International arbitration

Streamlining, while competition heats up

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Arbitration has, for some time, been the standard form of dispute resolution for international disputes. The increasing acceptance of arbitration is reflected in a number of traits typical of mature markets; namely, efforts to improve existing products rather than create new ones and a corresponding increase in competition between players in the market.

In an arbitration, the parties, or an institution on their behalf, select an arbitrator or arbitrators to render a binding decision on the parties' dispute. The process is private and largely confidential. Its key advantages are perceived to be neutrality, flexibility and the enforceability of decisions (arbitral awards) internationally.

Streamlining rather than innovation

The fabric that makes up international arbitration is a series of conventions, national laws and arbitral rules (rules that the parties can agree to adopt to govern their arbitrations). The last five years have seen refinements to this fabric rather than radical changes.

While no new international conventions have been enacted recently, positive trends can be seen in how existing conventions are implemented by national courts. The lynchpin of international arbitration is the New York Convention on the Enforcement and Recognition of

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Foreign Arbitral Awards, adopted in 1958 (New York Convention). Historically, national courts in some countries have been unsupportive in their interpretation of the New York Convention; however, recent years have seen an increase in decisions that respect its letter and spirit (*see "Russia" and "Asia" below*).

Moves have also been made to improve arbitral rules; for example, in 2010, the United Nations Commission on International Trade Law (UNCITRAL) published a revised version of its arbitration rules, originally published in 1976 (UNCITRAL rules). The 1976 UNCITRAL rules had been widely used and broadly accepted, and the 2010 changes focused on modernising and improving them rather than changing their underlying content.

Arbitral institutions have also been making steady efforts to improve the quality of the services they offer. For example, one constant complaint is that international arbitrators take on too much work and therefore delay the arbitral process. In mid-2009, the International Chamber of Commerce (ICC) International Court of Arbitration, arguably the leading international arbitral institution, decided to require arbitrators to disclose to the parties their workload in order to encourage arbitrators to reflect more carefully on their availability before accepting appointments.

Increased competition

One trend over recent years has been increasing competition between countries to attract international arbitrations.

The 2010 International Arbitration Survey: Choices in International Arbitration (2010 survey) revealed that parties' choice of the seat or legal place of the arbitration is mostly influenced by a country's formal legal infrastructure (*www.whitecase.com/files/upload/fileRepository/2010-International-Arbitration-Survey-Choices-International-Arbitration.PDF*). Many countries have been attempting to improve their legal framework to encourage parties to choose their country for arbitrations; for example, in 2008, Mauritius enacted a new arbitration act with a view to becoming a regional arbitration centre for African disputes. Even established arbitral jurisdictions have made efforts to improve. France, historically one of the most pro-arbitration jurisdictions, has recently implemented reforms to its arbitration legislation to maintain its position (*see "France" below*).

Such competition has also had a marketing angle. Singapore has marketed itself aggressively as a regional hub for international arbitration, focusing on its perceived neutrality, business friendliness and practical infrastructure, such as the availability of hearing rooms. Even popular places for arbitration such as London and Paris have increased their efforts in recent years to promote their use for international arbitrations.

This competition can only improve international arbitration. It creates more, and better, choices for parties that decide to use arbitration to resolve their disputes.

ENGLAND AND WALES

English law, as the governing substantive law of arbitration, and London, as the seat of arbitration, have enjoyed growing popularity in the last five years.

In the 2010 survey, 40% of respondents said that they use English law most frequently as the substantive governing law of their arbitrations, singling out the perceived neutrality and impartiality of the legal system as the driving force behind this choice. Similar reasons in respect of the formal legal infrastructure (the Arbitration Act 1996 and the track record in enforcing arbitration agreements and awards) were given by 30% of respondents choosing England as the preferred seat of arbitration.

This positive trend for arbitration in England is due largely to the pro-arbitration attitude of the English courts in upholding arbitration agreements, supporting party autonomy, and resisting interference in the various stages of the arbitral process.

Arbitration agreements

English courts have applied an expansive approach to the construction of arbitration clauses on the basis that, in the absence of clear wording to the contrary, parties who have included an arbitration clause in their contract have intended to submit all disputes arising out of their relationship to arbitration by the same tribunal (*Fiona Trust v Yuri Privalov [2007] UKHL 40; see News brief "International arbitration: full steam ahead", www.practicallaw.com/0-226-1953*). Clear words will be required to demonstrate that the parties intended to exclude certain disputes from their agreement to arbitrate.

