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International Arbitration
PERSPECTIVES

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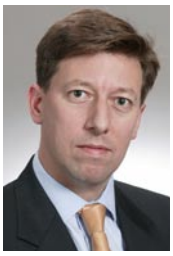

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Dear Friends,

Welcome to the inaugural issue of Mayer Brown's *International Arbitration Perspectives*, a bi-annual newsletter that will report and provide commentary on developments and trends in international arbitration law that are significant to our clients' business and investment interests across the globe.

In this issue, we have contributions from Mayer Brown international arbitration lawyers located in the United States, the United Kingdom, Germany and Hong Kong. From the **United States**, Jeffrey Sarles, a partner in our Chicago office, provides a discussion of recent federal court decisions interpreting "manifest disregard of the law" — a ground used to challenge arbitral awards in many US jurisdictions. From **Europe**, we present an article authored by Philippa Charles, a partner in our London office, and another by Mark Hilgard and Jan Kraayvanger, a partner and a senior associate in our Frankfurt office. The former discusses the West Tankers case — a landmark decision rendered by the European Court of Justice, which may have a profound effect on the choice of London as a venue for international arbitration proceedings. The latter discusses a new set of fast-track arbitration rules issued by the German Institution of Arbitration. Regarding the **Middle East**, London partner Raid Abu-Manneh reports on recent arbitration developments in Dubai. And from **Asia**, Nicholas Longley, a partner in Hong Kong, discusses two recent developments that cement Hong Kong's position as a leading international arbitration center in Asia.

We hope that *International Arbitration Perspectives* will be a trusted resource. Should you have any questions about the information presented in any of these articles, please feel free to contact either of us.

Violeta Balan and Nicholas Longley

US Courts Wrestle with "Manifest Disregard" after *Hall Street*

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The Federal Arbitration Act (FAA), the primary arbitration statute in the United States, provides four narrow grounds for vacating an arbitration award—a party's procurement of the award through fraud; evident partiality on the part of the arbitrators; misconduct by the arbitrators; and where the arbitrators exceeded their authority. These are essentially "due process" grounds, and they do not permit an award to be vacated merely for being either contrary to the applicable law or otherwise wrong.

However, virtually every jurisdiction in the United States has adopted a fifth, non-statutory ground on which an award may be vacated—"manifest disregard of the law." Although the courts have offered varying definitions of this standard, most have defined it as a refusal to apply a clearly defined legal principle known to the arbitrator to be controlling. The rationale for devising this non-statutory ground, which has its origins in dicta from a US Supreme Court case from the 1950s, is that some arbitration awards are too manifestly contrary to the applicable law to be sustained and yet are not covered by any of the four statutory grounds.

The continuing viability of the manifest disregard standard was thrown into question by an opinion issued by the Supreme Court in March 2008. The primary issue in *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008), was whether parties may contractually expand the narrow scope given to judicial review of arbitration awards by the FAA. In answering that question in the negative, the Court deemed the four grounds listed in FAA § 10 as "exclusive" and openly mused about the Court's prior references to "manifest disregard of the law":

> Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or..."manifest disregard" may have been shorthand for [the] subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers."

These "maybes" have led the lower courts to re-examine the manifest disregard of law standard. Five courts of appeals have now expressed their views.

The First Circuit was the first court of appeals to comment on *Hall Street*. It viewed the opinion as holding that manifest disregard "is not a valid ground" for vacating an arbitration

award. *Ramos-Santiago v. UPS*, 524 F.3d 120, 124 n.3 (1st Cir. 2008). The Fifth Circuit has recently adhered to that conclusion in a lengthy analysis. In *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009), the court concluded that the Supreme Court's description of the FAA § 10 grounds as "exclusive" means that manifest disregard of the law "is no longer an independent ground for vacating arbitration awards under the FAA."

