

# International Disputes Quarterly

## *Focus on Arbitration in Asia and the Pacific Rim*

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## Introduction: Focus on Arbitration in Asia and the Pacific Rim

This issue of *International Disputes Quarterly* continues our theme of focusing on arbitral developments in a particular region. This time we focus on Asia and the Pacific Rim.

White & Case LLP has a strong presence throughout Asia, with offices in Hong Kong, Tokyo, Beijing, Shanghai, Singapore, Bangkok and Almaty. In addition, lawyers from Asia and the Pacific work throughout the offices in our worldwide arbitration group. Many of these practitioners have contributed to this edition. In particular, our arbitration group in Hong Kong has contributed a number of articles relating to arbitral developments in Hong Kong and Mainland China. The growth of the Chinese economy and of China’s presence in the world, means that today,

more than ever, arbitration practitioners are watching with interest how China will handle disputes between Chinese and foreign parties. Some recent developments covered in this edition include new time limits for the enforcement of arbitral awards in China, the recognition of Hong Kong **ad hoc arbitral** awards in Mainland China, provisions for the reciprocal enforcement of money judgments in Hong Kong and Mainland China, and a new Chinese law on the mediation and arbitration of labor disputes. In addition, the major international arbitral institutions continue to grow in this region, with the ICC Secretariat establishing a branch office in Hong Kong, and the major Hong Kong and Chinese arbitral institutions (HKIAC and CIETAC) entering into an agreement to share resources.

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“One of the top three ‘global players’ in arbitration”  
—*International Who’s Who of Commercial Arbitration 2008*

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White & Case is ranked as a Tier One firm for China: Dispute Resolution (Hong Kong-Based Experts) by *Chambers Asia* 2008.

Outside of China and Hong Kong, this edition of *International Disputes Quarterly* also covers court decisions in India and Australia which are seen as unfavorable to the development of international arbitration. In *Venture Global Engineering*, the Supreme Court of India extended the power of Indian courts to set aside “foreign awards” (i.e., awards in arbitrations outside India) on the grounds that they violate Indian statutory provisions and are contrary to Indian public policy. In *Seeley International Pty Ltd.*, the Federal Court of Australia, taking a very literal reading of an arbitration clause, held that the parties were not confined to seeking declaratory relief in arbitration; they could also seek such relief from the

Federal Court. The decision serves as a reminder to parties drafting arbitration clauses to exercise caution in expressing which disputes are intended to be referred to arbitration, and which disputes are intended to be resolved by other means (e.g. by the courts).

With the recent images of the devastation in China and Myanmar, and as the Olympic Games kick off in Beijing on August 8, the world’s spotlight seems firmly fixed on Asia. This edition of *International Disputes Quarterly* gives a sampling of some developments affecting arbitration in the region. We hope you find it informative.

## ICC Secretariat Establishes Branch Office in Hong Kong

### Alex Charter

On March 12, 2008, the International Chamber of Commerce (the “ICC”) announced that in recognition of the growing importance of the Asia Pacific region to ICC Dispute Resolution Services, a branch of the Secretariat of the ICC International Court of Arbitration would be established in Hong Kong to administer ICC cases in the region. This is the first branch of the Court’s Secretariat to have been established outside of the ICC headquarters in Paris. The ICC International Court of Arbitration is one of the leading bodies in international commercial arbitration.

The Secretariat of the Court in Hong Kong will be implemented during the last quarter of 2008 and will encompass a case management team to administer ICC cases in the Asia Pacific Region under the ICC Rules of Arbitration.

The ICC also announced that the Director of ICC Arbitration and Amicable Dispute Resolution Asia would be based in Singapore where a liaison office dedicated to ICC Dispute Resolution Services will be established.

This latest development recognizes the importance of both Hong Kong and Singapore as centres for international dispute resolution.

The Secretary for Justice of the Hong Kong SAR Government has welcomed the ICC’s announcement and welcomed the endorsement of Hong Kong’s position as a premier centre for international arbitration services.

## New Time Limit for Enforcement of Arbitral Awards in China

**Kim Rooney and Dave Lau**

The time limits for enforcement of foreign arbitral awards in mainland China have recently been extended. This is an important development for parties wishing to enforce arbitral awards. Prior to the October 2007 amendment of the PRC Civil Procedure Law, it had provided that where one party fails to carry out a legally effective arbitral award, the other party may request execution of the award from a competent People's Court, which request had to be made within one year where one or both of the parties are individuals (Article 217), and six months where both parties are corporations (Article 219). This period was regarded as short, particularly for parties seeking to enforce a foreign arbitral award in mainland China.

On 28 October 2007, the Standing Committee of the National People's Congress of the People's Republic of China promulgated a set of amendments to the Civil Procedure Law. The new version of the Civil Procedure Law, which came into effect on

April 1, 2008, includes an extension of the limitation period for requesting execution of an arbitral award.

Article 213 of the amended Civil Procedure Law provides that if a party fails to comply with an award made by an arbitration institution that was established according to law, the other party may apply to the People's Court that has jurisdiction over the case for enforcement of the award. The time limit for making an enforcement application, as provided in the new Article 215, is now *two* years (for both individuals and corporations). This period is to be calculated from the last day of the period for performance specified by the award (if this is specified), or the day the award takes effect (if the period for performance is not specified in the award), or, if the award provides for installment performance, the last day of the period specified for each installment.

Hong Kong partner, Kim Rooney, was honored in *Global Arbitration Review's "Women of Arbitration"* (2007).

## "Double-Barrelled" Dispute Resolution Clauses? Lessons from Down Under

**Leon Ioannou**

On January 29, 2008, the Federal Court of Australia handed down a decision that confirmed the need for care in setting out the scope of parties'

submission to arbitration in a dispute resolution clause and raised questions as to how Australian courts will interpret them.<sup>1</sup>

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<sup>1</sup> *Seeley International Pty Ltd v. Electra Air Conditioning BV*[2008] FCA 29 (January 29, 2008).

*International Who's Who of Commercial Arbitration*, published by *Who's Who Legal*, featured Hong Kong partner, Kim Rooney, and named the Firm as one of the top three "global players" in arbitration.

### The "Double-Barrelled" Arbitration Agreement

Electra Air Conditioning BV, a Dutch company, appointed Seeley International Pty Ltd, an Australian company, as its exclusive distributor of air conditioners in Australia and New Zealand. The dispute resolution clause was "double-barrelled," in that:

- It provided that "a dispute, question or difference of opinion...between the parties concerning or arising out of this Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party... shall be referred to arbitration" under the arbitration rules of the Institute of Arbitrators and Mediators Australia.
- However, such reference to arbitration did not "preven[t] a party [from] seeking injunctive or declaratory relief in the case of material breach or threatened breach of this Agreement." The dispute resolution clause did *not* specify from which forum—an arbitral tribunal or a court—such injunctive or declaratory relief could or should be requested.

A dispute arose when Electra, due to problems with its credit insurer, refused to accept Seeley's purchase orders, as it was contractually bound to do. Seeley applied to the Federal Court for a declaration and summary judgment that Electra was obliged to accept its purchase orders.