This liberal approach extends to situations in which the arbitration agreement between the parties is contained in a second, related agreement. Where this second agreement arises directly out of the relationship between the parties governed by the first agreement, an arbitration clause contained in the first agreement may apply and the tribunal may therefore have jurisdiction over a claim arising under the second agreement (*Emmott v Michael Wilson [2009] EWHC 1 (Comm); www.practicallaw.com/4-385-1000*). Parties should therefore be aware of the need to ensure that those disputes which are not to be arbitrated are clearly identified and carved out of the arbitration clause.

Careful drafting is also necessary when prescribing eligibility requirements for prospective arbitrators. An arbitration agreement providing that only persons of a certain religious belief could act as arbitrator has been held void on the ground of religious discrimination (*Jivraj v Hashwani [2010] EWCA Civ 172*). Arbitration clauses prescribing requirements concerning gender, nationality or age are likely to fall foul of UK anti-discrimination legislation.

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Support of arbitral proceedings

English courts have demonstrated an inclination to support, rather than review, the arbitral process. They have resisted assuming the tribunal's role by conducting a full re-examination of the merits of a tribunal's peremptory order. In *Emmott*, the High Court emphasised that its power to review peremptory orders by a tribunal is limited, and that its proper role is to support the tribunal and ensure that its peremptory orders are respected by the parties.

Enforcement of awards

English courts have made it clear that they are willing and able to exercise their review powers, as the enforcing court under the New York Convention, to safeguard the fundamental rights of the parties (*Dallah v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46; www.practicallaw.com/7-504-0422*). When doing so, an English court may have regard to the reasoning and findings of the arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them. In *Dallah*, the Supreme Court refused to enforce a French award because there was no valid arbitration agreement. *Dallah* does not, however, reflect an anti-enforcement approach by the English courts. Indeed, this is only the third recorded case in the last 35 years where an international award has been refused enforcement in England (*see also box "Arbitration in the EU"*).

FRANCE

On 14 January 2011, France published its greatly anticipated new arbitration law, Decree No. 2011-48 (the decree). 30 years after the previous law, this reform confirms France's position as a leading arbitration jurisdiction with modern, arbitration-friendly legislation. The decree concerns both domestic and international arbitration and comes into effect on 1 May 2011, save for several specific provisions.

The decree

The decree largely aims to codify existing case law; for example, both the French Supreme Court and the Paris Court of Appeal have recognised the rule that a party who, without legitimate excuse, fails to raise an irregularity in the arbitral process on becoming aware of it, is estopped from doing so at the enforcement or annulment stage (*Cass. 1st Civil Chamber, Golshani v Islamic Republic of Iran, 6 July 2005, Case no. 01-15912; Paris Court of Appeal, Baste SA v Lady Cake Feine Kuchen GmbH, 20 September 2007, Case no. 05-21985*). The decree codifies this principle in Article 1466 of the French Code of Civil Procedure (CPC).

The decree also confirms and reinforces the powers of arbitral tribunals; for example, Article 1467 of the CPC recognises the arbitral tribunal's authority to order a party to produce documentary evidence, subject to a penalty should it fail to do so. Article 1468 of the CPC also allows the arbitral tribunal to order conservatory or interim measures.

The decree introduces two new provisions relating to enforcement or annulment proceedings. Article 1522 of the CPC provides that, by way of a specific agreement, the parties may, at any time, expressly waive their right to bring an action to set aside the arbitral award. The parties' waiver under this provision (which applies only to arbitration agreements entered into after 1 May 2011) does not, however, affect their right to challenge any decision to enforce the award in France. The practical advantage of such a waiver is to avoid a challenge of the award in France when its enforcement is sought only abroad. In addition, Article 1526 of the CPC confirms that a challenge to the award will not, in itself, stay its enforcement. Therefore, arbitral awards rendered after 1 May 2011 are provisionally enforceable pending challenge (reversing the previous rule).

French courts

French courts continue to prove their pro-arbitration stance. In *Dallah*, the Paris Court of Appeal, deciding on the same facts and law as the UK Supreme Court (*see "England and Wales"*

Arbitration in the EU

Arbitration is expressly excluded from the scope of application of the Brussels Regulation, which governs jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in the EU (*44/2001/EC*). However, a recent decision of the European Court of Justice (ECJ) has raised criticism and fear of court interference in arbitration proceedings in the EU, which the exclusion of arbitration from the Brussels Regulation was designed to avoid.

