(Note that my caution to common law counsel is very much the obverse of my caution to civil law counsel).

Q: Under what circumstances should a Tribunal consider appointing its own expert?

A: Generally speaking, it is unnecessary to do so. I think it should be avoided unless (a) the technical character of the expert evidence has made the contribution of the party-appointed experts less than comprehensible or (b) the Tribunal finds that the party-appointed experts were (or appear to have been) unduly partisan.

Since I would not presume, *ex ante*, that either of these situations will arise, I would generally not retain an expert for the Tribunal until after the first opinions have come in, even though this will by definition entail some otherwise avoidable delay.

Q: What is your view of dissenting opinions in international arbitrations? Should they be encouraged? Discouraged?

A: They should be discouraged and I discourage them.

An Interview with Alfredo Bullard

Alfredo Bullard is a partner at Bullard, Falla & Ezcurra Abogados in Lima, Peru, a boutique law firm that focuses on competition, regulatory issues and arbitration. Dr. Bullard chaired the drafting commission for Peru's new General Arbitration Law, enacted in 2008 and has participated as arbitrator, counsel or expert in over 80 arbitrations, both domestic and international. He also served for several years as President of the Competition Chamber of INDECOPI, Peru's highest administrative tribunal in issues of competition and intellectual property.

Q: You recently chaired the commission that drafted Peru's new General Arbitration Law, applicable to both domestic and international arbitrations. What are the advantages of this new law? To what extent will this law help bridge the differences between domestic and international arbitrations in Peru?

A: It is a very modern law and has received good commentary. It protects arbitration and makes it more dynamic and flexible. It reinforces the autonomy of the parties and the arbitrators to manage the arbitration. It limits judicial interference. It protects the arbitration agreement and has very interesting and new rules, such as those that regulate the participation of non-signatory third parties. Having a similar regulation for

domestic and international arbitration will help Peruvians become accustomed to arbitrate under international standards. I think it contributes a great deal towards Peru becoming a competitive venue for international arbitration.

Q: How has Peru's domestic arbitration practice evolved since 1996, when Peru's previous arbitration law was enacted? (Please refer to changes in demand for arbitration, the evolution of local counsel and arbitral institutions and the response to arbitration by Peruvian courts.)

A: Peru is a special case. It is the country with the most explosive growth in arbitration in Latin America (and perhaps the world). In the last 12 years we have gone from being a place where nothing was arbitrated to a country that arbitrates almost everything. The State has been very friendly to arbitration. The laws for public contracting and acquisitions oblige the State to have an arbitration clause in all its contracts. In any expropriation, the expropriated subject can ask for an arbitration to rule on the compensation to which he is entitled. And the State has promoted investment in a context that is very friendly to foreign investment. We live in an intense arbitral culture, and practice is very intense and I would say, of good quality. Already,

legal firms have departments or specialists in arbitration and the Judicial Branch has been very respectful of arbitrators' decisions. Indeed, the Constitutional Tribunal has developed a consistent case law that permits arbitrators to cast off judicial interference that does not relate to the annulment of the award. All law schools have arbitration courses and the congresses and seminars that they organize are filled by an interested audience. Agents already know arbitration is a different world from ordinary litigation, and businessmen are happy to have escaped complicated and difficult judicial processes. The important thing is that we continue to advance and that there is much enthusiasm; so much so that we have approved a new law (despite the fact that the old one was working well), because we want to advance even faster. In Peru, arbitration has arrived to stay.

Q: You have acted as counsel, arbitrator and expert in several domestic and international arbitrations. What are the main differences in your approach to arbitrations in each role?

A: They are very different, but at the same time complementary. It is like soccer; the game looks different depending on where you are standing. The attorney is the player. The responsibility to try and win rests with him. The expert is like a technical advisor who, while maintaining his independence, has to give an opinion on how he sees the game and these opinions help the player understand the match better. The arbitrator is the referee and has to make the decisions that define who wins. Having been a referee helps you play better because you understand how the decision-maker thinks. But, having been an attorney helps the arbitrator to understand the problems facing the parties in proving their case. The expert's role seems the easiest because it appears to involve the least responsibility, but in reality it is central because you have to lend credibility to a defensive position. And, a good expert must know that he can only be credible by maintaining independence. I have been lucky to have played all these roles, but the one I most enjoy is, without a doubt, being an arbitrator.

Q: What are, in your opinion, the main differences between domestic arbitrations and international arbitrations, whether procedural or substantive? Which of these differences are a result of the civil law/common law divide and which are a result of the "national v. international" character of the arbitration?