In turn, Electra applied for an order that Seeley's proceedings be stayed pursuant to Section 7(2) of the International Arbitration Act 1974 (Cth). Section 7(2) provides that a court must stay proceedings before it and refer the dispute to arbitration where the proceedings are instituted by a party to an arbitration agreement against another party to the agreement. Seeley resisted Electra's application for a stay, arguing that its claim for declaration and summary judgment was not covered by the parties' arbitration clause.

### The Parties Agreed to Arbitrate, Right?

Justice Mansfield's analysis was itself double-barrelled in deciding whether the parties agreed to submit their dispute regarding declaratory relief to arbitration.

The Judge found that the parties' clause constituted an arbitration agreement sufficiently wide to encompass a declaration as to the meaning and proper operation of the parties' agreement. That is, it impliedly gave the arbitrator the power to grant declaratory relief.

However, the Judge observed that parties may agree that certain potential disputes *do not have to be* referred to arbitration. He stated that the proper scope of dispute to be arbitrated should be "robustly assessed," which involves ascertaining the intention of contracting parties, having regard to the text of the arbitration agreement and the factual matrix surrounding its drafting.

The Judge interpreted the clause to mean that the parties were not confined to seeking declaratory relief in arbitration; they could also seek such relief from the Federal Court. The Judge held that—on a close reading of the text of the clause—the parties had agreed to treat disputes as to declaratory relief (which did not have to be referred to arbitration) differently from other disputes (which had to be referred to arbitration). In justifying this reading, the Judge placed emphasis on the fact that the agreement was the result of extensive negotiation and careful drafting.

Accordingly, the Judge decided that the parties were not confined to seeking declaratory relief from an arbitrator. He therefore declined Electra's request to stay proceedings before the Court.

## Practical Lessons

The *Seeley* decision is a sobering reminder for drafters of arbitration clauses to exercise caution in expressing which disputes are intended to be referred to arbitration and which disputes are intended to be resolved by other means (e.g., by the courts).

In *Seeley*, the Judge observed that “it does not flaunt business common sense that the parties, having agreed upon arbitrating their disputes, should nevertheless agree upon an optional alternative dispute resolution process—by way of court proceedings—in certain circumstances.” However, to give the dispute resolution clause “business common sense,” it is necessary to consider the “circumstances” in which the parties would want “an optional alternative dispute resolution process.”

This is exactly what the Judge did *not* do. While noting that he was obliged to “robustly assess[s]” the scope of the disputes the parties agreed to arbitrate, the Judge took an overly strict, literal interpretation of the words of the arbitration clause, and in doing so, preserved the Court’s jurisdiction over the matter. Although the Judge mentioned several factors in considering the arbitration clause, those bearing on the words of the clause—such as the clause’s drafting history—were teased out as being most important. The Judge’s close textual reading of the parties’ arbitration clause bucks the current Australian and international trend, which favours according an arbitral tribunal broad power by widely construing the parties’ agreement to arbitrate.

The Judge noted that the second “barrel” of the clause was designed to address circumstances “of some urgency.” However, the Judge did not analyse whether, in the circumstances, the relief sought by *Seeley* was urgent. The particular dispute in *Seeley*—namely, whether Electra was bound to accept purchase orders—did not appear to be “urgent” or a pressing business matter.

If the function of the clause was to permit a court (as opposed to a tribunal) to provide urgent injunctive or declaratory relief, the wording of the parties’ clause did not make that clear.

The Judge’s decision also gives rise to the practical problem of having more than one forum consider the same problem. In *Seeley*, the Court would decide on the question of injunctive relief, but any questions of damages resulting out of that decision (or any other relief) would have to be determined by arbitration. Notably, the Judge observed that it is “unlikely [the parties] intended that different disputes should be resolved before different tribunals.” The Judge did not explain why it makes “commercial common sense” for parties to have half of their substantive dispute resolved in one forum and half in another.

Thus, parties should ensure that their arbitration agreements are water-tight, including setting out clearly the particular circumstances in which disputes are to be referred exceptionally to a court or other dispute resolution forum. Otherwise, Australian courts following the *Seeley* decision may consider themselves empowered to hear disputes through a literal interpretation of dispute resolution clauses providing for both arbitration and litigation.

Examples of matters in which the Asia/Pacific team has recently been involved include representing the Republic of Indonesia in an ICSID arbitration relating to an investment in a partially privatized corporate group and representing a People’s Republic of China joint venture in a complex contractual dispute with a US corporation under the Arbitration Rules of the Stockholm Chamber of Commerce.

White & Case has been ranked among the top ten law firms in the world in *American Lawyer's* annual Global 100 survey (2007).

## Another Setback for Indian Arbitration (and Foreign Investors)

**Dipen Sabharwal**

The recent decision of the Supreme Court of India in *Venture Global Engineering v. Satyam Computer Services Ltd.* (“*Venture Global*”) has served another blow to the fledgling Indian arbitration regime and, in the process, sounded warning bells for those doing business in India.

Four years ago, the Supreme Court ruled that any domestic arbitral award found to contravene Indian statutory provisions could be set aside by Indian courts for violating “public policy” (*ONGC v. SAW Pipes*). This sweeping interpretation of “public policy” introduced potentially limitless judicial review of Indian arbitral awards—something that the Indian Arbitration Act 1996 (the “1996 Act”) was intended to eliminate. The *SAW Pipes* decision was roundly criticised—both within and outside India—with practitioners expressing the hope that the Supreme Court would reconsider its approach.

Unfortunately, these hopes have been dampened following the decision in *Venture Global*, which extends to the international arena the broad powers to set aside awards which previously were limited to domestic arbitrations. Parties now can challenge “foreign awards” (i.e., awards in arbitrations outside India) before Indian courts on the grounds that they violate Indian statutory provisions and are contrary to Indian public policy.

As a result, even if transactions are structured to ensure that disputes are arbitrated outside India, the post-*Venture Global* risk is that parties will find spurious grounds to unwind arbitral awards in Indian courts, thereby undermining the parties’ original bargain. The only saving grace is that the Supreme Court acknowledged that parties can draft suitable language in their contracts to eliminate (or at least reduce) the scope for such judicial review.

### Decision

*Venture Global Engineering* (“*Venture*”), a US corporation, entered into a joint venture with *Satyam Computer Services Limited* (“*Satyam*”), an Indian company. Their Shareholders’ Agreement provided for arbitration under the rules of the London Court of International Arbitration. *Satyam* alleged that *Venture* committed an event of default under the Shareholders Agreement which entitled *Satyam* to buy *Venture*’s shares in the joint venture. To this end, *Satyam* commenced arbitration, secured a favourable award and sought to enforce the award in the courts of Michigan.

*Venture* responded by asking a court in Secunderabad, India, to set aside the award on the ground that the transfer of shares required by the award would contravene Indian law. The matter reached the Supreme Court on appeal on the issue of whether a foreign award can be set aside if it violates Indian statutory provisions and is thereby deemed to contravene Indian public policy.