In the *West Tankers* decision of February 2009, the ECJ declared unlawful an anti-suit injunction by an English court to restrain litigation in Italy because the parties had agreed to arbitration in London (*Allianz SpA v West Tankers, Case C-185/07; www.practicallaw.com/2-385-1001*). According to the ECJ, the Italian court had jurisdiction over the merits of the claim under the Brussels Regulation and, by extension, the preliminary and incidental question of the validity of the parties' arbitration agreement.

In September 2010, the European Parliament confirmed that it strongly opposed the (even partial) abolition of the exclusion of arbitration from the scope of the Brussels Regulation (which could be the consequence of the *West Tankers* decision). In December 2010, the European Commission issued a proposal pursuant to which the courts of the place of arbitration and arbitral tribunals would have priority jurisdiction to decide on the validity of an arbitration agreement (*see News brief "Brussels Regulation: the Commission's proposals for reform", www.practicallaw.com/0-504-5668*). It seems to be a step in the right direction. If adopted, it would help to ensure the exclusion of arbitration from the Brussels Regulation and limit court interference in the arbitration process in the EU.

above), came to the exact opposite conclusion and confirmed that the arbitration award could be validly enforced in France against a non-signatory party (*Paris Court of Appeal, 17 February 2011*).

In addition, consistent with its decision in *Hilmarton v OTV*, the French Supreme Court held in *Société PT Putrabali Adyamulia v Société Rena Holding* that a foreign award may be enforced in France despite its annulment in the country of the seat of the arbitration and its replacement by another award issued by the same arbitral tribunal (*Cass. 1st Civil Chamber, 10 June 1997; Cass. 1st Civil Chamber, 29 June 2007*). The court said that the foreign award, which is not linked to any national legal order, is a decision of international justice whose legality is to be assessed under the rules applicable in the country where its enforcement is requested. Applying the New York Convention, the court explained that the annulment of an award at the seat of arbitration is not a ground to set it aside or refuse either its recognition or its enforcement in France.

GERMANY

Recent developments in Germany illustrate that the country is becoming an increasingly established venue for international arbitration.

Legal framework

In 1998, the statutory regulations for arbitration in the German Code of Civil Procedure (ZPO) were revised, based on the UNCITRAL model law. These regulations are user-friendly, contain few mandatory provisions and provide the parties with significant freedom to fix their own rules for the proceedings.

Arbitration rules

The arbitration rules of the German Institute for Arbitration (DIS) provide for comparably short and cost-effective proceedings; for example, they only provide for limited document production. In addition, the DIS introduced Supplementary Rules for Expedited Proceedings in April 2008. These provide for:

- A sole arbitrator (unless the parties agree otherwise).
- A limitation on the number of briefs exchanged.
- An oral hearing.
- The termination of proceedings within six months (in the case of a sole arbitrator) or nine months (in the case of a three-member tribunal) of the commencement of proceedings.

In 2010, the DIS enacted new rules on various alternative dispute resolution mechanisms, including expert opinion, expert determination and adjudication. The new rules regarding adjudication concentrate on dispute boards, appointed at the outset of a project, which are responsible for the resolution of disputes throughout the project's life.

(*See also box "Recent German court decisions"*.)

THE US

Over the past few years, US courts have rendered several decisions in which they have demonstrated a pro-arbitration trend, reinforcing the jurisdiction's position as a leading forum for international arbitration.

Judicial review of arbitral awards

In *Hall Street Associates LLC v Mattel Inc*, the US Supreme Court held that parties cannot expand the grounds for judicial review of arbitral awards beyond the provisions contained in section 10 of the Federal Arbitration Act (FAA) (section 10) (*128 S.Ct. 1396 (2008)*). The court refused to give effect to the terms of an arbitration agreement that purported to entitle a court to vacate, modify or correct any award where the arbitrator's conclusions of law were erroneous. The court also touched on the controversial common law ground for vacating an award for "manifest disregard of the law", querying, among other things, whether that term was intended to refer to the section 10 grounds collectively or was meant to be a new ground for review. Lower courts remain divided on this issue.