A: I always tell my students that the difference is like reading a book and watching the movie: international arbitration is much more vivid. Maybe in international arbitration the principles are more important than the legal rules and above all, it is much more factually oriented. Proof is more important than legal argument. This makes international arbitration more oral (more hearings) and makes witnesses and experts the principal proof—this is a clear influence of the common law. But these differences tend to be disappearing. Both types of arbitration become more alike with each case and I think that in the near future both will be "cinematic."

Q: In your experience, do arbitrators from civil law countries approach the resolution of legal issues differently than those from common law countries? For example, would it be true to say that civil law arbitrators are more formalistic and that common law arbitrators focus more on equity?

A: As I said, common law arbitrators are more fact-based. They are more concerned with the evidence, the witnesses, and the hearings. It is a natural consequence of a practice where case law is central. In common law, the rules are created based on concrete cases rather than abstract ideas. The civil law arbitrator tends to concern himself more with written documents and written legal positions. This can give the impression that they are more formalistic. But they are tending to become ever more similar. When I comment on the common law's influence on arbitration with my common law colleagues, they answer definitively that it is the other way around: that arbitration forces them to write too much and use a lot of "doctrine" in civil law style. It is probable that arbitration is the genetic offspring of both systems and that those of

us from each system focus mostly on what we see as different. The father says it looks like the mother and the mother says it looks like the father, but in reality it looks like both.

Q: Based on these differences, what are the three most important recommendations you would give counsel when advising on an international arbitration?

A: First, never promise your client something you cannot attain. Success is not winning everything, but doing what you promised you would do. Believing in a case you don't have irritates arbitrators, disillusions your client and damages your reputation. Second, be

honest with the tribunal. The majority of arbitrators have the experience and the time to discover that you are not being transparent. Lies have short legs in arbitration. It is better to recognize the weaknesses of your case and not wait for the other party to bring them out and destroy you during a hearing. Third, take good care of the evidence. More arbitrations are won because you were able to convince the tribunal of what happened than because you convinced them of a legal position. If you manage to have them sympathize with your case, it will be easier for them to accept your legal theory. But, if you convince them of your legal theory and not your facts, you will likely lose.

Client Alerts: Recent Developments in International Arbitration

Non-Exclusive Jurisdiction Clauses—Effect in Hong Kong Law

Dave Lau (Hong Kong)

Non-exclusive jurisdiction clauses are common provisions in contracts. Typically, they allow the parties to agree to submit any dispute arising from the contract to a particular jurisdiction's courts, while leaving the parties free to commence legal proceedings in any other jurisdiction's courts. In contrast, *exclusive* jurisdiction clauses are more restrictive—in addition to agreeing on a particular jurisdiction, the clause will also stipulate that any dispute can *only* be submitted to that agreed jurisdiction.

The two types of jurisdiction clauses are clearly different in theory. As to their effect in practice, particularly in the context of how the Hong Kong Court may give effect to them when deciding whether to take jurisdiction over a dispute, the differences between them are not as straightforward, as explained in a recent Hong Kong Court of Appeal decision.

In *Noble Power Investments Limited & Another v. Nissei Stomach Tokyo Co Ltd*, CACV 398/2007 (decision handed down on 24 April 2008), the parties were all companies registered in places other than Hong Kong. None of the parties carried on business in Hong Kong. However, in a Hong Kong law-governed Cooperation Agreement made between the parties in June 2006, there was a non-exclusive jurisdiction clause providing for the parties to "submit to the non-exclusive jurisdiction of courts of Hong Kong". The clause stated expressly that "[n]othing contained in this Clause shall limit the right of any party to take any suit, action or proceedings arising under this Agreement against the other parties in any other court of competent jurisdiction...." About one month after the Cooperation Agreement was entered into, the Defendant sent a letter to the Second Plaintiff effectively stating that the Defendant was not going to perform its obligations. The Plaintiffs

regarded this as a repudiation by the Defendant and subsequently commenced proceedings in Hong Kong claiming damages. As the Defendant is a Japanese company based in Japan, under Hong Kong law the Plaintiffs had to get the Hong Kong Court's permission to serve the writ on the Defendant in Japan. The Plaintiffs obtained such permission and served the writ on the Defendant. The Defendant then issued an application in the Hong Kong proceedings, amongst other things, to set aside the service of the writ, saying that the Hong Kong Court should not have granted the permission to serve the writ, on the basis that Japan was a more appropriate forum than Hong Kong for the trial of the matter.