In contrast, the Sixth Circuit has held that *Hall Street* merely "reduced" the ability of courts to vacate awards on grounds other than those specified in FAA § 10 but "did not foreclose" review for manifest disregard of the law. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F.3d App'x 415, 418 (6th Cir. 2008). The Sixth Circuit reasoned that the Supreme Court's "hesitation to reject" the manifest disregard standard would make it "imprudent" to jettison "such a universally recognized principle." But underscoring the difficulties posed by *Hall Street*, a different Sixth Circuit panel subsequently noted that the Supreme Court opinion "casts some doubt on the continuing vitality" of the manifest disregard standard. *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 380 (6th Cir. 2008).

The Ninth Circuit, too, has held that *Hall Street* did not undermine a court's authority to vacate arbitration awards for manifestly disregarding the law. *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277 (9th Cir. 2009). However, the Ninth Circuit views manifest disregard as subsumed within FAA § 10(a)(4), which authorizes vacatur where the arbitrators exceed their powers. On that view, manifest disregard is not a non-statutory ground but rather one way that arbitrators can exceed their powers (another being, for example, deciding an issue not presented to them).

Finally, the Second Circuit also has held that the manifest disregard standard survives *Hall Street* but explained that the standard can no longer be considered a non-statutory ground of judicial review. Rather, it must be deemed as "a mechanism to enforce the parties' agreements to arbitrate." *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008). In any event, one of the Second Circuit's various articulations of the standard—"an error that is so obvious that it would be instantly perceived as such by the average person qualified to serve as an arbitrator"—seem to offer unhappy recipients of an arbitration award at least some room to challenge the award other than on the FAA's narrow grounds. But litigants should note that the Second Circuit continues to insist that an arbitration award will be vacated on that basis only in "exceedingly rare" instances.

This division among the courts of appeals is reproduced among the district courts. What does all this mean for parties seeking to challenge an unfavorable arbitration award?

With the law unsettled on whether the manifest disregard standard has survived *Hall Street* and, if so, on what basis, parties petitioning to vacate an award should consider invoking *both* FAA § 10 and the manifest disregard of law standard in their petitions. Even in circuits where the manifest disregard standard has been firmly rejected (e.g., the Fifth), it would be wise to raise it in the alternative because this issue may well return to the Supreme Court for final resolution.

Of course, no matter what court you are in, and no matter what standard you invoke, it remains extremely difficult to vacate an arbitration award for a substantive defect. Hence, the best practice is to do everything possible to avoid an unfavorable arbitration award—for example, by carefully drafting the arbitration clause to require the arbitrators to apply the governing law and issue a reasoned decision, engaging experienced counsel and carefully selecting the arbitrators. Notwithstanding the controversy over the full meaning of *Hall Street*, there can be no doubt that the decision reconfirmed the narrow scope of judicial review of arbitral awards. Thus, parties are well advised to minimize the risk of a bad award rather than hope to vacate one. ◆

Anti-Suit Injunctions: The ECJ Decision of 10 February 2009 in the *West Tankers* Case

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In a landmark decision, the European Court of Justice (the "ECJ") has decided that courts in countries within the European Union cannot prevent parties from issuing court proceedings in other Member States simply on the basis that the dispute arises under a contract which includes an arbitration agreement. The ECJ decided that any such "anti-suit injunction" would be contrary to EC Regulation 44/2001 (the "Regulation"). This decision could have a profound effect on the choice of London as a venue for arbitration proceedings.

Anti-Suit Injunctions: What Are They?

Before discussing the facts of the decision, it is worth explaining what an anti-suit injunction is and what it does. An anti-suit injunction is a powerful common law tool used to protect a party's contractual right to arbitrate. It can be obtained by any party to an arbitration agreement and, in effect, prevents other parties to the arbitration agreement from commencing court proceedings. As a result, the anti-suit injunction is used to uphold the arbitration agreement.