Discovery

Section 1782 of the US Code (section 1782) allows parties to obtain discovery of evidence in the US for use in proceedings before foreign or international tribunals. Since the US Supreme Court's decision in *Intel Corp v Advanced Micro Devices Inc*, in which it was suggested that section 1782 can be invoked in aid of international arbitration proceedings, several federal courts have extended the application of section 1782 from tribunals established by governments to non-sovereign tribunals, including private commercial arbitrations (*542 U.S. 241 (2004)*). To date, section 1782 has been applied by federal courts in Connecticut, Delaware, Massachusetts and Minnesota with respect to private commercial arbitrations, and by federal courts in a number of states, including New York and California, with respect to investment treaty arbitrations. However, other federal courts in Illinois, Texas and Florida have not been willing to extend section 1782 to private arbitral tribunals.

Competence-competence

In *Rent-A-Center West v Jackson*, the US Supreme Court considered whether courts are required to hear claims that an arbitration agreement subject to the FAA is unconscionable, even when the parties have clearly and unmistakably assigned that decision to the arbitrator (*130 S.Ct. 2772 (2010)*). The court held that, under the FAA, a challenge to the validity of an arbitration agreement that contains a provision delegating that authority to the arbitrator is to be decided by the arbitrator and not a court. This reinforces the principle of *competence-competence* (that is, that an arbitral tribunal has the power to rule on its own jurisdiction). However, the court also held that, because an arbitration agreement is severable from the remainder of the contract, a specific challenge to the enforceability of the arbitration agreement must be considered by a court.

Class action arbitration

In *Stolt-Nielsen SA v AnimalFeeds International Corp*, the US Supreme Court held that, under the FAA, parties cannot be compelled to submit to

Recent German court decisions

German courts are generally pro-arbitration, as is illustrated by some recent court decisions.

Arbitration clauses

Frequently, arbitration agreements are concluded by reference to general terms and conditions that contain an arbitration clause. Such incorporation is valid under German arbitration law if the general terms and conditions have been included in the contract. However, problems arise if the contract contains several documents that contradict each other. In 2007, the Federal Court of Justice (BGH) decided a case in which the contract consisted of the following four documents (listed in descending order of priority, as agreed between the parties):

- The written order.
- The protocol.
- General terms and conditions on which the contractor had insisted.
- General terms and conditions chosen by the principal.

Only the latter included an arbitration clause, while both the protocol and other general terms and conditions provided that the place of jurisdiction for all disputes was to be the competent state court of the seat of the contractor.

The BGH held that the higher ranked provisions did not interfere with the arbitration clause as these provisions were intended to determine which specific state court would be competent in the case of general jurisdiction of the German courts (*BGH NJW-RR 2007, 1719*). The BGH's decision indicates that an arbitration clause in any contractual document is likely to prevail.

No more double exequatur

Until 2009, it was possible, in certain circumstances, to enforce in Germany both a foreign arbitral award and a foreign court decision incorporating that arbitral award (double exequatur). The BGH has changed its jurisprudence in this regard to avoid exposing debtors to the risk of facing two such procedures, so that only the foreign arbitral award itself can now be enforced in Germany (*BGH NJW 2009, 2826*).

Shareholders' resolutions

Until 2009, it had been unclear whether disputes concerning the validity of shareholders' resolutions in a limited liability company were arbitrable, and so they had usually been excluded from arbitration clauses. The BGH has now accepted that such disputes are arbitrable provided that the arbitration proceedings are conducted in a manner that provides legal protection comparable to that in state court proceedings (*BGH NJW 2009, 1962*). The minimum standards defined by the BGH are that all shareholders have:

- Agreed on the arbitration clause.
- The opportunity to participate in the proceedings.
- The opportunity to participate in the selection of the arbitrators, even if they are not involved in the proceedings from the beginning.

In addition, all disputes concerning the same shareholders' resolution must be dealt with by a single arbitral tribunal.

However, drafting arbitration clauses to implement these requirements has proved to be extremely difficult. The DIS therefore introduced special rules for these disputes, effective as of 15 September 2009, which may be incorporated by reference (*DIS Supplementary Rules for Corporate Law Disputes*).

class arbitration if their arbitration agreement is silent on the subject (*130 S.Ct. 1758 (2010)*). Class arbitration is a recent phenomenon in the US, coming to the fore following *Green Tree Financial Corp v Bazzle*, where the Supreme Court held that it is for arbitrators rather than courts to decide whether a silent clause permits class arbitration (*123 S.Ct. 2402 (2003)*). The recent rise in US class arbitrations is illustrated by the American Arbitration Association's (AAA) figures: it administered nearly 300 class arbitrations between 2004 and 2009, approximately 76% of which arose out of consumer, employment and franchise disputes. In many of these cases, a silent arbitration clause was presumed to permit class arbitration. However, since *Stolt-Nielsen*, it is expected that class arbitrations will become more of a rarity.