At first instance, the Court considered the Defendant's application on the usual *forum non conveniens* basis and regarded the non-exclusive jurisdiction clause simply as one of the factors to be weighed in its decision as to the appropriateness of Hong Kong as the forum for the dispute in question. The Court decided that Japan was the more appropriate forum for the dispute and granted the Defendant's application.

The Plaintiff appealed successfully to the Court of Appeal. The Honourable Mr. Justice Ma, the Chief Judge of the High Court, gave the leading judgment. In summary, the Court of Appeal held the following:

1. The basic premise is that, save in exceptional cases, the Court will hold the parties to their contractual bargains. In the context of a non-exclusive jurisdiction clause, the parties have agreed to submit to a named jurisdiction.
2. Accordingly, where proceedings are commenced in the *named* jurisdiction, the party that contests the appropriateness of such jurisdiction will have a "very heavy burden to discharge", since that party has agreed contractually to submit to that jurisdiction. To discharge this burden, the contesting party will have to show "strong or overwhelming reasons or exceptional

circumstances... such as the existence of factors not contemplated by the parties at the time the relevant agreement was made." The Court of Appeal commented that in this sense, the non-exclusive jurisdiction clause is in practice the same as the exclusive jurisdiction clause.

3. However, where proceedings are commenced in a jurisdiction other than the named jurisdiction, although each case would depend on its facts, generally the above contractual submission issue will not arise, so the contesting party may well have a less heavy burden.
4. Accordingly, in the present case, where there was a non-exclusive jurisdiction clause (providing for submission to the Hong Kong Court) and proceedings were in fact commenced by the Plaintiffs in Hong Kong, the Court of First Instance was wrong to regard the non-exclusive jurisdiction clause simply as one of the factors to be weighed in its decision on the appropriateness of Hong Kong as the forum.
5. Instead, simply by referring to the non-exclusive Hong Kong jurisdiction clause, the Plaintiffs had already discharged their burden of showing that Hong Kong was an appropriate forum. Thereafter, the burden shifted to the Defendant to show "strong or overwhelming reasons or exceptional circumstances" as to why the parties' contractual bargain should not be upheld. Since the Defendant has failed to do this, its application should have failed.

This case is a sound reminder to parties to think carefully when agreeing on any kind of jurisdiction clauses. It is over-simplistic to think that a non-exclusive jurisdiction clause maintains fully the parties' freedom to conduct disputes in any jurisdiction they may wish. The Hong Kong Court has stated clearly that it will hold parties to their contractual bargains, including in a non-exclusive jurisdiction agreement.

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No Remedy for an Investor's Own Mismanagement: The Award in the ICSID Case *Biwater Gauff v. Tanzania*

Epaminontas E. Triantafilou (Washington, DC)

Introduction

On July 24, 2008, a panel of distinguished arbitrators (Gary Born, Toby Landau, Bernard Hanotiau) rendered an award in the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*.¹ The ICSID Tribunal refused to award damages to an Anglo-German consortium that filed a claim against the Republic of Tanzania under the UK-Tanzania Bilateral Investment Treaty (BIT). The Tribunal's ruling came in the wake of an award in favor of Tanzania in an UNCITRAL arbitration initiated by the parties to resolve their purely contractual (i.e., non-treaty) differences. The main thrust of the *Biwater Gauff* decision, endorsed by the Tribunal's majority,² is that while Tanzania's actions may have constituted prima facie violations of certain BIT provisions, they did not cause injury to the claimant's venture. Consequently, the claimant was not entitled to compensation. In the course of its discussion, the Tribunal made some important observations with respect to the notion of legal injury and the proper conceptualization of "investment" in ICSID arbitration. It also offered a reminder that ICSID arbitration is not meant to be an insurance policy against an investors' miscalculations and/or fiscal mismanagement. Finally, the Tribunal offered some remarks on the role of amici curiae in the arbitral proceedings.

Summary of the Dispute

Biwater arose out of a dispute between a British project company, held jointly by a British and a

German company, and the Republic of Tanzania over a concession to operate the water and sewerage services of Tanzania's capital, Dar es Salaam. After concluding that Claimant failed to meet its contractual obligations, Tanzania canceled the contract and regained possession of assets previously leased to Claimant. Claimant brought an action before ICSID under the UK-Tanzania BIT, claiming that Tanzania breached its obligation to afford Claimant fair and equitable treatment, to provide full protection and security, not to take unreasonable and discriminatory measures and to guarantee the unrestricted transfer of funds.