In deciding the issue, the Supreme Court relied principally on an earlier decision, *Bhatia International v. Bulk Trading*, which held that provisions of Part I of the 1996 Act—stated to cover only domestic arbitrations—apply equally to foreign arbitrations. The *Bhatia* decision was in the context of the power of Indian courts to grant interim measures (e.g., injunctions) in foreign arbitrations.

In *Venture Global*, the Court extended its reasoning in *Bhatia* to explicitly hold that the “public policy” provision in Part I of the 1996 Act (section 34 of the 1996 Act), which (after *SAW Pipes*) allowed Indian courts to set aside domestic arbitral awards found to contravene Indian statutory provisions, applies also to foreign awards.

Simply put, the Supreme Court held that foreign awards can be set aside by Indian courts under section 34 of the 1996 Act i.e., for violating Indian statutory provisions and being contrary to Indian public policy.

Specifically, the Court emphasized that the “extended definition of public policy” articulated in *SAW Pipes* could not be “bypassed by taking the award to a foreign country for enforcement” such that a party would be “deprived of the right to challenge the award in Indian courts.” The Supreme Court acknowledged, however, that Indian courts cannot set aside foreign awards where “the parties by agreement, express or implied” exclude the provisions of Part I of the Act.

Having decided the principal legal issue, the Supreme Court referred the matter back to the Secunderabad court to dispose of the action on its merits.

### Net Result

While the *Venture Global* ruling is not entirely surprising—the Court effectively made explicit that which was implicit after the *Bhatia* decision—it is nonetheless disappointing for the international arbitration community, and potentially dispiriting for Indian and foreign investors alike. Decisions such as these are crippling the potential of arbitration

to be a viable method for dispute resolution for transactions involving Indian parties.

If disputes are to end up in court anyway—and the experience after *SAW Pipes* suggests that losing parties in arbitration almost invariably challenge awards on “public policy” grounds—there is no incentive for parties to incur the time and expense of arbitrating in the first instance. Worse, the potential for protracted litigation in Indian courts inevitably leads to a risk premium being factored into Indian deals.

Some Indian lawyers have suggested that the residual power of Indian courts to review and set aside foreign arbitral awards at the enforcement stage is desirable—perhaps even necessary—to protect the interests of vulnerable Indian parties who may not have had a fair hearing before a foreign tribunal. In *Venture Global*, however, it was a foreign party (*Venture*)—not an Indian party (*Satyam*)—which benefited from the intervention of Indian courts, thereby demonstrating that expansive judicial review is very much a double-edged sword.

In sum, it is more important than ever for parties wishing to minimise intervention by Indian courts to carefully draft their arbitration clauses, and specifically exclude the applicability of Part I of the Indian Arbitration Act.

## Enforcement of Hong Kong Ad Hoc Arbitral Awards in Mainland China

### Dave Lau

Prior to China’s resumption of sovereignty over Hong Kong in 1997, arbitral awards made in Hong Kong were enforceable in China under the New York Convention in the ordinary way. However, following the resumption of sovereignty, Hong Kong was and is a part of China. Accordingly, the New York Convention, which only applies by Article I(1) to ‘the recognition and enforcement

of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought’, ceased to apply to the enforcement of Hong Kong arbitral awards in Mainland China.

The above issue gave rise to some initial concern as to whether any arbitral awards made in

The 2008 *Vault Guide to the Top 100 Law Firms* ranked White & Case number one in International Law.

The *Global Arbitration Review* has ranked White & Case among the top three law firms in the world.

Hong Kong were enforceable in Mainland China (and the procedure that should be adopted to apply for enforcement). This matter was clarified by the “Memorandum of Understanding on the Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong signed on June 21, 1999 (‘the Arrangement’).” The Arrangement confirmed the general enforceability of Hong Kong arbitral awards in Mainland China and set out a detailed procedure (including time limits) for applying for enforcement.

However, notwithstanding the above, there has been residual doubt in some quarters in relation to one aspect of the enforceability of Hong Kong arbitral awards in Mainland China. All arbitrations conducted in Mainland China are required to be administered by a recognised arbitral institution or commission, for example, the China International Economic and Trade Arbitration Commission (CIETAC). Thus, **ad hoc arbitration is not permitted** in Mainland China. However, **ad hoc arbitrations**

commonly take place in Hong Kong, for example, under the UNCITRAL rules.

In view of the above, the question has therefore been whether ad hoc arbitral awards made in Hong Kong are enforceable in Mainland China. In this regard, in response to a letter from Hong Kong’s Secretary for Justice, China’s Supreme People’s Court has (by its “Reply on whether awards made in “ad hoc” arbitration proceedings in the HKSAR are, subject to the Memorandum of Understanding on the Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and the HKSAR (‘the Arrangement’), enforceable in the Mainland dated October 25, 2007) confirmed that ad hoc arbitral awards which do not fall within Article 7 of the Arrangement are enforceable in Mainland China. Article 7 of the Arrangement largely reproduces the grounds for resisting the enforcement of awards set out in Article V of the New York Convention.

## A Historic First: The New Zealand-China Free Trade Agreement

### Sophie East

On April 7, 2008, New Zealand became the first developed country to sign a free trade agreement with China (FTA). The FTA, covering trade in goods, services and investment, was signed by New Zealand’s Trade Minister, Phil Goff, and the Chinese Commerce Minister, Chen Deming. New Zealand Prime Minister Helen Clark and Chinese Premier Wen Jiabao were present at the signing ceremony.

China is New Zealand’s fourth-largest trading partner, but at current rates of growth, it will be third in a few years time, overtaking the United States. Currently, New Zealand exporters into China face tariff barriers of between ten and twenty percent (costing New Zealand companies an estimated US\$ 92 million a year). From the date the

FTA goes into effect, New Zealand exports to China which now face tariffs of five percent or less will be cut to zero. There will be a staggered time frame for cuts on New Zealand exports that face larger tariffs, with 31 percent of New Zealand’s exports to China expected to be tariff-free by 2013. Eventually, 96 percent of New Zealand exports to China will be tariff-free. The New Zealand Government says the deal is expected to result in an annual increase in trade of between US\$179 million and US\$278 million.

From New Zealand’s perspective, the FTA is seen as a means for New Zealand to get better access to the Chinese market, in particular, China’s expanding middle class. China’s middle class is estimated to be 25 times the entire population of New Zealand

and is a growth market for major New Zealand exports like butter, cheese and lamb. The FTA is considered a reward to New Zealand, which was the first nation to sign off on the terms for China's accession to the World Trade Organization in 2001. New Zealand also recognized China as a market economy, rather than a non-market economy, a designation that nations including the US use to bar Chinese goods.

The benefits of the FTA for China include an agreement by New Zealand to phase out tariffs in areas such as textiles and clothes, and to allow a limited number of specialist Chinese workers to come into New Zealand on temporary visas. Returns to China are expected to be much less than those to New Zealand: about US\$62.5 million a year on the US\$4.4 billion in goods China sends to New Zealand.