ASIA

The 2010 survey suggests that Asia has become a more familiar, trusted and frequently-used region for parties involved in international arbitration proceedings. Even parties from outside Asia now often choose arbitration in the well-established forums of Hong Kong and Singapore. According to the 2010 survey, Singapore became the most favoured arbitral seat in Asia in 2010, moving slightly ahead of Hong Kong.

Reform

Around Asia in 2010, countries and arbitral bodies have been revising and enhancing laws and institutional rules applicable to international arbitration. In Hong Kong, a new Arbitration Ordinance was passed on 10 November 2010 (the ordinance), which, among other things, abolishes the distinction between domestic and international arbitration, and provides for a new unitary

regime based on the UNCITRAL model law. It also makes clear that courts may intervene in the arbitral process only in circumstances expressly set out in the ordinance. In practice, this means that minor, procedural hearings, such as those for challenges to arbitrator appointments and orders to extend time for arbitral proceedings, are not subject to appeal.

The Singapore International Arbitration Centre (SIAC) published a revised version of its arbitration rules in 2010, which enable the adoption of streamlined procedures for limited-value disputes of $5 million or less, and expedited arbitrator-issued interim remedies in cases of genuine urgency. Additionally, the requirement for a memorandum of issues to be drawn up and agreed between the parties (defining the issues in dispute at an early stage) has been abandoned.

Most arbitral institutions continue to use the 1976 UNCITRAL rules; however, the Kuala Lumpur Regional Centre for Arbitration in Malaysia was the first arbitral institution to adopt the new 2010 UNCITRAL rules.

These developments follow those in North Asia in recent years. In late 2009, the Japanese Commercial Arbitration Association amended its arbitration rules by adopting the UNCITRAL rules. Earlier, in 2007, the Korean Commercial Arbitration Board (KCAB) implemented an entirely separate set of international arbitration rules (the KCAB international rules), which now exist alongside the KCAB arbitration rules. The KCAB international rules, modelled closely on the ICC rules, apply to international arbitrations under the auspices of the KCAB, provided that parties expressly adopt them in their arbitration agreements.

An emerging judicial consensus?

Courts in the region have continued to contribute to legal certainty in a range of pro-arbitration rulings. For example, in 2010, the Tokyo High Court held that the public policy exception in Article 44(1) of the Japanese Arbitration Law was not intended to allow courts to set aside awards in cases where tribunals have made mistakes (even if unreasonable) in their findings of fact or law (*Decision No. 3 of 2009*). Rather, it was to enable setting aside where the effect of an award is contrary to the public policy of Japan: a much higher hurdle. While the number of cases handled by the Japan Commercial Arbitration Association remains relatively low, the approach adopted by the Japanese courts is now consistent with international expectations of non-interference with the arbitral process.

Similarly, in a 2009 decision, the Korean Supreme Court held that public policy should be interpreted narrowly when enforcing international awards, so that enforcement should be refused only if the actual consequences of recognition or enforcement would be against good moral and social order (*Majestic Woodchips, Inc. v Donghae Pulp Co. Ltd, Case No. 2006Da20290*).

In another pro-arbitration decision, the Singapore High Court held that it is generally inappropriate to conduct any substantive examination of the documents filed in support of an application to enforce a foreign arbitral award; the court's task is largely formalistic (*Strandore Invest A/S and others v Soh Kim Wat [2010] SGHC 174*). If the relatively basic requirements of Singapore's International Arbitration Act for enforcement are met, the foreign award should be enforced without further review.

THE MIDDLE EAST

A number of the Gulf States which make up the Gulf Co-operation Council (GCC) have tried to improve both the image and the reality of arbitration within their jurisdictions during the last five years. A lack of confidence by foreign investors in court systems perceived as antiquated and inefficient, coupled with doubts about commitment to the enforcement of arbitral awards, have had to be addressed in order for the Middle East to compete with other regions.

United Arab Emirates

Progress has recently been most marked in the United Arab Emirates (UAE), where Dubai has taken the lead. The Dubai International Arbitration Centre (DIAC) is the best known regional arbitration centre in the UAE. Its revised arbitration rules came into force in May 2007.