Facts Established By The Tribunal³

In 2003 several multilateral lending institutions, including the World Bank, the African Development Bank, and the European Investment Bank, granted Tanzania US\$140 million to upgrade and expand the water and sewerage infrastructure of its capital city, Dar es Salaam. In 2002, to fulfill some of the conditions imposed by the multilateral lenders, Tanzania had launched a bidding process for a private operator of water and sewerage services, who would also serve as a contractor for some of the required upgrade and expansion works.

Tanzania awarded the concession, set to last for ten years, to a joint venture of Biwater International Limited ("Biwater"), a British corporation and HP Gauff Ingenieure GmbH and C. KG-JBG ("Gauff"). In January 2003, Biwater and Gauff incorporated jointly Biwater Gauff (Tanzania) ("BGT"), a British

¹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) ("*Biwater Gauff*").

² Arbitrator Gary Born filed a separate Opinion, concurring in part, dissenting in part and concurring in the judgment. Mr. Born's narrow dissent focuses on the distinction between causation and valuation and whether one or the other best supported the Tribunal's refusal to award damages in this case. See Section V below.

³ An elaborate and well-presented account of the relevant facts appears in Award ¶¶ 95-228.

corporation that would become the Claimant in this case. In turn, as required by the terms of the bid, BGT partnered with a Tanzanian company, Super Doll Trailer Manufacture Co. (T) Limited (“STM”), and incorporated the operating company, City Water Services Limited (“City Water”), under the laws of Tanzania. To implement the project, City Water entered into three key contracts (jointly, “Project Contracts”) with the Dar es Salaam Water and Sewerage Authority (DAWASA).

Under the terms of the Project Contracts, City Water would lease DAWASA’s existing pipeline network, which City Water would use to provide water and sewerage services to customers. Customers would pay a tariff that would remain fixed under a contractual indexation formula for the first five years of operation. City Water’s portion of that tariff was subject to three levels of review: annual, interim and major. The main reason the parties agreed to elaborate tariff-review provisions was that neither City Water nor DAWASA had extensive or sufficiently reliable data on customer demand and revenue projections. In addition to providing services previously rendered by DAWASA, City Water would undertake, on a priority basis, the performance of upgrades to the water supply system and would install water meters in all customer locations, to attain accurate data on water consumption. City Water would also act as the main contractor for the expansion of Dar es Salaam’s water supply network and for other improvements necessary for the implementation of the project.

Eleven months after the commencement of City Water’s operations, however, it was apparent that the project was facing significant financial difficulties and was in danger of shutting down. City Water concluded that it would need to call for an interim review of the tariff it was receiving under the Project Contracts. Critically for Claimant’s claims against Tanzania, although the water and sewer systems were in bad condition before City Water took over, shifting part of the blame for increased operating costs to prior acts of DAWASA, the main source of City Water’s problems was the Claimant’s (BGT’s) gross overestimation

of projected tariff revenues at the bidding stage, combined with the failure of the BGT-appointed management of City Water to successfully handle the project’s numerous challenges. The operating company’s failures were borne out in Claimant’s own internal evaluation of the project, in reports by independent auditors employed to evaluate whether a tariff renegotiation was warranted (it was not) and the decision of a mediator employed by the parties in the course of subsequent negotiations on how to revive the moribund project.

Despite good faith negotiations during the first months of 2005, Claimant and the Government of Tanzania failed to reach agreement on how to salvage the project. Contemporaneous documentation cited by the Tribunal provides further evidence that the project was in dire straits, since solutions that were considered potentially viable during the negotiations were simultaneously characterized as “radical” or “last resort” by the parties themselves.

While the contractual relationship was headed inevitably towards dissolution, Tanzanian Government officials, motivated by electoral concerns, among others, took a series of drastic measures that went far beyond the contractually mandated process for termination of the Project Contracts. In May 2005, Tanzanian Government officials, causing public furor, repudiated unilaterally and rather publicly the lease agreement with City Water, while calling on the performance bond posted by BGT, reinstated the previously waived VAT on purchases by City Water, repossessed forcibly the assets previously leased to City Water and deported City Water’s BGT-appointed management.

The Tribunal’s Holdings

The *Biwater Gauff* Tribunal addressed exhaustively all arguments raised by the parties. The more significant aspects of the Tribunal’s Award are listed below.