Facts of the Case

West Tankers owned a vessel that was chartered to Erg Petroli, an Italian entity. The vessel collided with a jetty in Syracuse that was also owned by Erg. The charterparty between West Tankers and Erg was governed by English law and contained an arbitration agreement specifying London as the seat of arbitration. Erg made an insurance claim and the insurers paid the limit of the insurance cover. The following proceedings took place:

- Erg commenced arbitration proceedings in London against West Tankers in relation to claims for its uninsured losses.
- Erg's insurers (RAS Riunione) commenced proceedings in Italy against West Tankers to recover amounts paid under the insurance policies.
- West Tankers sought an injunction in the English court, arguing that the insurers were bound by the arbitration clause in the charter-party to arbitrate in London. The English first instance and appeal courts agreed with West Tankers and

granted an injunction restraining the insurers from continuing the Italian proceedings. That claim was then referred to the House of Lords, which referred it to the ECJ.

Jurisdiction Regulation and the Scope of the "Arbitration Exclusion"

The Regulation provides a set of rules for the allocation of jurisdiction between EU Member States. Article 1(2)(d) of the Regulation provides that proceedings relating to arbitration are excluded from the scope of application of the Regulation, the so-called "arbitration exclusion."

The English courts decided that the arbitration exclusion was applicable given that the purpose of proceedings before the English court was to protect West Tankers' right to have the dispute determined by arbitration. This meant that the proceedings fell outside of the Regulation.

House of Lords' Observations

The House of Lords, England's highest appellate court, recognised that the question of whether or not to extend European authority to arbitration would affect the efficacy of arbitration as a method of resolving commercial disputes. Lord Hoffmann, who gave the leading judgement, underlined the importance of the principle of autonomy of the parties to choose the seat of arbitration and governing law.

Advocate General's Opinion

In any ECJ proceeding, and before the ECJ gives its ruling, it is usual for the ECJ Advocate General to issue an advisory opinion. This opinion is not binding on the ECJ but it is usually very influential.

In West Tankers, the Advocate General concluded that the English court does not have the power to grant an anti-suit injunction. The opinion was based on the grounds that such an injunction would constitute an unwarranted interference with the autonomy of the courts of another Member State. The rationale of the Advocate General's opinion reflects the European concern that the anti-suit injunction is a common law remedy not recognised in the national laws of the other EU Member States, and that it is at odds with the principles of mutual trust, implicit within the Regulation.

The Advocate General's opinion was as follows.

1. The parties issued proceedings in the Italian court first.
2. The mere fact that the proceedings were brought in breach of an agreement to arbitrate should not deprive the Italian court of its right to determine its own jurisdiction pursuant to the provisions of the Regulation.

The Advocate General referred to the decision delivered by the ECJ in *Turner v. Grovit* (2004) concerning a breach of an exclusive jurisdiction clause. In that case, the ECJ upheld the Regulation despite the fact that the first set of proceedings were brought by a party in bad faith with the intent to frustrate existing or likely proceedings in the mutually agreed jurisdiction.

The Advocate General considered that the arbitration exclusion should be limited to circumstances in which the subject matter of the proceedings was the arbitration itself (such as an application for the appointment of an arbitrator). In this case, the subject matter of the court proceedings was a claim in tort for damages and, therefore, the Advocate General concluded that the Regulation applied. This was a significant narrowing of the scope of the arbitration exclusion as the English Courts had historically understood and applied it.

ECJ Decision

The ECJ's judgment of 10 February 2009 upheld the reasoning of the Advocate General, including the scope of the arbitration exclusion in the Regulation.

Although the ECJ's approach is in principle correct, the decision is particularly unsatisfactory from the perspective of a contracting party that may become embroiled in protracted litigation in a country where domestic courts cannot decide the issue of jurisdiction on a preliminary basis but must instead determine both jurisdiction and the merits issues at the same

time. The European principle of uniformity in respect of jurisdiction emphasised by the ECJ is undermined by the fact that the Member States do not have a universal process for deciding jurisdiction as a preliminary matter. As a result, a party to an arbitral agreement is effectively deprived of the benefits of the arbitration agreement in that its dispute will be heard in the public courts and will take longer to be determined (particularly if ultimately after the court proceedings, the courts do refer the claim to arbitration).