In addition, the Dubai International Finance Centre (DIFC), a separate jurisdiction based on common law, with its own arbitration law based on the UNCITRAL model law, has formed a relationship with the London Court of International Arbitration (LCIA) (the DIFC-LCIA centre). In 2008, the DIFC-LCIA centre introduced its LCIA-based arbitration rules. However, the DIFC court, while much heralded, is likely to find its impact diminished by its decision, published in March 2010, in *Hardt and Hardt Trading FZE v Damac (DIFC) Co Ltd*, which indicates that the court's jurisdiction will be limited to disputes involving the DIFC-LCIA centre, its members or related transactions (*DFI 036/2009*). There is no prospect of other parties in the region opting in to the court's jurisdiction.

The UAE's reputation for arbitration has been enhanced by recent decisions on recognition and enforcement. In April 2010, the Fujairah Federal Court of First Instance ordered the enforcement of two awards in shipping disputes made by a London arbitrator and, in October 2010, a court in the DIFC recognised for the first time an award issued by the DIFC-LCIA centre. The Dubai Court of First Instance also enforced a London arbitration award in January 2011. In 2009, the Ruler of Dubai established the Dubai World Tribunal to deal with disputes arising from the well-publicised economic difficulties of the Dubai World development, drawing on DIFC judiciary, to maintain the confidence of the international financial community.

There are further signs that the UAE is determined to be fully received as a member of the international arbitra-

tion community. The absence of dedicated arbitration legislation has been an impediment: UAE arbitration law is based not on the UNCITRAL model law but on certain sections of the UAE Civil Procedure Code, published under a 1992 federal law. This is now being addressed and an UNCITRAL-based draft federal law on arbitration and the enforcement of arbitral awards is currently under consideration. When enacted, it is unlikely to be a panacea; there remain uncertainties about its relationship with the DIFC jurisdiction, as well as important procedural issues, such as challenge and enforcement. However, it is rightly seen as indicative of the UAE's move, albeit not an overnight one, to embrace modern international dispute resolution systems and practices.

Qatar and Bahrain

In some respects, at least, Qatar and Bahrain have been ahead of the UAE. Bahrain has been a signatory of the New York Convention since 1988 and Qatar since 2002, whereas the UAE only joined the list of signatories in August 2006. In addition, Bahrain implemented the UNCITRAL model law in 2004. Although Qatar's Code of Civil and Commercial Procedure (1990) does not follow the UNCITRAL model law, the Arbitration Regulations of the Qatar Financial Centre (QFC), introduced in 2005, do follow it. The QFC is, in this respect, comparable to the DIFC. In 2009, the QFC Civil and Commercial Court and Regulatory Tribunal heard its first cases, applying common law principles. Qatar hopes that this court may attract disputes from elsewhere in the region, although it is too early to estimate the likelihood of this.

Bahrain has also taken steps, by its legislative decree of 2009, to reform its arbitration procedure and, as part of its wider joint initiative with the AAA, set up the Bahrain Centre for Dispute Resolution in January 2010 (Bahrain Centre). The Bahrain Centre offers a form of statutory adjudication for international disputes over a threshold value of approximately $1.3 million.

Russian legal framework for arbitration

The legal framework applicable to arbitrations and/or the recognition and enforcement of awards in Russia includes the following:

- New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards 1958 (New York Convention). Article 5 lists the grounds for refusal of recognition and enforcement of awards.
- European Convention on International Commercial Arbitration 1961. This applies solely to disputes arising from international trade. It lists the grounds for setting aside an award and also deals with other issues relating to arbitration proceedings in general. The UK, Switzerland, Sweden and the Netherlands are not parties but over 30 countries are, including Russia and the Ukraine.
- Law on International Commercial Arbitration 1993. This is based on the United Nations Commission on International Trade Law (UNCITRAL) model law and mirrors the provisions of the New York Convention concerning the enforcement of awards. Amendments are expected in 2011 to reflect the changes to the UNCITRAL model law in 2006 and are intended to address, in particular, interim measures and the form of the arbitration agreement.
- Arbitrazh Procedure Code 2002. This governs the procedure in the Arbitrazh courts (Russian commercial courts).