Jurisdiction:⁴ The Tribunal found that it was properly vested with jurisdiction. A notable objection by

4 Award ¶¶ 307-353.

Tanzania to the Tribunal's jurisdiction was that, since City Water had been unprofitable from the start and was likely to remain as such for the duration of its concession, it could not be considered an "investment" under the ICSID Convention. In support of this proposition, Tanzania cited the "regularity of profit" requirement of the so-called "*Salini* test," according to which the hallmarks of an investment are i) duration; ii) regularity of profit and return; iii) assumption of risk; iv) substantial commitment and v) significance for the host State's development. The Tribunal, nonetheless, ruled against a strict application of the *Salini* test, and in favor of a flexible approach that would allow consideration of all relevant circumstances in a given case. The Tribunal opined further that the mere fact that an investment is unprofitable does not render it unfit for protection by the ICSID Convention and the provisions of the applicable BIT. It was sufficient that the Claimant had in good faith expected to receive a positive return on its investment.

Expropriation:⁵ The Tribunal found that Tanzania had committed an indirect expropriation of BGT's investment through a series of actions that transcended the behavior expected of a party to the Project Contracts and entered the realm of exercise of sovereign authority that violated Tanzania's treaty obligations. Specifically, instead of following the contractually prescribed course for termination of the Project Contracts, the Tanzanian Government openly repudiated the lease contract with City Water causing public furor, called on the performance bond, canceled the VAT waiver and deported City Water's expatriate staff. In the Tribunal's view, the *cumulative* effect of these acts amounted to an unlawful expropriation of BGT's rights in the lease contract and in the project because BGT's rights, although due to expire a short time thereafter under the contracts' Notice of Termination, were still technically valid.

Fair and Equitable Treatment:⁶ The Tribunal ruled that several of Tanzania's actions breached its treaty obligation to accord BGT's investment fair and equitable treatment, despite the relatively high bar State activity needs to meet to violate that standard. Specifically, the Tribunal cited as violations: Tanzania's publicity campaign against City Water in May 2005, including the public repudiation of the lease contract; the withdrawal of the VAT exemption; the forcible occupation of City Water's offices; the assumption of management control by the Government and the deportation of City Water's BGT-affiliated senior management.

Unreasonable and Discriminatory Measures:⁷ To be reasonable and nondiscriminatory, a State's actions need to bear a reasonable relationship to a rational policy, while any differential treatment of a foreign investor must have a rational justification. Because this treaty standard bears a close relationship to that of unfair and inequitable treatment, the Government's acts that the Tribunal ruled to be unreasonable or discriminatory overlapped with those that it characterized as unfair or inequitable. Among such acts were the public repudiation of the lease contract in conjunction with derogatory public remarks directed towards City Water and BGT; a speech delivered by a Tanzanian Minister to City Water staff that undermined BGT's managerial control; the withdrawal of the VAT exemption and the seizure of City Water's assets and subsequent deportation of its senior management.

Full Protection and Security:⁸ The Tribunal held that a state affords full protection and security when it guarantees a stable and secure physical, commercial and legal environment. The Tribunal found that Tanzania's seizure of City Water's offices and deportation of City Water staff violated Tanzania's obligation to provide a safe environment.

5 Award ¶¶ 451-520.

6 Award ¶¶ 584-676.

7 Award ¶¶ 691-710.

8 Award ¶¶ 724-731.

Remedies:⁹ The majority of the Tribunal (Messrs. Landau and Hanotiau) ruled that, although some of Tanzania’s acts met the treaty-established elements for breach of Tanzania’s treaty obligations, BGT had failed to establish a causal link between that breach and the diminution in value of BGT’s investment. The majority found, specifically, that Tanzania’s actions were neither the proximate cause nor the cause in fact of City Water’s economic failure. The Tribunal proceeded to demonstrate that, at the time Tanzania committed the acts violative of the BIT, City Water was already worth nothing due to BGT’s mismanagement. Thus, according to the majority, Tanzania had not injured Claimant.

Amici Curiae:¹⁰ The Tribunal noted with approval arguments made by amici curiae, which the Tribunal allowed to participate by applying the new ICSID Rules.¹¹ In fact, the *Biwater Gauff* Tribunal was the first ICSID Tribunal to permit amicus participation under the new Rules. The Tribunal’s extensive discussion of the points raised by the amici, and its reference to the usefulness of the amicus submission, affirmed the active role amici are expected to play in investment arbitration, and vested third-party participation with additional institutional legitimacy (beyond that conferred by the Rules themselves). Notably, in this instance, the amici did not confine themselves to broad policy considerations, as the Tribunal’s initial decision to allow their participation suggested. Rather, they addressed several substantive issues, including, inter alia, the possibility that BGT’s bid for the project was artificially (and unsustainably) low with an eye to renegotiation at some future point.