Impact on London as an Arbitration Venue

The availability of anti-suit injunctions in support of arbitration was considered to be a benefit of using London as an arbitration venue for companies seeking to "insure" their choice of arbitration. It is quite possible, therefore, that after the ECJ ruling, some disputes will now be decided in other international locations, such as Hong Kong.

However, many comparable European seats of arbitration, such as France and Switzerland, do not have anti-suit injunction protection. In any event, the other advantages of London as a seat of arbitration (including the utility of the 1996 Arbitration Act, the number of excellent arbitrators based locally and the English court policy) remain strong reasons to continue to opt for London for arbitration.

Impact on Contracting Parties

In light of the ECJ's decision, there is an increased risk that parties to arbitration agreements may tactically commence foreign EU court proceedings to avoid or frustrate arbitration. Even if the Member State's court refuses jurisdiction and refers the matter to arbitration, a jurisdictional battle will incur potentially significant additional legal costs and delays.

The decision, though, is unlikely to have an impact on the decision to include an arbitration agreement in international commercial contracts. An agreement to arbitrate is still likely to be preferred because of ease of enforcement provided by the New York Convention and the fact that disputes can be kept confidential. ◆

New German Arbitration Rules Meant to Expedite Proceedings

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One of the most important advantages of arbitration, when compared to litigation, is supposed to be speed. However, there is growing criticism that in recent years commercial arbitration has become too lengthy and, as a result, too expensive.

As a reaction to such complaints, the German Institution of Arbitration (DIS) issued a set of arbitration rules in April 2008 that provide for fast track arbitration. These "Supplementary Rules for Expedited Proceedings" are available at http://www.dis-arb.de/download/2008_SREP_Download.pdf. As indicated by their name, these new rules neither substitute nor change, but rather supplement the standard arbitration rules of the DIS (DIS Rules) in cases where the parties commit to fast track arbitration. The Supplementary Rules enable the parties to conduct arbitral proceedings within a fixed, accelerated schedule.

The Arbitration Clause

Parties that want to use the benefits of fast track arbitration shall explicitly agree on both the DIS Rules and the Supplementary Rules. As the Supplementary Rules do not provide for a stand-alone set of rules, they have to be agreed upon in conjunction with the standard arbitration rules of the DIS. Moreover, it should be noted that, in contrast to the Swiss arbitration rules, the expedited German DIS procedure is not automatically applicable if the value in dispute is below a certain amount.

The DIS recommends the following wording for a fast track arbitration clause:

> All disputes arising in connection with the contract [description of the contract] or its validity shall be finally settled according to the Arbitration Rules and the Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration e.V. (DIS) without recourse to the ordinary courts of law.

In addition, the fast track arbitration clause should be complemented by the following provisions:

- The place of arbitration is ....
- The substantive law of ... is applicable to the dispute.
- The language of the arbitral proceedings is ....

It is also possible to agree on specific conditions that have to be met in order to initiate fast track arbitration. For instance, fast track arbitration could be made dependent on the value at stake, as the Swiss arbitration rules provide. However, any deviation from the standard clause recommended by the DIS should be carefully considered with an arbitration expert, as otherwise procedural problems might arise when a dispute occurs. Moreover, the parties may agree on fast track arbitration only prior to commencement of the arbitral proceedings. It is no longer possible to opt for fast track arbitration if the arbitral proceedings are already pending.

The Fast Track Procedure

The Supplementary Rules consist of only seven provisions. One of the core provisions is Section 1.2, which stipulates that the duration of the arbitral proceeding shall be limited to six months (in the case of a sole arbitrator) or nine months (in the case of a three member tribunal) as of the filing of the statement of claim. Whereas in standard arbitral proceedings under the DIS Rules the arbitral tribunal consists of three arbitrators, unless the parties have agreed on only one arbitrator, in fast track arbitration this rule is reversed: the dispute shall be decided by only one arbitrator unless the parties have agreed otherwise.