The FTA's dispute resolution provisions are noteworthy. As in recent Bilateral Investment Treaties ("BITs") signed by China, China

unconditionally commits to arbitration for the resolution of disputes with New Zealand investors, provided that the investor first agrees to applicable domestic review procedures lasting no longer than three months. Arbitration is permitted under ICSID or UNCITRAL rules. The choice of rules is left to the investor that initiates the proceedings, a feature that is more flexible than China's BITs.<sup>1</sup>

The FTA is also noteworthy for recognizing the *kompetenz-kompetenz* principle. Article 154 states that if a party objects to a claim on the basis that it is without merit or otherwise outside the jurisdiction of an arbitral tribunal, the decision on jurisdiction shall be made by the arbitral tribunal. This is in contrast to the law of the People's Republic of China which allows the courts to decide the validity of the arbitration clause and jurisdictional issues.

The FTA is expected to be ratified by the New Zealand Parliament and to go into effect by October 1, 2008. Australia, South Africa and Peru are currently negotiating their own FTAs with China.

## Reciprocal Enforcement of Money Judgments in Hong Kong and Mainland China

### Kim Rooney and Marco Lam

On April 23, 2008, the Hong Kong Legislative Council passed the *Mainland Judgments (Reciprocal Enforcement)* Bill (the "Bill"). The Bill:

i. Implements the provisions of the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and the HKSAR pursuant to Choice of Court Agreements between Parties Concerned ("the Arrangement"), which was entered into between Hong Kong and Mainland China on 14 July 2006.

ii. Provides for the registration and enforcement by the Hong Kong courts of money judgments given by designated courts of the Mainland, exercising their jurisdiction pursuant to a valid exclusive choice of court clause contained in a business-to-business agreement.

The negotiations relating to the Arrangement and the Bill commenced between Hong Kong and Mainland authorities in 2002. Since then, the negotiations have undergone a complex process,

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<sup>1</sup> Other disputes between Parties concerning rights or obligations under the FTA, but not falling within the definition of an "investment" under Article 135, shall be settled according to the provisions in Chapter 16. Chapter 16 provides for consultation between the parties as a first step. If consultation is unsuccessful, a party may request arbitration. An arbitral tribunal shall be comprised of three members and may regulate its own procedures (although it must also follow certain mandatory procedures in Article 191).

until the Bill was passed by the Hong Kong Legislative Council without opposing votes.

The following steps have to be taken in order for the Bill to take effect in Hong Kong:

- 1) The Chief Executive has to sign and promulgate the Bill in accordance with Article 76 of the Basic Law. Thereafter, the Bill will become the Mainland Judgments (Reciprocal Enforcement) Ordinance.
- 2) The Hong Kong authorities have to announce the in-force date of the Bill in Hong Kong.

As for the implementation of the Arrangement in Mainland China, the Supreme People's Court in Beijing has to promulgate a Judicial Interpretation in respect of the Arrangement. Such Judicial Interpretation will serve as a legal instrument which

will implement the Arrangement in Mainland China. As with the case in Hong Kong, the Mainland authorities have to announce the in-force date of the relevant law in the Mainland in order for the Arrangement to take effect.

It should be noted that the Arrangement or the Bill cannot be relied on yet, because the Arrangement will only apply where an exclusive jurisdiction agreement is entered into after the in-force date of the Arrangement.

In addition, it should be noted that the exceptions and process that will apply to enforcement of money judgments under the Arrangement are likely to be materially different from the exceptions and process that apply to the reciprocal enforcement of arbitration awards in Hong Kong and Mainland China.

## Cooperation Agreement Signed Between CIETAC and HKIAC

### Dave Lau

On February 21, 2008, the China International Economic and Trade Arbitration Commission (CIETAC) and the Hong Kong International Arbitration Centre (HKIAC) signed a Cooperation Agreement ("the Agreement") in Beijing. The Agreement aims to promote more effective resolution of international business disputes through arbitration in the Greater China Region.

Under the Agreement, CIETAC agreed, in arbitrations where the parties have designated Hong Kong as the venue for meetings or hearings, to encourage the parties to conduct those meetings/hearings at the HKIAC. Similarly, in a HKIAC administered arbitration where the parties have agreed to hold arbitral meetings/venues in Mainland China, HKIAC has agreed to encourage the parties to conduct those meetings/hearings at CIETAC (or one of its sub-commissions). As the host institution, either CIETAC or HKIAC will provide administrative and other support for the

conduct of the arbitral meetings and hearings. This will include, in appropriate cases, CIETAC and HKIAC recommending arbitrators from each other's panel of arbitrators.

The Agreement expresses a mutual desire of the institutions to facilitate the exchange of information, case management techniques and knowledge about arbitration in their respective jurisdictions. To this end, the Agreement envisages the exchange of staff members between the two institutions and leaves open the possibility of CIETAC and HKIAC jointly administering arbitrations in the future.

The Agreement represents further cooperation between the two bodies, both of which are leading arbitral institutions in Asia in their own right. A notable example of the two bodies' cooperation in the past is the establishment of the Asian Domain Name Dispute Resolution Centre in 2002.

# New Chinese Law on Mediation and Arbitration of Labour Disputes

## Alex Charter

On December 29, 2007, the National People's Congress passed a new *PRC Law on Mediation and Arbitration on Labour Disputes* (the "Labour Arbitration Law") that will come into force on May 1, 2008. The law applies to an employer in the People's Republic of China (the "PRC") and their employees.

When such labour disputes occur, it is common practice for the dispute to be referred initially to mediation. Often issues concerning the neutrality of the mediator may lead to the failure of the mediation to result in settlement and the next stage will be for the employer or employee to apply to the local labour arbitration commission for arbitration.

The Labour Arbitration Law expands the power of the local labour arbitration commissions, allowing them to issue legally binding awards. Awards against the employer are non-appealable on the following issues:

- a) Remuneration.
- b) Medical expenses for work-related injuries.

c) Monetary compensation or damages (not exceeding 12 times the local minimum monthly salary).

d) Disputes arising from implementation of state standards on work hours, holidays and social insurance.

Perhaps the most significant change under the Labour Arbitration Law is to extend the period by which a party must commence a labour arbitration from 60 days from the occurrence of the labour dispute (under the existing regime) to one year (pursuant to Article 27). Additionally, there are a number of events that can, if they occur within the one-year limitation period, cause the limitation period to run afresh. Article 27 also provides for extension of this one-year limitation period when a force majeure event or other justifiable causes prevent the potential claimant from commencing a labour arbitration.

## Client Alerts: Recent Developments in International Arbitration

### The Supreme Court Prohibits Contractual Expansion of Judicial Review for Arbitral Awards Under the FAA

**Michelle Burrowes**

The US Supreme Court's March 25, 2008 decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>1</sup> curtails contractual expansion of the scope of judicial review of arbitral awards that are governed by the Federal Arbitration Act (the "FAA") where such expansion is based on non-statutory grounds. In this 6-3 decision, the Court concluded that sections 10<sup>2</sup> and 11<sup>3</sup> of the FAA provide the exclusive grounds for expedited vacatur and modification of arbitration awards pursuant to the FAA. Therefore, when arbitration agreements fall within the purview of the FAA, private parties may not contractually confer authority upon a reviewing court that goes beyond these strict statutory provisions.