The Partial Dissent

As mentioned above, one of the arbitrators, Gary Born, disagreed with the Tribunal majority’s conclusion that BGT had failed to establish a causal link between Tanzania’s actions and BGT’s injury. According to Mr. Born’s partial dissent, since BGT had made a

broad plea for relief, it had requested legal redress for all types of injury recognized under the BIT. Thus, a facial violation of the BIT by Tanzania automatically amounted to compensable injury to the Claimant and the causal link between act and injury was actually present. One of the ways Tanzania had injured Claimant was by depriving it of the enjoyment of its investment before the contractually determined termination of the Project Contracts. Tanzania’s expropriatory act was a legally cognizable injury under the Treaty. Yet, because the investment was worthless, the injury resulted in zero damages. Accordingly, Mr. Born concurred in the judgment that Claimant should receive no compensation.

The majority’s response was that both its and Mr. Born’s approaches were “tenable” and led to the same result—namely that the Claimant was not entitled to compensation.

Conclusion

Biwater Gauff is an important case, which first and foremost illustrates the maxim “*caveat investor*.” ICSID claims are not insurance policies for investment decisions that fail to yield desirable outcomes because of poor planning and/or mismanagement. The Award itself serves as a model of reasoning and exhaustive analysis. In addition to promoting a flexible view as to the notion of “investment” under the ICSID Convention, the Tribunal offered clear and compelling insights on several legal standards, such as fair and equitable treatment, which otherwise remain hotly debated in international investment law. Furthermore, the Tribunal helped solidify the legitimacy of amicus submissions, a practice that is nascent in ICSID arbitration. Finally, the debate between the majority and Mr. Born on the issue of causation highlighted several nuances of a less discussed aspect of ICSID claims. In all, the *Biwater* Award is an important addition to ICSID jurisprudence that is certain to serve as a guide for many tribunals in the years to come.

⁹ Award ¶¶ 773-808.

¹⁰ Award ¶¶ 370-392.

¹¹ See *Biwater*, Procedural Order No. 5 (Feb. 2, 2007).

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Second Circuit Limits Discovery from Nonparties to Arbitration

Sophie East (New York)

The US Court of Appeals for the Second Circuit—which includes New York—has ruled that the Federal Arbitration Act (FAA) does not authorize an arbitrator to compel pre-hearing document discovery from nonparties to the arbitration. The decision in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,¹² issued on November 25, 2008, is significant in that it is a definitive ruling by the Second Circuit on an issue which has divided other circuits.

The *Life Receivables* case arose out of what the Court described as the “somewhat macabre” market where companies take over the life insurance policies of elderly people in return for a cash payment. As a hedge against the possibility that an insured person might live past his or her life expectancy, the purchasers of these policies, such as Life Receivables Trust, buy contingent cost insurance policies from insurers like Syndicate 102. If the insured person lives more than two years beyond his or her life expectancy, Syndicate 102 would pay Life Receivables the net death benefit and assume the policy itself. A dispute arose over the purchase of a policy covering a Mr. Wang. Mr. Wang outlived his life expectancy by two years, but when Syndicate 102 was called on to pay the net death benefit, it refused and claimed that Life Receivables misrepresented the date on which it acquired the Wang policy and fraudulently calculated Mr. Wang's life expectancy. During the ensuing American Arbitration Association (AAA)

arbitration, Syndicate 102 sought discovery from both Life Receivables and a closely related entity, Peachtree Life Settlements, which bought life insurance policies on Life Receivables' behalf. Life Receivables argued it did not control Peachtree and had no ability to compel the production of documents from it. The arbitration panel issued a subpoena requiring Peachtree to produce its responsive documents and Peachtree moved to quash the subpoena in federal court. The District Court upheld the subpoena and the appeal to the Second Circuit followed.

The case turned on the language of section 7 of the FAA, the only FAA provision to address discovery. This states that:

The arbitrators...may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case....

The Eighth Circuit has previously ruled that although the FAA does not explicitly authorize the production of documents from entities not party to the arbitration proceedings, an arbitration tribunal has an implicit power to subpoena relevant documents from such third parties.¹³ The Fourth Circuit has said that arbitral tribunals have this power where a party can prove “special need or hardship” arising from

¹² *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, No. 07-1197-cv, 2008 WL 4978550 (2nd Cir. 2008).