In addition, the procedure to nominate the arbitrators is significantly shortened and the Appointing Committee of the DIS has wider reaching authority to appoint the arbitrator(s) if the parties cannot agree at short notice. Moreover, as parties to arbitration often delay payment of the arbitrators' fees, the Supplementary Rules require claimants to pay the full amount of the arbitrators' fees in advance of filing the statement of claim.

Once the tribunal has been appointed it shall, after consultation with the parties, establish a schedule to ensure the six- or nine-month time frame. Unless the parties agree otherwise, respondent shall file its statement of response within four weeks from receipt of the statement of claim. Thereafter, all further written submissions have to be filed within four weeks of receiving the other party's submission. Each party shall submit only one further brief after the exchange of statement of claim and defence. In addition, only one oral hearing (at which any taking of evidence will occur) will take place within four weeks of receiving the final written submission. Upon the oral hearing having taken place, the tribunal shall, within four weeks, render its decision. No further written submissions may be exchanged after the closing of the oral hearing. Moreover, counterclaims and set-offs shall only be admissible with the consent of all parties and the arbitral tribunal.

Therefore, in summary, an ideal schedule pursuant to the Supplementary Rules could look as follows:

Day	Stage of the arbitral proceeding
0	Filing of the statement of claim with DIS
3	Respondent's receipt of the statement of claim
31	Filing of the statement of defence
59	Filing of claimant's rebuttal
87	Filing of respondent's rebuttal
115	Oral hearing
143	Handing down of arbitral award

The parties can, of course, agree on an even more ambitious time frame. However, once the arbitral tribunal is constituted, any modification of the schedule requires its consent. Experience teaches us that parties are often enthusiastic about short deadlines at the beginning of arbitral proceedings but, later, regularly apply for extensions of time. To encourage the parties to stick to the initial timetable, the Supplementary Rules require the arbitral tribunal to consent to the extension of time limits only for good cause. Moreover, if the arbitral proceeding cannot be concluded within the initial time frame, the arbitral tribunal is required to justify the delay in writing vis-à-vis both the parties and the DIS Secretariat.

Conclusion

The Supplementary Rules provide for a compelling procedure to minimize time and costs in cases where a quick decision is as important to the parties as a just decision. However, the success of the Supplementary Rules will decisively depend as well on the willingness of arbitrators and parties to stick to the tight schedule the rules impose.

The common DIS Rules do not prevent parties from agreeing to speedy arbitration procedures. However, in practice, one or more of the parties often aims to delay or even obstruct the arbitration. Moreover, we see that from time to time certain arbitrators are too busy to fully dedicate themselves to the proceedings or may manage the proceedings too loosely. Therefore, the most important benefit of the Supplementary Rules might be to constantly remind the parties, as well as the tribunal, that they have committed to fast track proceedings so as to encourage them to act accordingly. ◆

Dubai: A Regional Arbitration Centre?

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Following the recent establishment of the LCIA-DIFC Centre at the Dubai International Financial Centre (DIFC), Dubai now has two international arbitration centres. This reflects the increasing acceptance of arbitration in the Middle East and the progress made in developing arbitration in Dubai.

The Dubai government recognised at an early stage that, in order to establish Dubai as a regional financial centre, the government needed to improve its legal system. It therefore set up the DIFC as a free zone with its own, common-law-based legal system and established a DIFC Court currently headed by Sir Anthony Evans.

Despite this undoubted progress, more needs to be done if Dubai is to become a regional arbitration centre and attract the large and complex Middle East disputes that are regularly referred to London and Paris.

What Are the Recent Key Arbitration Developments in Dubai?