#### Background

Petitioner Hall Street leased property to respondent Mattel, Inc. and its predecessors, for manufacturing purposes. During Mattel's tenancy, contaminants were discovered in the property's well water—a violation of local environment laws and certain lease provisions. Hall Street filed suit in the US District Court for the District of Oregon

challenging Mattel's right to terminate the lease and seeking indemnification. After Mattel received an initial favorable ruling in the ensuing bench trial, the parties proposed that outstanding issues be submitted to arbitration. The court consented and entered the parties' arbitration agreement as an order.

In their arbitration agreement, the parties stipulated that judicial review was available in the form of vacatur and modification upon the district court's finding that the arbitrator committed legal error, or that his decision was not supported by substantial evidence—both non-statutory grounds.<sup>4</sup> The arbitrator first ruled for Mattel. Hall Street filed a motion to vacate or modify the arbitral award. The district court invoked the parties' contractually conferred review authority and vacated the award, finding legal error by the arbitrator. The case was twice appealed to the Ninth Circuit Court of Appeals, and it was reversed and remanded to the Oregon District Court on each appeal. On the second remand, the Ninth Circuit held that §§ 10 and 11 of the FAA provide the exclusive grounds for vacatur and modification of arbitral awards. Thus, the Court held, the parties' arbitration provision

<sup>1</sup> 128 S.Ct. 1396.

<sup>2</sup> 9 U.S.C. § 10(a) provides four grounds under which a court may vacate an arbitration award, i.e., where: 1) it was procured by corruption, fraud, or undue means; 2) the arbitrator was partial or corrupt; 3) the arbitrator was guilty of misconduct, such as refusing to postpone the hearing, upon sufficient cause shown, or refusing to hear evidence pertinent and material to the controversy; or 4) the arbitrator exceeded his/her power, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.

<sup>3</sup> 9 U.S.C. § 11 provides three grounds under which a court may correct or modify an arbitration award, i.e., where: a) there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; b) the arbitrator has awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the controversy; or c) the award is imperfect in matter of form not affecting the merits of the controversy.

<sup>4</sup> See *supra* notes 2 and 3.

<sup>5</sup> 196 Fed.Appx. 476.

expanding judicial review was impermissibly based on non-statutory grounds and unenforceable.<sup>5</sup>

The US Supreme Court agreed with the Ninth Circuit, finding that private parties may not supplement the grounds for expedited vacatur and modification by contract under the FAA.

### The Scope of Judicial Review Under the FAA Must Be Narrowly Construed

The Court noted the inflexible and exclusive language of § 9 of the FAA which provides that where a party seeks confirmation of an arbitral award, the court *must grant* such an order; provided the award is not subject to vacatur, modification or correction *as prescribed in sections 10 and 11* of the FAA. This mandatory language of § 9 necessarily limits judicial review to the grounds provided exclusively by §§ 10 and 11.

Hall Street argued that the Court previously departed from the statute and recognized “manifest disregard of the law”<sup>6</sup> as a valid non-statutory grounds for vacatur, thereby, setting precedent for private parties to also deviate from §§ 10 and 11. The Court was not convinced, finding the prior reference to “manifest disregard” too vague and not supportive of Hall Street’s argument for general review of the arbitrator’s legal errors. The Court also reasoned that the reference to “manifest disregard” could merely represent the Court’s collective characterization of the various grounds for vacatur of an arbitral award as delineated by § 10, not an additional, non-statutory ground. Moreover, assuming the Court expanded the scope of judicial review through statutory interpretation, this would not confer litigants the authority to expand the FAA’s parameters by private contract.

The Court also rejected Hall Street’s argument that the judicial review clause of its arbitration

agreement with Mattel should be enforced because arbitration is a creature of contract, and its enforcement is favored by Congress and the judiciary. According to the Court, freedom to contract in the context of arbitration is necessarily constrained by the FAA’s specifically delineated grounds regarding judicial review upon completion of arbitration.

The Court reasoned that “[i]nstead of fighting the text, it makes more sense to see the three provisions, §§ 9 – 11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”<sup>7</sup>

### Expanded Judicial Review Remains Available for Arbitration Agreements Outside the FAA’s Expedited Procedures

The Court emphasized that its *Hall Street* decision, holding that §§ 10 and 11 provide the exclusive grounds for expedited judicial review pursuant to the FAA, does not preclude expandable judicial review outside the Act; indeed, “[t]he FAA is not the only way into court for parties wanting review of arbitration awards.”<sup>8</sup>

Notably, the Court remanded *Hall Street* for consideration of whether the arbitration agreement which was entered as a court order during the course of the ongoing litigation should be treated as an exercise of the district court’s case management authority pursuant to Federal Rules of Civil Procedure 16, and thus outside the FAA. Neither the Ninth Circuit nor the district court has yet entered judgment with respect to this remanded issue. However, the Supreme Court’s disposition of the matter suggests that, where cases present a similar procedural history, judicial review expansion may be available pursuant to the district court’s case management authority.

<sup>6</sup> Hall Street cited the U.S. Supreme Court’s decision in *Wilko v. Swan*, 346 US 427 (1953).

<sup>7</sup> *Hall Street*, 128 S.Ct. at 1405.

<sup>8</sup> *Id.* at 1406.

Parties may also stipulate that enforcement of their arbitration agreement is governed by state statutory or common law, not the FAA's expedited review, such that an expanded scope of judicial review may be available.

### Implications of Hall Street

Contracting parties should review their existing arbitration agreements to determine whether their agreements are: a) subject to the FAA, and if so, b) whether the parties provided for expanded judicial review on non-statutory grounds. Such provisions are now unenforceable.

## Legal Professional Privilege and In-House Counsel: the *Akzo Nobel* Decision<sup>1</sup>

**Nathalie Vidrascu**

On September 17, 2007, the European Court of First Instance issued a judgment concerning the issue of legal professional privilege (or "LPP", to use the Court's acronym) in EU law, and more particularly in the context of EU competition law. The effect of this decision is to clarify the scope of the Commission's powers to require production of documents and business records during investigations on the basis of Regulation No. 17 of February 6, 1962 (relating to competition and antitrust).

This case arises out of a 2003 investigation by representatives of the European Commission at Akzo's premises in the United Kingdom. The Commission ordered Akzo (a paint and coatings manufacturer) and its subsidiary, Akcros, to submit to an investigation seeking evidence of anti-competitive practices. During the investigation, Commission officials took copies of a considerable number of documents. Akzo's representatives informed the Commission officials that certain documents were likely to be considered legally privileged.

The *Akzo Nobel* decision has two key aspects: first, it provides valuable guidance on the general scope

of LPP in EU law; and second, it confirms that such privilege does not apply to communications with in-house counsel in EU law.