¹³ *In re Arbitration Between Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000).

the lack of evidence.¹⁴ However, the Third Circuit has held that section 7 of the FAA “unambiguously restricts an arbitrator’s subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time.”¹⁵

Like the Third Circuit, the Second Circuit in *Life Receivables* held that the language of section 7 is “straightforward and unambiguous”. Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness. The Court therefore joined the Third Circuit in holding that section 7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities not party to the arbitration proceedings. This is the case even where those third parties, like Peachtree, had signed the underlying arbitration agreements. In making this finding, the Second

Circuit pointed out that this did not leave arbitrators powerless to order the production of documents from non-parties; in fact they have a variety of tools to do so. Arbitrators could, consistent with section 7, subpoena a party to appear before the panel and then order that person to produce documents (given the party would then be a testifying witness). Arbitrators could also compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. Separately, where a non-party to the arbitration is a party to the arbitration agreement, formal joinder may be appropriate which would enable arbitrators to exercise their contractual jurisdiction to compel discovery from the parties before them. However, to the extent parties in the Second Circuit wish to rely on section 7 of the FAA, the decision in *Life Receivables* has made it clear that documents ordered to be produced must be documents held by a testifying witness.

¹⁴ *Comsat Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999).

¹⁵ *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3rd Cir. 2004).

Practice Tips

Tips for Fast-Track Arbitration: The Procedural Tools Available

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“Fast-track” (or accelerated) arbitration can be an effective way to help parties reduce the time taken to reach a solution to their dispute. This article seeks to identify examples of procedural mechanisms and techniques that parties might use in order to achieve “fast-track” arbitration. These procedural tools are designed to accelerate arbitration either by reducing the time between the Request for Arbitration and the Award, or by helping encourage settlement in the course of the arbitration.

The procedural tools for a “fast-track” arbitration come from two main sources: (i) the rules of arbitration institutions (for example, the Rules for Expedited Procedures of the American Arbitration Association (“AAA”)); or, more importantly, (ii) the agreement of the parties. The ability of parties to an arbitration to define and agree on their own procedure is one of the distinctive features of arbitration. This gives parties room for procedural creativity, including shortening time frames between steps in the arbitral process, or removing certain steps entirely.¹⁶

How and when should parties agree to a “fast-track” procedure and the procedural tools to achieve it? There are two main options: (i) in the Arbitration Agreement itself—which expresses an intent that arbitration be expedited and/or (ii) at the outset of the arbitration of a dispute, because the resolution of the dispute is of some urgency. In such cases, the parties may invoke certain procedural tools to tailor the arbitration to their needs. Some practical tips and procedural tools that the parties may keep in mind or use for accelerating the resolution of their dispute

are outlined below.

Tip 1: Select the right Arbitral Tribunal

The cooperation of the parties and, in addition, of the Arbitral Tribunal (or a single arbitrator) is essential to a “fast-track” procedure. If the parties intend to employ a “fast-track” procedure, or consider that the need to “fast-track” proceedings could arise, they would be well-advised to: (i) select experienced arbitrators with available time; (ii) select arbitrators with strong case-management skills and (iii) select arbitrators who will render their Award in a timely manner. Inexperienced or overly busy arbitrators may have difficulty employing or conforming to a “fast-track” procedure.

Tip 2: Select time limits

Time limits in any “fast-track” procedure should be reasonable and realistic. No matter how quickly the parties may want the dispute resolved, they should not curtail their ability to state their case fully. The arbitrators, in consultation with the parties, should define milestones for the steps in the proceedings and the Award. These milestones should be flexible where necessary to ensure due process and thus ensure the validity of the Award.

It is possible that time limits are identified in the arbitration clause itself. For example, a clause might provide that:

“The Award shall be rendered within [...] months of the commencement of the arbitration, unless

¹⁶ For example, Article 32.1 of the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce (the “ICC Rules”) provides: “The parties may agree to shorten the various time limits set out in these Rules (...).”

¹⁷ Paul Friedland, *Arbitration Clauses for International Contracts* 88 (2d ed., 2007).

the arbitral tribunal determines that the interest of justice requires that such limit be extended.”¹⁷

Otherwise, time limits are generally defined at the beginning of the arbitration when the parties and the Arbitral Tribunal discuss and agree on the arbitration timetable.