THE NEW YORK CONVENTION

The low point for arbitration in Dubai was possibly the UAE's Court of Cassation's decision in *Dubai Aviation Corporation v. Bechtel* (2004), where the UAE's highest civil court annulled an arbitral award made two years earlier in Dubai on the grounds that the witnesses in the arbitration had not been sworn.

The UAE court's decision dealt a serious blow to arbitration in Dubai, and to the UAE as a whole. The decision also led to significant pressure on the UAE to accede to the New York Convention, particularly following the UAE infrastructure boom where foreign contractors, undertaking multibillion dollar projects, sought greater certainty in enforcing their entitlements.

After a consultation process, the UAE finally acceded to the New York Convention in August 2006. Accession provided a huge boost to arbitration in the UAE because it meant that arbitral awards could be more readily enforced outside the UAE.

NEW DIAC RULES

New Dubai International Arbitration Centre (DIAC) rules came into effect in May 2007. The changes in the rules represented a considerable advance on the previous rules and brought the DIAC rules in line with other major arbitration centres around the globe. To take two examples, the DIAC rules now

provide that on the application of one of the parties, the tribunal has the power to order interim measures (Article 31), and that the proceedings and all awards, evidence and documents produced or disclosed in the arbitration are confidential (Article 41).

The DIAC has clearly established itself in Dubai as a leading centre, having attracted approximately 100 cases worth more than US$2 billion last year, but it is now facing stiff competition following the establishment of the new LCIA-DIFC Centre and the enactment of the new DIFC Arbitration Law.

NEW DIFC ARBITRATION LAW AND LCIA-DIFC ARBITRATION CENTRE

On 1 September 2008 the DIFC Arbitration Law 2008 came into force. Although the previous DIFC Arbitration Law 2004 was based on the UNCITRAL Model Arbitration Law, its application was limited to arbitrations in which one of the parties, or the dispute itself, was connected to the DIFC. Under the new law, however, parties anywhere in the UAE and beyond are able to choose the DIFC as the seat of their arbitration.

A DIFC award is a New York Convention award and is therefore enforceable in other convention states, just like all other UAE awards. Significantly, the main advantage of the new DIFC Arbitration Law is that it should make arbitral awards more readily enforceable within the UAE itself. This is because a DIFC award, once ratified by the DIFC Court, is in theory enforceable without any opportunity for challenge in the Dubai courts unlike cases with arbitral awards obtained outside the DIFC. However, because there are, as yet, no examples of enforcement of DIFC awards in the Dubai courts, only time will tell whether such awards will in fact avoid a challenge.

This law comes hot on the heels of the February 2008 establishing of the LCIA-DIFC Centre, which brought to Dubai the LCIA's expertise in administering arbitrations and provided Dubai with a well-known arbitral institution and a modern arbitration law.

THE NEED FOR REFORM

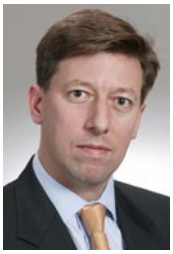
What is still required in the UAE is a new, stand-alone arbitration law to replace the UAE Civil Procedure, Federal Law No (11) of 1992 (CPL), which applies to all arbitrations where the seat is not the DIFC. This in essence covers the vast majority of contracts entered into prior to September 2008 (before parties anywhere were able to choose the DIFC as a seat) and therefore many potential disputes.

There is unanimous agreement that the CPL does not adequately provide for arbitration. In particular, the CPL does not sufficiently restrict parties from challenging awards because it leaves the door open for the opposing party to object to an application for enforcement.

The good news is that the current law is under review and a draft of a new Federal Arbitration Law was circulated last year based on the UNCITRAL Model Law. A new law is a key requirement for the progress of arbitration in Dubai, even though the new DIFC Arbitration Law has (at least on paper) provided parties with the ability to circumvent the CPL by allowing them to chose the DIFC as their seat of arbitration. ◆

Hong Kong Cements Its Place in International Arbitration— Recent Developments in Hong Kong

Nicholas J. Longley



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For a number of years, Hong Kong has battled with Singapore and other regional centres to be the dominant arbitration centre in Asia. Hong Kong's position has benefited from a number of occurrences, such as the establishment by the ICC of a secretariat there. However, two recent developments will help to cement Hong Kong's position as a leading arbitration centre. These are the adoption of the HKIAC Rules for Administered Arbitration and the court decision in *A v. R*.