### General Scope of Legal Professional Privilege in EU Law

The Court recalled that the purpose of legal privileges is, *inter alia*, to guarantee the full exercise of individuals rights of defense, and specifically, to safeguard the requirement that any person must be able to consult his or her lawyer without fear that any information given in confidence might subsequently be disclosed. The Court further held that documents are privileged if they were drawn up exclusively for the purpose of seeking legal advice from a lawyer. Privilege attaches even if the documents were not exchanged with an external lawyer or were not created for the purpose of being sent to an external lawyer. However, the Court noted that LPP should be construed restrictively with regard to such preparatory documents, and noted that the party relying on LPP must prove that "the documents in question were

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<sup>1</sup> *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission of the European Communities*, Joined Cases T-125/03 and T-253/03, Judgment of the Court of First Instance (First Chamber, Extended Composition). The Court of First Instance's judgment is available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62003A0125:EN:HTML>.

drawn up with the sole aim of seeking legal advice from a lawyer". The Court added that the applicability of a privilege should be clear from the documents themselves or the context in which those documents were prepared. That a document has been discussed with a lawyer is not sufficient to afford it such protection.

### LPP Does Not Extend to In-House Counsel

During the investigation, Commission officials took copies of e-mails between Akzo's in-house counsel and Akcros's General Manager. Akzo submitted that such correspondence should be protected from disclosure under relevant privilege rules. Akzo requested the Court to reconsider the well-established position under EC law since the 1982 *AM & S* case that the protection accorded to legal privileges under EU law applies only when the lawyer is independent, that is to say, not an employee of the party invoking the privilege (*AM & S v. Commission*, Case 155/79). Despite submissions by various bar organizations, including the International Bar Association, the Court did not depart from the *AM & S* decision and expressly excluded communications with in-house counsel from protection under privilege rules.

Akzo argued that it was not appropriate to attribute the notion of independence only to outside lawyers, as in-house counsel also had a position of independence vis-à-vis their employers. The Court rejected this argument on the basis that the test of legal advice provided in "full independence" implied that the advice was provided by a lawyer "who structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice".

The Court also rejected Akzo's argument that it should extend the scope of LPP because the laws of the Member States had evolved and the protection of communications with in-house lawyers is more common today. The Court noted that it was not possible to identify uniform tendencies in the laws of the Member States regarding LPP and that a large number of Member States still excluded in-house lawyers from protection under LPP.

Akzo further submitted that the in-house counsel concerned, being a member of the Netherlands Bar, was subject to the professional and ethical rules of that body and, as a result, had a certain level of independence. The Court ruled that even the in-house lawyer's membership in a national bar association does not impact on the level of protection afforded.

The Court also disagreed with Akzo's contention that, because the correspondence between the in-house lawyer and the General Manager was protected under their respective national laws, EC law should also afford them such protection. The Court pointed out that the protection offered by privilege is an exception to the Commission's powers of investigation. Therefore, the Court reasoned, the protection directly affects the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules of competition. The Court stated that for those reasons it had tried, consistent with the European Court of Justice's decision in the *AM & S* case, to develop a "community concept of LPP" so as to ensure a uniform application of the Commission's powers in the common market.

As a result, pursuant to the "community concept of LPP", it should not be expected that communications involving in-house counsel will be covered by LPP. However, in non-EU matters, there is a diversity of approaches in the national laws of the Member States. Some Member States, such as the Netherlands, accept that in-house lawyers are covered by LPP protection. However, in other Member States, such as France or Italy, employment and membership in the bar have no bearing on this point and documents exchanged with employed lawyers are not covered by LPP.

It is not yet clear whether the approach followed by the Court in the *Akzo* case will be limited to antitrust or competition law cases or whether it will extend to other areas of EU law.

## Practice Tips

### Tips Regarding Electronic Evidence and Disclosure in International Arbitration<sup>1</sup>

**Rahim Moloo**

While US or UK litigation-style discovery is not permitted or desired in international arbitration, electronic evidence is still bound to affect the nature of international arbitrations. This article seeks to identify some of the unique issues that will confront arbitral tribunals and arbitration counsel in dealing with electronic evidence.

#### Tip 1: Consider the Application of the IBA Rules

When the parties to an arbitration believe that electronic evidence will play a significant part in the arbitration, they should consider whether they wish to have applied the IBA Rules on the Taking of Evidence in International Commercial Arbitration (“IBA Rules”).

First, the IBA Rules are one of the few rules that explicitly include electronic information in its definition of “document.”<sup>2</sup> Second, the objections to requests for production in Article 9.2 are especially relevant to requests for the production of electronic evidence.

Of particular note, Article 9.2 permits a party to object to a request for production due to lack of relevance or materiality, unreasonable burden to produce the requested evidence, or considerations of fairness or equality that the tribunal determines to be compelling.<sup>3</sup> While these objections permit the tribunal to exercise a significant amount of discretion in limiting the scope of requests for electronic documents, it is important to note that the standard for the various objections under Article 9.2 are not static. For example, what is overly burdensome for one company may not be overly burdensome for another, and what is burdensome today may not be three years from now.<sup>4</sup> This is especially true of electronic evidence, as electronic document management software becomes more sophisticated and prevalent.

#### Tip 2: Consider the Form of Production

With paper documents, all of the information is provided on the face of the document—not so with electronic documents. Metadata is defined

<sup>1</sup> An extended version of this article appears in Mealey’s International Arbitration Report, Vol. 23, no. 4, April 2008.

<sup>2</sup> IBA Rules on the Taking of Evidence in International Commercial Arbitration, International Bar Association (June 1, 1999), Article 1. Where the applicable rules do not refer to electronic evidence, the general provisions on document production can apply. *See e.g.* UNCITRAL Rule 24(3) (stating “At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.”); ICC Article 20(5) (stating “At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence.”); ICSID Arbitration Rule 34(2)(a) (stating “The Tribunal may, if it deems it necessary at any stage of the proceeding: call upon the parties to produce documents, witnesses and experts....”).

<sup>3</sup> IBA Rules, Article 9.2(a),(c) and (g). *See also* A Project of the Sedona Conference Working Group on Electronic Document Retention & Production, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2nd ed. June 2007), Principle 2 (stating that in balancing the cost, burden, and need for electronically stored information it is relevant to consider “the technological feasibility and realistic costs of preserving, retrieving, reviewing and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.”)

<sup>4</sup> Richard D. Hill, *The New Reality of Electronic Disclosure in International arbitration: A Catalyst for Convergence*, Electronic Evidence and Disclosure in International Arbitration Juris Conference, New York (31 Jan 2008) at 2-3.

by the Sedona Glossary as “[d]ata typically stored electronically that describes characteristics of [electronically stored information (“ESI”)], found in different places in different forms....Metadata can describe how, when and by whom ESI was collected, created, accessed, modified and how it is formatted....”<sup>5</sup> Of particular note, certain metadata can only be extracted if the document is produced in native format, and not when it is printed on paper or electronic image.<sup>6</sup> One example of where metadata can be useful is when it is relevant to determine if a particular individual viewed a given document, or if and when that individual modified the document. Another example of where metadata can be particularly useful is in determining how certain numbers were calculated in an excel spreadsheet.<sup>7</sup> These examples illustrate how the form of production can be as important as the document that is being produced.