Whether the Bahrain Centre, the QFC court, or the DIAC (or, less probably, Abu Dhabi's Commercial Conciliation and Arbitration Centre, which is of some significance for its formal promotion of conciliation as a precursor to arbitration) becomes the acknowledged leader among the regional arbitration centres of the Gulf States remains to be seen.

RUSSIA

Historically, Russian courts have accepted the grounds for refusal of enforcement (under Article 5 of the New York Convention) more readily than the courts of other jurisdictions (*see also box "Russian legal framework for arbitration"*). For example, where an English court would adopt a narrow interpretation of public policy for the purpose of refusing enforcement, the Russian courts have tended to opt for a much wider interpretation. Russian courts have refused enforcement on grounds ranging from the invalidity of arbitration agreements and lack of proper notice, to non-arbitrability, procedural irregularities and violation of public policy. This practice has led to some concern that enforcing foreign arbitral awards in Russia is difficult, if not impossible.

The issue of interim relief in support of arbitral proceedings has also caused much anxiety to those wishing to protect their ability to enforce against assets situated in Russia. In theory, interim relief has been available since 2002; however, there have been no successful applications and it remains unclear whether it would be granted in support of foreign arbitration proceedings where the seat of arbitration was outside Russia.

In addition, the formalistic approach traditionally adopted by the Russian courts has meant that inexperienced users are often punished for minor errors, oversights and typos which might be forgiven in other jurisdictions. This formalistic approach still reigns and parties must be aware that strict adherence to all procedural rules, including those relating to form and content of applications and accompanying documents, is essential.

However, recent decisions of the Russian commercial courts (Arbitrazh courts) suggest that Russian courts are giving more thought than in the past decade to their role in foreign arbitrations and are now taking small steps in the right direction.

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Enforcement applications

In December 2009, the Stockholm Chamber of Commerce (SCC) tribunal rendered an arbitration award in which the Russian respondent was ordered to pay the Swedish claimant over $45 million plus interest (*Case No. V (032/2008)*). During enforcement proceedings in Russia, the Russian company raised procedural irregularity and public policy grounds in its defence but the Arkhangelsk Arbitrazh court granted the application and issued an enforcement order (*Case No. A05-10560/2010*). A cassation appeal was filed and the Russian Cassation Court suspended enforcement of the enforcement order. The case continues.

Viewed against a large volume of rejected applications, it is hoped that this case serves as an indication of a change in attitude towards the enforcement of foreign arbitral awards in Russia.

Applications for interim measures

Edimax v Chigirinsky concerned an application to the Moscow City Arbitrazh court for a freezing order over Mr Chigirinsky's apartment in Moscow in support of LCIA arbitration proceedings (*Case No. A40-19/2009*). There have been four relevant decisions in this case:

- The Russian Court of First Instance refused interim relief on the basis that the application did not satisfy the requirements of the Russian Arbitrazh Procedure Code.

- The Russian Court of Appeal reversed the decision of the Court of First Instance and granted the freezing order.

- The Russian Court of Cassation annulled the decision of the Court of Appeal on the basis that there was no commercial element in the case and so the Arbitrazh courts lacked jurisdiction.

- The Supreme Arbitrazh Court in Moscow made a final decision on the case in April 2010, establishing that the Arbitrazh courts can order interim relief over assets located in Russia in support of foreign arbitration proceedings (*Case No. 17095/09*).

In *AS Akciju komercbanka Baltikums v Rostman Ltd*, the Russian Court of First Instance and the Russian Court of Appeal rejected an application by a Latvian bank to seize a vessel belonging to the respondent (which secured the respondent's obligations under a loan agreement) moored in a Russian exclave on the basis that interim measures against the same vessel (but in different proceedings) had been obtained previously. The Supreme Arbitrazh Court disagreed, annulling the previous decisions and holding that different measures may be imposed on the same vessel if they are in support of different claims (*Case No. BAC-10301/10*). The court also said that the Russian courts may adopt interim measures in support of international arbitration.

Partial awards

The Supreme Arbitrazh court has also held that provisional or partial awards cannot be enforced until the final award is issued (*Case No. BAC-10301/10*).

In *Sokotel v Living Consulting Group AB*, the claimant applied to the Russian courts to enforce a partial award by an SCC tribunal ordering the respondent to pay the advance on arbitration fees. The Russian Court of First Instance granted the application and issued an enforcement order. The Russian Court of Appeal agreed. The Supreme Arbitrazh Court, however, disagreed and annulled the enforcement order on the basis that it did not constitute a final award (*Case No. 6547/10*).