Tip 3: Provide procedural rules to adjust/accelerate the conduct/steps of the proceedings

It is possible at every step of the arbitral procedure to make adjustments in order to accelerate the case. These could include:

- Placing a limit on the length of submissions;
- Limiting the number of submissions; for example providing for one round of memorials rather than the usual two rounds, or excluding the need for the parties to submit post-hearing memorials;
- Ruling out a document production phase;
- Providing that the matter be decided on the basis of the written submissions without the need for a hearing;
- Limiting the number of witnesses or experts that the parties may put forward (or even providing that there shall be no witnesses or experts).

Tip 4: Consider the utility of “baseball” arbitration

In a final offer or “baseball” arbitration, the powers of the arbitrators concerning the award are narrowed down to a choice between two final offers submitted by the parties, after an exchange of written pleadings. The following is an example of a “baseball” arbitration clause:

“Each party shall submit to the arbitrator and exchange with the other, in accordance with a procedure to be established by the arbitrator, its best offer. The arbitrator shall be limited to awarding only one or the other of the two positions submitted.”¹⁸

The advantages of “baseball” arbitration are that it can expedite the resolution of disputes and encourage settlement. This is a procedure that commercial parties are more likely to adopt after a particular dispute has arisen. It would be difficult to anticipate at the contract drafting stage whether or not this procedure would work for all disputes.

Tip 5: Consider the use of a sealed offer

A “sealed offer” is a written offer to settle a dispute which has been referred to arbitration. It is an offer which is expressly made “without prejudice save as to costs.”¹⁹ The offeree who does not accept the offer and subsequently fails to achieve a more favorable award by continuing the proceedings, is liable for all the costs of the arbitration as of the date of the submission of the sealed offer. The sealed offer can therefore provide an incentive to a settlement and thus “fast-track” the dispute. However, the sealed offer comes from dispute practice in the United Kingdom and is not yet standard practice in international arbitration.

Conclusion

The appropriate procedural tools for a “fast-track” arbitration will depend on the specificities of each dispute. Whilst the tools outlined in this article are by no means exhaustive, they can help to facilitate efficient procedures in which time and cost can be better controlled.

¹⁸ *Id.*, 119.

¹⁹ www.whitecase.com/idq/winter_2008_tips

Practitioner Recognition, Practitioner Appointments and News

Practitioner Recognition

Thirteen White & Case partners were ranked among *The International Who's Who of Commercial Arbitration 2009*, tying the Firm for the top spot worldwide for most lawyers recognized by the publication, which identified White & Case as a "global player" in the field. White & Case partners ranked were: **Paul Friedland, Carolyn Lamm, Abby Cohen Smutny, Andrea Menaker, Jonathan Hamilton, Phillip Capper, John Bellhouse, Claes Zettermarck, Michael Polkinghorne, Christopher Seppälä, Stephen Bond, Patricia Nacimiento** and **Kim Rooney**.

White & Case International Arbitration practice ranked tier 1 in *Chambers USA* and tier 2 in *Chambers Europe*. **Carolyn Lamm, Abby Cohen Smutny, Paul Friedland, Darryl Lew, Claes Zettermarck, Stephen Bond, Christopher Seppälä, Phillip Capper, John Bellhouse, John Reynolds** and **Michael Polkinghorne** were also ranked individually.

White & Case was named as a leading law firm in the recently published *Who's Who in Legal Construction Lawyers 2008*, with the Construction and Engineering Practice highlighted as "one of the pre-eminent outfits for construction arbitration." Five partners from across our European offices, **Phillip Capper, John Bellhouse, Ellis Baker** (London), **Christopher Seppälä** (Paris) and **Claes Zettermarck** (Stockholm), were singled out as leading individuals.

Practitioner Appointments

Paul Friedland (New York) has been appointed as Chairman of the AAA's Law Committee.

Jonathan C. Hamilton (Washington, DC) has been named Chair of the Americas Initiative and a member of the Executive Board of the Institute for Transnational Arbitration.

Andrea Menaker (Washington, DC) has been elected as Co-Chair of ASIL's Dispute Resolution Interest Group.

Ank Santens (New York) has been appointed to the Executive Committee of the Foundation for International Arbitration Advocacy (FIAA).

Anders Reldén (Stockholm) has been appointed Chairman of the Arbitration Association for Young Lawyers at the SCC Institute (SYJ).

News

White & Case achieved a significant victory for the Republic of Bulgaria in the first Energy Charter Treaty arbitration to reach an award on the merits at ICSID.

Patricia Nacimiento, formerly of German firm Nörr Stiefenhofer Lutz, joined White & Case's International Arbitration Group as a partner in its Frankfurt office.

White & Case—Worldwide

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