HKIAC Rules for Administered Arbitration

In September 2008, the Hong Kong International Arbitration Centre (HKIAC) adopted the new Administered Arbitration Rules (Rules). Until the adoption of these Rules, arbitrations in Hong Kong were generally "ad hoc," meaning that they were not administered by any authority. In ad hoc arbitrations, the HKIAC's role is normally limited to the appointment of an arbitrator (if the parties cannot agree on the arbitrator) and the provision of a venue for the arbitration hearing.

However, it was perceived that certain parties, particularly from Mainland China, would prefer to engage in an arbitration that was administered by an overriding authority. There are two perceived reasons for this: first, that Chinese parties are accustomed to administered arbitrations, and second, that lingering doubts remain about the enforceability of ad hoc arbitrations in the Mainland despite the confirmation provided by the Supreme People's Court of the PRC in October 2007 that "ad hoc" arbitration awards obtained outside the Mainland are recognisable and enforceable in the Mainland.

Approach of the New Rules

The overall approach of the new Rules is to provide "light touch" administration. They are generally based on the UNCITRAL arbitration rules and are said to be inspired by the Swiss Arbitration Rules. The HKIAC's primary roles are:

- The appointment of arbitrators if the parties cannot agree or refuse to appoint them within the specified time limit;
- To determine challenges to arbitrators' independence and impartiality; and
- To determine fees of the arbitration tribunal in conformity with its own schedule.

The HKIAC does not have a role in vetting any arbitration award, and in

that way, the service offered differs from the ICC. Some aspects of the Rules are highlighted below.

COMMENCEMENT, PLEADINGS AND AMENDMENTS

Once the Notice of Arbitration has been issued, the Respondent is obliged to provide a written Answer to the Notice of Arbitration within 30 days of receipt. However, unlike the ICC Rules, there is no obligation on the parties to agree to the Terms of Reference.

Once the arbitration has commenced and the arbitral tribunal appointed, the Rules provide for a formal written Statement of Claim and Statement of Defence to be served. These statements shall be accompanied with the documents on which the party shall rely.

It should be noted that Article 19 provides a formal right to amend the Statement of Claim or Defence. However, this right is expressly limited. An arbitral tribunal can refuse amendments if the tribunal considers them inappropriate—after considering the party's delay in proposing them, the prejudice to the other party or any other circumstances. This contrasts with the general practice in Hong Kong, which is that amendments are often accepted by arbitral tribunals at a late stage.

EXPEDITED PROCEDURE

Article 38 of the Rules provides for an expedited arbitration procedure for claims not exceeding US$250,000. The Rules, unfortunately, do not set out timing for submissions but instead set out a general requirement that the arbitral proceedings shall be conducted in a "shortened time" determined by the HKIAC. The expedited arbitration will proceed as a documents-only arbitration unless the tribunal decides that it is necessary to hold a hearing.

FEES

Of course, the HKIAC charges a fee to administer arbitrations. This fee is established based on a sliding scale that depends upon the amount in dispute, subject to both minimum and maximum fees. The minimum fee for sums in dispute up to US$50,000 is US$1,500, and the maximum fee payable to the HKIAC for sums in dispute over US$50 million is US$26,850.

Both the claim and the counterclaim are taken into account in assessing the sum in dispute. Interest is not taken into account unless the amount claimed for interest is more than the principal sum. In such circumstances, the principal sum is excluded from the determination and only the interest amount is taken into account in assessing the fee.

In perhaps a sensible compromise, the Rules allow the parties to be able to choose whether the arbitrator(s) themselves are paid a fee in accordance with any agreement between the parties and the arbitrator(s) or pursuant to fees established by the HKIAC.

