MAYER·BROWN

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International Arbitration Update

Mayer Brown Key Events:

3RD ANNUAL GAR LIVE – 25 JUNE 2015 – ISTANBUL

Dany Khayat, partner and head of Mayer Brown's International Arbitration practice in Paris, joined a panel of experienced counsel at the latest *Annual GAR* in Istanbul to discuss the latest trends in investor-state arbitration, including:

- Damages – from Yukos to Gold Reserve, are tribunals getting valuation right?
- Investor-state cases involving Turkey or Turkish parties, with a particular focus on the construction sector; and
- Interim measures – are tribunals too reluctant to grant them? Is the use of emergency arbitrator procedures against states a good idea?

5TH ICC YAF GLOBAL CONFERENCE – 25 – 27 JUNE 2015 – LONDON

Sarah Reynolds, associate in Mayer Brown's International Arbitration practice in Chicago, acted as a reporter in a workshop on cross-examination of witnesses in international arbitration.

CONSTRUCTION LAW: CONTRACTS & DISPUTE MANAGEMENT CONFERENCE – 29 JUNE – 2 JULY 2015 – LONDON

Raid Abu-Manneh, global co-head of International Arbitration at Mayer Brown and Alejandro López Ortiz, partner in Mayer Brown's International Arbitration practice in Paris, spoke in London on trends and developments in the resolution of disputes in emerging markets.

WEBINAR SERIES – SEPTEMBER 2015 – GLOBAL

Mayer Brown's International Arbitration practice will be launching a series of webinars this September on current issues in international arbitration. Please visit the Mayer Brown International Arbitration homepage for further information.

AFRICA INTERNATIONAL LEGAL AWARENESS CONFERENCE – 14 SEPTEMBER 2015 – LONDON

Kwadwo Sarkodie and Rachael O'Grady from Mayer Brown's International Arbitration practice in London will be keynote speakers at the *Africa International Legal Awareness Conference*, co-hosted by Mayer Brown. They will speak on policy objectives and issues in international investment law.

INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE – W/C 5 OCTOBER 2015 – VIENNA

B. Ted Howes, partner and head of Mayer Brown's International Arbitration practice in the United States, will be speaking on a panel organised by the IBA International Arbitration Committee at the 2015 *International Bar Association Annual Conference,* hosted this year in Vienna. There will feature around 200 conference sessions with an opening ceremony keynote speech from José Manuel Durão Barroso, the immediate Past President of the European Commission.

INTERNATIONAL ARBITRATION IN LATIN AMERICA: THE ICC PERSPECTIVE – 1-3 NOVEMBER 2015 – MIAMI

Alejandro López Ortiz, partner in Mayer Brown's International Arbitration practice in Paris, together with a selection of other speakers, will be discussing arbitration and recent legal and construction developments in Latin America at the *ICC's Annual Miami conference*. In particular, sessions will touch upon topics such as major infrastructure projects in Panama, Columbia and Brazil and the impact these projects have on alternative dispute resolution, arbitration in banking, finance and energy disputes and the law and rules applicable to the arbitration agreement and jurisdictional issues in view of recent case law.

Mayer Brown Publications:

INVESTMENT ARBITRATION UNDER THE ENERGY CHARTER TREATY

2015: *Investment arbitration under the Energy Charter Treaty**, by Alejandro López Ortiz, partner in Mayer Brown's International Arbitration practice in Paris and Michael P. Lennon Jr., partner in Mayer Brown's International Arbitration practice in Houston, published in *Practical Law, 2015,* explains the legal requirements of arbitration under the Energy Charter Treaty (ECT). The article also analyses issues and concepts that commonly arise in arbitration under the treaty.

To read the full article, click here.

CHILE: TURNING CHALLENGES INTO OPPORTUNITIES

19 March 2015: *Chile: Turning Challenges into Opportunities** by Alejandro López Ortiz, partner in Mayer Brown's International Arbitration practice in Paris, discusses developments and opportunities in the Chile infrastructure market in *Building Magazine*.

To read the full article, click here.

NAVIGATING RISK IN AFRICA: TREATIES, COURTS AND ARBITRATION

22 April 2015: *Navigating risk in Africa: Treaties, courts and arbitration** by Kwadwo Sarkodie, partner in Mayer Brown's International Arbitration practice in London, was published in *This Is Africa*. The article discusses navigating geopolitical risk when investing in Africa, highlights the crucial benefits of international arbitration, particularly in the context of Africa, looks at the recent growth of arbitration centres established in Africa and examines bilateral and multilateral investment treaties within Africa.

To read the full article, click here.