SWEDEN

Although there have been few significant developments over the past few years in Sweden, those that have occurred have aimed to improve the international arbitration landscape.

Revised SCC rules

The Arbitration Institute of the SCC (the SCC institute) adopted new Arbitration Rules and Rules for Expedited Arbitrations (together, the SCC rules), which came into effect on 1 January 2007. The revisions aimed to promote clarity and transparency by codifying existing practice. However, the SCC rules introduced some changes to SCC procedure, the most significant of which are as follows:

Consolidation. With respect to multi-party situations, a new and rather conservative rule on consolidation was included (*Article 11*). If a request for arbitration is filed concerning a legal relationship in respect of which arbitration between the same parties is already pending under the SCC rules, the board of the SCC institute may, at a party's request, decide to include the claims contained in the request for arbitration in the pending proceedings. Before deciding on consolidation, the board must consult the parties and the arbitral tribunal.

Written witness statements. The SCC rules provide that signed written witness and expert statements may be submitted (*Article 28*). However, unless the parties have agreed otherwise, any witness or expert whose testimony a party will rely on must attend a hearing for examination.

Payment of advance on costs. Respondents sometimes refuse to pay their part of the advance on costs so that, if a claimant wishes the arbitration to proceed, it has to pay the respondent's part as well, otherwise the SCC will not transfer the file to the arbitrators. The SCC rules include a new provision under which a party may, in such case, request the arbitral tribunal to make a separate award and order the respondent to reimburse the claimant (*Article 45(4)*).

Emergency arbitrator

Since 1 October 2009, a party can apply to the SCC institute for the appointment of an emergency arbitrator with the power to decide urgent interim measures even before a request for arbitration is filed and before an arbitral tribunal has been established. The emergency arbitrator must be appointed within 24 hours and a decision on the interim relief must, as a rule, be made within five days of the registered application.

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Revised SCC rules 2010

Minor amendments to the SCC rules were adopted on 1 January 2010. For example, in non-expedited arbitrations where the parties have agreed that the dispute must be settled by one arbitrator, the time given to the parties to jointly appoint an arbitrator was reduced from 30 days to ten days (*Article 13*).

Case law

Recent Swedish case law has suggested that the courts are becoming more supportive of the arbitration process; for example:

Arbitrators' fees. The SCC rules provide that the costs of the arbitration, including the arbitrators' fees, are to be decided finally by the SCC institute. However, the Swedish Supreme Court has held that a party did not lose the right to appeal such a decision to the district court under section 41 of the Swedish Arbitration Act (*Soyak International Construction & Investment Inc v Hobér, Kraus and Melis, NJA 2008 p. 1118*). The case was remanded to the district court but, since the arbitrators accepted the reduction claimed, no decision was made on the merits.

Reasons for award. An arbitration agreement may require the arbitral tribunal to provide reasons for the award. In *Soyak International Construction & Investment Inc v Hochtief AG*, the Swedish Supreme Court considered whether an arbitral tribunal had fulfilled its obligation to provide reasons under the SCC rules (*NJA 2009 p. 128*). The court found that only if the award completely lacked reasons or included reasons which were so incomplete that they corresponded to a complete lack of reasons, could this constitute a challengeable procedural error.

Seat of arbitration. In *Titan Corporation v Alcatel CIT SA*, the Svea Court of Appeal held that it lacked jurisdiction in challenge proceedings on the basis that, although the agreed seat of arbitration was Stockholm, there was insufficient connection between the arbitration and Stockholm (*RH 2005:1*).

Not only did the dispute concern a contract that had no connection to Sweden, it was an ICC arbitration involving French and American parties, hearings had taken place in London and Paris and the arbitrator, who was from the UK, had, presumably, done his work in London.

However, in *RosInvestCo UK Ltd v Russian Federation*, the Swedish Supreme Court clearly rejected this reasoning (*NJA 2010 p.508*). It held that, if the parties have agreed that the seat of arbitration will be in Sweden, it is irrelevant that the parties or the arbitrators have chosen to hold meetings abroad, that the arbitrators were not from Sweden, that they had done their work abroad or that the dispute concerned a contract which, in other respects, has no connection to Sweden.

After *RosInvestCo UK Ltd*, the heavily criticised appeal court ruling in *Titan* would appear no longer to carry any precedential value.

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