Drafting an Appropriate Administered Arbitration Clause

The Rules do not prevent parties from conducting ad hoc arbitrations in Hong Kong and, given the long-standing practice, it is likely that many arbitrations in Hong Kong will continue to be conducted on an ad hoc basis. However, now both options are available.

If parties would like their arbitration to be administered, then they should ensure that the arbitration clause is drafted to expressly state that the arbitration is to be "administered by the HKIAC."

The Decision in *A v. R*

The second recent development is the Hong Kong Court's decision in *A v. R*, handed down in April 2009.

THE FACTS

The facts of the underlying case are not in themselves remarkable. The case concerned an application in the Hong Kong courts to enforce an arbitration award issued in Denmark. Arbitration awards issued overseas are enforced in Hong Kong pursuant to the New York Convention. The Respondent sought to oppose the enforcement proceedings. However, under the New York Convention, courts are obliged to enforce arbitration awards other than in exceptional situations. One of those exceptional situations is if the enforcement

of the award would be contrary to public policy.

In this case, the underlying claim was for liquidated damages, set at US$1 million per breach, which seemed to be out of proportion to the damages incurred. Counsel for R argued that the liquidated damages were a penalty and were unenforceable under Hong Kong law for public policy reasons.

THE DECISION

The judge did not accept this argument. This was for a number of reasons, including that:

- The argument was not put to the arbitrator. Instead, although R had initially appointed lawyers, it had terminated those instructions. It was not represented and did not attend the arbitration hearing.
- It was not clear on the information before the Hong Kong court that the liquidated damages were a penalty in any event.
- Referring to case law from Hong Kong, Singapore and England, the court established the test for refusing to enforce an arbitration award on grounds of public policy as whether "upholding the arbitral award would 'shock the conscience.'" The court did not consider that upholding this arbitration award would "shock the conscience."

The court therefore upheld the award. This in itself is not remarkable. It is rare in Hong Kong for an arbitration award not to be enforced. What is surprising about this case is the award of costs. It would be usual for a winning party to be awarded costs, payable on a "party-to-party basis." As a rough rule of thumb, a winning party can expect to receive about two thirds of its costs under this usual order. In this decision, A was awarded costs on an indemnity basis, which is a much higher basis of assessment. In deciding to award indemnity costs, the court ruled:

1. Applications by a party to appeal against or set aside an arbitral award should be "exceptional events." Where a party unsuccessfully makes such an application, he should in principle expect to have to pay costs on a higher basis.
2. If the losing party pays costs on the usual basis, the winning party would in effect be subsidising the losing party's attempts to frustrate the enforcement of the valid award.

Additional reasoning for the decision was derived from the recent civil justice reforms in Hong Kong, which brought new court rules into effect from April 2009. The new court rules now require parties to assist the Court with the just, cost-effective and efficient resolution of a dispute. The court considered that, in the light of the civil justice reforms, the court ought not to be troubled with an application to appeal or set aside an arbitration award.

The decision, although surprising, is consistent with the hands-off approach Hong Kong courts have adopted to arbitration. This non-interventionist approach is one of the reasons why Hong Kong has attracted international arbitrations over the years.

Although the case concerned an enforcement action under the New York Convention, the reasoning would apply to the enforcement of all arbitral awards in Hong Kong, whether domestic or international. Indeed the final paragraph of the decision reads:

> Accordingly, in the absence of special circumstances, when an award is unsuccessfully challenged, the Court will henceforth normally consider awarding costs against the losing party on an indemnity basis.

It is clear that following the civil justice reforms, the courts intend to use the sanction of costs as an incentive for parties not to bring actions without merit. It is possible that the threat of an adverse indemnity costs award may act to reduce the number of challenges to arbitral awards in Hong Kong, which may in turn increase the strength of Hong Kong as an arbitration venue. ◆

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