HOW FIRMS ARE GETTING TO GRIPS WITH THE SURGE IN GLOBAL ARBITRATION

5 May 2015: Raid Abu-Manneh, global co-head of Mayer Brown's International Arbitration practice, is quoted in an article in *The Lawyer* on the global trends in International Arbitration, addressing, in his view, why global arbitration is growing so significantly.

To read the full article, click here.

*The full article is also available on the Mayer Brown International Arbitration homepage: http://www.mayerbrown.com/experience/International-Arbitration/?section=newspubs

Legal Updates:

NEW CIETAC RULES (CHINA INTERNATIONAL ECONOMIC & TRADE ARBITRATION COMMISSION)

1 January 2015: The China International Economic & Trade Arbitration Commission's (CIETAC) new set of arbitration rules becomes effective.

These new CIETAC Rules bring CIETAC arbitration proceedings closer in line with international arbitration practices. Key amendments include:

- Further grounds for merging arbitrations into a single arbitration;
- The incorporation of a mechanism for joining additional parties to the arbitration;
- A new mechanism for appointing emergency arbitrators;
- Introducing provisions governing arbitrations administered by the CIETAC Hong Kong Arbitration Center, including setting Hong Kong as the default seat;
- Opportunity for the Claimant to commence a single arbitration where a dispute has arisen out of or relating to multiple contracts; and
- Clarification of procedural matters, such as specifying methods for serving the necessary arbitration documents, and bestowing increased powers upon the tribunal's presiding arbitrator.

PROPOSED AMENDMENTS TO INDIA'S ARBITRATION AND CONCILIATION ACT 1996

February 2015: India's new Modi-led government acknowledges that reforms must be made to the Indian Arbitration and Conciliation Act 1996.

It was announced that proposals will be considered in the Government's next legislative session. Whilst the content of the Bill is not yet certain, the very fact that reforms are being considered alone demonstrates India's efforts to promote consistency with

international standards and to improve the arbitration process in India, in turn achieving the Government's goal of maximising foreign investment in India.

INTERNATIONAL CHAMBER OF COMMERCE ADOPTS NEW EXPERT RULES

1 February 2015: Expert testimony, while not a traditional component of evidence in international arbitration, has certainly become the norm; particularly with respect to damage calculations and issues of industry conduct. In recognition of that trend, the International Chamber of Commerce ("ICC") adopts new Expert Rules, which include the following provisions:

(1) Proposing Experts and Neutrals (Proposal Rules): At the request of a court, a tribunal, a party or the parties jointly, the ICC will make non-binding proposals for experts or neutrals. "Neutrals" may include adjudicators, mediators, neutral evaluators or dispute board members. The ICC will not inform other parties of unilateral requests for an expert or neutral proposal unless explicitly asked to do so. Under the Proposal Rules, the ICC's involvement ends with the delivery of the proposal. The ICC does not charge fees for expert or neutral mediator proposals for cases administered by the ICC.

(2) Appointing Experts and Neutrals (Appointment Rules): In the context of a dispute resolution process, parties may request that the ICC appoints experts or neutrals. ICC appointments are binding and the ICC's involvement ends upon completion of the appointment process. Experts appointed by the ICC serve as jointly appointed or tribunal-appointed experts. Unless the parties agree otherwise, any appointed expert is to act as an independent expert. The ICC will only appoint an expert under these rules if there is a clear agreement between the parties that allows for such an appointment.

(3) Administering Expert Proceedings (Administrative Rules): Parties may enlist the ICC to supervise the entire expert process in a dispute. The ICC will appoint experts or confirm party-nominated experts, coordinate between the parties and experts, monitor deadlines, oversee costs, scrutinise the draft expert report (if requested by the parties) and notify the expert reports to the parties at the end of the proceeding. Expert findings may be used to inform parties when negotiating settlements or, by agreement of the parties, they may treat expert determinations as contractually binding.

Parties operating under the ICC's old 2013 Rules for Expertise for the proposal or appointment of an expert prior to the enactment of these new Expert Rules shall be deemed to have agreed to the operation of the new rules, unless any party objects. If a party objects, the old rules shall apply.

DEMOCRATIC REPUBLIC OF THE CONGO ACCEDES TO NEW YORK CONVENTION

3 February 2015: The Democratic Republic of Congo becomes a Contracting State to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").

Whilst this is a positive step for those investing in the DRC, there is no certainty as to the accuracy with which DRC court judges will apply Convention rules. The DRC has carved out a number of reservations in the legislation facilitating its accession, including:

- Reciprocity - the DRC will enforce awards only if made in the territory of other Contracting States;
- Commerciality - the DRC will only recognise and enforce commercial matters under the New York Convention; and
- Non-retroactivity - the New York Convention will apply only to an award made post 3 February 2015.