### Tip 3: Seek the Preservation of Electronic Documents

An obvious consideration is the nature in which electronic documents are stored. An electronic file is rarely deleted when an individual simply deletes it from his or her hard drive. Instead, the information often remains stored on back-up drives.<sup>8</sup> That being said, it can be a lot more difficult to obtain documents that are no longer on an individual’s local drive. As such, in certain circumstance, granting an order to preserve electronic evidence may be appropriate. In deciding whether to grant an

order to preserve electronic evidence, an arbitral tribunal will likely be guided by the relevant rules governing provisional measures.<sup>9</sup>

### Tip 4: Consider Narrow ESI Requests, Including Through the Use of Search Terms

To avoid fishing expeditions, it is critical that any request made for electronic evidence be specific (as would be required for document requests generally).<sup>10</sup> Given the volume of ESI, it may be that the same specific request that would have resulted in relatively few hard copy documents being produced before will now result in a significant number of electronic documents being produced. For example, a party may request all correspondence, including e-mails, sent from X to Y between March 2 and April 10, 2007 concerning Z contract, where X and Y are correspondents allegedly in breach of Z contract. In making this request, there may now be numerous e-mails that must be produced where as before, there may only have been a few letters. Electronic means of instantaneous communication has simply made it easier to respond quickly and more frequently, resulting in more potentially relevant documented evidence.

In attempting to recover relevant ESI, it may be useful for arbitrators to permit the use of agreed-upon search terms that can help filter through numerous electronic documents.<sup>11</sup>

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<sup>5</sup> *The Sedona Conference Glossary: for E-Discovery and Digital Information Management*, (2nd ed. December 2007), available at [http://www.thosedonaconference.org/dltForm?did=TSCGlossary\\_12\\_07.pdf](http://www.thosedonaconference.org/dltForm?did=TSCGlossary_12_07.pdf), at 33.

<sup>6</sup> *Id.*

<sup>7</sup> Where an excel spreadsheet is produced in native form, the viewer can click on an individual cell to determine how the number in that cell is derived.

<sup>8</sup> John M. Barkett, *E-Discovery for Arbitrators*, Electronic Evidence and Disclosure in International Arbitration Juris Conference, New York (January 31, 2008) at 29.

<sup>9</sup> See e.g. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1 of March 31, 2006, at para. 88 (ordering the preservation of all documents, in both “electronic and hard copy” form pursuant to Article 39(1) of the ICSID Arbitration Rules).

<sup>10</sup> See e.g. IBA Rules, Art. 3(3) requiring a request to include a description of the document sufficient to identify it or a description of a narrow and specific category of documents that are reasonably believed to exist.

<sup>11</sup> See *The Sedona Principles*, *supra* note 3, Principle 11 (stating “A responding party may satisfy its good faith obligation to preserve and produce responsive electronically stored information by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data reasonably likely to contain relevant information.”)

Requests for communications between certain dates and individuals can be made even more specific by requiring the production of only those documents containing certain relevant search terms in those documents.

### Tip 5: Beware of Adverse Inferences Due to Non-Production or Non-Preservation of ESI

If a party fails to preserve or produce relevant electronic evidence, a tribunal may, in the appropriate circumstance, draw an adverse inference against that party regarding the content of the missing documentation.<sup>12</sup> Before doing so, however, an arbitrator should consider certain additional factors to those normally considered under the applicable arbitration rules.<sup>13</sup> First, a tribunal should consider whether producing the document would be overly burdensome on the non-producing party, and should weigh this factor against the importance of the evidence to determining the relevant facts. Second, a tribunal should ensure that the missing electronic documents were not deleted as a result of the non-producing party's legitimate and reasonable document retention policy.<sup>14</sup> For example, many companies will retain certain electronic documents only for a certain period of time.

### Tip 6: Plan for the Use of Electronic Evidence

What should arbitrators and arbitration counsel do to make electronic evidence a part of their arbitration? First, counsel should ensure that

they have reviewed relevant electronic evidence in formulating their case so that they are able to adduce all possible evidence in support of their client's position. Second, the parties should consider whether they wish to have the IBA Rules govern the taking of evidence, including electronic evidence, in their arbitration. Third, the parties should discuss issues pertaining to electronic evidence at the preliminary conference to ensure that the parties and the tribunal all agree on the role that electronic evidence will play in the arbitration. Issues that may be discussed include the form of production of the electronic documents, any issues relating to the preservation of electronic (and other) evidence and guidelines for requesting electronic documents. Fourth, counsel will want to discuss with their clients what ESI should be preserved and how. This may simply require counsel to ensure that their client has a viable ESI retention policy in place. Fifth, a party may wish to seek an order from the Tribunal to ensure the preservation of the other party's electronic evidence if the circumstances warrant such an order.

There is no doubt that electronic evidence has already become a reality in international arbitration. While electronic evidence can and should play an important role in uncovering relevant facts in a case, arbitration counsel and arbitrators must ensure that they tread carefully and thoughtfully to ensure electronic evidence does not burden the fact-finding process, but facilitates it.

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12 IBA Rules, Article 9.4, 9.5 (allowing a tribunal to draw an adverse inference for the failure to produce relevant evidence under certain circumstances.)

13 See Jeremy K. Sharpe, Drawing Adverse Inferences from the Non-production of Evidence, 22 ARB. INT. 549 (2006) for a discussion of the criteria for drawing adverse inferences for the non-production of evidence generally.

14 See Barkett, *supra* note 8 at 49 (asking "What if material records only exist on backup media and the backup media were recycled as part of the routine operation of an electronic records storage system?")

## What Our Practitioners Are Saying

### Ank Santens, New York, on Changes in the Law Relating to Investment Disputes in the Americas

On February 29, 2008, Ank Santens, Partner, New York, participated in a panel discussion on Energy and Natural Resources Disputes in the Americas, at the First Conference of the Americas organized by the International Bar Association and held in Mexico City. Ms. Santens discussed recent changes in the law relating to investment disputes in the Americas, including the 2004 United States Model Bilateral Investment Treaty (BIT); the 2003 Canadian Model Foreign Investment Protection Agreement (FIPA) (the Canadian equivalent of a BIT) and the 2004 Dominican Republic—Central America—United States Free Trade Agreement (CAFTA—DR).

In respect of the model BIT and FIPA, Ms. Santens noted that, in the last decade, Canada and particularly the US had shifted from being champions of investment protections for their nationals investing abroad, to a more cautious approach due to the States having been sued by foreign investors on several occasions. Given the recent experience of both the US and Canada as respondents in international arbitrations, both the new model BIT and the new model FIPA are more protective of the States than the previous generation of BITs and FIPAs.

Ms. Santens explained the three objectives that can be found in the BIT/FIPA models, which were drafted around the same time and are very similar. First, the models attempt to clarify substantive obligations and protections by including more detail than previous versions and by clearly spelling out what the treaty does and does not do. Second, the models attempt to make the dispute resolution process more regulated and therefore, it is hoped, more efficient. For example, each model has very

detailed provisions on the selection of arbitrators and the conduct of arbitration. Third, the models aim to be more transparent than earlier versions. The States are required to publish or otherwise make publicly available any laws, regulations, procedures and administrative rulings of general application respecting any matter covered by the treaty. To the extent possible, each State also promises to publish in advance any such measure that it plans to adopt and to provide interested persons and the other State with a reasonable opportunity to comment on such proposed measures. In respect of investor-state dispute resolutions, hearings are to be open to the public, there is provision for *amicus curiae* submissions, and, in the US model BIT, all documents surrounding the arbitration are to be published (in the Canadian model, the disputing party may object to publication of any document except the award).