DUBAI INTERNATIONAL FINANCE CENTRE (DIFC) COURTS FINALLY ADOPT PRACTICE DIRECTION ON THE REFERRAL OF JUDGMENT PAYMENT DISPUTES TO ARBITRATION

16 February 2015: The DIFC Courts' Practice Direction No. 2 of 2015 on the Referral of Judgment Payment Disputes to Arbitration is now in full force.

The essential objective of the Practice Direction remains the same: creditors may enforce payment judgments issued by DIFC Courts against non-compliant debtors. Yet, these reforms will serve to strengthen enforceability of "judgment-converted-awards" under such international enforcement instruments as the New York Convention.

UNITED NATIONS CONVENTION ON TRANSPARENCY IN TREATY-BASED INVESTOR STATE ARBITRATION

17 March 2015: The official signing ceremony takes place for the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration ("the Mauritius Convention on Transparency").

To date, nine countries have signed the treaty, including Canada, France, Germany, the United Kingdom and the United States.

The Rules came into effect on 1 April 2014, and are incorporated into the 2013 United Nations Commission of International Trade Law ("UNCITRAL") Arbitration Rules by Article 1(4) of those Rules. Pursuant to Article 9(2), the Convention will enter into force six months after the deposit of the first three instruments of ratification, acceptance, approval or accession.

The Convention aims to provide additional scope for the application of the Transparency Rules, which promote transparency in investor-State proceedings conducted under the UNCITRAL Arbitration Rules. In particular, they permit the public release of basic information regarding filed cases and of key documents, the occasional participation of non-disputing third parties and open hearings.

The popularity of the Convention and the manner in which the Rules will be interpreted and applied in arbitral proceedings remains to be seen. What is certain even at this stage, however, is that this Convention marks a step towards greater transparency in investment arbitration.

EXPEDITED ARBITRATION PROCEDURE TO RESOLVE FINANCIAL SERVICES DISPUTES

30 April 2015: Addressing criticism from financial institutions that traditional arbitration procedures are void of speed and certainty, thus inappropriate for the settlement of financial services disputes, the Financial Sector Branch of the Arbitration Club in London launches the Financial Services Expedited Arbitration Procedure.

This enables parties to customise an expedited procedure that is compatible with both UK and international arbitration rules.

This new "Fast-Track" Procedure offers, in certain circumstances, a far more efficient and cost effective measure of enabling awards in financial services disputes to be rendered than if the standard arbitration rules of other arbitral institutions are relied upon.

EUROPEAN COMMISSION PUBLISHES "CONCEPT PAPER": *INVESTMENT IN TTIP AND BEYOND – THE PATH FOR REFORM*:

5 May 2015: The European Commission publishes its "Concept Paper" containing proposals for the "*profound reform*" of a potential future investor-state dispute settlement ("ISDS") mechanism in the Transatlantic Trade and Investment Partnership ("TTIP"). The intention is to enhance EU investment protection within TTIP and all future EU investment agreements and to make arbitral tribunals operate more like traditional courts.

The paper identifies the "*concrete solution for improvement*" in four key policy areas: i) the protection of the right to regulate; ii) the establishment and functioning of arbitral tribunals; iii) the review of ISDS decisions through an appellate mechanism; and iv) the relationship between domestic judicial systems and ISDS. It provides rationale for each of its proposals and demonstrates how it links with the EU's approach followed to date in the Comprehensive Economic and Trade Agreement ("CETA") and in the EU-Singapore Free Trade Agreement ("FTA").

This paper is non-binding and without prejudice to the final position of the European Commission. It will serve as a basis for discussion with the European Parliament and Council.

VICE PRESIDENT OF BRAZIL APPROVES AMENDMENTS TO ALTER BRAZILIAN ARBITRATION ACT 1996

26 May 2015: The Bill amending the Brazilian Arbitration Act 1996 ("BAA 1996") is signed into law by the Vice President of Brazil, Michel Temer. Published in the Federal Official Gazette on the following day, it shall become effective on 26 July 2015.

The 1996 Arbitration Law, resolutely progressive and arbitration friendly, was a crucial step for Brazil, placing it among the biggest arbitration players worldwide. The new Bill now attempts to modernise and clarify the BAA 1996 and protect the interests of parties that choose arbitration as a dispute resolution mechanism.

Notable changes to the new law permit Brazilian state entities to participate in arbitrations, subject to transparency laws. Further, the new provisions expressly allow arbitration clauses in by-laws of companies and make such arbitration clauses binding upon all shareholders, including those who voted against the insertion of the arbitration clause, granting them the right to exit the company.

Meanwhile, the Vice President vetoed provisions in the Bill which would have permitted arbitration as a means of resolving disputes in relation to consumer and labour contracts on the grounds that this could "*mean a setback and offense to the guiding principles of consumer protection*" and could create "*an unwanted distinction between employees*".

Case Law:

THE ENFORCEMENT OF ARBITRAL AWARDS UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES ("ICSID CONVENTION")

13 February 2015: In *Mobil Cerro Negro, Ltd., et al v. Bolivarian Republic of Venezuela, Case No. 14 Civ. 8163* a New York federal district court upholds use of an *ex parte* procedure available under New York law to convert an ICSID award into a US court judgment, rejecting Venezuela's sovereign immunity challenge. It confirmed that the role of the national courts is simply to confirm the authenticity of an ICSID award.

The decision highlights the delocalised nature of ICSID awards and reflects the ICSID Convention's intent to create an arbitral regime that is independent of domestic courts.

ENGLISH COURTS SET ASIDE AWARD ON GROUNDS OF SERIOUS IRREGULARITY UNDER SECTION 68 OF THE ARBITRATION ACT 1996

17 February 2015: London's Technology and Construction Court reaches a decision in the case of *The Secretary of State for the Home Department v. Raytheon Systems Ltd [2015] EWHC 311 (TCC)* on the evidentiary tests which applicants, seeking to successfully challenge arbitration awards on the ground of serious irregularity under s.68 (2)(d) of the English Arbitration Act 1996 ("Act"), must satisfy.

In limited circumstances, the Act grants the court powers to redeem failures of compliance with the due process of arbitral proceedings. Pursuant to s.68, an applicant may challenge or appeal an arbitration award if there has been serious irregularity causing them substantial injustice. A high evidentiary threshold is required and rarely have the courts found challenges successful.

In his judgment, Mr Justice Akenhead set out guidance to be considered when assessing whether any serious irregularity is deemed to have existed. He noted the "*high threshold*" requirement but highlighted that what mattered was due process, not whether the tribunal's decision was correct. He added that in order to demonstrate that the failure of compliance caused "*substantial injustice*", an applicant must show that its position was *"reasonably arguable, and that, had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award"*. There is no need for the applicant to show that it would have also succeeded on the issue in question.

A second hearing then considered the appropriate relief under s.68(3) for a failure to deal with an issue put to the tribunal. Mr Justice Akenhead reached the conclusion that the decision should be set aside and the matter resolved by a different arbitral tribunal on the grounds that not only was the challenge "*towards the more serious end of the spectrum of seriousness in terms of irregularity*", but also that a re-hearing by the same tribunal risked real embarrassment and criticism of injustice should the tribunal reach the same conclusions as before.

This judgment provides useful guidance to applicants seeking to challenge an award by virtue of s.68(2)(d) of the Act. However, further future case law is necessary in order to clarify the court's position as to whether parties will be able to seek their costs from a first set of arbitration proceedings in a second arbitration on the same facts and legal issues.

FRENCH COURT OF CASSATION CONFIRMS UNILATERAL (ASYMMETRICAL) JURISDICTION CLAUSES INVALID

25 March 2015: The French Court of Cassation reaches a decision dealing with the "*unilateral*", "*optional*", "*hybrid*", "*split*" or "*asymmetrical*" jurisdiction clauses.

Unilateral jurisdiction clauses grant one of two or more contracting parties the choice to determine the forum where a dispute shall be decided, while the other party to the agreement is able to bring an action only in a specified arbitral institution or national court. This is based on the rationale that the borrower and/or its assets can be pursued by the lender in any jurisdiction the lender wishes, while the borrower may only commence proceedings in a specified forum.

In the 2012 *Rothschild* decision, the French Court of Cassation stated that such jurisdiction clauses are to be deemed invalid under French law, impliedly supporting previous European case law which reached the same conclusion on this matter. This new 2015 judgment further upholds these earlier decisions.

Yet, in contrast to the earlier case law, this judgment provides a wholly new argument against unilateral jurisdiction clauses: that the broad wording of such a jurisdiction clause is not adequately certain. This draws into question how one might draft a unilateral clause which aims to protect a lender whilst avoiding the incorporation of wide-reaching and undetermined recourses for the resolution of disputes.