Ms. Santens noted that post 2003/2004, all US BITs and investment chapters in the US-concluded Free Trade Agreements and all Canadian FIPAs have been very similar to these models, although, to her knowledge, there have been no cases at this point which have been based on such agreements. The practical effect of the models therefore remains to be seen. One big question is whether the abundance of detail will help to avoid, or instead create, confusion and dispute. Ms. Santens expressed the view that, often, “less is more” in these types of documents. Another matter that is already being tested is how the new models influence interpretation of the older-generation investment treaties and vice versa (e.g., does the fact that a provision in the new model is not present in an older-generation treaty mean that the parties intended for it not to be there or should the new model instead “enlighten” the parties’ intent in the older-generation treaties?). It can be expected that these matters will be explored in numerous cases in the years to come.

Ms. Santens also discussed CAFTA—DR, which includes an investment chapter that is based on, and very similar to, the 2004 US model BIT. Two cases under CAFTA—DR have been commenced but not yet resolved (one against Guatemala and one against the Dominican Republic). Ms. Santens concluded that the same considerations as those raised with respect to the model BIT and FIPA applied in this context.

### “Commercial Dispute Resolution in Emerging Markets: Anticipating Risks and Limiting Liability”

In cooperation with the EU-Georgia Business Council, White & Case presented the seminar “Commercial Dispute Resolution in Emerging Markets: Anticipating Risks and Limiting Liability” in Tbilisi, Georgia, on February 26, 2008. The event, which received national media coverage, was attended by over 50 participants, comprising a broad spectrum of government officials, international investors and Georgian companies.

White & Case lawyers presented on four topics: (1) key issues in international commercial arbitration; (2) international investment arbitration; (3) developments in Georgian law relevant to international arbitration and (4) transactional lessons from emerging market investments.

**Paul Friedland (Partner, New York)** discussed basic arbitration principles and selected issues in international commercial arbitration. Mr. Friedland outlined key considerations in the selection of arbitrators and arbitral institution, as well as party recoupment of costs. Highlighting points of particular interest to companies doing business in emerging markets, Mr. Friedland also advised

on the importance of the place of arbitration. Mr. Friedland explained, “If the law of the place of arbitration will not give effect to an arbitration agreement or the courts there are hostile to arbitration, it may be impossible to conduct an arbitration there or the ultimate award may be subject to challenge before the courts at the place of arbitration on questionable grounds.”

**Charles Nairac (Partner, Paris)** described the distinguishing features of dispute resolution involving investors and States. In addition, Mr. Nairac spoke about the protections afforded to investments in Georgia through bilateral investment treaties and multilateral treaties. Mr. Nairac reviewed key treaty provisions setting forth the scope of protection and required treatment of investments, and the relevant legal standards typically applied in investment treaty arbitrations.

**Sara Lulo (Associate, London)** described developments in Georgian law relevant to international arbitration. In particular, Ms. Lulo discussed Georgia’s national arbitration law and proposed amendments thereto, as well as Georgia’s participation in the international treaty framework.

**Villiers Terblanche (Partner, Abu Dhabi)** contributed a transactional perspective focused on infrastructure project finance deals in emerging markets. Mr. Terblanche advised on how parties can limit, at the contract negotiation stage, a party’s exposure to liability. Mr. Terblanche suggested factors that parties should consider in relation to, among other things, project revenue stream allocation, termination provisions, site acquisition, operation and maintenance agreements and force majeure.

## Practitioner Appointments, Practitioner Recognition and News

### Practitioner Recognition

*Who's Who Legal*, in its publication *Commercial Arbitration 2008*, ranked **Stephen Bond** (Paris) as one of the top twenty "most highly regarded individuals" in the field of commercial arbitration.

*Chambers USA* is honoring **Carolyn Lamm** (Washington, DC) with a Lifetime Achievement Award at the Chambers USA Awards for Excellence in June.

Gillis Wetter Prize Panel of Judges has named **Epaminontas E. Triantafilou** the GWP 2008 winner for his essay "Amicus Submissions in Investor-State Arbitration after Vivendi."

### Practitioner Appointments

**Carolyn Lamm** (International Arbitration Partner, Washington, DC) has been nominated as president-elect of the American Bar Association.

**Paul Friedland** (New York) has been selected to Chair the American Arbitration Association's Law Committee.

**Andrew McDougall** (Paris) has been appointed Associate Professor at Université Paris I Panthéon-Sorbonne where he will teach international arbitration.

**Jonathan C. Hamilton** (Washington, DC) has been named to the Council of the Americas Trade Advisory Group.

**Mark Luz** (New York) has been appointed to the United States Council on International Business (USCIB) Arbitration Committee Amicus Curiae Subcommittee.

### News

**Andrea Menaker**, outgoing chief of the NAFTA Arbitration Division for the US State Department, has joined White & Case's International Arbitration Group as a partner in its Washington, DC, office.

**Phillip Capper**, head of the worldwide international arbitration practice at Lovells, is joining White & Case's International Arbitration Group as a partner in its London office.

## White & Case—Worldwide

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## White & Case

White & Case is a leading global law firm with more than 2,300 lawyers in 37 offices in 25 countries. Among the first US-based law firms to establish a truly global presence, we provide counsel and representation in virtually every area of law that affects cross-border business. Our clients value both the breadth of our network and depth of our US, English and local law capabilities in each of our offices and rely on us for their complex cross-border transactions, arbitration and litigation. Whether in established or emerging markets, the hallmark of White & Case is our complete dedication to the business priorities and legal needs of our clients.

Our approach is based on listening to our clients' needs, taking the time to understand their business and responding with effective strategies and solutions, no matter how big the opportunity or formidable the challenge. With new technologies, globalization, consolidation and other forces continuously changing how business gets done, we help our clients evaluate the risks and rewards of ventures designed to advance their interests.

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—*American Lawyer, 2007*

International Arbitration Team of the Year 2007

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Restructuring Team of the Year 2006

—*IFLR Americas Awards*

Banking and Finance Team of the Year 2005

—*Legal Business*

Ranked Number One in Global  
Bankruptcy 2006

—*The Deal*

Airport Finance/Road Finance Law Firm of the  
Year 2007

—*Jane's Transport Finance Awards*

Defense Hot List 2006

—*The National Law Journal*

One of the Top Ten Law Firms For Global  
M&A 2007

—*Thomson Financial/Bloomberg*

Ranked Second in Global Private  
Equity 2006

—*PLC Cross-Border Quarterly*

One of the Top Ten Antitrust Law Firms 2007

—*Global Competition Review*

A Leading Privacy Law Firm 2006

—*Computerworld*

One of the Top Ten Global Employment Law  
Firms 2006

—*PLC Cross-Border Quarterly*

Top International Law Firm 2008

—*Vault Guide to the Top 100 Law Firms*

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