EUROPEAN COMMISSION BLOCKS ENFORCEMENT OF AN ICSID AWARD WHILE US DISTRICT COURT FOR THE CIRCUIT OF COLUMBIA DENIES *EX PARTE* MOTION TO CONFIRM IT

30 March 2015: The European Commission issues an injunction preventing Romania from honouring the ICSID award of 11 December 2013 issued in *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (ICSID Case No. ARB/05/20).* This award found that by revoking an investment incentive scheme in 2005 - four years prior to its scheduled expiry in 2009 - Romania had infringed a bilateral investment treaty between Romania and Sweden. The Commission also finds that compensation already paid by Romania to the claimants breached EU state aid rules.

Following Romania's filing of a request to ICSID in an attempt to annul the award, the Miculas brought a petition in Washington seeking *ex parte* confirmation of the award. The Miculas argued that because the law is purportedly silent as to the proper procedure for confirming an ICSID award, the court should "*look to the most analogous state law in crafting the procedural mechanism to confirm such judgments*" - here, the District of Columbia Uniform Enforcement of Foreign Judgments Act. This allows the Superior Court for the District of Columbia to confirm foreign judgments on an *ex parte* basis.

The District Judge held that the law expressly requires federal courts to treat ICSID awards in the same manner as "*state court judgments*" and, notably, uses only the verb "*enforce*" as it relates to state court judgments as opposed to "*confirm*" or "*recognise.*" It was added that "*because the plain language of the ICSID enabling statute requires arbitral awards and state court judgments to be treated in a parallel manner, it follows that ICSID awards were intended to be enforced by plenary actions*". The District Court added that such interpretation of the law does not conflict with, or abrogate in any way, the United States' obligations under the ICSID Convention. This is because Article 54 of the ICSID Convention obligates the United States to both "*recognise*" and "*enforce*" an ICSID award "*as if it were a final judgment of a court in that State*", but does not oblige its contracting states to adopt any specific method for fulfilling those obligations.

ICSID TRIBUNAL REJECTS JURISDICTION ON THE BASIS THAT CLAIMANT IS CONTROLLED BY NATIONALS OF RESPONDENT STATE

3 April 2015: In *Venoklim Holding BV v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/22),* the majority of an ICSID Tribunal declined jurisdiction and refused to hear the claims brought by a Dutch corporation against Venezuela on the basis that the Claimant's full ownership by Venezuelan nationals meant that it did not qualify as a foreign investor – a requirement for the application of the ICSID Convention. The Tribunal held that to permit this claim to proceed would "*allow formalism to prevail over reality and treason the object and purpose of the ICSID Convention*".

This decision contradicts previously established case law on jurisdiction. The landmark case *Tokios Tokelés v. Ukraine* (ICSID *Case No. ARB/02/18)* ruled that it was irrelevant that the shareholders were nationals of the host State in determining whether jurisdiction existed to hear a claim.

ECUADOR'S RECONSIDERATION MOTION

10 April 2015: In *Perenco Ecuador Limited v. Republic of Ecuador (ICSID Case No. ARB/08/06) (Decision on Reconsideration Motion),* an ICSID tribunal rejected Ecuador's request for reconsideration of its 12 September 2014 Decision on Remaining Issues of Jurisdiction and on Liability.

The reason stated was that Article 52 of the New York Convention "*does not vest this Tribunal with the power to reopen, amend and/or reverse a decision preliminary to its award*". Likewise, Article 44 of the New York Convention could not be read to establish a general power of reconsideration of a tribunal's decisions. The Tribunal expressly stated that its powers "*cannot be used to circumvent the Convention's and the Arbitral Rules' plain language when it comes to amending or otherwise re-opening an award*". This decision takes a similar approach to the majority of the tribunal in the important case of *ConocoPhilips Petrozuata and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30)* on the jurisdiction of an ICSID tribunal to review its findings prior to an award being issued.

THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU) REACHES JUDGMENT IN GAZPROM CASE

13 May 2015: The CJEU gives judgment on its interpretation of *Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of civil and commercial matters* ("**Brussels I Regulation**"), in response to the Supreme Court of Lithuania's request for a preliminary ruling.

This included consideration as to whether an EU member state may refuse to enforce an arbitral award that contains an anti-suit injunction on the grounds that it is incompatible with the Brussels I Regulation.

In its decision, the CJEU held that the Brussels I Regulation "*must be interpreted as not precluding a court of a member state from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that member state*". The CJEU based its decision solely on the text of the Brussels I Regulation, which does not preside over the recognition and enforcement, in a member state, of an arbitral award issued by an arbitral tribunal in a different member state. This decision will remain good law under Recital 12 of EU Regulation 1215/2012 ("**Recast Brussels Regulation**") which has replaced the Brussels I Regulation in respect of proceedings commenced in the EU courts on or after 10 January 2015, not least because the Recast Brussels Regulation makes clear that the CJEU distinguishes between the decision of a tribunal and the decision of a member state's court.

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